

INTERLOCUTORY, VACATING, AND MISCELLANEOUS ORDERS

SCHOOL SERVICES, INC., ET AL.

Docket 8729. Order, January 7, 1969

Order denying respondent's petition for reconsideration of Commission's order of October 10, 1968.

ORDER DENYING PETITION FOR RECONSIDERATION

The Commission issued its decision and order in this matter on October 10, 1968.* On November 27, 1968, respondents filed a petition for reconsideration of the decision herein, principally on the ground that it denies respondents due process of law. According to respondents, "[i]t does so by denying respondents' request for leave to submit a supplemental brief and by the reflection of bias and prejudgment in the special methods adopted for finding violation."

The Commission's Rules of Practice require that petitions for reconsideration be filed under Section 3.55, which in pertinent part provides that:

[a]ny petition filed under this subsection must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission.

Respondents' petition does not claim that the decision or final order raises any new questions. Nor do we believe that respondents were denied an opportunity to argue any and all issues before the Commission, as respondents allege. Respondents' contention that in an answering brief they are precluded from addressing issues not raised by the appeal brief is without merit. The Commission's Rules of Practice certainly do not so limit an answering brief. In fact, respondents in their answering brief should raise any and all pertinent issues germane to the Commission's consideration of the appeal, whether or not specifically referred to by complaint counsel. The time to raise these issues was when the matter was before the Commission, and every opportunity was accorded to respondents to do so. The fact that

*74 F.T.C. 920.

respondents did not take advantage of this opportunity does not now, at this late date, merit granting their petition for reconsideration. Accordingly,

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

Commissioner Elman dissented.

KOPPERS COMPANY, INC.

Docket 8755. Order and Opinion, January 15, 1969

Order denying third party's motion to modify or quash a subpoena.

OPINION OF THE COMMISSION

This matter is now before the Commission upon the appeal of United States Pipe and Foundry Company from the examiner's order modifying the subpoena and otherwise denying the motion to quash. U.S. Pipe bases its appeal upon twelve separate grounds which are stated at length in its brief and which, to some extent, overlap.

Considered broadly, the grounds for appeal advanced by U.S. Pipe are that the subpoena is void and unenforceable because respondent failed to pay the necessary witness fees and mileage in connection with the return on the previous subpoena; respondent has reopened the entire question of prehearing discovery and now seeks documents not heretofore contemplated by prior Commission opinions on interlocutory appeals in this case and for time periods not previously deemed relevant, including periods subsequent to the complaint; the subpoena seeks to compel production of confidential business information subject to legal privilege; the subpoena is too broad in the range of documents sought; the subpoena is improper because it calls for a document specifically excluded from production in the prior subpoena; it is unlikely that any protective order can be devised which would afford U.S. Pipe sufficient protection against probable abuse by respondent of cost and other confidential figures, and; the examiner has declined to order use of procedures whereby the respondent would obtain the information requested, but in a form which would soften some of the objectionable features of the present subpoena.

In his order denying the motion to quash, production of the documents called for by the subpoena was ordered on condition that the witness fees then in dispute and a witness fee and

travel fee be deposited with the Secretary of the Commission. Further, in the order it was made clear that all references to secret processes would be physically deleted and all documents produced would be held in confidence by counsel until within a specified time counsel for U.S. Pipe moved for a protective order. Following this order, U.S. Pipe filed its present appeal and on December 19, 1968, the Commission extended the return date on the subpoena until five business days following receipt by U.S. Pipe of the Commission's order and opinion on the appeal.

The question of this subpoena was carefully considered by the Commission in its Interlocutory Opinion and Order dated November 1, 1968 [74 F.T.C. 1621]. In that opinion, the Commission pointed out that U.S. Pipe's objections to disclosure of its cost, price, production and similar data were well taken, but that the often confidential nature of such material is not equivalent to an absolute privilege against its disclosure. A claim of privilege for such material cannot succeed if the need for its continued secrecy is found to be outweighed by its importance to the party seeking production in maintaining or refuting issues raised in litigation.

The Commission added that the examiner was, of course, free to consider alternative methods whereby the conflicting considerations of secrecy on the one hand and disclosure on the other may be reconciled and, in that connection, made reference to the procedure whereby sensitive trade information could be submitted to an independent third party for analysis, as in *Mississippi River Fuel Corporation*, Docket No. 8657, [69 F.T.C. 1186 and 70 F.T.C. 1759] or to a procedure whereby the party seeking protection could be required to prepare a nonconfidential summary of the documents for inclusion in the record, or to a procedure whereby the examiner may conduct an *ex parte, in camera* examination of documents for the purpose of excising portions thereof before disclosure is made to the respondent. But the Commission went on to point out that:

Each of these proposed discovery techniques contains inherent drawbacks, however, and may in some instances impair substantially the value of information sought by respondent. The examiner must consider, in any given instance, whether the ends of justice would be better served by disclosure directly to the respondent, with such reasonable safeguards against misuse as have already been utilized in this proceeding with reference to *in camera* materials and the use of materials obtained by deposition.

In all of these situations it is important to remember that the adoption of no one of these techniques is mandatory and they are not intended to be a substitute for the exercise of the sound and responsible discretion of the examiner, who is in a

far better position than the Commission, because of his proximity to the case, to assess the multitude of variables and arrive at an informed decision as to the procedure best to use in the case before him. *Furr's, Inc.*, Docket No. 8581, Interlocutory Opinion, November 18, 1963 [63 F.T.C. 2225]; *Lehigh Portland Cement Company*, Docket No. 8680, Interlocutory Opinion, August 2, 1968 [74 F.T.C. 1585]. As the Commission observed in its *Furr's, Inc.*, opinion "Orderly procedure requires that matters so intimately connected with the conduct of hearings as the terms and conditions of production of documents be left very largely to the responsible judgment of the examiner." Further, as the Commission has previously ruled in this very same matter, unless there is a clear showing of an abuse of discretion the Commission, in the absence of unusual circumstances, will not disturb a ruling of a hearing examiner in matters involving procedure and discovery.

The Commission finds no such unusual circumstances nor any abuse of discretion here. On the contrary, it appears that the examiner has carefully observed the instructions contained in the prior Commission opinions and fashioned a protective order which in his judgment met the needs of the case before him at the same time as he ordered production of the documents and information to which he deemed respondent was entitled for the preparation of its defense. These are the matters which the Commission has directed him to consider and it seems then that U.S. Pipe's appeal is taken not from his failure to adopt any protective measures at all but rather from his failure to adopt other procedures which U.S. Pipe now urges would have been better suited to its needs. This is not a decision with which the Commission is now disposed to interfere.

With the exception of the question raised by controversy involving witness fees, which has been adequately resolved by the examiner's order, the issues raised in this appeal are not new as the subpoena involved has been in litigation for some time and has been the subject of at least two prior Commission opinions, during the course of which questions of scope and relevancy, as well as confidentiality, have been fully debated and carefully considered. While all elements of due process must be observed, if this proceeding is to be conducted with the speed and dispatch which the interests of the public demands, there must be a stage at which debate over this one procedural point ends and the hearings themselves begin. It would seem that the question of this subpoena has reached that stage.

Commissioner MacIntyre concurred in the result.

ORDER DENYING APPEAL FROM EXAMINER'S DENIAL OF MOTION
TO QUASH SUBPOENA

Upon consideration of the appeal dated December 9, 1968 by United States Pipe and Foundry Company from the examiner's order modifying the subpoena and otherwise denying the motion to quash, dated December 3, 1968, and for the reasons stated in the accompanying opinion,

It is ordered, That the appeal of the United States Pipe and Foundry Company from the hearing examiner's ruling be, and it hereby is, denied.

Commissioner MacIntyre concurring in the result.

KOPPERS COMPANY, INC.

Docket 8755. Order and Opinion, January 30, 1969

Order instructing hearing examiner to extend three weeks the time set for trial to commence.

OPINION OF THE COMMISSION

This matter is again before the Commission upon respondent's Application for Leave to File Interlocutory Appeal from Order of Hearing Examiner, filed January 2, 1969. The application was filed pursuant to Rule 3.23(a) of the Commission's Rules of Practice and seeks permission to appeal from the examiner's order, dated December 23, 1968, granting respondent's motion to cancel the trial date to the extent of rescheduling the same to commence January 28, 1969. Although not required to do so by the Rules, counsel supporting the complaint filed their opposition to this Application on January 14, 1969.

In its motion, respondent urges two principal grounds for seeking an appeal. First, respondent alleges that it has not yet had the benefit of the discovery to which it is entitled prior to trial in that United States Pipe and Foundry Company has not yet responded to the subpoena as modified by the examiner on December 3, 1968 and because officials of U.S. Pipe allegedly failed to respond to 80 percent of the questions asked of them at the depositions held on December 11, 1968. Second, respondent contends that an extension should be granted because its counsel is already obligated to try another case before a Commission hearing examiner on January 27, 1969. Respondent then urges that the Commission remand this matter to a new and different

examiner because of the present examiner's alleged refusal to follow the mandate of prior Commission orders with regard to respondent's rights.

In the order in question, the examiner granted the respondent's motion to cancel the trial date of January 13, 1969, to the extent of rescheduling the trial to commence on January 28, 1969, without prejudice to respondent's right to file a new motion to cancel the January 28th trial date in the event of actual commencement of formal hearings in the other case. At that time, the examiner was aware of U.S. Pipe's failure to respond to the subpoena and of respondent's allegations with respect to the depositions. Still it was his view that while some postponement was required, it did not follow that an indefinite postponement should be made. On the other hand, if respondent's counsel did proceed to trial in the other case on January 27th and if there had by that time been no decision by the Commission on the then pending matters before it and no order of enforcement of the subpoena, then further postponement would be necessary. Failing that, the examiner felt that the case should proceed to trial as ordered and that respondent was protected by the reservation that it may move for a delay for purposes of further discovery at the conclusion of complaint counsel's case.

At the time of this action by the examiner, he could not have been aware of the fact that on December 24, 1968 the Commission extended the return date on the subpoena until five business days following receipt by U.S. Pipe of the Commission's order and opinion on the appeal from the examiner's order modifying the subpoena and otherwise denying the motion to quash. He further, obviously, was not aware of the fact that on January 15, 1969, the Commission would issue its order denying the appeal, thus, under its previous order, leaving U.S. Pipe with five business days following receipt of the order within which to respond.

Upon its review of the entire record to date, including the contentions of all the parties, the Commission is of the opinion that no adequate grounds exist under the Rules for granting respondent's application for leave to file an appeal on the points now at issue. The Commission can see little to be gained by the time which would be consumed in the filing of extensive briefs and further consideration of matters which can be disposed of just as well at this time. Such a procedure can only result in further involving the Commission in the details of procedure which are better left to the discretion of the examiner, who, as

the Commission observed in its January 15th opinion, is carefully observing the instructions contained in prior Commission opinions and is attempting to conduct the proceedings in accordance therewith. Hence, the Commission does not regard as deserving of further consideration respondent's contention that this case should be remanded to a new and different examiner for the reasons advanced by respondent.

On the other hand, the Commission wishes to reiterate, for the benefit of the parties and the examiner, its firm policy against piecemeal hearings or hearings held at intervals. In almost all cases, the interests of fairness and speed in adjudication will be served by refining the issues and permitting full discovery in advance of hearings and then holding continuous hearings. Deviations from these general rules should be permitted only in rare and unusual circumstances and the need for such deviations should be fully set out in the record. At the same time, the examiner has available ample authority to see that the Commission's discovery procedures are not abused and to prevent their utilization solely for purposes of delay.

While denying respondent's application for leave to appeal, the Commission is also of the opinion that events outside the examiner's control, which are obvious to the Commission upon its review of the record, dictate the need for some extension of time before the hearings actually commence. Thus the Commission's opinion denying U.S. Pipe's motion to quash the subpoenas was not rendered until January 15, 1969, and actual service upon U.S. Pipe was not effected until a later date, following which the Company had five additional business days within which to respond. This fact plus the approaching trial date in the other case in question have resulted in a telescoping of events into a period too close to the trial date of January 28, 1969 set by the examiner. For this reason, the Commission is returning this matter to the examiner with instructions to grant an extension of three weeks from the date now set for the trial to commence, or such further time as he might within his discretion deem necessary in light of his own evaluation of all the factors involved.

Commissioner MacIntyre concurred in the result.

ORDER DENYING APPLICATION FOR LEAVE TO FILE
INTERLOCUTORY APPEAL

Upon consideration of respondent's Application For Leave To File Interlocutory Appeal, filed January 2, 1969, and for the reasons stated in the accompanying opinion,

It is ordered, That respondent's application for leave to appeal be, and it hereby is, denied.

