policies, acts and practices of that corporation is not sufficient grounds for concluding that it is no longer necessary to hold him as a respondent in order to serve this purpose.

Petitioners having failed to show that changed conditions of fact or law require that the order be set aside as to respondent Ira Rubin, or that the public interest so requires, as provided by Section 3.72(b)(2) of the Rules of Practice:

It is ordered, That petitioners' request that the order to cease and desist be set aside as to Ira Rubin in his individual capacity be, and it hereby is, denied.

CRUSH INTERNATIONAL LIMITED, ET AL. DOCKET 8853
DR. PEPPER COMPANY DOCKET 8854
THE COCA-COLA COMPANY, ET AL. DOCKET 8855
PEPSICO, INC. DOCKET 8856
THE SEVEN-UP COMPANY DOCKET 8857
NATIONAL INDUSTRIES INC., ET AL. DOCKET 8859

Order, March 23, 1972

Order denying respondents' motions to dismiss complaints for failure to join respondents' bottlers as indispensible parties.

ORDER RULING ON MOTIONS TO DISMISS FOR FAILURE TO JOIN INDISPENSABLE PARTIES

This matter is before the Commission upon requests for permission to file interlocutory appeals by the respondents in Docket Nos. 8853–8857 and Docket No. 8859, upon complaint counsel's response thereto, filed February 17, 1972, and upon respondent Dr. Pepper Company's response to complaint counsel's reply, filed February 29, 1972.[1] Al-

[1] The motions are as follows: Crush International Limited, Docket No. 8853—application for leave to file an interlocutory appeal or to treat motions as certified filed February 4, 1972; Dr. Pepper Company, Docket No. 8854—request for permission to file an interlocutory appeal from the order of the hearing examiner denying respondent's motion to dismiss the complaint for failure to join indispensable parties and for a stay of proceedings, and request for permission to file an interlocutory appeal from the order of the hearing examiner denying respondent's motion to amend the complaint to join the Dr. Pepper Company bottlers as co-respondents filed February 4, 1972. The Coca-Cola Company, Docket No. 8855—application (I) for leave to file interlocutory appeals and (II) to treat motions to dismiss as certified filed January 18, 1972; Pepsico, Inc., Docket No. 8856—application for leave to file interlocutory appeal or to treat motions as certified filed January 31, 1972; The Seven-Up Company, Docket No. 8857—application for permission to file (1) appeal for de novo consideration of respondent's motion to dismiss, or (2) interlocutory appeal filed January 31, 1972; National Industries, Inc., Docket No. 8859—respondents' request for permission to file interlocutory appeal from the hearing examiner's order denying motion to dismiss the complaint for failure to join indispensable parties filed February 3, 1972.

though the motions are not identically styled and vary somewhat in the specific relief sought, they nevertheless involve the same question and will therefore be considered together.

The question arises as a result of complaints issued by the Commission against several soft drink companies challenging the legality of respondents' contracts with their respective bottlers. Respondents take the position that their bottlers are indispensable parties to these proceedings and that absent their joinder the complaints should be dismissed. Motions to this effect were denied by the examiner and these requests for permission to appeal followed. Before considering these requests we will deal with the procedural issues of the examiner's authority to rule on a motion to amend the complaint by the addition of parties to Commission proceedings and his authority to rule on motions to dismiss.

I

The Commission has consistently taken the position that the examiner has no authority to amend a complaint by the addition or deletion of parties except to the extent that his ruling deals with matters of procedure rather than substance such as the deletion of an individual respondent who has deceased or the substitution of respondents improperly named, etc. The same applies to motions to dismiss because both involve the "reason to believe" concept of Section 5 which only the Commission itself can express. Both issues were involved in the *Suburban Propane Gas Corp.* case, Docket No. 8672, Order Ruling on Interlocutory Appeals, May 25, 1967, CCH Trade Reg. Rep. [1967–1970 Transfer Binder] ¶ 17,965 [71 F.T.C. 1695]. On the issue to amend the complaint by a joinder of an additional party we there held that it should have been certified to the Commission. As to the motion to dismiss we stated as follows:

> The examiner recognized that the question involved the administrative discretion in issuing a complaint and that it presented an issue on which he had no authority to rule. Nonetheless, he denied the motion. The matter should have been certified to the Commission with the examiner's recommendation. Section 3.6(a), Commission's Rules of Practice; Drug Research Corp., Docket No. 7179 (October 3, 1962). [Footnote omitted] Respondent, however, has not been prejudiced, since the matter is now before the Commission for *de novo* consideration and determination, at 20,337.

The Commission has made a distinction however, between those instances in which the motion to dismiss challenges the Commission's legal power to issue the complaint and those in which it seeks to probe the Commission's discretion or judgment on whether or not a proceeding would be in the public interest. It is only in the latter instance in which the examiner is considered to be without authority to rule. See, *The Drive-X Company, Inc.*, Docket No. 8615, Order

Denying Application for Leave to File Interlocutory Appeal or in the Alternative for an Order Requiring Certification of Question, June 10, 1964. While it is clear that the present situation falls within the former, *i.e.*, the category of cases challenging the Commission's legal authority to issue the complaint, and hence within the examiner's authority to decide, we have nevertheless determined that that question is so intertwined with the question of amending the complaint by the addition of parties that both should have been certified to the Commission.

Although the matter has not been so certified, we are not precluded from considering it, since it is before us upon respondents' request for leave to file interlocutory appeals. A similar procedure was followed in *Maremont Corp.*, Docket No. 8763, Order Denying Respondent's Request to File Interlocutory Appeal and Motion to Dismiss the Complaint or Stay Proceedings, October 3, 1968, CCH Trade Reg. Rep. [1967–1970 Transfer Binder] ¶ 18,542 [74 F.T.C. 1614]. There we held as follows:

> Respondent argues first that the examiner erred in ruling on the motion, which it asserts to be beyond his jurisdiction, and, secondly, that its request is justified on the merits. We agree that the hearing examiner erroneously ruled on the request to dismiss the complaint or stay the proceeding. The motion clearly is addressed to the Commission's administrative discretion and does not concern adjudicative factfinding functions delegated to hearing examiners. *Graber Manufacturing Company, Inc.*, Docket No. 8038 (order issued October 15, 1964). The hearing examiner should properly have certified this part of respondent's motion to the Commission for the Commission's determination and action. Nevertheless, in view of respondent's application for permission to file an interlocutory appeal, the matter is now before the Commission in the same posture as it would have been had the examiner certified it. Accordingly, while our holding is that the hearing examiner erred in failing to certify the motion, this in the circumstances was not to respondent's prejudice and the motion will now be treated as though it has been properly certified. at 20,889.

We will follow this procedure in the instant proceeding. At the same time we will consider the examiner's ruling as his recommendation to the Commission for the disposition of this matter.

II

The question presented for our decision is whether respondents' bottlers who are parties to the contract being challenged by the complaint are indispensable parties to this proceeding. In essence the position urged upon us by the respondents is that an adjudication of these contracts involves substantial rights of the bottlers who, over the years, have expended goodly sums of money in the development of their business operations in reliance on the terms of their

contracts and hence due process requires that they be made a party so that they may be bound by the outcome of this proceeding as well as protect their interests. Respondents are also concerned that the failure of joinder may subject respondents to multiple litigation with their bottlers and result in inconsistent future adjudications. Absent a joinder of the bottlers, respondents ask that the complaints be dismissed.

The examiner's ruling complained of contains the following statements:

> It is quite apparent that an ultimate decision by the Commission striking the exclusive territorial provisions from the various franchise contracts that the respondents have with their bottlers may very well directly affect substantial property rights these bottlers have acquired and own as a result of their franchise contracts. If a bottler were to lose its exclusive territory within which to sell the respondents' trademarked products, it would be without recourse to sue the respondents for damages or for injunctive relief requiring them to provide the protection against competition from other bottlers who may well invade its territory. To that extent, therefore, the bottlers may be considered indispensable.
>
> As a practical matter, however, it is not feasible to join all of the respondents' bottlers as parties to this proceeding. In the first place, the large number of them (1186) would create a completely unmanageable situation for trial purposes. Secondly, it is presumed that a substantial number of such bottlers operate within a small territory within a state, and consequently, may well not be engaged in commerce thereby depriving the Commission of jurisdiction over such bottlers. Order Denying Motion to Dismiss the Complaint for Nonjoinder of Indispensable Parties, January 7, 1972, page 3–4.

The examiner was guided in his decision by Rule 19 of the Federal Rules of Civil Procedure and *Provident Bank* v. *Patterson*, 390 U.S. 102 (1968) a case interpreting the requirements of Rule 19.