It is further ordered, That the matter be returned to the examiner with instructions to grant an extension of three weeks from the date now set for the trial to commence, or such further time as he might within his discretion deem necessary in light of his own evaluation of all the factors involved.

Commissioner MacIntyre concurring in the result.

THE STANLEY WORKS

Docket 8760. Order, January 30, 1969

Order denying respondent's request for the production of confidential documents.

ORDER DENYING REQUEST FOR THE PRODUCTION OF CONFIDENTIAL DOCUMENTS

This matter is before the Commission upon the request of respondent for the production of confidential documents, filed December 12, 1968, and complaint counsel's opposition thereto, filed December 18, 1968. This request seeks to reactivate an application of July 24, 1968, which has been held in abeyance pending the outcome of a simultaneously filed motion for issuance of a subpoena directed to the hearing examiner. The request for the production of confidential documents was filed under the Public Information Section of the Administrative Procedure Act¹ and the motion for issuance of a subpoena was made pursuant to the Commission's discovery rules.²

In its request of December 12, 1968, respondent states that "[t]he Hearing Examiner in the above case has now denied Stanley's Motion for Issuance of a Subpoena." Review of the transcript, however, reveals that motion was granted in part and only denied with respect to applicant material (Tr. 222). Accordingly, the better part of respondent's request is now moot. As to the applicant material, the examiner is of the opinion that he is not "at liberty to order the production of this material" and he denied the motion as to it.

The Rules of Practice are silent on the question whether or not the examiner may order the production of applicant material. Since Section 3.36 does not limit the examiner's authority

¹ 5 U.S.C. Sec. 552.

² Sec. 3.36, Rules of Practice.

in this respect, there does not appear to be any reason why he should not have the authority to rule on the motion. If the examiner should, as he in fact did in this proceeding, deny the motion, the orderly and expeditious conduct of the proceeding would require the parties, if they disagreed with the examiner's decision, to appeal to the Commission within the time specified by the Rules of Practice.

Since the examiner's opinion concerning his authority to rule on the motion for issuance of a subpoena may have misled respondent and, as will be explained below, action on an improperly made request for the production of confidential documents was deferred (to the possible prejudice of respondent), the examiner is instructed to consider *de novo* that part of respondent's motion for issuance of a subpoena previously denied.

With respect to the request of July 24, 1968, reactivated on December 12, 1968, it states that it is made pursuant to Section 4.8(b) of the Rules of Practice and is predicated upon the Public Information Act of 1966. It is noted that Section 4.8(b) refers to the availability of public information; requests for confidential information predicated upon the Public Information Act must be made under Section 4.11. Furthermore, Section 4.11(b) requires such requests to be made under oath, which respondent failed to do. In any event, Section 3.22 of the Rules of Practice requires that all motions made during the time a proceeding is before an examiner, with the exception of those relating to the disqualification of the examiner, shall be directed to the examiner, which respondent did not do either. Should the examiner have no authority to rule on the motion, the rules require him to certify it to the Commission, along with his recommendations. This requirement is imposed to insure the orderly conduct of the proceeding. It also enables the Commission to obtain the views and recommendations of the examiner, which would otherwise be missing. For these reasons respondent's request will be denied. Accordingly,

It is ordered, That respondent's request for the production of confidential documents be, and it hereby is, denied.

ALLIED CHEMICAL CORPORATION, ET AL.

Docket 8767. Order and Opinion, January 30, 1969

Order denying respondent's appeal from examiner's denial of motion to subpoena Commission records.

OPINION OF THE COMMISSION

This matter is before the Commission upon two appeals; (a) respondents' appeal filed December 20, 1968, from the hearing examiner's denial of their motion for a subpoena for records of the Commission and complaint counsel's answer thereto filed December 30, 1968; and (b) complaint counsel's appeal filed December 23, 1968, from the order of the hearing examiner disposing of the motion for the issuance of the subpoena for records of the Commission, and respondents' answer thereto filed January 3, 1969, entitled "Respondents' Motion To Dismiss Complaint Counsel's Appeal From Order Of Hearing Examiner."

Respondents' motion for records of the Federal Trade Commission was filed on November 22, 1968. In this motion respondents requested the production or disclosure of various documents, papers and other materials in the records of the Commission, including the names, addresses and business affiliations of all persons interviewed by the Commission's staff in connection with this matter and all memoranda, transcripts or other records reflecting the substance of such interviews. This motion was considered in a prehearing conference held on December 12, 1968. In the course of this conference complaint counsel stipulated with respondents' counsel for the production of part of the documents sought and the hearing examiner supplemented the stipulations by his directions on the record, including a protective order. The hearing examiner subsequently issued a formal, written order, filed December 13, 1968, denying respondents' motion for the issuance of a subpoena for records of the Federal Trade Commission, which order recited the stipulations of complaint counsel and the arrangements made for the production of certain of the records requested.

Respondents now appeal from such denial insofar as respondents have not received production of all the documents and materials sought. The documents not produced upon respondents' request under the stipulations and the order and directions of the hearing examiner would appear to be reports of interviews, if any, of persons interviewed by the Commission's staff in connection with this matter.

Complaint counsel agreed, prior to the December 12, 1968, conference, to supply the information requested in Item 3 of the respondents' motion, that is, the names, addresses and business affiliations of all persons interviewed by the Commission's staff in connection with this matter so long as the respondents would disclose like information.¹ It appears that this arrangement was satisfactory to respondents and the examiner's directions at the pretrial conference explicitly covered the terms of such exchange. (It is the examiner's direction in such matter, limiting the exchange to persons interviewed outside the organizations, which forms the basis for complaint counsel's appeal.)

Respondents, however, seek the production of the reports of the interviews with such persons. They claim, in effect, that they are entitled to such access as a matter of a general discovery right. Respondents assert that the Commission's staff has engaged in what is described as a far-reaching investigation covering a period of more than one year and that in that period, both before and after the issuance of the complaint, thirty-nine persons were interviewed, of which complaint counsel indicated an intention to call only eleven. Complaint counsel will not reveal, it is claimed, what they have learned from any of the persons interviewed. Respondents argue that they "cannot hope to retrace complaint counsel's steps." The reasons they assert are that the hearing date set for February 3, 1969, does not allow sufficient time and, furthermore, that they have "every reason to believe that the interviewees will not prove cooperative." Thus, they argue that in the circumstances it would be unfair and a denial of due process to permit the hearing to proceed without requiring complaint counsel to divulge materials favorable to respondents' case or casting doubt on the complaint counsel's case.

As legal authority for their contention that they are entitled to interview reports as a part of prehearing discovery, the respondents cite the cases of *Giles v. Maryland*, 386 U.S. 66 (1967); and *Brady v. Maryland*, 373 U.S. 83 (1963). These cases, in our view, are inapposite to Commission proceedings. Both involve the suppression of evidence where the defendants were found guilty of crimes for which they had been sentenced to death (commuted to life in the *Giles* case). The holdings in such cases, on vastly different factual circumstances, have little, if any, direct relevance to administrative proceedings. In addi-

¹ Complaint counsel supplied this information to respondents on December 12, 1968 (Tr. 149-150).

tion, neither case expressly deals with the rights of a party being proceeded against so far as matters of pretrial discovery are concerned. They are concerned with production of material and admissible evidence which had been suppressed. The interview reports here involved are not in that category.

The holding in *Hickman v. Taylor*, 329 U.S. 495 (1947), is more nearly, if not precisely, in point. In such case the Court was dealing with pretrial discovery applications under the Federal Rules of Civil Procedure and the right, if any, to inquire into materials collected by an adverse party's counsel in the course of preparation for possible litigation. The Court held in that case there was only a naked general demand for the materials as a matter of right and a finding by the District Court that no recognizable privilege was involved. That, the Court stated, was insufficient to justify discovery of what it described as the lawyer's "work product."

This case is not dissimilar. The interview reports sought generally come within the category of the work product of a lawyer and no adequate justification has been presented for their disclosure. While respondents claim that they do not have the time to conduct the interviews, they have not demonstrated that any attempt has been made to interview the persons in question nor have they given any reasons why this should take more time than that available. Respondents also claim that they have "every reason to believe" that the interviewees will not prove cooperative, but they have not elaborated on this statement and they have not demonstrated that they will fail to receive cooperation. These are the sole grounds mentioned. Under the controlling *Hickman* precedent this is insufficient justification for the production sought. See also Commission Rule 3.36(b) covering the content of a motion for a subpoena for Commission records.

Respondents' request does not raise the precise issue with which the Commission was concerned in prior referred to cases such as *Inter-State Builders, Inc.*, Docket No. 8624 (order issued April 22, 1966) [69 F.T.C. 1152]; *L. G. Balfour Company*, Docket No. 8435 (order issued April 22, 1966) [69 F.T.C. 1118]; and the more recent *Star Office Supply Co.*, Docket No. 8749 (order issued September 18, 1968) [74 F.T.C. 1595]. In those cases the question of production related to interview reports for persons who had testified at the trial. In this matter, it is clear that respondents will be given pretrial statements of witnesses qualifying under the Jencks Act, if any, at the time the witnesses testify (Tr. 99). Cf. 18 U.S.C. §3500 (1958). Respondents, how-

ever, want all statements made by all persons interviewed in connection with the case, whether or not producible under the Jencks Act and whether or not these relate to complaint counsel's witnesses. Respondents are, in effect, claiming the right to examine the Commission documents generally to determine whether or not any contain information favorable to its defense. The Commission's discovery rules do not go so far. Respondents are not entitled as a matter of discovery right to the general production of all interview reports for persons interviewed in connection with this proceeding. For a full discussion of the Commission's views on the production of interview reports under the Jencks rule see *Inter-State Builders, Inc., supra*, and *L. G. Balfour Company, supra*.

Complaint Counsel's Appeal

As previously mentioned, complaint counsel appeal from what they describe as an order of the hearing examiner issued in disposition of a motion for issuance of a subpoena for records of the Federal Trade Commission. Such counsel assert that this order was served on them December 16, 1968, and provides that complaint counsel supply respondents with a list of names, addresses and business affiliations of all persons interviewed by the Commission's staff in connection with this matter and that respondents' counsel provide complaint counsel with a list of the names, addresses and business affiliations of all persons outside of respondents' organizations interviewed by respondents' counsel in connection with this matter. Complaint counsel characterize this order as unfair and as applying a dual standard in that it requires complaint counsel to supply the names of all persons interviewed whereas respondents' counsel is required to supply the information only as to those persons outside of its organizations.² As heretofore noted, complaint counsel have already submitted the required information to respondents. It is not disclosed on the record whether this listing includes interviews with any persons other than those outside of the Federal Trade Commission. In any event, it appears that complaint counsel's objection is not so much with the breadth of the order so far as it affects complaint counsel as it is with the qualification which requires respondents' counsel to produce the information only as to persons outside respondents' organizations.

Respondents raise questions about the appropriateness and

² Complaint counsel apparently have misread the hearing examiner's ruling since the examiner expressly limited his direction to complaint counsel to produce the information to persons outside the Commission (Tr. 114).

the timeliness of complaint counsel's appeal. The matter is complicated by the fact that the hearing examiner made a ruling on the subject at the pretrial conference on December 12, 1968, and the next day, on December 13, 1968, in effect formalized his ruling by issuing an order denying respondents' motion for subpoena. Because the situation is not clear and also because respondents will not be prejudiced in view of our rejection of complaint counsel's request on the merits, we will proceed to consider complaint counsel's appeal as properly and timely made under the Commission's rules.

We are not persuaded that the matter raised by complaint counsel is anything more than a procedural detail within the discretionary authority of the hearing examiner. This whole question of the exchange of information concerning persons interviewed was considered in depth before the hearing examiner at the pretrial conference of December 12, 1968. Complaint counsel, at that time, presented their argument that they believed respondents' counsel should produce the names of persons interviewed inside as well as outside of respondents' organizations. They failed, however, to give any substantial reasons why the broader request was necessary and they failed to persuade the hearing examiner to their point of view. Moreover, an issue was raised as to whether or not complaint counsel were, in effect, trying to obtain additional discovery when it appears that their time for such discovery had run out. In such circumstances we can find no justification for interfering with the hearing examiner's resolution of the question.

Accordingly, the appeal of respondents and of complaint counsel will be denied. An appropriate order will be entered.

Commissioners Elman and Nicholson dissented.

ORDER DENYING INTERLOCUTORY APPEALS

Respondents, on December 20, 1968, having appealed from the hearing examiner's denial of their motion for a subpoena for records of the Commission, and complaint counsel, on December 23, 1968, having appealed from the hearing examiner's order disposing of the motion for the issuance of the subpoena for Commission records; and

The Commission having determined, for reasons appearing in the accompanying opinion, that such appeals should be denied:

It is ordered, That the appeal of respondents filed December 20, 1968, be, and it hereby is, denied.