Traditionally, of course, antitrust proceedings and decrees have taken little, if any, notice of third parties to any contract held to be in contravention of one of the antitrust laws perhaps because the vindication of public rights, even though they run counter to contractual rights between defendants and third parties, may be accomplished without joining these third parties. This reasoning is advanced by Professor Moore in 3A MOORE's FEDERAL PRACTICE, Section 19.10 at 2344. Respondents invite attention to two 1921 proceedings involving this Commission which allegedly support the proposition that the complaint should be dismissed for failure to join indispensable parties. The first is *Fruit Growers' Express Inc.*, v. *F.T.C.*, 274 F.205 (7th Cir. 1921) in which the court vacated a Commission cease and desist order on the ground that the Commission was without jurisdiction because the facts involved common carriers who are within the sole jurisdiction of the Interstate Commerce Commission. The second is *Sinclair Refining Co.*, v. *F.T.C.*, 276 F.686

(7th Cir. 1921), in which the failure to join what the reviewing court considered to be an indispensable party was advanced as one of the reasons for setting aside an order to cease and desist *after* the court had decided that no violation had been shown. Neither case can be considered a viable precedent for the proposition advanced here. Moreover, a subsequent decision by the same court specifically upheld the Commision's view and with specific reference to these two decisions *Automatic Canteen* v. *F.T.C.*, 194 F.2d 433 (7th Cir. 1952), *rev'd in part on other grounds*, 346 U.S. 61 (1953). Finally, the courts in a procession of decisions have failed to join or otherwise consider indispensable third parties to a contract the legality of which was being challenged under the antitrust laws. See, *United Shoe Machinery Corp.* v. *U.S.*, 258 U.S. 451 (1922); *U.S.* v. *Paramount Famous Lacky Corp.*, 282 U.S. 30 (1930); *Interstate Circuit, Inc.*, v. *U.S.*, 306 U.S. 208 (1939); *U.S.* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *U.S.* v. *National Lead Co.*, 332 U.S. 319 (1947); *U.S.* v. *Schine Theatres, Inc.*, 334 U.S. 110 (1948); and *U.S.* v. *International Boxing Club of New York, Inc.*, 171 F. Supp. 841 (S.D.N.Y. 1957), *aff'd* 348 U.S. 242 (1959). The last time this Commission had to consider this question was in *L. G. Balfour Co.*, Docket No. 8435, July 29, 1968, CCH Trade Reg. Rep. [1967–1970 Transfer Binder] ¶ 19,485 [74 F.T.C. 345] in which it came to the same conclusion. In *Eastman Kodak Co.*, Docket No. 6040, similar arguments were advanced with respect to the challenged resale price maintenance contracts Kodak had with over 6,000 retailers. What we said there is pertinent here:

> It is true that if an order prohibiting respondent from fixing and maintaining resale prices in accordance with its agreements with these dealers is issued, it would affect their contractual rights. However, no such prohibition will be issued herein unless the Commission determines that these agreements are in unreasonable restraint of trade and should not be continued. The courts have regularly struck down systems deemed violative of the antitrust laws even though such systems included leases, licenses and other forms of agreements where the other parties thereto were not before the court and where the enjoined covenants were clearly of benefit to said other parties. Order Disposing of Motion to Strike and Respondents' Motion to Dismiss, September 25, 1953.

It is well established, therefore, that third parties to a contract the legality of which is being challenged under the antitrust laws need not be joined in a suit against the first party and are thus not considered indispensable parties. In *National Licorice Co.* v. *N.L.R.B.*, 309 U.S. 350 (1940) the court observed that "in proceedings before the Federal Trade Commission, the order restraining unfair methods of competition may preclude the performance of outstanding contracts by the offender. Such orders have never been challenged be-

cause the holders of the contracts were not made parties." at 366. In light of the foregoing we believe respondents' claim that due process requires the joinder of the bottlers as indispensable parties and absent that, a dismissal of the complaints, to be without merit.

Respondents also assert that the failure to join the bottlers may subject respondents to the risks of multiple litigation and inconsistent future adjudications. Our own understanding of the applicable legal principles leads us to conclude that such an eventuality is highly unlikely. A contract which has been declared illegal cannot be enforced by either party.

> A party to an illegal bargain can neither recover damages for breach thereof nor, by rescinding the bargain, recover the performance that he has rendered thereunder or its value. * * * *Restatement of Contracts*, Section 598 (1932)

Similarly, supervening illegality renders a contract unenforceable even if it was legal when entered into *Restatement of Contracts*, Section 548. In this regard, administrative proceedings are considered to have the same effect as do statutory provisions.

> Clearly prevention by an executive and administrative order designed for the benefit of the general public may be considered excusable impossibility whether the order is directed to the general public or to an individual. 6 *Williston on Contracts*, Section 193 (Rev. Ed., 1938).

We turn now to the question of whether, by using Rule 19 of the Federal Rules of Civil Procedure, a different result would be dictated. The Federal Rules of Civil Procedure are not, of course, applicable to administrative agency proceedings which are governed by their own rules of practice. Nevertheless, they can provide an analytical framework for the disposition of related issues. Rule 19(a) provides that:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

As to (1), it is clear that depending on the outcome, complete relief can be acorded in this proceeding without joining the bottlers. Should the allegations of the complaint be upheld, the relief sought by the order, the termination of the exclusive territorial contracts, can be accomplished by an order to cease and desist naming the

presently named respondents. The second part of Rule 19(a) is divided into two parts—an unprotected interest and a substantial risk of incurring inconsistent obligations in relation to that interest. If, however, that interest is not a legally protected one, as for example rights pursuant to a contract declared illegal under the antitrust laws, it cannot serve as a basis for a joinder of allegedly indispensable parties. The fact that a contract may have previously not been illegal does not alter this result. The Commission was created for, among others, the purpose of prohibiting hitherto unchallenged trade restraints. *F.T.C.* v. *Sperry & Hutchinson Co.*, 405 U.S. 233 1972. As for the risk of incurring inconsistent obligations due to the failure to join the bottlers, Rule 19 requires that risk to be substantial before it will be considered as a reason for a joinder of additional parties. As we have mentioned above, that risk cannot be considered substantial. Our review of the applicable case law convinces us that the bottlers are not indispensable parties within the meaning of Rule 19. See, *e.g.*, *Bennie* v. *Pastor*, 393 F.2d 1 (10th Cir. 1968), citing *Shields* v. *Barrow*, 58 U.S. (17 How.) 129 (1854) and *Provident Bank* v. *Patterson*, 390 U.S. 102 (1968); *Chiodo* v. *General Waterworks Corp.*, 380 F.2d 860 (10th Cir. 1967), *cert. denied*, 389 U.S. 1004; *Stevens* v. *Loomis*, 334 F.2d 775 (5th Cir. 1964).

III

One final aspect of this matter need be considered. In its request, the Coca-Cola Company points to *The Coca-Cola Bottling Co.* v. *The Coca-Cola Co.*, 269 F.796 (D. Del 1920) as supportive of its position. There, in a dispute over the contract, the court found these exclusive territorial contracts to be lawful and as not "having an effect or intended to have an effect to defeat or lessen competition or to encourage or tend to create a monopoly, nor do I find anything therein that may be said to be in unreasonable restraint of trade." at 814. We have carefully reviewed that decision and conclude that it does not support respondent Coca-Cola's position.

IV

A number of the respondents have requested the opportunity for oral argument. Under the circumstances, we do not believe that an oral argument would serve any useful purpose. Accordingly,

It is ordered, That the motions to dismiss for failure to join indispensable parties be, and they hereby are, denied.

UNITED BRANDS COMPANY

Docket 8835. Order, March 29, 1972

Order authorizing hearing examiner to issue subpoenas *ad testificandum* to federal, state and local officials and employees.

ORDER AUTHORIZING ISSUANCE OF SUBPOENAS

The hearing examiner on March 1, 1972 certified complaint counsel's application for the issuance of subpoenas *ad testificandum* to government officers and employees therein identified, with the recommendation that the application be granted.

The Commission has considered the matter and is of the view that there may be alternative methods for receiving evidence needed in this proceeding in lieu of issuing the subpoenas requested by complaint counsel. The Commission, although it will hereby authorize the subpoenas, suggests that the hearing examiner first reconsider his rulings of October 13 and October 31, 1971 and make a new determination on the admissibility of the evidence in issue in the light of the possibility of alternatives. Accordingly,

It is ordered, That the hearing examiner be, and he hereby is, authorized to issue subpoenas *ad testificandum* to the federal, state and local officials and employees named and identified in complaint counsel's application filed February 28, 1972.

STANDARD OIL COMPANY OF CALIFORNIA, ET AL.

Docket 8827. Order, April 6, 1972

Order authorizing hearing examiner to issue subpoenas *ad testificandum* to officials or employees of governmental agencies.

ORDER AUTHORIZING ISSUANCE OF SUBPOENAS

Upon consideration of the hearing examiner's certification filed April 3, 1972 of complaint counsel's motion for the issuance of subpoenas *ad testificandum* to government officials or employees filed March 31, 1972, in which certification the hearing examiner recommends the motion be granted:

It is ordered, That the hearing examiner be, and he hereby is, authorized to issue subpoenas *ad testificandum* to the officials or employees of governmental agencies identified in complaint counsel's motion filed March 31, 1972.

AMERICAN ALUMINUM CORPORATION, ET AL.

Docket 8865. Order, April 7, 1972

Order denying respondents' appeal from the hearing examiner's order denying request for extension of time. The order further denies respondents' appeal from the hearing examiner's order denying their request for issuance of subpoenas *duces tecum.*

ORDER DENYING APPEAL AND REQUEST FOR PERMISSION TO FILE APPEAL

This matter is before the Commission upon the filing by respondents on March 21, 1972, of a document entitled "Appeal From Order Of Hearing Examiner Denying Request For Issuance Of Subpoenas Duces Tecum And For Adjournment Of Hearing," which respondents state is made pursuant to Section 3.35(b) of the Commission's Rules of Practice; and upon the answer of complaint counsel filed March 27, 1972, in opposition thereto.

There are two issues involved here: The first concerns the examiner's denial of their request for a thirty-day extension of time for preparation for trial. Under the Commission's applicable Rules of Practice an appeal from a ruling of this nature must be made pursuant to Section 3.23 of such rules, which requires that permission to file an interlocutory appeal must first be obtained from the Commision. This rule further states that permission will not be granted except 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 the conclusion of the hearing is essential to serve the interests of justice. The Commission will treat respondents' request on this issue as a request for permission to file interlocutory appeal. No showing of any kind has been made to justify the granting of such permission. Furthermore, this is purely a procedural ruling. The Commission will ordinarily not interfere with the broad discretion of the hearing examiner on such a ruling and no reason has been shown why it should do so in this case. The request will be denied.