It is further ordered, That the appeal of complaint counsel filed December 23, 1968, be, and it hereby is, denied.

Commissioners Elman and Nicholson dissenting.

BENRUS WATCH COMPANY, INC., ET AL.

Docket 7352. Order and Opinion, Feb. 4, 1969

Order denying respondents' petition requesting that Paragraphs 4 and 5 of final order be set aside.

OPINION OF THE COMMISSION

By petition filed December 3, 1968, corporate respondents and three individual respondents request that Paragraphs 4 and 5 of the final order to cease and desist which issued February 28, 1964, be vacated and set aside. The Director, Bureau of Deceptive Practices, has filed an answer in opposition to the petition.

Paragraphs 4 and 5 of the final order require respondents to cease and desist from:

4. Offering for sale or selling watches, the cases of which are in whole or in part composed of base metal which has been treated to simulate precious metal, without clearly and conspicuously disclosing on such cases the true metal composition of such treated cases or parts.

5. Offering for sale or selling watches, the cases of which are in whole or in part composed of base metal which has been treated with an electrolytically applied flashing or coating of precious metal or less than $1\frac{1}{2}$ 1000ths of an inch over all exposed surfaces after completion of all finishing operations, without clearly and conspicuously disclosing on such cases or parts that they are base metal which have been flashed or coated with a thin and unsubstantial coating.

The bezels¹ of two of respondents' watch cases were introduced in evidence in the trial of this case. As a result of tests, one bezel was found to have a gold covering of .00083 of an inch of 18.46 karat gold, while the gold covering of the other was found to be .0007 of an inch of 18.32 karat gold. The gold covering on both exhibits had been applied by electroplating. In our decision we stated that:

The record here shows that respondents' bezels, even though containing some gold, were in fact composed of base metal with a thin and unsubstantial coating of gold. The test results disclose that the gold coatings were extremely thin. We note that under the Commission's Trade Practice Rules for the Watch Case Industry a coating of less than $1\frac{1}{2}$ 1000ths of an inch thickness of precious metal is deemed either base metal or base metal flashed or coated with a very thin and unsubstantial coating. 16 C.F.R. 174.2(9). A bezel with less than $1\frac{1}{2}$ 1000ths of an inch thickness of gold marked in a manner set forth in such rule would not be considered misleading. Watches improperly marked as to gold content may be found to be deceptive and in violation of the Federal Trade Commission Act.

¹ A bezel is the grooved rim in which a watch crystal is set.

The Trade Practice Rules referred to in our decision were superseded by Guides for the Watch Industry, adopted by the Commission on May 14, 1968. Respondents contend that these Guides represent a complete turnabout of the Commission's previous views with respect to gold electroplated watch cases. Their position is that the Guides implicitly recognize that an electrolytically applied coating of gold of a thickness of $\frac{3}{4}$ 1000ths (.00075) of an inch is neither thin nor unsubstantial. Thus, they argue that their watch cases which were introduced in evidence in this case would have complied with the present thickness requirements of the Guides.

It is true that the thickness requirement for designating a watch case as "gold electroplated" was reduced from $1\frac{1}{2}$ 1000ths of an inch in the Trade Practice Rules to $\frac{3}{4}$ 1000ths of an inch in the Guides. However, thickness of the plating is but one of the criteria in the Guides for the use of the term "gold electroplated." Unlike the Trade Practice Rules, the Guides require that the plating must successfully withstand certain prescribed tests for adhesion, hardness, and porosity. Watch cases with platings that do not meet these tests, even though the plating be $\frac{3}{4}$ 1000ths of an inch thick, are to be marked as "Base Metal." Respondents have made no showing, nor do they even contend, that the bezels of their watch cases which were introduced in evidence would have met the test requirements of the Guides.

More importantly, respondents have chosen to ignore the argument advanced in their petition, filed July 1, 1964, requesting modification of Paragraph 5 of the final order. Specifically, respondents requested that we modify Paragraph 5 to permit them to designate as "gold electroplate" certain watch cases which they were then manufacturing and which had a plating of less than $1\frac{1}{2}$ 1000ths of an inch thickness.² Respondents argued that there had been substantial improvements in the electroplating art since the promulgation of the Trade Practice Rules, and that their then current watch cases were plated by a process that was markedly improved over the process employed in plating the bezels of the watch cases introduced in evidence. Respondents conceded that, given the limitations of the processes then in use, the standard adopted in the Trade Practice Rules may well have been reasonable.

Under these circumstances, respondents' argument that Para-

² Respondents requested permission to use the designation "20 Micron Gold Electroplate."

graphs 4 and 5 of the order should be set aside for the reason that their two bezels in evidence would have met the standards of the Guides must be rejected.

While we conclude that the grounds advanced by respondents for setting aside the two paragraphs of the order are without merit, we do not believe that the obligations imposed upon respondents should be any greater or different than are stated in the Guides for the Watch Industry. Ordinarily, therefore, we would reopen this proceeding for appropriate modification of the order. However, this is not necessary. The Commission has directed that provisions of outstanding cease and desist orders pertaining to subject matter covered by the Guides will not be construed as prohibiting or requiring more than the relevant provisions of the guides. Compliance with the order, as thus *pro tanto* modified, should not place on respondents any unreasonable burden.

On the basis of the foregoing, respondents' petition will be denied.

Commissioner MacIntyre concurred only in the result.

ORDER ON PETITION TO REOPEN PROCEEDING

This matter having come before the Commission upon petition by the two corporate respondents and three individual respondents, filed December 3, 1968, requesting that the proceedings be reopened and Paragraphs 4 and 5 of the final order be set aside; and

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

It is ordered, That respondents' petition, filed December 3, 1968, be, and it hereby is, denied.

Commissioner MacIntyre concurring in the result only.

THE STANLEY WORKS

Docket 8760. Order, February 24, 1969

Order denying respondent's motion to withdraw matter from adjudication.

ORDER DENYING MOTION TO WITHDRAW FROM ADJUDICATION

This matter is before the Commission upon the hearing examiner's certification, dated January 15, 1969, of a motion by respondent that the case be withdrawn from adjudication. In the alternative, respondent requests the scheduling of prompt

oral argument on, and the consideration of, respondent's settlement proposal which, together with a supporting memorandum, accompanied this motion. On January 10, 1969, complaint counsel filed their opposition to the request with the examiner.

The motion dated January 6, 1969, was filed pursuant to Section 2.34(d) of the Commission's Rules of Practice, which provides that "in exceptional and unusual circumstances, the Commission may, upon request and for good cause shown, withdraw a matter from adjudication for the purpose of negotiating a settlement by the entry of a consent order."

In the matter before us, respondent, in its motion of January 6, 1969, to the examiner, enumerates four conditions which it considers exceptional and unusual circumstances warranting withdrawal of the matter from adjudication: (1) no settlement offer has previously been considered by the Commission itself and the hearing has not yet commenced; (2) the recent disposition of the Commission's prospective antimerger complaint against Burlington Mills by entry of an order against future acquisitions; (3) the very slight amount of horizontal overlap between respondent and the acquired company; and (4) the proposed offer of settlement would afford sufficient relief even if, after lengthy and expensive litigation, including judicial review, the allegations of the complaint were ultimately sustained.

We fail to see how the first three of these conditions, either singly or in combination, amount to exceptional and unusual circumstances. There is certainly nothing unusual about the first. As to the second, we are unable to agree with the proposition that a consent order dealing with a challenged acquisition in a specific industry should guide the disposition of a challenged acquisition in an entirely different and unrelated industry. Nor is the amount of horizontal overlap between respondent and the acquired company relevant in this context since that goes to the merits of the proceeding. As to the nature of the relief which would be afforded by the proposed offer of settlement, the Commission believes that it should not consider the merits of the proposal submitted, since to do so would be contrary to the policy of its Rules. For these reasons, respondent's motion to withdraw the case from adjudication will be denied.

Due to the absence of exceptional and unusual circumstances, respondent's alternate motion for an opportunity to argue its settlement proposal before the full Commission will similarly be denied. To grant this motion would only unnecessarily delay this proceeding and interfere with its orderly conduct. Denial

of this motion does not, of course, preclude respondent from seeking the settlement of this case by regular adjudicatory process through the filing of an admission answer or submission of the case to the examiner on a stipulation of facts and an agreed-upon order. Accordingly,

It is ordered, That respondent's motion to withdraw the matter from adjudication and/or scheduling prompt oral argument on and consideration of respondent's settlement proposal be, and it hereby is, denied.

THE BENDIX CORPORATION, ET AL.

Docket 8739. Order, March 24, 1969

Order remanding to hearing examiner a request for modification of an agreement relative to a divestiture.

ORDER REMANDING APPLICATION TO EXAMINER

This matter is before the Commission upon the hearing examiner's certification, dated March 5, 1969, of an application by respondent Bendix for modification of an agreement with the Commission.¹ Complaint counsel, on March 10, 1969, filed an answer to the motion, expressing their opposition thereto, and on March 17, 1969, respondent filed a reply to complaint counsel's answer. This reply consists of a letter from A. P. Fontaine, chairman and president of The Bendix Corporation, dated March 17, 1969, addressed to Chairman Paul Rand Dixon, and a supporting statement from Paul F. Hartz, president, Fram Corporation.

A review of the matter has persuaded the Commission to remand the application to the examiner for consideration on the basis of the full record and disposition thereof in the initial decision, along with a recommendation to the Commission whether the requested modification of the agreement would impair the effectiveness of an order of divestiture should such an order ultimately issue. The Commission will act immediately upon receiving such recommendation from the hearing examiner. Accordingly,

It is ordered, That this matter be, and it hereby is, remanded to the examiner.

¹The application is contained in a letter dated February 24, 1969, addressed to Chairman Paul Rand Dixon. The letter was treated as a motion and referred to the examiner.

KOPPERS COMPANY, INC.

Docket 8755. Order and Opinion, March 24, 1969

Order denying respondent's motion to dismiss proceeding for lack of public interest.

OPINION OF THE COMMISSION

This matter is before the Commission upon the motion of respondent, filed February 11, 1969, to dismiss the proceeding for lack of public interest. This motion is predicated upon respondent's contention that contrary to the state of affairs upon which the complaint is premised, competition in the resorcinol market is now firmly established. Further, respondent contends that the only acts alleged in the complaint as restrictive of competition were the reduction of its prices in conjunction with the use of long term requirements contracts and that since the requirements contracts have been voluntarily modified by respondent, no issue remains for litigation, particularly in view of the protracted nature of the discovery phase of this proceeding.

In the Commission's view these contentions run to the merits of this proceeding and are such as can only be resolved by the hearings themselves. The question of the public interest in these proceedings was resolved by the Commission when it authorized issuance of the complaint and it would be premature, to say the least, to find at this stage that that interest no longer existed on the basis of suppositions of fact which are contested by counsel supporting the complaint and which have not been established on the record.

If respondent is intending to plead abandonment of the practices charged in the complaint as the basis for its contention that public interest is no longer involved, quite a different issue might be presented. While such a plea would not be sufficient to bring about dismissal of the complaint, it might furnish sufficient grounds to support a motion to withdraw this matter from adjudication for the purpose of negotiating a consent order along the lines of the notice order issued with the complaint. However, it is obvious that the Commission cannot pass upon the merits of such a motion unless and until it is presented in proper form and accompanied by a proposal which would effectively preclude the use of any of the practices charged in the complaint. It cannot rule upon it collaterally in a motion to dismiss.

In arriving at its conclusion, the Commission has given consideration to the examiner's Certification Of Additional Facts dated February 27, 1969, to the Statement of United States Pipe

and Foundry Company In Connection With Respondent's Motion To Dismiss, filed February 28, 1969, and to respondent's Response to this Statement, filed March 5, 1969. While the Certification of Additional Facts serves to clarify the positions of the parties with respect to the opportunity afforded complaint counsel to cross-examine the deponents from United States Pipe, this is a matter to be considered by the examiner as the hearings progress and should not be the occasion for further delay. The Statement of United States Pipe and the Response thereto are repetitions of arguments previously made and do not require further comment at this time.

ORDER DENYING MOTION TO DISMISS FOR LACK OF PUBLIC INTEREST

Upon consideration of the motion to dismiss this proceeding for lack of public interest, filed by respondent on February 11, 1969, and for the reasons stated in the accompanying opinion,

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

KOPPERS COMPANY, INC.

Docket 8755. Order and Opinion, March 24, 1969

Order denying respondent's motion to disqualify hearing examiner.

OPINION OF THE COMMISSION

The Commission has again been called upon to enter into this proceeding during the prehearing stage, this time to consider respondent's motion, filed March 5, 1969, to disqualify the hearing examiner. Under date of March 10, 1969, counsel for respondent and counsel for the complaint took note of the fact that the examiner was on leave and would continue to be so until about April 16, 1969, and stipulated that the time for a response to the motion to disqualify may be extended until 10 days following the return of the examiner or until about April 28, 1969, whichever is later.