The other issue concerns the hearing examiner's denial of respondents' request for subpoenas *duces tecum* to be issued to five companies which apparently are competitors, seeking copies of advertisements and other documents and information. Respondents have made no showing to support their appeal on this issue, as required by Section 3.35(b) of the Commission's Rules of Practice. Moreover, this is a matter of discovery and rulings thereon are ordinarily left to the

sound discretion of the hearing examiner. Respondents here made no showing of error. Thus, the appeal on this issue likewise will be denied. Accordingly,

It is ordered, That respondents' appeal from the hearing examiner's order of March 13, 1972, to the extent such order denies a request for an extension of time to comply with the pretrial order, treated herein as a request for permission to file an interlocutory appeal, be, and it hereby is, denied.

It is further ordered, That respondents' appeal from the hearing examiner's order of March 13, 1972, to the extent such order denies respondents' request for the issuance of subpoenas *duces tecum* be, and it hereby is, denied.

THE HEARST CORPORATION, ET AL.

Docket 8832. Order, April 20, 1972

Order placing on the Commission's docket for review the hearing examiner's order authorizing subpoenas to Commission employees.

ORDER PLACING HEARING EXAMINER'S ORDER AUTHORIZING SUBPOENAS TO COMMISSION EMPLOYEES ON THE COMMISSION'S DOCKET FOR REVIEW

In its own motion, the Commission, pursuant to Section 3.36(e) of the Commission's Rules of Practice, has determined to place on its docket for review the hearing examiner's order of March 6, 1972, granting respondents' application for subpoenas directed to the following Commission employees: Charles A. Tobin, Secretary; John R. Ferguson, Assistant General Counsel; and Charles F. Simon, Attorney. The Commission has further determined that the filing of briefs is not appropriate; therefore,

It is ordered, That the hearing examiner's order of March 6, 1972 be, and it hereby is, placed on the Commission's docket for review; and

The scope of the review is limited to respondents' motion for depositions and for subpoenas to Commission employees, the hearing examiner's order authorizing the requested subpoenas and the subpoenas directed to Messrs. Tobin, Ferguson and Simon; and the issues which will be considered are:

1. Whether the subpoenas directed to Messrs. Tobin and Ferguson were properly granted in light of the Commission's opinion of December 6, 1971 holding that respondents' Freedom of Information request was to be treated as an administrative matter separate from the instant adjudication; and in light of the Commission's decision in this matter of October 29, 1971;

2. Whether respondents made the required showing of relevancy under Section 3.36 of the Commission's Rules of Practice to warrant issuance of subpoenas to Messrs. Tobin and Ferguson; and

3. Whether the scope of the subpoena directed to Mr. Simon should be limited to exclude testimony concerning Advisory Opinion 128 in light of the Commission's decision in this matter of October 29, 1971.

Chairman Kirkpatrick not participating.

THE HEARST CORPORATION, ET AL.

Docket 8832. Order, April 20, 1972

Order denying respondents' interlocutory appeal from hearing examiner's denial of their motion to compel testimony or in the alternative, for an order striking certain allegations from the complaint.

ORDER DENYING INTERLOCUTORY APPEAL

Respondents the Hearst Corporation (Hearst) and Periodical Publishers' Service Bureau, Inc., (Periodical) have filed an interlocutory appeal from the hearing examiner's November 1, 1971, order denying Hearst's and Periodical's Motion to Compel Testimony, or Alternatively, for an Order Striking Certain Allegations from the Complaint. This appeal arises from an attempt by these two respondents to take the depositions of the president and vice president of a third respondent, International Magazine Service of the Mid-Atlantic (IMS) which is a franchisee of Periodical. Several allegations in the complaint seek to hold appellants responsible for certain deceptive practices engaged in by IMS, and appellants claim it is necessary to take the depositions of these IMS officials in order to effectively prepare to cross-examine certain of complaint counsel's consumer witnesses who dealt with employees of IMS. The two officials have refused to testify on Fifth Amendment grounds.[1] On September 23, 1971, Hearst and Periodical filed a motion with the hearing examiner to compel their testimony or alternatively for an order

[1] Upon Hearst's and Periodical's application, subpoenas directed to the IMS officials were first issued by the hearing examiner in May 1971, but the officials refused to testify at the scheduled depositions. Thereafter, Hearst and Periodical requested that the examiner certify to the Commission their request that the Commission issue an immunity order under the Crime Control Act, 18 U.S.C. § 6002. The Commission sought the approval of the Attorney General for the issuance of such an order which was denied, and the Commission remanded the matter to the hearing examiner who once more ordered the discovery depositions of the two officials. They again asserted their privilege against self-incrimination, whereupon Hearts and Periodical filed the motion which is the subject of this appeal.

striking the allegations of the complaint charging Hearst and Periodical with responsibility for the acts of IMS. This motion also requested that the examiner certify the motion to the Commission recommending that it commence enforcement proceedings. The examiner's denial of this motion is the subject of this appeal.

At the outset, we must consider whether respondents have made the necessary showing that the examiner's ruling 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."[2] We are of the opinion that respondents have not made the necessary showing to warrant an interlocutory appeal in this instance.

In our view, respondents' request is premature. The hearings involving the IMS phase of the proceedings have been postponed indefinitely due to a criminal indictment against IMS and three of its officers which involves some of the same acts and practices alleged in the Commission's complaint. In addition, we do not believe respondents' claim that they will be denied effective cross-examination of certain consumer witnesses can be determined until these witnesses have testified. Also, the examiner has given respondents an opportunity to raise the issue again after hearings involving IMS are subsequently rescheduled. Furthermore, if respondents are found to have been prejudiced in their cross-examination of consumer witnesses, there will be ample opportunity to correct such prejudice at the conclusion of the hearing.[3]

Consequently, at this stage in the proceeding, it cannot be said that the hearing examiner's ruling denies Hearst and Periodical substantial rights or that his ruling will materially affect the final outcome of the case. A determination of the correctness of the ruling at this time is in no way essential to the interests of justice, and in fact, the correctness of the ruling cannot even be accurately or adequately determined at this time.

Accordingly, the Commission having concluded that the respondents Hearst and Periodical have failed to make the necessary showing to warrant an interlocutory appeal under the Commission's Rules of Practice,

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[2] This showing is required to justify an interlocutory appeal under both Sections 3.23 and 3.35(b) of the Commission's Rules of Practice. While we believe that respondents were in error in appealing here under Section 3.35(b) because the examiner has not in fact quashed the subpoenas at issue to give rise to an appeal under this rule, their error does not affect the outcome of this appeal since both rules require the same showing.

[3] For example, the testimony of the consumer witnesses might be stricken, or the allegations in the complaint seeking to hold Hearst and Periodical responsible for IMS' acts might be stricken at that time.

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

Chairman Kirkpatrick not participating.

MISSOURI PORTLAND CEMENT COMPANY

Docket 8783. Order, April 28, 1972

Order denying request for review of hearing examiner's adverse rulings on a request for an extension of time, and for oral depositions and subpoenas *duces tecum*.

ORDER DENYING REQUEST FOR REVIEW OF HEARING EXAMINER'S RULINGS AND REQUEST TO RULE DIRECTLY ON MOTION FOR EXTENSION OF TIME

This matter is before the Commission upon the filing by respondent of two documents, the first entitled "Appeal From Hearing Examiner's Denial Of Request For Extension Of Time And Denial Of Application For Oral Depositions And Subpoenas Duces Tecum," filed April 20, 1972; and the other entitled "Motion For Extension Of Time In Which To Respond To Summary Judgment Motion," filed April 24, 1972.

On the first filing, termed an "appeal," the Commission has determined that respondent has not complied with the provisions of Commission Rule Section 3.23, governing interlocutory appeals, published in the Federal Register March 17, 1972 (Volume 37, No. 53, page 5608), and effective fifteen (15) days thereafter. There has been no determination by the hearing examiner of justification in accordance with Paragraph (b) of Section 3.23, nor has respondent shown that the rulings complained of fall within any of the four categories set out in Paragraph (a) of such rule.

Thus, respondent has not justified its request for a review of the hearing examiner's rulings under the Commission's Rules of Practice.

The Commission has further determined that respondent's other filing, which is a direct request to the Commission for an extension of time pursuant to Section 3.22(d) of the Commission's Rules of Practice, is inappropriate in the circumstances. Paragraph (d) of Section 3.22 is intended to give the hearing examiner or the Commission discretion to waive the requirements of Paragraph (c) of that section in the case of motions for extension of time, permitting such motions to be ruled on *ex parte*. Furthermore, Paragraph (d) must be read in the light of Paragraph (a) of Section 3.22, which provides

that during the time a proceeding is before the hearing examiner all motions except those filed under Section 3.42(g) are to be addressed to the hearing examiner, and if within his authority ruled on by him.

Thus, Paragraph (d) clearly means that a motion for an extension of time relating to an issue within the authority of the hearing examiner shall be ruled on by the hearing examiner and a motion for an extension of time relating to an issue reserved to the Commission shall be ruled by the Commission. It does not mean that during the time a proceeding is before the hearing examiner either the Commission or the examiner may rule on all motions for extensions of time nor does it mean that in connection with an issue properly before the hearing examiner a party may move the Commission directly for an extension of time.

In the circumstances, the Commission will not rule on the merits of the request for the extension of time. We hold only that in the circumstances the request was not properly made to the Commission. Accordingly,

It is ordered, That respondent's request filed April 20, 1972 for a review of the hearing examiner's rulings in his order filed April 17, 1972, denying (1) a request for an extension of time by respondent to oppose complaint counsel's motion for summary judgment, and (2) applications for oral depositions and subpoenas *duces tecum*, be, and it hereby is, denied.

It is further ordered, That respondent's request filed April 24, 1972, that the Commission directly rule on its motion for an extension of time, be, and it hereby is, denied.

EATON YALE & TOWNE, INC.

Docket 8826. Order, May 3, 1972

Order denying respondent's request for permission to file interlocutory appeal and for stay of hearings pending appeal.

Order Denying Request to File Interlocutory Appeal and Motion to Stay Hearings

This matter is before the Commission upon the filing by respondent on April 18, 1972 of a document entitled "Request For Permission To File Interlocutory Appeal And Motion For Stay Of Hearings Pending Appeal." Respondent seeks permission to file an appeal from a ruling on the record by the hearing examiner on April 12, 1972, which ruling it claims was to the effect "that the Complaint alleges

so-called vertical foreclosure in valve lifters." It further requests that the hearings be stayed pending disposition of the appeal.

The Commission has determined that respondent has not satisfied the provisions of Commission Rule Section 3.23, governing interlocutory appeals, published in the Federal Register March 17, 1972 (Volume 37, No. 53, page 5608), and effective fifteen (15) days thereafter. There has been no determination by the hearing examiner of justification in accordance with Paragraph (b) of Section 3.23, nor has respondent shown that the ruling complained of falls within any of the four categories set out in Paragraph (a) of such rule.

The request to file an appeal will be denied on the basis that respondent has not conformed to the provisions of the Commission's rule on interlocutory appeals and the motion to stay the hearings will be denied as moot in the circumstances. Accordingly,

It is ordered, That respondent's request, filed April 18, 1972, for permission to file interlocutory appeal and its motion for a stay of hearings pending appeal be, and they hereby are, denied.

Chairman Kirkpatrick not participating.

J. J. NEWBERRY CO.

Docket 8849. Order, May 15, 1972

Order returning to the hearing examiner for further proceedings consistent with views expressed in the order, the certification of respondent's application for a subpoena *ad testificandum* directed to a Commission official.

Order Ruling on Hearing Examiner's Certification

This matter is before the Commission upon the hearing examiner's order, filed April 27, 1972, certifying to the Commission respondent's application for subpoena *ad testificandum* directed to Edward B. Finch, Assistant Director for Textiles and Furs in the Commission's Bureau of Consumer Protection, and complaint counsel's answer in opposition to the application.

Respondent, in its application, states that it is its intention to examine Mr. Finch with respect to the following areas of inquiry:

1. Whether the Federal Trade Commission (and/or the Bureau or Division of the Commission responsible for enforcement of the Flammable Fabrics Act) had in effect, during the period May 1, 1969 through July 14, 1971, any formal or informal policy or policies (and/or so-called 'battle plan'), not published in the Federal Register, concerning the enforcement of the Flammable Fabrics Act; and in particular, whether there was any such policy with respect to retailers who purchased textile products subject to the Act from domestic suppliers.

2. Whether an exception to the aforesaid policy or policies was made with respect to respondent; and if so, the reasons for such an exception.

3. If there was no policy of the nature described in paragraph 1 above, information as to the recommendations made by the Bureau or Division responsible for the enforcement of the Flammable Fabrics Act, as to whether the Commission should institute a formal proceeding against respondent herein.

4. Mr. Finch's characterizations and impressions of respondent's cooperation in connection with the Commission investigation which led to the issuance of the complaint herein, and a comparison of respondent's cooperation with the cooperation of other retailers similarly situated as to which Mr. Finch had personal knowledge.

5. Whether Mr. Finch has knowledge as to whether all, most, or any of the retailers named in Commission Press Releases during the period January 1, 1970 through July 14, 1971, were formerly investigated by the Commission's staff.

The hearing examiner, in his certification, recommends he be authorized to issue a subpoena *ad testificandum* to Mr. Finch and that respondent be permitted to examine the witness with respect to each of the areas of inquiry listed except for Paragraph 3.

Under Section 3.36(c) of the Commission's Rules of Practice an application for the issuance of a subpoena to an official or employee of the Commission is a request which shall be ruled upon by the hearing examiner.[1] The rule also provides that to the extent the motion is granted the hearing examiner shall provide such terms and conditions as may appear necessary and appropriate for the protection of the public interest. While Section 4.11(d) of the rules contains a requirement that an official or employee served with a subpoena or other compulsory process for Commission confidential records or information must advise the Commission of such service and thereby seek its instructions, subpoenas issued under Section 3.36 are excepted. Thus, it is clear that the authority which the Commission has delegated to the hearing examiner includes that of issuing subpoenas *ad testificandum* to employees or officials of the Commission. Further, this authority is not subject to review except for the limited right to seek interlocutory appeal provided for in Section 3.23.

The hearing examiner concedes that he is authorized by Section 3.36 to rule on this application. He explains that he does not do so "to expedite the resolution of the question * * *." He believes that a ruling by him would be appealed by one party or the other anyway and "[w]ith a Commission ruling thus required, the certification

[1] If the hearing examiner is not available the rule provides that the application shall be ruled upon by the Director of Hearing Examiners or such other hearing examiner as he may designate.

procedure permits such a ruling while avoiding the additional time that the appellate procedure would involve." [2]

We are not convinced that certification is either the most expeditious or the most desirable procedure in this instance. The hearing examiner has broad authority to rule on a question involving the issuance of a subpoena. There are no circumstances here suggesting that the examiner cannot appropriately decide the question and we believe he should have decided it. The Commission's rules contain no specific limitation on the types of questions which a hearing examiner may certify; nevertheless, those having to do with the basic fact-finding function of the hearing examiner—in this case, whether or not respondent has justified its request—are within the special competence of the hearing examiner and, we believe, ordinarily should be decided by him.

Furthermore, it does not appear to us that this matter is ripe for review even though the hearing examiner takes the position there will be an appeal whatever his decision might be. To the contrary, an appeal is not inevitable, since this would depend on the circumstances and conditions of his ruling.[3] There are, in fact, two steps in issuing a subpoena requiring the production of confidential Commission documents or the appearance of a Commission employee. The first is the decision whether or not to require the production or appearance. The hearing examiner has considered this step at great length, and is apparently convinced that respondent has made a sufficient showing to justify the subpoena to Mr. Finch. His entire rationalization is in terms of respondent's requirements and needs.

There is, however, another step to be taken by the hearing examiner upon his decision to issue a subpoena under Section 3.36, and that is to provide such terms and conditions "as may appear necessary and appropriate for the *protection of the public interest*" (emphasis supplied). The hearing examiner has not indicated that he has considered this part of the rule or that he has made any such determination. He has suggested, it is true, that he would set some limits on the expected testimony but it is not clear from his certification that these are "terms and conditions" which would be established for the "pro-

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[2] The hearing examiner also states that certification "appears appropriate because the issue involves Commission policy and an interpretation of the Commission's Order and Opinion dated March 15, 1972, * * *" [p. 1016 herein]. It is not clear what exactly the hearing examiner means by this nor is it clear why either of the factors mentioned, if they are involved, justify the hearing examiner's not ruling on the question.

[3] Additionally, Commission Rule 3.23 sharply limits interlocutory appeals. See the Commission's recent interpretation of this rule in *Missouri Portland Cement Company*, Docket 8783 (April 28, 1972) [p. 1035 herein.].

tection of the public interest;" nor is it clear that these are the only terms and conditions he would require upon his ruling.

There is no rigid or formal procedure involved here. If the examiner had issued the subpoena, it perhaps could be assumed, without a showing to the contrary, that he had taken the protection of the public interest into account. No such assumption is possible in the circumstances presented. Thus, in addition to the other considerations mentioned, it seems to us that an essential determination within the competence of the hearing examiner has not been made, and that with this deficiency it would be premature for the Commission to rule on the matter.

This order should not be taken as a decision one way or the other on the merits, that is, on the question of whether or not respondent has justified its request for a subpoena to Edward B. Finch. Accordingly,

It is ordered, That this matter be, and it hereby is, returned to the hearing examiner for further proceedings consistent with the views expressed in this order.

THE HEARST CORPORATION, ET AL.

Docket 8832. Order, Memorandum of Commissioner Jones, June 9, 1972

Order denying respondents' motion to disqualify Commissioner Jones from participation in the proceedings.

Order Denying Motion To Disqualify

Respondents the Hearst Corporation and Periodical Publishers' Service Bureau, Inc., in a motion jointly filed on March 28, 1972, request that Commissioner Jones withdraw from participation in this proceeding or, in the alternative, that the Commission determine that she is disqualified from participation in this proceeding.

Commissioner Jones, for the reasons stated in the attached memorandum, has decided not to withdraw from participation in any further proceedings in this matter.

Traditionally, the Commission has viewed requests for disqualifications as a matter primarily to be determined by the individual member concerned, leaving it within the exercise of the Commissioner's sound and responsible discretion. This practice, the Commission believes, is proper and consistent with the law, and in the instant case the Commission finds, upon its consideration of all relevant matters, no basis for departing therefrom. Accordingly,

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

Chairman Kirkpatrick and Commissioner Jones not participating.

MEMORANDUM OF COMMISSIONER JONES IN RESPONSE TO MOTION THAT SHE WITHDRAW FROM FURTHER PARTICIPATION IN THIS PROCEEDING

By joint motion, filed March 28, 1972, respondents, the Hearst Corporation and Periodical Publishers' Service Bureau, Inc., have requested that I withdraw from participation in this proceeding or, in the alternative, that the Commission determine that I be disqualified.

I have carefully considered respondents' motion and concluded not only that no grounds have been presented but that no grounds exist which would require my withdrawal. Accordingly, I shall not withdraw from participation in this proceeding.

Respondents' alternative motion, *i.e.*, that the Commission determine that I be disqualified from participation, will be decided by the Commission without my participation in the deliberations or decision.