As the Commission views this matter, it will not be necessary to act upon the stipulation, which might in some manner be considered to be a motion to extend the time for the examiner to respond, as it has concluded that the motion is so lacking in merit that no response by the examiner will be necessary. Respondent has filed this present Motion to Disqualify with full knowledge of the fact that on January 30, 1969, the Commission denied its request to have this proceeding remanded to a new

and different examiner for reasons which closely parallel those here advanced. At that time the Commission commented that the examiner was carefully observing the instructions contained in prior Commission opinions and was attempting to conduct the proceedings in accordance therewith. Hence, the Commission did not regard respondent's contention as deserving of further consideration.

While acknowledging that it had made the prior request for a new and different examiner, respondent now gives scant attention to the language used by the Commission and justifies what is in essence the same motion in different form by apparently relying upon the fact that the request was previously made as a part of an application to file an interlocutory appeal on other grounds and hence the Commission has not had an opportunity to consider this request standing alone.

Whether that is the reason or not, the Commission has again considered the motion on its merits, together with all the matters cited in support thereof, and concluded that no reasonable grounds have been advanced to support the action proposed. In a most trying situation, the examiner appears to be exerting every effort to the expedition of these hearings in a fair and reasonable manner and it would seem to behoove the parties to exert all their efforts at cooperating to this end rather than into the filing of repetitive motions.

ORDER DENYING MOTION TO DISQUALIFY HEARING EXAMINER

Upon consideration of the Motion To Disqualify The Hearing Examiner, filed by respondent March 5, 1969, and for the reasons stated in the accompanying opinion,

It is ordered, That the motion of respondent be, and it hereby is, denied.

MAREMONT CORPORATION

Docket 8763. Order and Opinion, March 24, 1969

Order and opinion denying application to appeal (treated as an appeal) from hearing examiner's order denying motion to quash subpoena duces tecum.

ORDER AND OPINION DENYING APPLICATION TO APPEAL (TREATED AS AN APPEAL) FROM HEARING EXAMINER'S ORDER DENYING MOTION TO QUASH SUBPOENA DUCES TECUM

This matter is before the Commission upon the application of Genuine Parts Company, filed March 5, 1969, for leave to file an

interlocutory appeal from the order of the hearing examiner denying its motion to quash a subpoena *duces tecum* directed to it and upon complaint counsel's response thereto, filed March 13, 1969.¹

Genuine Parts Company challenges the subpoena issued against it on two points: (1) that the description of the documents set forth therein does not define the phrase "automotive parts, accessories, and equipment," and (2) that complaint counsel is not entitled to the documents sought since these assertedly are the subject matter of litigation between the Genuine Parts Company and the Commission in a separate action pending in the United States District Court for the Northern District of Georgia, Atlanta Division, Civil Action No. 12030.

On the first point, the examiner ruled that the term "automotive parts, accessories, and equipment" is sufficiently clear to be understood by Genuine Parts Company. The examiner is vested with a broad discretion on such details as this in the conduct of the proceeding. There has been no showing here of an abuse of discretion. Moreover, Genuine Parts Company has presented no convincing grounds to support its claim that the term is vague and indefinite. We agree with and sustain the examiner in his determination on this issue.

On the other point, Genuine Parts Company refers to its complaint for a declaratory judgment and other relief in the federal district court identified above, challenging an order to file a special report issued by the Commission pursuant to Section 6 of the Federal Trade Commission Act. Its claim is that complaint counsel should not be able to obtain by subpoena documents which are partly the subject of the federal district court litigation. The examiner stated, and this was not disputed by Genuine Parts Company, that the grounds for the Federal District Court action concern relevancy, burdensomeness and the claim that the Commission already has access to some of such information. In this case the examiner held that the two items sought by the subpoena are clearly relevant to the present ad-

¹ Genuine Parts Company, contesting the examiner's ruling on its motion to quash a subpoena *duces tecum*, could have directly appealed under Section 3.35(b) of the Commission's Rules of Practice, rather than to proceed as it did and file a request for permission to file an interlocutory appeal under Section 3.23 of such rules. However, complaint counsel have filed a response to the request, and it appears that Genuine Parts Company has fully presented its arguments on the issue; thus, we will treat the matter as though it were on appeal to the Commission under Section 3.35(b) of the Commission's rules.

judicative proceeding. He also points out there is no claim made by Genuine Parts Company that it has already supplied such information to the Commission or that the production would constitute an undue burden. In view of these distinctions the hearing examiner ruled—rightly, we think—that the issues in the two matters are entirely different and that the disposition of the one will not affect the other. The pendency of the district court case gives Genuine Parts Company no justification for non-compliance with the subpoena issued against it in this proceeding.

Furthermore, Genuine Parts Company has failed to make a showing, as required by the Commission's rules under Section 3.35(b) (as well as under Section 3.23(a)), that the ruling complained of involves substantial rights and will materially affect the final decision, and that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice. Accordingly,

It is ordered, That respondent's application, treated as an appeal from the examiner's order denying its motion to quash, be, and it hereby is, denied.

UNIVERSE CHEMICALS, INC.

Docket 8752. Order and Opinion, April 2, 1969

Order remanding case to hearing examiner for trial of the issues *de novo*.

OPINION OF THE COMMISSION

I

Introduction

This matter is before the Commission upon the appeal of respondents, Universe Chemicals, Inc., and two individuals connected therewith, from an initial decision filed September 27, 1968. The complaint, issued December 5, 1967, charged respondents with the use of false, misleading and deceptive representations in the sale of water repellent paints and coatings, in violation of Section 5 of the Federal Trade Commission Act. Respondents' answer, filed January 10, 1968, admitted certain of the factual allegations but denied generally any violation of law.

Hearings were held in July, 1968 and the examiner handed down his decision in September, 1968 finding that respondents had misrepresented their affiliation with Union Carbide Company and the part played by that company in developing and testing

respondents' products; that respondents had misrepresented the nature of the guarantee covering products sold by respondents and the earnings which dealers can make by selling respondents' products and that respondents had misrepresented their policy on products not sold by their dealers and various product characteristics, such as the percentage of silicones, their waterproofing effectiveness and other uses and characteristics. The examiner concluded that respondents had violated Section 5 of the FTC Act, that the individual respondents were responsible for the illegal practices and that an order directing all respondents to cease and desist was necessary and appropriate.

Primarily, respondents are claiming that the examiner denied to them due process by law by directing that hearings should be held in more than one city.¹

During pretrial proceedings complaint counsel had requested, and the hearing examiner, after overruling respondents' objection, directed, that hearings in this case should be held in Chicago, Illinois; Evansville, Indiana; Omaha, Nebraska and Minneapolis, Minnesota. The examiner's ruling was upheld by the Commission on respondents' motion for an interlocutory appeal from the examiner's order scheduling the hearings.²

Respondents refused to participate in any of the hearings set

¹ Respondents' appeal is directed secondarily to the substantive findings and conclusions of the examiner. While adhering to their due process argument, respondents in their brief set forth their position with respect to each of the examiner's substantive findings; they contend that the findings of fact, conclusions and order entered by the hearing examiner are not supported by the evidence and propose a substitute order. Respondents' counsel explained at the oral argument that respondents wished to present their view of the record in case it becomes necessary to reach the merits of the case on appeal (Tr. 57-58). In view of our disposition of this matter, it is unnecessary to comment on this portion of respondents' appeal.

² Pursuant to the authority of Section 3.23(a) of the Commission's Rules of Practice, respondents filed an interlocutory appeal with the Commission from the order scheduling hearings. Respondent's Motion Requesting Permission to File an Interlocutory Appeal, Feb. 29, 1968. Acting thereon, the Commission first directed both parties to file supplemental affidavits more fully setting forth their arguments in support of their respective positions, Order directing filing of supplemental affidavits, March 13, 1968, and postponed the hearings, then scheduled to commence March 14 in Evansville, Indiana, until further order of the Commission. Order, March 14, 1968. Upon receipt and consideration of the affidavits, the Commission denied respondents' request for an appeal, Commissioner Elman dissenting.

down by the examiner, including the hearing held in Chicago, respondents' place of business. They stated that they declined to participate in the Chicago hearing in order to preserve their substantive position respecting due process (Transcript of Oral Argument on Appeal ["Tr."], 8-9).

Respondents contend on this appeal, as they contended to the examiner, that all hearings should have been held in Chicago, which was the location of the corporate respondent's headquarters and place of business. They argue that participation in out of town hearings would have been financially burdensome. Respondents further assert that the examiner's order scheduling the hearings outside Chicago "removed [the hearings] outside of the scope of respondents' effective opposition by a procedure which resulted in *ex parte* hearings (*id.*, 4), that the hearings "would be unduly burdensome to them, financially and otherwise" and "they would be put to great expense as a consequence of the distances between Chicago, Evansville, Omaha and Minneapolis (*id.*, 5). Finally, they urge that (*id.*, 7):

* * * [T]he Hearing Examiner failed to have "due regard for the convenience and necessity of the parties" in the administrative proceedings involved in this matter and therefore violated the Statute, the law, and the Rules, and in supporting his position, both he and the Commission acted arbitrarily, capriciously and oppressively.³

Commission counsel argued before the examiner, and reiterates his contention on this appeal, that the government's witnesses were small businessmen and holding the hearings at locations which were closer to their place of business avoided hardship to the dealer witnesses and extra expense to the Commission. Commission counsel also argues on appeal that holding the hearings in these four cities did not in fact delay the hear-

³ Respondents' assertion on this appeal that the scheduling of hearings in more than one place violated their rights under Section 5(a) of the Administrative Procedure Act (15 U.S.C. 554(a)) is without merit. Section 5(a) provides:

"* * * In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives."

Thus, the section imposes a "convenience and necessity" test for the fixing of hearing locales. It is well established that the "convenience and necessity" criterion applies to *all* of the parties in an administrative proceeding, including the agency as well as the respondent. Sen. Docket No. 248, 79th Cong., 2d Sess. (1946), p. 203; *Burnham Trucking Co. v. United States*, 215 F. Supp. 561, 564 (D. Mass. 1963). A review of the facts here and the cases under this provision demonstrates that respondents' rights under this section were not violated. See, *e.g.*, *Tractor Training Service v. FTC*, 227 F. 2d 420, 424 (9th Cir. 1955), *cert. denied*, 350 U.S. 1005 (1956).

ings and therefore could not have been in violation of the Commission's rule (Tr. 32).

The Commission has already considered this issue and ruled on it. However, respondents argue on their appeal that the Commission's ruling is in conflict with an earlier decision by the Commission in another matter which, respondents contend, is indistinguishable from this case.⁴ Complaint counsel answers by relying on another Commission decision, which he claims to be the proper precedent governing the instant case.⁵ Although our own research has disclosed two other Commission decisions under Rule 3.41(b) raising this issue of separate hearings (*infra* pp. 1073-74), all four matters were disposed of with little discussion by the Commission of the standards which should be followed in applying the Rule. At issue here is the meaning of Section 3.41(b) of the Commission's Rules. The importance of resolving any real or apparent conflicts among earlier Commission decisions interpreting this rule and the need for an interpretation of the rule prompts us to consider respondents' argument *de novo* as it has been presented by the arguments of the parties to this appeal.

II

The Commission's Rule Section 3.41(b)

Section 3.41(b) of the Commission's Rules of Practice provides as follows:

(b) *Expedition*.—Hearings shall proceed with all reasonable expedition, and, insofar as practicable, shall be held at one place and shall continue without suspension until concluded. Consistent with the requirements of expedition, the hearing examiner shall have the authority to order brief intervals of the sort normally involved in judicial proceedings and, in unusual and exceptional circumstances for good cause stated on the record,

⁴ The case relied upon by respondents is *Wilmington Chemical Corp.*, Dkt. 8648, order of March 2, 1965 [67 F.T.C. 1356]. In that case complaint counsel, in arguing for hearings in several cities, showed that 21 small businessmen witnesses would have been compelled to travel to Chicago, allegedly causing them considerable inconvenience and expense. The Commission refused to authorize hearings in the various cities requested.

⁵ Complaint counsel does not attempt to distinguish the *Wilmington Chemical* case but urges the Commission to follow instead its more recent decision in *Thermochemical Products, Inc.*, Dkt. 8725, order of August 9, 1967 [72 F.T.C. 1001]. In that case respondent corporation was located in New York; hearings were scheduled for Los Angeles and San Francisco, California; Chicago, Illinois; Houston, Texas and Greensboro, North Carolina. We note, however, that the appeal to the Commission raised only the issue of timing; respondent did not object to the location of the hearings.

he shall have the authority to order hearings at more than one place and to order brief intervals to permit discovery necessarily deferred during the prehearing procedures. Otherwise, intervals shall not be ordered by the hearing examiner except as directed by the Commission upon his certificate of necessity therefor.