Respondents' motion was filed pursuant to Section 7 (a) of the Administrative Procedure Act, 5 U.S.C. 1006 (a),[1] and Section 4.7 of the Commission's Rules of Practice. Their motion is based on the fact that on February 8, 1972, Mr. Arthur E. Rowse sent a letter to me in which he thanked me for a Commission ruling in this case granting a motion to quash a subpoena issued to him. I transmitted his letter to the Commission's General Counsel who responded to Mr. Rowse by letter of March 24, 1972, advising him that his letter constituted an *ex parte* communication and that as such I could not personally respond to it. Copies of Mr. Rowse's letter were then sent to the parties in this proceeding. A handwritten postscript in Mr. Rowse's letter, however, was deleted by the General Counsel from the copies of the letter transmitted to the parties since he believed as he reported to me, that the contents of this postscript had no relation whatsoever to the instant proceeding and was of a personal nature pertaining to Mr. Rowse's daughter. Under the circumstances, I agreed that disclosure did not seem necessary or appropriate and that without doing injury to the parties in this proceeding, we could avoid any embarrassment to the daughter which might attend disclosure of the postscript.

Respondents' instant motion for my disqualification is based in part on the deletion of this postscript. While stating that they do not

[1] 5 U.S.C. § 1006 was superseded September 8, 1966, by 5 U.S.C. § 556.

seek to inquire into the nature of the "undisclosed 'personal' communication" respondents contend that the deletion of the footnote "demonstrates clearly and beyond doubt the impossibility of Commissioner Jones continuing to sit as an impartial judicial officer in this proceeding." They further argue that an "undisclosed personal relationship between a Commissioner and a newspaper activist who has publicly campaigned against one of the respondents clearly casts a cloud of suspicion and doubt over the proceeding." Further, respondents draw upon the fact that the letter was addressed "Dear Mary," and signed "Warmest regards, Ted," to argue that "the tenor of the letter, plus the very personal "Mary" and "Ted" relationship, render disqualification proper in this case." They also suggest that "the personal tone of the letter and the deletion of the postscript suggest the inference that prior *ex parte* conversation may have taken place. * * *"

The mere recitation of respondents' arguments bespeak their fatuity. They are aimed at creating the implication that somehow through some unspecified personal relationship and continued communication with Mr. Rowse, I must share his alleged views on the instant adjudication. There is absolutely no basis in fact for these implications which respondents seek to draw from Mr. Rowse's letter, nor is there any basis in law for my disqualification from this case.

First, as to respondents' insinuations of other *ex parte* communications from Mr. Rowse, I can give unequivocal assurance that no other *ex parte* communications have been made or received by me. Second, as to the deletion of the postscript, this was done as noted earlier, solely in the interest of Mr. Rowse's daughter. However, in view of the implications which respondents seek to create from the deletion of the note, I am asking the General Counsel today to send copies of the complete letter to all parties to this proceedings so they can ascertain for themselves the fact that the contents of the postscript pertain in no way to this case and could have no influence upon my ability to judge the instant proceeding fairly on its merits. Third, as to the body of the letter itself, respondents cannot seriously contend that it will unfairly influence me. It has little relevance to the issues in dispute and more important, it has been revealed to the parties according to the Commission's rules. The parties, accordingly, have a full opportunity, if relevant and appropriate, to contest its contents before the Commission in the course of this proceeding.

Finally, I come to respondents' implication that this communication will render my impartiality impossible because of some "undisclosed personal relationship" existing between Mr. Rowse and me. This contention is difficult to deal with because while clearly suggestive of improper judicial conduct on my part, respondents' charges

are in themselves quite unclear and nebulous. Respondents in effect appear to be arguing that an *ex parte* communication made on a first-name basis constitutes grounds for disqualification. Respondents' imaginings as to the existence of other *ex parte* communications or of some "undisclosed personal relationship" which preclude my impartiality here are mere fantasies on their part with no basis in fact.

To disqualify myself on the basis of these fantasies would do an injustice to the concept of a fair and impartial hearing. If disqualification were proper under such circumstances the ability of the decision maker to sit in judgment would depend solely on the whim of any third party acquaintance who might choose to indulge in an *ex parte* communication. Merely being the recipient of such communication would make impartiality suspect, despite the fact that, as is the case here, the decision maker has neither said nor done anything to imply bias or prejudice in the matter.

Furthermore, I find no merit in respondents' argument that as a matter of law I should withdraw from this proceeding. Respondents' contention that trials and/or administrative hearings must be attended by the appearance of fairness cannot of course be disputed. *In Re Murchinson*, 349 U.S. 133 (1955); *Amos Treat & Co. v. Securities and Exchange Commission*, 306 F. 2d 360 (D.C. Cir. 1962). However, unlike any of the cases cited by respondents in which the conduct of the decision maker was found to create the appearance of unfairness, no conduct on my part in this case gives rise to an appearance of unfairness.[2] In fact, the *only* conduct on my part alluded to by respondents in their motion, namely my refusal to respond to the *ex parte* communication and placing of this letter on the public record, as is required by the Commission's Rules of Practice, the

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[2] In *In Re Murchinson, supra,* for example, a judge was disqualified from deciding a contempt charge since he was the very same judge who, sitting as a one-man grand jury, had cited the defendant for contempt during the course of his grand jury testimony. In *Amos Treat, supra,* a Securities and Exchange Commissioner was disqualified from deciding a case on the grounds that his *ex parte* recommendations concerning respondent, made when he was a staff member of the Commission, created the appearance of unfairness. In *American Cyanamid Co.* v. *FTC,* 363 F.2d 757, 768 (6th Cir. 1966), the Chairman of the Federal Trade Commission was disqualified because of his prior involvement as counsel for a congressional investigation involving the same facts and issues and the same parties in the case before the Commission. It was not his service as counsel alone, but the "depth" of the investigation and his "questions and comments" as counsel which served as the basis for the court's decision. In *Cinderella Career and Finishing Schools, Inc.* v. *FTC,* 425 F.2d 583, 590 (D.C. Cir. 1970), disqualification was based on a finding that the decision maker's public statements gave the appearance of having prejudged the case. In *Pillsbury Co.* v. *FTC,* 354 F.2d 952, 964 (5th Cir. 1966), it was not so much the conduct of the Commissioners that gave rise to their disqualification but rather the exertion of "powerful external influences" upon them in the form of a congressional investigation focusing upon the mental decisional processes of the Commission in a case pending before it. Clearly a situation does not exist here which is in any way similar to these cases.

Administrative Procedure Act and common fairness could hardly constitute unfairness or the appearance of unfairness. On the contrary, this conduct is plainly consistent with my responsibility to not only act fairly, but also to maintain the appearance of fairness.

To extend the "appearance of fairness" requirement to cover a factual situation of the type here involved would be to extend it beyond reason. In the interest of fairness, nothing more is required of the recipient of an *ex parte* communication than that he or she provide all parties with a copy of the communication.

In concluding, I wish to state that I have formed no opinion with respect to matters still pending in this case and, further, that I am fully capable of rendering a completely impartial decision herein. I, therefore, decline to withdraw.

HEAD SKI CO., INC., ET AL.

Docket C-1323. Order, June 9, 1972

Order dismissing Commission order to show cause, because civil penalty proceeding is appropriate avenue for relief in this case.

ORDER DISMISSING ORDER TO SHOW CAUSE

On April 13, 1971, the Commission issued an "Order to Show Cause Why Consent Order to Cease and Desist Issued April 19, 1968 Should Not be Reopened and Modified in Respects Therein," against Head Ski Co. Inc., and Head Ski & Sports Wear, Inc.

Prior to the issuance of the Show Cause Order, the Commission certified to the Attorney General a proposed civil penalty proceeding involving the aforementioned respondents. By stipulation, the civil penalty suit* is proceeding against AMF Incorporated, (AMF) the successor to Head Ski Co. Inc., as the sole party defendant. AMF has also stipulated that it is bound by any final judicial determination of the proceedings in Docket No. C-1323.

On May 16, 1972, counsel supporting the Order to Show Cause filed a motion with the Commission to dismiss the order. AMF Incorporated responded that it has no objection to, and in fact joins in, this motion. Because counsel supporting the order and AMF agree that the Show Cause Order should be dismissed, and because the civil penalty proceeding is also an appropriate avenue for relief in this case, the Commission has determined that the Show Cause Order should be dismissed.

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*Consent judgment of $30,000 entered December 14, 1972, by U.S. District Court for District of Colorado.

It is ordered, That the Order to Show Cause Why the Proceedings in Docket No. C–1323 Should Not Be Reopened and Modified in Respects Therein, issued April 13, 1971, is dismissed.

IDEAL CEMENT COMPANY

Docket 8678. Order and Opinion, June 29, 1972

Order denying respondent's petition to reopen proceedings for the purpose of modifying a Commission order.

OPINION OF THE COMMISSION

Respondent, on May 8, 1972, filed a petition to reopen this proceeding for the purpose of modifying the Commission's order of divestiture issued May 19, 1966 [69 F.T.C. 762], so as to provide that it will have additional time within which to divest Builders Supply Company of Houston (Builders).[1] The new period requested is that "within twelve months of the termination of the proceedings now pending in the United States District Court for the Southern District of Texas, Houston Division, entitled, *American Benefit Life Insurance Company* v. *Ideal Basic Interest Industries, et al.*"

Respondent asserts in substance that on January 5, 1968, it divested Builders in accordance with the terms of the Commission's order but that subsequent thereto it became necessary for it, in protection of its security interests, to reacquire substantial stock ownership in the firm by foreclosure of a pledge agreement with purchasers. The American Benefit Life litigation, according to respondent, has created uncertainty over its ownership of certain shares of capital stock of Builders and it contends that until the litigation clears the title to the stock in question, there is no way that complete divestiture can be accomplished. Potential purchasers, it states, are not interested in negotiating for a purchase until the American Benefit litigation is resolved. On this ground respondent seeks a new divestiture time period extending 12 months after the resolution of the American Benefit Life litigation.