In order to resolve the issue presented on this appeal as to the proper standard which must be applied in interpreting the "unusual and exceptional" test laid down in the Rule, it will be helpful to review the origin of Rule 3.41(b).

Prior to 1961, the Commission's rules relating to the time and location of its administrative hearings provided simply that (Rule 3.16(d) (1960)):

(d) *Expedition.* The taking of evidence and subsequent proceedings shall proceed with all reasonable expedition.

In 1961 the rules were changed to provide that hearings should be all held in one place unless the Commission otherwise ordered upon a certificate of necessity of the examiner. Thus, the new rule stated (Section 4.14(d) (1961)):

(d) *Expedition.* Hearings shall proceed with all reasonable expedition. Unless the Commission otherwise orders upon a certificate of necessity therefor filed by the hearing examiner, all hearings will be held at one place and will continue without suspension until concluded * * *

No criteria or standards were contained in the 1961 amendment to guide the examiner or the Commission as to the circumstances where the one locale of hearing principle could be deviated from.

In applying the 1961 amended rule, the Commission was confronted several times with certificates of necessity from hearing examiners certifying the holding of hearings in more than one place. These certificates were based principally on assertions of counsel that this was necessary for the convenience and necessity of witnesses and to reduce the government's expense.

In two of these cases decided under the 1961 amended rule, the Commission refused to order multiple hearings despite examiners' certificates of necessity.⁶ In *Wilmington Chemical*

⁶ During this period multiple hearings were ordered only once. *House of Lords, Inc.*, Dkt. 8631, order of October 26, 1964. In that matter the scheduling was unopposed, and the Commission did not discuss the appropriate standard to be followed. The certificate related assertions of complaint counsel that some of the witnesses were representatives of small retail stores who would suffer serious hardship if they were required to leave their places of business around Washington, D. C. and Cleveland, Ohio and travel to New York City, particularly as hearings were scheduled during the pre-Christmas season.

(*supra* p. 1072, n. 4) the Commission found that upon the facts stated in the certificate, granting the order would be inconsistent with the purposes and policy of the rule. In contrast, the Commission's ruling in *Frito-Lay Inc.* (Docket 8606, Order of March 13, 1964 [64 F.T.C. 1447]) was based on its conclusion that the certification presented an insufficient basis upon which to make an informed determination,⁷ and the Commission accordingly returned the matter to the hearing examiner for reconsideration. In the *Frito-Lay* opinion, the Commission observed that the rule was not intended to be inflexible and stated its continued belief that hearings might be allowed in more than one place where the public interest would be better served.

In 1967, the Commission again amended its rules, including its rule of expedition, incorporating into that rule a standard on which decisions respecting the locale of hearings should be based. (Rule Section 3.41(b), *supra* p. 1072). At the same time, the Commission delegated the implementation of this rule to the hearing examiner. Thus, in its 1967 amendment the Commission provided that the examiner could order hearings in more than one place "in unusual and exceptional circumstances for good cause stated on the record."⁸ The clear language of the rule shows that this power to deviate from the requirement of a single place of hearings is not a liberal discretionary authority but rather a limited grant to enable examiners to make necessary accommodations for special situations.

The Commission's Rule respecting the locale of its hearings has always been designed to go further than the *forum conveniens* provision contained in Section 5(a) of the Administrative Procedure Act (*supra* p. 1071, n. 3). While that provision is designed primarily to require a balancing of interests and con-

⁷ In *Frito-Lay*, a proceeding under Section 7 of the Clayton Act, the hearing examiner had shown that the case involved three lines of commerce and 8 acquisitions affecting 17 separate marketing areas, and that the witnesses' convenience and expenses of the government and respondent would be lessened by holding hearings in cities ranging from Boston, Massachusetts to San Francisco, California.

⁸ Since under the new revision the examiner himself makes the determination whether hearings shall be held in several places, the Commission, of course, has no opportunity to rule upon such determinations in the absence of an appeal by one of the parties. Only one interlocutory appeal has come before the Commission involving the rule as revised in 1967, *Thermochemical Products Inc.*, *supra* p. 1072, n. 5, order of August 9, 1967. There, respondents' request for leave to file an interlocutory appeal did not raise the question of multiple locations of hearings but only of the allegedly insufficient travel intervals allowed between the various locations.

venience between the parties in fixing the locale of hearings, the Commission's Rule Section 3.41(b) was directed at a different problem. It is a rule which is primarily concerned with eliminating delays in administrative proceedings. The Commission chose to accomplish this objective by encouraging the holding of hearings in one place and permitting deviation from that principle only in unusual and exceptional circumstances.

It is clear from both the 1961 and 1967 rule changes that the Commission envisaged that there would be some circumstances under which the general requirement of hearings in one place can be modified. The Commission's decisions under the 1961 amendment illustrate this premise, although the standard to be followed was expressed simply in the general terms of considerations of the public interest (see *Frito-Lay, Inc.*, *supra* p. 1074).

Obviously, only a limited number of factors could, under any standard and however expressed, be relevant to the question of whether a hearing should be held at one place or at several. They would be limited essentially to such factors as the location of the principal place of business of the respondent, the locations, business occupations and any personal hardships or burdens of witnesses and the location of essential corporate files to be relied upon in the course of testimony.

It seems obvious, also, that the intent of both the 1961 and 1967 rule amendments was to require, as support for a request for hearings in more than one place, something in addition to a mere showing that witnesses to be called were in different places or that it would be more convenient for these witnesses or for a respondent's officials to testify in different places. On the contrary, the 1961 amendment and even more so the 1967 amendment to Rule Section 3.41(b) was designed to impose an obligation on the requesting party to demonstrate clearly and convincingly that the need for hearings in more than one place was compelling and indeed virtually required in the public interest.

In short, such factors as the number and location of witnesses and the need for reliance on active or voluminous files will be *relevant* to a determination of the need for multiple hearing places but will not be determinative. The rule requires more than circumstances of convenience to support a request.

Consideration of actual hardship and genuine burden which might result for a respondent or a witness if he were required to appear at a place too distant from his home or at multiple hearing places, and considerations of serious and actual interferences with the conduct of a respondent's business if its of-

ficials and/or files were required to leave their home base, would in our judgment constitute the type of unusual and extraordinary circumstances contemplated by the rule. Thus, for example, actual individual hardship—whether arising from professional or business reasons or from personal circumstances—would, we believe, constitute the type of unusual circumstances contemplated by Section 3.41(b).⁹ Similarly, corporate hardship arising from the need to transport active, voluminous and essential files or from the demonstrated need for the on-the-spot presence of essential corporate personnel could in a proper case also operate to involve the exceptional provisions of Section 3.41(b).¹⁰ Financial hardship for a corporate respondent must also be included as one of the factors which might also activate the Rule's exception.

Only after the unusual and exceptional circumstances have been demonstrated would any need arise to balance relative hardships and conveniences. In this situation, the determinative factor might well be the extent to which the multiple location hearings will in fact delay the proceedings.

III

The Hearings in this Proceeding

In our earlier opinion denying respondents' motion for leave to file on interlocutory appeal, we pointed out that matters such

⁹ For example, such hardship could arise if a witness were physically disabled or if his presence as close to home as possible were essential as might be the case with doctors or other technical experts unable to leave their patients or laboratories or with family members unable to be away from convalescents or, perhaps, minor children.

Similarly, the need to have witnesses who are sole proprietors, widely scattered geographically and who could not without financial sacrifice leave their place of business for any length of time, could also be relevant to the fixing of hearings at more than one place.

The same need might be asserted in the case of professional or expert witnesses who cannot leave their place of business without serious hardship to their work.

¹⁰ Thus a respondent headquartered in Los Angeles charged with price discrimination in two of its regional divisions in the east and southeast might argue that the hearings must be held in both divisions because of its need to have access to its files during the hearing or because of its need to rely on its executives and salesmen in each of the two divisions who must be able to continue to perform their duties during the period of the hearings or who must be instantly available at their places of business to make decisions and the like.

as the scheduling of hearings in more than one place are "best left to the sound discretion of the hearing examiner." We also concluded, after examining the parties' affidavits in support of their respective positions, that the examiner had not abused his discretion in scheduling the hearings in four cities.

In the ordinary situation, we would not be inclined to disturb the examiner's exercise of discretion, especially where, as here, we have already considered the matter on interlocutory appeal. However, in the instant case a review of our earlier decisions applying Rule Section 3.41(b) demonstrates that the Commission has never discussed the standard which it has incorporated into the rule for determining when multiple hearing places may properly be scheduled. Moreover, we are concerned that our prior decision in this matter may be in direct conflict with our earlier decision in *Wilmington Chemical Corporation* (Docket 8648, *supra* p. 1072, n. 4), where the Commission rejected a request for multiple hearing locales on the basis of substantially similar facts. Respondents have not only persisted in their view that our decision in *Wilmington Chemical* is the correct one but, in order to dramatize their disagreement with our decision denying their interlocutory appeal, have gone to the length of refusing to attend any of the hearings in this matter, even including the hearings which were held in Chicago, respondents' place of business and their choice of locale for the entire hearing.

Therefore, we believe that we should reconsider our earlier opinion in this matter. Applying the general principles discussed above to the case at hand, we are persuaded that we were in error in our earlier decision sustaining the examiner's order scheduling hearings in four cities. A review of the papers and consideration of the arguments presented on this appeal convinces us that complaint counsel has not sustained the burden of establishing that the circumstances here were so unusual and exceptional as to constitute good cause to hold hearings in more than one place.¹¹

We do not agree that the mere assertion that "many if not all" of the witnesses were small businessmen for whom travel to Chicago would have been a distinct hardship is a sufficiently

¹¹ In particular, we reject as wholly irrelevant counsel's argument that since respondents saw fit to go to distant places to make sales they should be likewise prepared to go to those locations to defend against allegations of misrepresentations. (Tr. 36-37, 43-44.) We believe that such an argument treads dangerously close to a suggestion that respondents are civilly guilty until proven innocent.

unusual circumstance by itself to warrant multiple hearings.¹² At the least, this factor would have to be buttressed by a further showing that a clerk or assistant could not have been substituted for the witnesses at their places of business for a day or two or that for some reason the distance required to be traveled if hearings were all held in one place would have taken the witnesses away from their jobs for substantially longer periods than were required under the multiple location order. The naked fact that the witnesses in this case would have had to travel greater distances if hearings had been set in one place than they did for the hearings that were set in several places does not, standing alone, constitute the type of unusual and exceptional circumstances which the Commission had in mind in drafting Rule Section 3.41(b).

Nor in our judgment is the allegedly greater cost to the government of witnesses' travel expenses—at least absent some special circumstances not present here—a relevant factor in determining whether multiple locations for hearings should be directed, unless, conceivably, it could be demonstrated that all parties were willing and that no delay would ensue from holding multiple hearings.¹³

We are aware that respondent made no showing that hearings in more than one place would or might substantially delay the proceedings and that it appears that no extra delay was occasioned in fact by the nonadherence to the rule's requirements. While our rule suggests a presumption of delay flowing from hearings in multiple locations, some specific showing on this issue—which, after all, is the primary objective of this part of the rule—would have been relevant and material where the facts were as close as they are here. We do not believe, however, that the absence of delay, brought up now as a matter of

¹² On this appeal complaint counsel alleged that in Omaha, Evansville or Minneapolis, some witnesses could testify in a few hours, whereas for them to travel to Chicago would have necessitated their absence from their businesses for a minimum of one night or a maximum of three or four days. (Tr., 34-35; Ans. Br. of Counsel Supporting the Complaint, 5.) This allegation was not supported by any affidavits or other matter to indicate what real burden of hardship, if any, would have been caused by the witnesses' spending an extra two or three days away.

¹³ We are not considering here the corollary question of unusual financial hardship to the corporate respondent in having to defend in cities outside Chicago since respondent on oral argument on this appeal made it clear that they were not relying on company poverty but simply on the absence of circumstances satisfying the requirements of the rule. (Tr. 64.)

hindsight (Tr. 26-28, 32) can be relied upon as justifying the departure from the rule which, we have concluded, has occurred.

IV

Conclusion

We conclude that complaint counsel's showing of the circumstances of the present proceeding—consisting as it does simply of unsubstantiated assertions of hardship to witnesses and added governmental expense—was insufficient to demonstrate that the circumstances were unusual and exceptional within the meaning of Section 3.41(b) of the Commission's Rules of Practice. We therefore find that scheduling hearings at more than one place in this case violated that section. This ruling is, of course, limited to the facts before us. We do not here hold that under no circumstances would the sheer numbers and/or grave inconvenience of witnesses in themselves justify the conclusion that hearings ought to be scheduled in more than one place. The facts of each individual proceeding will be determinative.