The Director of the Bureau of Competition disputes respondent's claim that it is unable to divest Builders under the present circum-

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[1] This is the second petition to reopen by respondent on the same grounds. The first petition was filed April 12, 1971; the Commission thereafter, on June 10, 1971, issued an order directing a hearing on the issue of whether or not the matter should be reopened. The matter was assigned to a hearing examiner, but respondent, on January 31, 1972, moved to dismiss its petition without prejudice. The hearing examiner granted this request by order filed February 8, 1972.

stances. He contends, among other things, that Ideal has not attempted to negotiate with American Benefit to obtain its agreement to a sale of Builders to a third party and the substitution of the proceeds of the sale for the Builders' stock involved in the current American Benefit litigation. The director further states that it is evident respondent has not exhausted the possibilities in offering indemnification terms to prospective acquirers to induce them to purchase Builders.

The issue here goes not to the substance of the order, but to the time for compliance under the order. Respondent concedes that it does not seek to be relieved of the obligations of divestiture. Thus, we have here a question which concerns the subject of compliance and appropriately should be disposed of through regular compliance procedures. Furthermore, there is no showing of changed conditions of fact or law or considerations of public interest such as would justify a reopening of the proceeding. In the circumstances, we will deny respondent's request.

ORDER DENYING PETITION TO REOPEN PROCEEDINGS

This matter having come before the Commission upon respondent's petition, filed May 8, 1972, pursuant to Section 3.72(b) of the Commission's Rules of Practice, requesting that this proceeding be reopened for the purpose of modifying the order issued by the Commission on May 19, 1966 [68 F.T.C. 762], and upon the answer of the Director, Bureau of Competition, in opposition to such petition; and

The Commission, for the reasons stated in the accompanying opinion, having determined that the petition should be denied:

It is ordered, That respondent's petition requesting that this proceeding be reopened for the purpose of modifying the order issued by the Commission May 19, 1966, be and it hereby is, denied.

ASH GROVE CEMENT COMPANY

Docket 8785. Order, June 29, 1972

Order denying respondent's application for review of hearing examiner's order denying cement cost subpoena *duces tecum*.

ORDER DENYING APPLICATION FOR REVIEW

This matter is before the Commission upon the submission by respondent, filed June 6, 1972, entitled "Respondent's Appeal From The Examiner's May 11, 1972, Order Denying Cement Cost Sub-

poenas Duces Tecum."[1] Complaint counsel, on June 13, 1972, filed an answer in opposition thereto.

Respondent has not attempted to demonstrate nor does the record show that its application comes within the Commission's rule on interlocutory appeals (Section 3.23 published in the Federal Register March 17, 1972, Vol. 37, No. 53, p. 5608, and effective fifteen days thereafter on April 1, 1972). This rule provides that an interlocutory appeal may be made only at the discretion of the Commission upon an application for review and limits any such appeal to the four categories listed in Paragraph (a) of the rule and to those instances in which the hearing examiner makes a determination of justification as required in Paragraph (b) of the rule. There is no showing that the instant submission comes within either category.

Instead, respondent contends, that the rules governing the proceeding were changed in the course of the hearings which hearings have not been completed, and that the Commission rule applicable for an interlocutory appeal in this matter is the rule in effect at the time of the issuance of the complaint. Specifically, it contends that former Rule Section 3.35(b) applies to its submission.

Respondent cites *Union-Bag Camp Paper Corporation*, Docket No. 7946, 66 F.T.C. 1542 (1964), in support of its position. In that case the Commission determined that pending cases would be governed by rules in effect prior to the date of the rule changes made in that period. The holding there dealt with a different situation and is not a precedent for the changes made effective April 1, 1972. The Federal Register in connection with the announcement of the April 1, 1972, rule changes contains the following statement:

> These amendments are effective 15 days after publication in the FEDERAL REGISTER and will govern all proceedings initiated on or after the aforesaid effective date *and the remaining procedures in all proceedings pending on the aforesaid effective date.*" (Emphasis supplied.) (Federal Register, Vol. 37 No. 53, March 17, 1972, Page 5608)

Thus, it is apparent that the amended rules are to apply to pending proceedings as well as all new matters. Commission orders applying the rule changes effective April 1, 1972, to pending proceedings include *Missouri Portland Cement Company*, Docket No. 8783 (April 28, 1972) [p. 1035 herein] and *Eaton, Yale & Towne, Inc.*, Docket No. 8826 (May 3, 1972) [p. 2036 herein].

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[1] The submission herein termed an appeal is not timely filed under either the Commission's present rules or its previously effective rules since both state that the filing of the appropriate document with the Commission be within five days after notice of the hearing examiner's ruling.

Furthermore, respondent has made no showing that the change in the Commission's rule on interlocutory appeals will work an injustice for it or will affect its substantive rights.

Respondent's appeal, treated herein as an application for review, will be denied, not on the merits of the appeal which have not been considered, but on the ground that respondent has not satisfied the requirements for appeal under applicable Rule Section 3.23 of the Commission's Rules of Practice. Accordingly,

It is ordered, That respondent's appeal, treated as an application for review, be, and it hereby is, denied.

Establishment of an information pool which would serve as a conduit for referral of complaints by members and responses by manufacturers. (File No. 723 7005)

Opinion Letter

JANUARY 7, 1972.

DEAR MR. FELLMAN:

This is in response to your request for an advisory opinion concerning a proposal of The Section to establish a pool of information regarding members' experiences with equipment they use in their operations and to serve as a conduit for referral of members' complaints and the manufacturers' responses.

In brief, it is the Commission's understanding The Section has devised forms which its members will be invited to fill in showing the make and model of machines they use in their operations and to describe their experiences with regard to installation, maintenance, and operation of the machines.

Manufacturers of the equipment would be apprised of the plan before it is put into effect.

Some of the forms would be used to describe a member's complaints and would be submitted to the manufacturer via The Section. Manufacturers would be encouraged to respond via The Section.

*Prior to October 29, 1969, in conformity with the policy of the Commission, advisory opinions were confidential and available to the public only in digest form. Digests of advisory opinions were published in the Federal Register. The policy was changed on October 29, 1969, to provide for publication of advisory opinions and requests therefor, including names and details, when rendered, subject to any limitations on public disclosure arising from statutory restrictions, the Commission's rules, and the public interest. The policy was again changed on December 22, 1971, to provide for the placement in the Commission's public record of advisory opinions and requests therefor, including names and details, immediately after the requesting party has received the Commission's advice, subject to any limitations on public disclosure arising from statutory restrictions, the Commission's rules, and the public interest.

In the case of requests for advice concerning proposed mergers, the requests together with supporting materials are placed on the public record as soon after they are received as circumstances permit, except for information for which confidential classification has been requested, with a showing therefor, and which the Commission, with due regard to statutory restrictions, its rules, and the public interest, has determined should not be made public. Any advice given under Section 1.3 of the Commission's Rules of Practice concerning proposed mergers, together with a statement of supporting reasons, are published when given.

None of the forms would contain information regarding the price which the member had paid for the equipment, service charges or the like.

The filled-in forms would be placed in folders in The Section's offices in Arlington, Virginia, and would be available, after the names of complaining members had been deleted, to members participating in the plan and to prospective entrants into the industry. Manufacturers of the equipment also would have access but only to the folders pertaining to their own equipment and not to that of other manufacturers.

It is the Commission's opinion, based on the available information, that initiation of the plan, in and of itself, would not be violative of Commission administered law. However, the Commission is of the view that great care must be used in implementing the plan to avoid its becoming illegally coercive either on members who choose not to participate or on manufacturers against whom complaints are lodged or regarding whose equipment information is maintained. Special care must be used to prevent the program being used to boycott or intimidate particular manufacturers.

Participation by members must be completely voluntary and The Section may not deny access to the information in the folders to any affected party, including members of the industry, although a reasonable fee may be charged for such access.

With regard to the manufacturers and their equipment, The Section only may perform a reportorial service. It may not evaluate particular equipment and make recommendations regarding its use or prepare lists of "approved" manufacturers or equipment. The reason is that for The Section, or for members collectively, to do so in the context of the plan would suggest that an illegal boycott or blacklist had been established.

Lastly, you are advised that the Commission intends to examine the operation of the program after a reasonable period of time to determine whether it has been the vehicle for any anticompetitive actions stemming from abuse of the plan.

By direction of the Commission.

Supplemental Letter Relative to Request

AUGUST 25, 1971.

DEAR MR. DUFRESNE:

In response to your inquiry of August 26, 1971 with regard to the subject matter, we wish to advise you that the SIC number for cold type composition equipment manufacturers is: 3555. The SIC number for members of the cold type composition industry is: 2791.

In reviewing our letter of July 2, 1971 to the Commission, we find that there is a possible ambiguity on Page 4 of the letter. In the last sentence of the first paragraph on Page 4, we refer to a situation wherein CTC may receive no response from a manufacturer in connection with this program. We state:

> In the event that the manufacturer does not cooperate with CTC and does not respond to our member's complaints, this fact will also be noted.

This sentence should read:

> In the event that a manufacturer chooses not to participate in the CTC program and does not respond to the member's complaints, this fact will also be noted as indicated in Form VIII by the sentence: 'The manufacturer does (does not) respond to the member complaint forms'

We also wish to clarify the reason that the names of complaining parties will be excised from the material on file that is available for industry members' inspection. It has been our experience that unless a complaining party is assured of some anonymity, he may be extremely reluctant to send in his complaint. For this reason, the complaining party's name will not be included in the public file. This in no way changes the fact that the name of the complaining party will obviously be submitted to the manufacturer in question so that the manufacturer is able to answer the complaint.

If you should have any questions, please do not hesitate to contact us.

Very truly yours,

COUNIHAN, CASEY & LOOMIS.
/s/ STEVEN JOHN FELLMAN.