Accordingly, we are remanding the case to the examiner with directions to proceed *de novo*, with all hearings to be held at a single location determined with due regard for the convenience of the parties.

Chairman Dixon and Commissioner MacIntyre not concurring in the result.

ORDER REMANDING PROCEEDINGS TO HEARING EXAMINER

This matter having been heard by the Commission upon the respondents' appeal from the hearing examiner's initial decision and upon briefs and oral argument in support of and in opposition to said appeal; and

The Commission having determined that the schedule of hearings in these proceedings violated Section 3.41(b) of the Rules of Practice of the Commission,

It is ordered, That the initial decision be, and it hereby is, vacated and set aside.

It is further ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner for a trial *de novo* in conformity with the views expressed in the accompanying opinion of the Commission.

Chairman Dixon and Commissioner MacIntyre not concurring in the result.

KNOLL ASSOCIATES, INC.

Docket 8549. Order, April 8, 1969

Order requiring filing of briefs relative to the question whether the evidence minus that excepted by the 7th Circuit Court of Appeals supports issuance of an order.

ORDER REQUIRING FILING OF BRIEFS

The Commission's order in this matter having been set aside on June 18, 1968, by the Seventh Circuit Court of Appeals and the cause remanded to the Commission for reconsideration of the record of the proceeding, excepting therefrom all evidence and testimony given or produced by or through the witness Herbert Prosser, and

The Commission being of the opinion that it should hear the views of respondent and complaint counsel as to whether the record of this proceeding, minus the evidence and testimony given or produced by the witness Prosser supports the entry of a cease and desist order;

It is ordered, That respondent and complaint counsel, within 30 days after service of this order, file briefs with the Commission setting forth their views as to whether the record of this proceeding, minus the evidence excepted by the Seventh Circuit Court of Appeals, supports issuance of an order to cease and desist.

Commissioner Elman not concurring.

LEHIGH PORTLAND CEMENT COMPANY

Docket 8680. Order, April 11, 1969

Order denying respondent's request to withdraw proceeding from adjudication in order to negotiate a consent order.

ORDER DENYING MOTION TO WITHDRAW FROM ADJUDICATION

This matter is before the Commission upon the respondent's February 13, 1969, request that the case be withdrawn from adjudication for the purpose of negotiating a settlement by the entry of a consent order. On February 26, 1969, complaint counsel filed their opposition to the request and on March 7, 1969, respondent filed a reply.

Respondent's request was filed directly with the Commission

pursuant to Section 2.34(d) of the Commission's Rules of Practice, which provides that "in exceptional and unusual circumstances, the Commission may, upon request and for good cause shown, withdraw a matter from adjudication for the purpose of negotiating a settlement by the entry of a consent order."

Respondent's request sets out three basic reasons why the Commission should make a finding of exceptional and unusual circumstances warranting withdrawal of the matter from adjudication: (1) "respondent never had the opportunity prior to the issuance of the formal complaint to submit a settlement offer to the Commission covering all acquisitions attacked in this proceeding;"¹ (2) settlement would "avoid further costly and unnecessary litigation, both on the merits and on significant collateral matters. . . .;"² and (3) "respondent believes that the staff's attitude toward settlement of this case may not accurately reflect the Commission's current policies with regard to consent settlement in merger cases. . . ."³

The facts in support of the allegation that respondent has not had an adequate opportunity to present a proposed settlement covering all acquisitions to the Commission do not constitute anything unusual or exceptional.⁴ Respondent had from December 15, 1965, until April 1, 1966, to utilize the Commission's consent order procedures. This period included extensions of time granted for that purpose. Furthermore, during this four-month period, the staff discovered additional acquisitions had been made by respondent. Respondent, therefore, was notified by a letter from the Commission on February 17, 1966, that any consent proposal should also include consideration of the newly discovered acquisitions. Respondent refused to include these acquisitions in its consent proposals. On February 28, 1966, the consent proposal was rejected as inadequate. An amended complaint was then issued on April 1, 1966. The fact that respondent declined to include these acquisitions in its 1966 proposals but now desires to do so does not, by any stretch of the imagination, constitute the unusual or exceptional circumstances contemplated by Section 2.34.

It is quite true, of course, that an immediate settlement of this case would save time and money. There is nothing unusual

¹ *Memorandum in Support of Respondent's Proposed Agreement Containing Consent Order*, p.2 (February 13, 1969).

² *Id.* at p.6.

³ *Id.* at p.5.

⁴ See, *The Stanley Works*, Docket No. 8760, Order Denying Motion to Withdraw From Adjudication (February 24, 1969) p. 1062 herein.

or exceptional about this conclusion. Similar conclusions may be reached in almost any Commission case in which a formal complaint ultimately issues. If the Commission is to establish a policy of accepting routine assertions such as this respondent has made as sufficient reason to withdraw a case from adjudication, then the powerful incentives for early settlement which are provided by the precomplaint consent settlement rules would be completely vitiated.

For these reasons, and in the absence of exceptional and unusual circumstances and the requisite showing of good cause, respondent's request to withdraw the case from adjudication will be denied. Denial of this request does not, of course, preclude respondent from seeking the settlement of this case by regular adjudicatory process through the filing of an admission answer or submission of the case to the examiner on a stipulation of facts and an agreed-upon order. Accordingly,

It is ordered, That Lehigh Portland Cement Company's request to withdraw the proceeding from adjudication for the purpose of negotiating a settlement by the entry of a consent order, and for oral presentation on respondent's settlement proposal be, and it hereby is, denied.

Commissioner MacIntyre not participating.

Commissioner Elman does not concur. He believes that the Commission, before acting on respondent's request to withdraw this matter from adjudication for the purpose of negotiating a settlement by the entry of a consent order, should have obtained the recommendation of the hearing examiner.

KOPPERS COMPANY, INC.

Docket 8755. Order and Opinion, May 6, 1969

Order denying respondent's request to subpoena certain officers of the U.S. Pipe & Foundry Company.

OPINION OF THE COMMISSION

This matter is again before the Commission upon respondent's application dated March 7, 1969, for leave to appeal from the examiner's order denying respondent's motion to compel answers. The record shows that respondent originally filed its motion on April 10, 1968, for leave to take depositions of certain officials of U.S. Pipe and Foundry Company and for subpoenas *ad testificandum*. By order dated April 23, 1968, respondent's

motion was denied by the examiner because the persons whose depositions were sought were expected to testify at the hearings. By our order dated July 2, 1968, the Commission remanded the matter for further consideration because of its conclusion that the taking of depositions could not be denied merely because the persons whose depositions were sought were expected to testify when it was clear the depositions were sought for purposes of cross-examination.

Pursuant to this order, the examiner, on July 9, 1968, ordered the depositions taken and issued the subpoenas, with leave for U.S. Pipe to move for a protective order. Following motions from both parties, the examiner, on July 18, 1968, issued an order modifying the July 9th order in certain respects, including a paragraph limiting the depositions to those matters alleged in the complaint concerning which the witnesses were expected to testify. Inquiry into the details of the processes used or to be used and into privileged matters was also prohibited.

Respondent appealed this order and the Commission, on August 14, 1968, after expressly upholding the limiting provision above, remanded the matter to fashion a more flexible form of order pertaining to attorney-client discussions, which was given effect by the examiner's order dated September 17, 1968. Respondent's appeal from this order was denied November 1, 1968. Following further prehearing conferences concerning other discovery motions, including a subpoena *duces tecum* addressed to U.S. Pipe, the examiner, on December 4, 1968, fixed the date for commencement of the taking of depositions for December 11, 1968. No subpoenas *ad testificandum* were requested or issued following this order.

U.S. Pipe failed to make its return on the subpoena *duces tecum* on the specified date and this default was duly certified to the Commission. Respondent then sought to delay the commencement of the depositions, which motion was denied by the examiner on December 10, 1968. Respondent took no appeal from this order, but commenced the taking of depositions on December 11th.

In the meantime, the Commission entertained an appeal by U.S. Pipe from the examiner's denial of its motion to extend the time to respond to the subpoena and, for reasons stated in its order and opinion dated December 24, 1968, extended the time until five days following its decision on the appeal. The appeal was denied on January 15, 1969. U.S. Pipe again failed to respond and the examiner certified the default to the Commission.

Against this background, respondent, on January 15, 1969, filed its Motion To Compel Answers, in which it alleged that counsel for U.S. Pipe had frustrated the purposes of the depositions by taking the position that the appearance of the witnesses was purely voluntary, since no valid subpoena compelled their attendance, and by instructing the witnesses not to answer certain of the questions propounded. Respondent terminated the taking of depositions following the completion of the testimony of three of the six witnesses who had appeared.

In its opposition to this motion, U.S. Pipe defended its position that the witnesses had appeared voluntarily and not in response to a valid subpoena, its argument being that the subpoenas issued pursuant to the examiner's order dated July 9, 1968, were no longer valid in view of subsequent developments. Instead, U.S. Pipe argued that new subpoenas should have been obtained under the order dated September 17, 1968. Despite this alleged defect, U.S. Pipe argues that its officials appeared for voluntary interviews and did not refuse to answer any questions which were properly put to them under the terms of the examiner's order of September 17, 1968.

In the order which is the subject of this appeal the examiner stated he had read the depositions in their entirety and found they were conducted as interviews rather than as depositions because counsel for deponents properly insisted that the failure of respondent to serve new subpoenas constituted a fatal omission. He further determined that such interviews gave ample opportunity to respondent to secure information by way of discovery of what the persons present would testify to on behalf of complaint counsel and that the need for additional depositions or for compelling answers to the particular questions where answers were not given should not be ordered in light of the greatly expanded discovery granted in connection with the new subpoena duces tecum. He also concluded that an order for the taking of further depositions or further answers would provoke further delay without real benefit to respondent and might well constitute undue harassment to the witnesses in view of the numerous postponements and in view of the fact that counsel for respondent failed to take advantage of their previous availability for interview.

Respondent now seeks leave to appeal from this order and the Commission has concluded that its application to that end should be denied. Initially, it should be observed that the Commission is not inclined at this stage to undertake to resolve the controversy

surrounding the validity at the time of the depositions or interviews of the subpoenas issued pursuant to the examiner's July 9, 1968, order. Suffice it to say that even if it were conceded that new subpoenas should have been sought pursuant to the examiner's September 17th order, the Commission would not permit respondent to be deprived of discovery to which it was entitled simply because its counsel made a mistake as to the law. The substantive rights of the parties should not be made dependent upon procedural questions.

In the Commission's view, the problem goes deeper than that. Indeed, respondent itself appeared to be aware of that fact when in its January 15th Motion To Compel Answers it argued to the examiner that it is of no real significance whether the witnesses were appearing for a deposition voluntarily or under compulsion of a subpoena if they did in fact appear and answer questions. Respondent at that point elected to proceed and, in fact, did question three of the six witnesses at some length. Then respondent itself decided to terminate the proceedings because, in its view, the witnesses were not being as cooperative as respondent thought they should have been. The remaining three witnesses were not questioned at all even though respondent could not at that juncture have foretold with accuracy how much additional information could have been secured from them, thus obviating to some extent the need for further discovery.

Having then unilaterally chosen to break off the engagement, respondent would now have the Commission order the witnesses back into the field. This the Commission is unwilling to do. Further, the Commission experiences some difficulty in visualizing just what type of order respondent would have it issue. Even if we assume the witnesses were there under legal compulsion, it does not follow that they are thereby compelled to answer each and every question asked without regard to the scope of the depositions and questions of relevancy and confidentiality. These are questions which must be resolved by the examiner and he had found no dereliction here. The Commission is not inclined to substitute its judgment for his on a question such as this, when he had read the transcript in its entirety and concluded that the interviews gave respondent ample opportunity to secure information by way of discovery to which they were entitled.

The accompanying order will therefore deny respondent's application for leave to appeal. Further, the Commission is not inclined to devote a great deal of attention to the motion filed

by respondent on March 21, 1969, to strike the brief filed by U.S. Pipe in opposition to respondent's application because of its length. The Commission's Rules are silent as to this point, although by inference respondent would supply the omission and limit the brief in opposition to the same length as the application. Further, the length of typewritten documents is a relative matter and the Commission has taken note of the obvious fact that while respondent employed single spacing with narrow margins, U.S. Pipe used double spacing with correspondingly wide margins so that its brief is of little, if any, greater total length than that submitted by respondent. Thus the Commission can only wonder why such a point was ever raised at all.

Commissioner MacIntyre concurring in the result.