Letter of Request

JULY 2, 1971.

DEAR MR. SECRETARY:

We are writing to you on behalf of our client, the Cold Type Composition Section of Printing Industries of America, Inc., in request for an advisory opinion as to whether the operation of a proposed Maintenance Referral Service would violate the laws administered by the Commission. The Printing Industries of America is a national trade association which is composed of state and area printing industry associations and certain national sections, dealing in specifically limited areas of trades.

The Cold Type Composition Section of PIA is one of such national sections. Its membership is primarily composed of those persons and firms who do composition work using either direct impression or photo composition equipment or both.

Many of the firms which are members of the Cold Type Composition Section are small to medium sized firms. The cold type equipment which they must purchase in order to enter this area of competition is extremely expensive and highly sophisticated from a technical standpoint. During the past several years, many members have reported that they have run into substantial difficulty in that expensive machinery did not operate in accord with expectations. Specifically, the main area of concern involved maintenance problems. The expense of this machinery is such that the average firm cannot afford to have excess capacity available. Thus, if a machine is out of order, the company's operations are seriously curtailed. It therefore is of extreme importance to be able to evaluate a prospective purchase of new equipment on the basis of accurate information as to the reliability of the equipment and the availability of prompt and efficient mainitenance service. It is with the goal of providing the cold type composition industry with such information that the Cold Type Composition Section of Printing Industries of America wishes to establish a Maintenance Referral Service. It is our expectation that the operation of this service will have the important additional benefit of enabling manufacturers to identify promptly areas which are causing problems with the result that immediate corrective action may be taken to the betterment of the entire industry.

Enclosed herewith are eight forms that have been prepared as samples of what would be used by the Section in operation of the Service. As can be seen from an examination of these forms, the basic purpose of the Service is to obtain from industry members a record of actual experience with various types of equipment. This record would then be made available to other industry members who are considering the purchase of new equipment. The Association will be serving as a central source through which anyone will have the opportunity to submit information and in the same vein, any one who submits information will have the opportunity to obtain information.

Let us examine each form in detail.

The first form involves information as to the user's experience with regard to installation and operation under the warranty period. It is of extreme importance that our members know whether equipment will be delivered on time as promised, and whether equipment can be made operational within a reasonable time after delivery. This form provides information identifying the machine, the buyer, delivery data, warranty data, production downtime, and furthermore, indicates whether or not complaints are handled to the satisfaction of the purchaser.

Form 2 identifies the purchaser and the equipment purchased, and then provides specific information with regard to maintenance experience.

All industry members will be requested to fill out Form 1 within six months of the purchase of a new piece of machinery. Thereafter they will be requested to fill out Form 2 on a periodic, probably annual, basis.

Form 3 is a combination of Form 1 and Form 2. At the outset of this program, there will be no data available, so CTC intends to obtain information concerning past experience both regarding installation and maintenance via the combined experience form, Form 3.

Form 4 is a complaint form. Any industry member who has a complaint concerning maintenance or service of a cold type machine will have the option to fill out a complaint form and submit it to CTC. This form contains a description of the complaint and identifies the purchaser and the equipment involved. CTC will obligate itself to submit all complaints submitted to the manufacturer of the piece of equipment involved. This will be done without any evaluation on the part of CTC through the use of a form letter as set forth in Form 5. When the manufacturer replies to a complaint, a copy of the reply will be forwarded to the complaining member and the matter will be automatically considered closed unless we hear from the complainant to the contrary within ten days. This will be accomplished via Form 6.

In the event that the complaining member is not satisfied with the manufacturer's reply and forwards a written response objecting thereto, said written response will be forwarded to the manufacture in accord with Form 7. All the complaint files will be maintained at the offices of the Cold Type Composition Section. Any industry member who is willing to provide CTC with his experience in purchasing machinery (if he has purchased machinery) or any firm that seriously is considering entry into the market, will have access to all the information in the CTC files regardless of whether that firm is a member of CTC. All information reported to members by CTC shall be reported via Form 8.

This form identifies the model and manufacturer of the machine, the number of machines that are in operation to our knowledge, the number of reports that we have had on the machine and reports the experiences on record with regard to delivery, warranty, service, operation, and handling of complaints. In the event that the manufacturer does not cooperate with CTC and does not respond to our member's complaints, this fact will also be noted.

Finally, all records of the Cold Type Composition Section will be available for detailed inspection by any industry member who wishes

to come to the CTC headquarters. Thus, in addition to Form 8, an industry member will have the opportunity to sit down and examine the material on file at the CTC offices in Arlington, Virginia. The only material that will be excluded from the file will be the identification of complaining parties.

The system set forth above has been designed to insure that the operation involved will be fair to both manufacturers and industry members. Prior to the implementation of such a program, manufacturers will be given the opportunity to sit down with CTC and learn about the program.

It is felt that by providing the means for an exchange of information of this nature, CTC will be promoting competition in the cold type composition industry by enabling the small manufacturer and the small buyer to obtain some of the market information of vital importance that has heretofore been unavailable.

Naturally before the Commission can make a decision in this matter it will be necessary to consider information concerning the economics of the industry involved.

The term cold type composition basically refers to the practice of generating type composition by printers by any means other than traditional hot metal casting. Specifically, these processes include "strike on", or direct impression methods similar to typewriting; "photocomposition", whereby a character image is exposed to film or paper; "electronic composition", whereby characters are generated on the face of a cathode ray tube and then exposed to film or paper; plus a variety of miscellaneous operations including manually assembled type.

Prior to the advent of cold type composition, the great majority of type in the United States was created on hot metal casting machines. These machines were costly (approximately $50,000), difficult to operate, and of such size and complexity that the great majority of all composition work was done in composition trade shops which served several firms.

Today, the technology of the cold type composition machine has brought a significant change in the internal printing industry markets. The costs of cold type composition machines range from $2,000 to $20,000 for standard direct impression units and $10,000 to $50,000 for standard photomechanical composition units. The speed of operation provided by these highly sophisticated machines has enabled many non-printers to adopt and utilize cold type machinery to meet their own printing needs. Although many cold type machines are installed in printing firms and traditional trade shops, as represented by the Cold Type Composition Section of Printing Industries of

America, a much larger percentage of total production, especially of the typewriter-like, lower cost units, have been purchased or leased by the traditional non-printer customers of the printing industry. All in all, the members of the Cold Type Composition Section of P.I.A. represent a rather small percentage of the total number of cold type users in the United States.

The United States Department of Commerce estimates that there are some 38,000 printers in the United States. Industry sources believe that approximately one-third of these comprise the potential market for cold type equipment.

Thus, there are at least 12,500 potential customers for cold type equipment in the printing industry. Since printers comprise a small percentage of the total market, it is estimated that the total market consists of more than 40,000 potential buyers. The entire membership of the P.I.A. totals only approximately 6,000 firms of which only approximately 125 firms are active members of the Cold Type Composition Section. It can be seen that the Cold Type Composition Section of P.I.A. contains only a small portion of the total market for cold type composition equipment.

It should also be noted that there are approximately 3,000 newspapers being published in the United States. Every newspaper is a potential user of cold type composition equipment and many newspapers have been using such equipment for some time. Newspaper publishers belong to either the American News Publishers Association or the Publishers Auxiliary or other such trade associations. Very few, if any, newspaper publishers are members of P.I.A. or the Cold Type Composition Section of P.I.A.

The Cold Type Composition Section of P.I.A. has a membership that has been traditionally made up of firms which are small and medium size cold type trade shops. Many of these firms have as few as five employees and do an annual volume of business of $150,000 and up. The majority of these firms have installed some printing equipment such as multiliths but still have an annual volume of business which is often under $1,000,000. Our members also include composition departments of basically printing firms. These firms may have an annual volume of business of between $2,000,000–$3,000,000 under typical conditions but actual composition work represents only 10% or less of this amount. The printing industry is unique among general manufacturers in that it is composed of a large number of small firms. Among P.I.A. as a whole, the average member has twenty employees and enjoys a volume of business of approximately $600,000. P.I.A. has less than 400 members in the United States which have one hundred or more employees.

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By contrast, the manufacturers of cold type equipment are large companies. We estimate that there are approximately twenty firms who manufacture this equipment. Among the five largest firms are International Business Machines, Inc.; Harris Intertype Corporation, Intertype Division; Varityper, a Division of Addressograph-Multilith; Photon Compographic Corporation and Merganthaler Linotype Division, ELTRA Corporation.

As can be readily seen, the membership of CTC can have only insignificant economic effect on companies of this nature individually or collectively and therefore the need to collect this trade information becomes important as a means of maintaining competition through essentially an educational endeavor.

We wish to make it clear that the operation of the maintenance referral service is expected to take only a minimum amount of time. It is anticipated that not more than five hours per week of clerical time will be devoted to the operation of the service at a cost of approximately $1,000 per year. Another $1,000 per year of staff executive time will be required plus an additional $500 for facility usage.

The Cold Type Composition Section presently has dues revenue budget at $10,000. Thus from a practical standpoint it becomes difficult to readily envision a complicated program requiring more time. Under such circumstances we would not wish to consider utilizing the services of an outside accounting firm or other consultant to operate the maintenance referral service. To do so would require an expenditure of monies which are not presently available.

We wish to make it clear that the chances of this service turning into a means of unintentionally boycotting any supplier are nonexistant. The disparity in economic power between the seller and the buyers are such that the entire membership of the Cold Type Composition Section could stop buying from all manufacturers without a susbtantial effect on the total market of any manufacturer.

We would appreciate your providing us with the Commission's views on this program as soon as possible.

In the event that there are any questions concerning the program's operation, we will be glad to provide whatever information is necessary.

Thank you for your consideration.

Very truly yours,

COUNIHAN, CASEY & LOOMIS,
/s/ STEVEN JOHN FELLMAN.

MAINTENANCE REFERRAL SERVICE

INSTALLATION AND WARRANTY EXPERIENCE DATA FORM 1

Purchaser data:

Individual name_____ Title _____
Company name_____ Phone _____
Address_____
(Street, City, State, ZIP Code)

Equipment data:

Manufacturer_____
Machine model No_____ Serial No._____
Date acquired_____ New ☐ Used ☐
How acquired: Purchased ☐ Leased ☐ Rented ☐

Delivery data:

Number of days between the time you signed the contract to acquire the equipment and the time of physical delivery of the equipment:

Actual: _____ days. Promised: _____ days.

Number of days between the time of physical delivery of equipment and completion of installation by manufacturer's representative in such a manner as to make the machine operational under your normal operating conditions:

Actual: _____ days. Promised: _____ days.

Describe the reason for any difference between the actual and promised times set forth in the questions above:_____
_____
_____
_____

Warranty data:

Was the machine covered by a warranty: Yes ☐ No ☐
If covered by a warranty, for how many days: _____.
If covered by a warranty, did the warranty include only parts ☐ or both parts and labor ☐
During the warranty period (after the machine was placed in production operation) how many hours of downtime* per week did you experience:

1–5 hours ☐ 5–10 hours ☐ 10–20 hours ☐ over 20 hours ☐

If complaints were made to the manufacturer during the warranty period, were the complaints handled to your satisfaction:

All of the time_____ ☐
A majority of the time_____ ☐
Less than the majority of the time_____ ☐
We had no complaints_____ ☐

What was the number of planned production hours per week for the piece of equipment during the warranty period: _____.

*Note: Downtime is referred to as the number of planned production hours per week lost due to machine malfunction and does not include preventive maintenance.

MAINTENANCE REFERRAL SERVICE

SERVICE PERFORMANCE EXPERIENCE DATA FORM 2

Purchaser data:

Individual name_____ Title_____
Company name_____ Phone_____
Address_____
(Street, City, State, ZIP Code)

Equipment data:

Manufacturer_____
Machine model No. _____Serial No. _____
Date acquired_____ New ☐ Used ☐
How acquired: Purchased ☐ Leased ☐ Rented ☐

Maintenance data:

Since the expiration of the warranty, what has been the average number of hours per week that you have operated the machine: _____.

Since the expiration of the warranty, what has been the average number of hours per week downtime* you have experienced in connection with the operation of this machine: _____.

If service requests have been made to the manufacturer after the expiration of the warranty, have such requests been handled to your satisfaction:

All of the time_____ ☐
A majority of the time_____ ☐
Less than the majority of the time_____ ☐
No requests for service made_____ ☐

Since the expiration of the warranty, has this machine been covered by a maintenance contract: Yes ☐ No ☐

Since the expiration of the warranty, has the machine been covered by a time and materials agreement, rather than a maintenance contract: Yes ☐ No ☐

*Note: Downtime is referred to as the number of planned production hours per week lost due to machine malfunction and does not include preventive maintenance.

MAINTENANCE REFERRAL SERVICE

COMBINED EXPERIENCE DATA FORM 3

Purchaser Data:

Individual name_____ Title _____
Company name_____ Phone _____
Address _____
(Street, City, State, ZIP Code)

Equipment data:

Manufacturer _____
Machine model No. _____Serial No. _____
Date acquired_____ New ☐ Used ☐
How acquired: Purchased ☐ Leased ☐ Rented ☐

Delivery Data:

Number of days between the time you signed the contract to acquire the equipment and the time of physical delivery of the equipment:

Actual: _____ days. Promised: _____ days.

Number of days between the time of physical delivery of equipment and completion of installation by manufacturer's representative in such a manner as to make the machine operational under your normal operating conditions:

Actual: _____ days. Promised: _____ days.

Describe the reason for any difference between the actual and promised times set forth in the questions above: _____

_____

Warranty data:

Was the machine covered by a warranty: Yes ☐ No ☐

If covered by a warranty, for how many days: _____.

If covered by a warranty, did the warranty include only parts ☐ or both parts and labor ☐

During the warranty period (after the machine was placed in production operation) how many hours of downtime* per week did you experience:

1–5 hours ☐ 5–10 hours ☐ 10–20 hours ☐ over 20 hours ☐

If complaints were made to the manufacturer during the warranty period, were the complaints handled to your satisfaction:

All of the time _____ ☐
A majority of the time _____ ☐
Less than the majority of the time _____ ☐
We had no complaints _____ ☐

What was the number of planned production hours per week for the piece of equipment during the warranty period: _____.

Maintenance data:

Since the expiration of the warranty, what has been the average number of hours per week that you have operated the machine: _____.

Since the expiration of the warranty, what has been the average number of hours per week downtime you have experienced in connection with operation of this machine: _____.

If service requests have been made to the manufacturer after the expiration of the warranty, have such requests been handled to your satisfaction:

All of the time _____ ☐
A majority of the time _____ ☐
Less than the majority of the time _____ ☐
No requests for service made _____ ☐

Since the expiration of the warranty, has this machine been covered by a maintenance contract: Yes ☐ No ☐

Since the expiration of the warranty, has the machine been covered by a time and materials agreement, rather than a maintenance contract: Yes ☐ No ☐

*Note: Downtime is referred to as the number of planned production hours per week lost due to machine malfunction and does not include preventive maintenance.

MAINTENANCE REFERRAL SERVICE

COMPLAINT REPORT FORM IV

Complaint No. _____
Date _____

Purchaser data:

Individual name_____ Title _____
Company name_____ Phone _____
Address _____
(Street, City, State, ZIP Code)

Equipment data:

Manufacturer _____
Machine model No. _____ Serial No. _____
Date acquired_____ New ☐ Used ☐
How acquired: Purchased ☐ Leased ☐ Rented ☐

Average number of hours per week that machine has been in production operation: _____. Explanation (if necessary) _____
_____

Is complaint under warranty: Yes ☐ No ☐ If so, give warranty number_____, or send a copy of warranty.

Is complaint under maintenance or rental contract: Yes ☐ No ☐ If so, give maintenance contract No. _____; rental contract No. _____.

Describe complaint: _____
_____
_____
_____

MAINTENANCE REFERRAL SERVICE

MANUFACTURER ADVICE REQUEST FORM V

Complaint No. _____
Date _____

DEAR MANUFACTURER:

The National Cold Type Composition Section of PIA operates a Maintenance Referral Service. We have asked our members to report to us information with regard to maintenance experience on various types of machinery. In order to maintain fairness to all parties, we try to get both sides to every experience report.

Enclosed is a complaint submitted to us with regard to one of your products. The model number, serial number, and purchaser of the product are clearly indicated.

We would appreciate your evaluation of this complaint. In the event that affirmative steps will be taken to eliminate what may be a misunderstanding, we would appreciate your advice so that we may include such information in our files.

Very truly yours,

MEMBER RESPONSE ONE

FORM VI

Complaint No._____
Date _____

DEAR MEMBER:

Enclosed is the reply we received from the Manufacturer regarding your complaint.

Please advise us if you consider this reply satisfactory. Unless we hear from you within ten days, we will assume that this matter is closed.

Very truly yours,

MANUFACTURER ADVICE REQUEST TWO

FORM VII

Complaint No._____
Date _____

DEAR MANUFACTURER:

Enclosed is our member's reply to your letter of _____. We would appreciate your advice as to your position with reference to this reply.

Very truly yours,

MAINTENANCE REFERRAL SERVICE

MEMBER REPORT FORM VIII

DEAR MEMBER:

The following information is submitted in response to your recent request:

Equipment data:

Manufacturer _____

Machine model No._____ Serial No._____

Our records indicate that the basic model of this machine was introduced in year _____, and that there have been _____ modifications since that time.

Approximately _____ hundred of said machines have been installed within the last years.

We have had _____ reports on the specific model that you have inquired about.

Our reports indicate that delivery time for this machine has ranged from _____ to _____ days, and deliveries have been from _____ to _____ days of the promised delivery time.

This machine is (is not) covered by a warranty which includes parts or parts and labor and lasts for a period of _____ days.

During the warranty period, our members have experienced an average of _____ hours downtime* per week and operated this equipment for an average of _____ hours per week.

*Note: Downtime is referred to as the number of planned productions hours per week lost due to machine malfunction and does not include preventive maintenance.

After the expiration of the warranty, the equipment has been run by our members for an average of between _____ and _____ hours per week, with a down-time range of between _____ and _____ hours per week.

Service requests made to the manufacturer during the warranty period were handled satisfactorily:

All of the time_____ ☐
A majority of the time_____ ☐
Less than the majority of the time_____ ☐
No requests were made_____ ☐

Service requests made to the manufacturer after the warranty period were handled satisfactorily:

All of the time_____ ☐
A majority of the time_____ ☐
Less than the majority of the time_____ ☐
No requests were made_____ ☐

Since the expiration of the warranty, _____% reporting have this machine under a complete maintenance agreement, ____% reporting have this machine under a maintenance agreement including parts only, and ____% have this machine under a straight time and materials agreement.

We have received _____ complaints from members during the last _____ months regarding this piece of equipment. _____ of these complaints were handled to the satisfaction of our members.

The manufacturer does (does not) respond to our member complaint forms.

All of our records with regard to this piece of equipment are available for your inspection. To arrange an appointment for such an inspection, please contact _____.

TABLE OF COMMODITIES[1]

DECISIONS AND ORDERS

[1]Commodities involved in dismissing or vacating orders are indicated by italicized page references.

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DECISIONS AND ORDERS

*Covering practices and matters involved in Commission orders. References to matters involved in vacating or dismissing orders are indicated by *italics*.

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U. S. GOVERNMENT PRINTING OFFICE : 1973 O - 487-883

Mr. Popoff