ORDER DENYING APPLICATION FOR LEAVE TO APPEAL EXAMINER'S
DENIAL OF MOTION TO COMPEL ANSWERS

Upon consideration of respondent's Application For Leave To Appeal From Hearing Examiner's Order Which Denies Respondent's Motion To Compel Answers, filed March 7, 1969, and for the reasons stated in the accompanying opinion,

It is ordered, That the Application For Leave To Appeal be, and it hereby is, denied.

Commissioner MacIntyre concurring in the result.

THE STANLEY WORKS

Docket 8760. Order, May 6, 1969

Order granting hearing examiner's request for withdrawal of his certification for enforcement of a subpoena duces tecum.

ORDER RULING ON THE EXAMINER'S REQUEST ORDERING THE
WITHDRAWAL OF A CERTIFICATE FOR ENFORCEMENT OF SUBPOENA

This matter is before the Commission upon the hearing examiner's request, filed April 22, 1969, that the certification with recommendation for enforcement of a subpoena *duces tecum* directed to Mr. Bernard Friedel, President, David Allison Co., Inc., at the instance of the respondent, be ordered withdrawn. This request is occasioned by the fact that respondent, on April 17, 1969, filed a motion to cease any enforcement proceeding aimed at compliance with the subpoena for the reason that a stipulation with complaint counsel regarding some of the mate-

rial sought has been entered into. This stipulation between counsel was reached on April 15, 1969, and for this reason the hearing examiner recommends that respondent's above-mentioned motion be allowed. For the reasons set out in the request it will be granted. Accordingly,

It is ordered, That the examiner's request be, and it hereby is, granted.

NATIONAL TEA COMPANY

Docket 7453. Order and Opinion, May 20, 1969

Order denying respondent's request for modification of an anti-merger order.

OPINION OF THE COMMISSION

Respondent, National Tea Co., by petition filed March 26, 1969, requests modification of the final order issued in this matter on March 4, 1966. That order prohibits respondent from acquiring the whole or any part of the stock or assets of any firm, partnership or corporation engaged in the retail sale of food products for a period of ten years without the prior approval of the Commission.

Subsequent to the issuance of this order, the Commission, on January 17, 1967, announced its Enforcement Policy with Respect to Mergers in the Food Distribution Industries. Therein, the Commission expressed the view that mergers and acquisitions which satisfy each of three specified criteria do not ordinarily require specific Commission review. In three matters involving retail food chains, settled by consent agreement after the announcement of the Enforcement Policy, the Commission accepted orders which require prior Commission approval for all acquisitions except those satisfying the three announced criteria.

Respondent states that its position is comparable to that of the three retail food chains under consent orders, and it requests that its order be modified so as not to require it to obtain our prior approval for acquisitions meeting the three criteria.

The fact that three other retail food chains are under less stringent orders than respondent is not, of itself, sufficient justification for modification of the order. The order against respondent is the remedy which, on the basis of the facts in the litigated record, the Commission found necessary to correct imbalances in the markets caused by respondent's acquisitions. In finding twenty-four of respondent's acquisitions to be unlawful,

the Commission relied in part on the fact that each was a part of a "cumulative series" of acquisitions that made up a larger whole. Moreover, respondent was the leader in the merger movement in this industry, with its numerous acquisitions substantially increasing concentration in the already concentrated chain store sector of the market. It was under these circumstances that the Commission decided that even minor increases in concentration as a result of acquisitions by this respondent should be carefully examined. As expressed in the concurring statement in this case "[T]he facts presented here by the instant case constitute precisely the type of predictable lessening of competition which the [Clayton] Act was intended to cover and fully justify the imposition of an injunction against respondent from making future acquisitions which is the sole relief ordered here."

The Enforcement Policy statement, relied upon by respondent, does not grant permission for a company to make acquisitions satisfying the three criteria either with or without prior Commission approval. Obviously, the legality of an acquisition meeting these criteria must be determined on the basis of all of the known circumstances.

Respondent has made no showing of a changed condition of fact or law which would warrant the requested modification. It is our opinion that the public interest will best be served by continuing the requirement for prior Commission approval of all retail food store acquisitions by respondent. This, of course, does not mean that respondent will not be permitted to make any acquisitions for the ten-year period. However, viewed against the background of the litigated record, the Commission believes that an acquisition by respondent which satisfies the three criteria may nevertheless have an anticompetitive impact, and that a determination on this issue should be made by the Commission on each acquisition contemplated by respondent. Accordingly, respondent's request will be denied.

Commissioner Elman not concurring.

ORDER DENYING PETITION TO MODIFY FINAL ORDER

This matter having come before the Commission upon respondent's petition, filed March 26, 1969, requesting modification of the final order, and upon the answer of the Director, Bureau of Restraint of Trade, in opposition to said 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 modification of the final order be, and it hereby is, denied.
Commissioner Elman not concurring.

UNIVERSE CHEMICALS, INC.

Docket 8752. Order, June 5, 1969

Order denying respondents' motion that hearing examiner be disqualified from hearing case.

ORDER DENYING MOTION TO DISQUALIFY HEARING EXAMINER

Respondents, pursuant to Section 3.42(g) of the Commission's Rules of Practice, on May 23, 1969, moved the Commission to disqualify and remove Donald R. Moore as Hearing Examiner in this proceeding, stating in an attached affidavit, in substance as their reason, that the same hearing examiner presided at the prior hearing in the matter and hence that he would be without sufficient objectivity to conduct a trial *de novo*. Although the Chief Hearing Examiner has as yet made no assignment for the hearing examiner to this case, Hearing Examiner Moore, on May 28, 1969, filed his reply thereto, stating that he finds no basis to disqualify himself.

The Commission has considered respondents' motion and determined that the grounds stated are insufficient to justify the removal and disqualification of Hearing Examiner Moore from participation in this proceeding. The case may be assigned to Hearing Examiner Moore or any other examiner in accordance with the law and established procedures as though a new complaint had been issued. Accordingly,

It is ordered, That respondents' motion of May 23, 1969, requesting the disqualification and removal of Hearing Examiner Moore, be, and it hereby is, denied.

RICHARD A. ROMAIN TRADING AS EDUCATIONAL
SERVICE COMPANY

Docket 8781. Order, June 9, 1969

Order denying respondent's request that case be withdrawn from adjudication, but ordered to resubmit case.

ORDER DENYING RESPONDENT'S REQUEST THAT THE COMPLAINT
BE WITHDRAWN FROM ADJUDICATION

This matter is before the Commission upon the hearing examiner's certification, dated May 27, 1969, of a request by re-

spondent that the case be withdrawn from adjudication. In their request of May 13, 1969, respondent's counsel recite the fact that they have just been retained as counsel for respondent and that they are of the opinion that the matter may be resolved without the necessity of formal litigation and they therefore request that they be given an opportunity of at least two weeks in which to explore the possibilities of reaching a consent settlement.

The Commission is of the opinion that exploration of consent settlement by the parties does not in this instance require withdrawal from adjudication. Accordingly,

It is ordered, That respondent's request that complaint be withdrawn from adjudication be, and it hereby is, denied without prejudice to respondent's right, prior to June 28, 1969, to re-submit its request accompanied by an order agreed upon by the parties, disposing of this matter.

KOPPERS COMPANY, INC.

Docket 8755. Order, June 11, 1969

Order granting respondent's request for a stay of the date for evidentiary hearings.

ORDER GRANTING RESPONDENT'S REQUEST FOR A STAY OF HEARINGS

Upon consideration of respondent's application of May 28, 1969 (and the addendum thereto of June 6, 1969) for leave to appeal from the hearing examiner's orders of May 21, 1969, and May 23, 1969, which have been treated as an appeal,

It is ordered, That respondent's request for a stay of the commencement of the evidentiary hearings in this matter, is granted.

It is further ordered, That the matter be returned to the examiner with instructions to commence the hearings no later than 10 days after he has determined, on the basis of the disposition of *Federal Trade Commission v. United States Pipe and Foundry Company*, (D.D.C. No. 1500-69), that respondent Koppers' discovery needs have been met.

KENNECOTT COPPER CORPORATION

Docket 8765. Order and Memoranda June 13, 1969

Order denying respondent's motion that Commissioner Jones withdraw from this case with two memoranda by Commissioner Jones.

MEMORANDUM OF COMMISSIONER JONES IN RESPONSE TO THE
MOTION OF RESPONDENT KENNECOTT COPPER CORPORATION THAT
SHE WITHDRAW FROM THIS PROCEEDING

Respondent Kennecott Copper Corporation by motion dated December 31, 1968, has requested that I disqualify myself from participation in the above captioned proceeding. If I decide not to disqualify myself, respondent moves the Commission to determine that I be disqualified from such participation.

Respondent's motion is based on certain statements attributed to me in the course of an interview on the general subject of conglomerate mergers and reported in the November 1, 1968, issue of Forbes Magazine, a copy of which is attached to respondent's motion. The "statements" in the article relied upon by respondent as the basis of its motion are quoted on page 2 of respondent's motion.¹ The complete "question" and "answer" containing the part of the "statement" which respondent excerpted in its motion papers appeared as follows:

In your written opinion in the General Foods case, you seem concerned with the way a company enters a market as well as the traditional lessening of competition by a specific merger. Why are you so preoccupied with just how a company gets into a market?

Comm. Jones. When we look at the structure of a market, we also must look at the barriers to entry. We have to determine whether the acquired com-

¹ Respondent also alleges in its motion that my letter of December 23, 1968, in reply to respondent's request that I withdraw from this proceeding also "indicated prejudgment" because it "characteriz[ed] what are the 'critical issues' in this case, and the types of evidence relevant to these issues." Respondent makes no further attempt to explain in what way this letter constitutes additional prejudgment nor indeed does it make any further reference to this letter in the body of its argument in the motion. Since counsel did not further pursue this aspect of its motion, I shall not pursue it further either except to note in passing that my December 23rd letter was simply responding to respondent's counsel's own characterization of my alleged prejudgment statements in the Forbes article as involving "a critical issue" in the case (counsel's letter of November 1, 1968, p. 2). My letter of December 23 merely noted the distinction between the language appearing in the context of the article and counsel's own description of the critical issues. If counsel were serious in pursuing this part of their motion, they would make it impossible for anyone to respond substantively to such a prejudgment charge.

pany could have gone into the market on its own or whether its new presence might keep others out. Perhaps it's easier to see in a case like the Kennecott Copper-Peabody Coal complaint. We have here an instance of a copper company that was actually moving into the coal industry on its own. Kennecott was experimenting with a small, previously acquired coal property. The complaint says that Kennecott, in effect, eliminated itself as a probable new entrant into the coal industry when it went out and bought a major coal company.

As I stated in my two letters to respondent's counsel dated November 8, 1968, and December 23, 1968, the article on which this motion is grounded was not written by me but by a Forbes reporter.² The "statements" attributed to me are in the words of that reporter reflecting his report of his conversation with me. The entire basis for respondent's motion, therefore, is respondent's construction of particular words and sentences which are not in fact mine but those of a third party.

This motion raises a basic question of general policy which I believe must be brought out in the context of the arguments of prejudgment being made here.

There is little doubt that today it is increasingly important to recognize and give heed to the public policy of ensuring as free as access as possible to government files and to public officials. This is clearly reflected, for example, in the recently enacted Freedom of Information Act. It is important that the public and the press have access to the all-too-often unfamiliar policies and procedures of our public agencies. Public officials, therefore, must make themselves available and be as candid and open about their own thinking on public issues as is possible within the bounds of propriety. In this regard, it is far preferable that in approaching the press they are not placed in such a position that it becomes essential for them to insist on editing the ultimate reporting of such interviews. This can only lead to conscious or unconscious efforts to tone down or even change thoughts originally and spontaneously expressed.

When requests are made for interviews with the press or other members of the public, in my judgment the public interest in such interviews is manifestly not served if officials respond by speaking only in vague generalities. I believe that an important part of the duties owed by a Commissioner to the public in this respect would be severely hampered if we were in effect prohibited from mentioning any pending cases and the allegations contained in the complaint. These are precisely the cases in which

² Altogether, six letters were exchanged between myself and respondent's counsel, and copies of this entire correspondence are attached.

the public is interested since they represent the most up-to-date and concrete applications by the agency of the more generalized policy which the statute commands the agency to administer.

The Forbes "question" and "answer" I think illustrates this general problem. The economic theories involved in evaluating the competitive and anticompetitive potentials of conglomerate acquisitions are by their very nature general and frequently theoretical. The Forbes reporter was attempting to direct the discussion to the practical application of these economic theories which by themselves are neither novel nor difficult to understand as theories. I could not have responded meaningfully and helpfully to this reporter's effort to shed some light on the policies of the Commission without talking in terms of concrete examples of actual applications of the general economic theories about which the Forbes reporter was inquiring.

I agree with the principle that it is important to the integrity of the administrative process to preserve the appearance of impartiality as well as impartiality in fact. Nevertheless, in judging the appearances of statements, one must consider their context. Obviously ideas attributed to me by a third party cannot be interpreted in quite the same light as statements which I make directly. In this regard, although the Forbes article represents not my words but the reporter's synthesis of thoughts and statements expressed in the course of my discussions with him in this interview, even the reporter's version of what I said is clearly in the context of the complaint allegations in the Kennecott Copper case as an illustration of the use of entry barriers which was the purport of his "question" to me. There is very little likelihood indeed of anyone concluding from this article that I am making independent statements of fact as the motion asserts.

The Forbes "question" and "answer" relied upon does no more than state what the Commission alleged in its complaint against Kennecott Copper Corporation. The complaint alleges, *inter alia*, that "Kennecott undertook an intensive investigation of the feasibility of entering the coal industry" (Par. 9) and that its board of directors "approved purchase of the Knight-Ideal Coal reserves" and "allocated funds for the opening and operating of a coal mine" (Par. 10). It is further alleged that "Kennecott incorporated a Utah subsidiary, Kennecott Coal Company, to mine, sell and ship coal and to perform all functions ancillary thereto" (Par. 11), and Kennecott's acquisition of Peabody is

charged as a violation of Section 7 in that among other things Kennecott was eliminated as a "substantial potential entrant into the production and sale of coal to electric utility companies" (Par. 30(c)).

Respondent is not denying its previous acquisition of the Knight-Ideal coal property. Respondent's claims of prejudgment are based on two phrases excerpted from the Forbes article which allegedly appear not as a description of the complaint allegations but rather as statements of fact by me. These two phrases and the particular "excerpt" of the article relied upon by respondent as evidencing my prejudgment of "crucial issues" in the case is that Kennecott was "moving into the coal industry on its own" and was "experimenting with a small, previously acquired coal property."³ As I pointed out in my letter to counsel of December 23, 1968:

These two statements . . . appeared as part of a discussion of why the Commission had a concern with market entry as a factor in considering the applicability of Section 7 of the Clayton Act and must be so read. Thus the discussion started with a reference to what the Commission "must look at" when it is dealing with market structure and market entry; the next reference is to what the Commission "must determine" with respect to market entry. Then comes the illustrative reference to Kennecott Copper involving a market entry situation and summarizes the specific charge in the complaint on this market entry illustration [to the effect that] . . . the "complaint says that Kennecott eliminated itself as a probable new entrant."

In sum, the complete context of this report is clear. I was directing my attention to a general issue and alluding to the Kennecott Copper complaint as an illustration of the way in which such issues manifest themselves. Certainly no issue of prejudgment can arise on the basis of a simple reference to a pending case and to the allegations contained in that complaint. This is in fact the way in which I referred to the Kennecott Copper complaint, and in my judgment the Forbes reporter did not distort the thrust of my remarks.

I reiterate my unequivocal denial: I have not prejudged any issue in this case to any degree. This magazine article is not itself evidence of prejudgment. Moreover, in my opinion it does

³ Respondent's letter of November 1, 1968, and present motion assert that Kennecott was neither engaged in coal *mining* nor capable of doing so. I am not quite sure of the relevance of this argument in view of the fact that the "statements" attributed to me in the Forbes article do not speak of coal mining. This argument exemplifies to me the extent to which respondent is reading into the article its own interpretation of the issues which it sees in this case.

not on its face give the appearance of prejudgment nor does it reflect any ideas or attitudes which are likely to be interpreted as any prejudgment by me of any issues in the pending complaint against this respondent.

Since I cannot agree that there is any ground on which I should or must disqualify myself, I must deny respondent's request to disqualify myself from participation in this proceeding.

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

SUPPLEMENTAL MEMORANDUM OF COMMISSIONER JONES IN RESPONSES TO THE MOTION OF RESPONDENT KENNECOTT COPPER CORPORATION THAT SHE WITHDRAW FROM THIS PROCEEDING

On rereading my memorandum to the Commission in connection with the above-captioned matter and respondent's motion to disqualify me, I realize that it does not state precisely what I said and did not say to the Forbes reporter in that interview. I am afraid that my concern not to impugn in any way the integrity of Forbes' reporting and not to overstate my own ability to recall the exact words and sentence sequence which I used in talking to the Forbes reporter may have been the cause of my failure to explain more precisely what I can in fact recollect affirmatively about that interview. Accordingly, I am submitting this supplemental memorandum to the Commission to make my recollection as clear as possible.

I can state unequivocally and affirmatively that all statements made to the Forbes reporter by me about the Kennecott Copper case were strictly and carefully made in the context of what the filed complaint charged. I could as easily have handed the reporter a copy of the complaint and pointed out the charging allegations to show him what the Commission's complaint charged. Instead, I reviewed what the complaint charged, and I am certain that this context of my remarks was clear to the reporter.

I cannot now, however, either deny or affirm whether the exact words which are attributed to me in the Forbes report in describing the complaint allegations are literally mine or the reporter's version of them.

I do know and can state affirmatively that in fact I did not once in my remarks to the reporter ever refer to the Kennecott Copper matter except in the context of telling him what the complaint alleges. If I did not repeat the words "the complaint

alleges" before each statement I made to the reporter concerning this case, I am quite certain he understood that to be the context of my remarks. The reporter's account of this conversation would have been more accurate had he made this context more explicit, but I presume the reporter is not a lawyer and therefore not sensitive to this important qualification.

ORDER DENYING MOTION TO DISQUALIFY

Respondent Kennecott Copper Corporation, by motion dated December 31, 1968, requested that Commissioner Jones withdraw from participation in this proceeding, or in the alternative, that the Commission determine that Commissioner Jones be disqualified from such participation.

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

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

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

Commissioner Elman was unable to concur in this action for the reason that he is unable to distinguish *Texaco, Inc. v. F.T.C.*, 336 F.2d 754 (D.C. Cir. 1964). The rationale of that case, as well as *American Cyanamid Co. v. F.T.C.*, 363 F.2d 757 (6th Cir. 1966), and *Gilligan, Will & Co. v. S.E.C.*, 267 F.2d 461 (2d Cir. 1959), appears to him to be controlling. Since Section 7 of the Administrative Procedure Act compels the agency to determine such a matter as a part of the record and decision in the case, Commissioner Elman has reluctantly reached the conclusion that the awkwardness and embarrassment of disqualifying a fellow Commissioner cannot be avoided here.

Commissioner Jones did not participate.

FOREMOST DAIRIES, INC.

Docket 7475. Order and Opinion, June 24, 1969

Order denying respondent's motion to quash the subpoena *duces tecum* of May 2, 1969.

OPINION OF THE COMMISSION

Foremost-McKesson, Inc. (formerly Foremost Dairies, Inc. and herein called Foremost) has filed a timely motion and memorandum in support thereof seeking "to quash and limit" the subpoena *duces tecum* served by the Commission on it on May 2, 1969, and requiring the production of various books and records.

The Commission's subpoena was served in connection with the Commission's investigation of possible violations by Foremost of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act and Section 5 of the Federal Trade Commission Act and also of the Order of the Federal Trade Commission dated May 23, 1963, entered in Docket 7475, the matter of *Foremost Dairies, Inc.* The subpoena requests documentary material with regard to Foremost's competitive activities, pricing practices, and its production and sales of fluid milk at four of its milk plants.¹

Foremost's challenge to the Commission's subpoena as urged in its motion is essentially that the Commission's subpoena is void and unconstitutional because according to Foremost three of the four milk plants as to which the information is sought are wholly engaged in intrastate commerce and hence beyond the Commission's jurisdiction and the scope of its order.² In support of its motion, Foremost filed affidavits from the managers of the plants and their suppliers, averring that all of the farms which supply milk to the plants' suppliers are within the respective states and all of the milk deliveries by the plants are within those states.

¹ The seven specifications of the subpoena as to which information is sought ask for documents relating to (1) competitive activity reports (Specification 1); (2) correspondence relating to production, sale and distribution of fluid milk (Specification 2); (3) discounts and rebates, discount and rebate schedules and cost justification studies (Specification 3); (4) respondent's annual dollar sales volume (Specification 6); and (5) annual sales volume of customers (Specification 7).

² The plants involved in the subpoena which are claimed to be wholly in intrastate commerce are Seattle, Shreveport and Phoenix plants. Information respecting its Mandan, North Dakota plant is not challenged since Foremost admits that it is engaged in interstate commerce.

Thus Foremost is resisting production of the substantive material requested until its jurisdictional contentions are ruled upon. This is plainly improper.

It is well established that an administrative agency is not required to determine the issue of jurisdiction before investigating the substantive issues involved in the alleged violations of law.³ As the Supreme Court stated in its decision in *Endicott Johnson Corp. v. Perkins*, 317 U.S. at 508-9:

This ruling [*i.e.*, the District Court's ruling that the Jurisdiction issue must be investigated and litigated first] would require the Secretary, [*i.e.*, the Secretary of Labor] in order to get evidence of violation, either to allege she had decided the issue of coverage before the hearing or to sever the issues for separate hearing and decision. The former would be of dubious propriety, and the latter of doubtful practicality. . . . On the admitted facts of the case, the District Court had no authority to control her procedure or to condition enforcement of her subpoenas upon her first reaching and announcing a decision on some of the issues in her administrative proceeding.

The plain intent and holding of these cases is that the Commission cannot be stopped at the threshold of an investigation by the raising of a jurisdictional issue.

But Foremost argues essentially that this rule cannot be applicable where the plain uncontested evidence demonstrates—as it believes its affidavits do in the instant case—that the milk which is processed at the three plants in question was purchased from local farmers and processed and sold within a single state (Respondent's Memorandum in Support of its Motion, page 4). Obviously even the jurisdictional issue raised by movant cannot be determined on the basis of affidavits alone. Foremost cannot rely on its own assertions to support its jurisdictional argument and at the same time seek to prevent the Commission from developing all of the relevant facts which will bear not only on the possible existence of violations but on the jurisdictional issue as well. The problem of determining the meaning of "commerce" as it applies not only to the order but to both Section 5 of the Federal Trade Commission Act and Section 2(a) of the Clayton Act does not rest on so simple a basis as determining where the

³ See, *e.g.*, *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 (see also opinion at 128 Fed. 2d 208); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (see also 147 F. 2d 658); *U.S. v. United Distillers Products Corp.*, 156 Fed. 2d 872; and *Cudahy Packing Co. v. Fleming*, 122 Fed. 2d 1005 reversed on other grounds at 62 S. Ct. 803; *FTC v. Crafts*, 355 U.S. 9 *rev'g* 244 F. 2d 882 (9th Cir. 1957); *NLRB v. Northern Trust Co.*, 148 F. 2d 24 (7th Cir. 1945); *Bland Lumber Co. v. NLRB*, 177 F. 2d 555 (5th Cir. 1949).

milk was originally purchased and then processed and sold.⁴ We have no way of knowing at this stage in the investigation what other indicia of interstate activity may exist with respect to the responsibility for pricing decisions, the purchase and sale of containers, whether the alleged intrastate sales involve interstate purchases taking formal delivery intrastate and the like.

We conclude therefore that for all of these reasons movant's challenge to the jurisdiction is certainly premature at this state in the investigation and must be denied. Accordingly respondent's motion to quash and limit the subpoena is denied.

Commissioner MacIntyre did not participate.

ORDER RULING ON RESPONDENT'S MOTION TO QUASH AND LIMIT SUBPOENA

Upon consideration of respondent's motion to quash and limit the subpoena *duces tecum* served by the Commission on it on May 2, 1969, and respondent's memorandum in support thereof, the Commission, for the reasons stated in the accompanying opinion, has determined that the motion to quash and limit should be denied. Accordingly,

It is ordered, That respondent's motion to quash and limit the subpoena be, and it hereby is, denied.

Commissioner MacIntyre not participating.

⁴ See, *e.g.*, the Supreme Court's broad view of commerce which was reflected in its opinion in *Moore v. Mead's Fine Bread Co.* 348 U.S. 115, 119 (1954) when it stated in referring to "commerce" under the amended Clayton Act:

"We think that the practices in the present case are also included within the scope of the antitrust laws. We have here an interstate industry increasing its domain through outlawed competitive practices. [*i.e.*, price discrimination and sales below cost] The victim, to be sure, is only a local merchant; and *no interstate transactions are used to destroy him.* But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources which include not only respondent but also a group of interlocked companies engaged in the same line of business; and the prices on the interstate sales, both by respondent and by the other Mead companies, are kept high while the local prices are lowered. If this method of competition were approved, the pattern for growth of monopoly would be simple. As long as the price warfare was strictly intrastate, interstate business could grow and expand with impunity at the expense of local merchants * * * * The profits made in interstate activities would underwrite the losses of local price cutting campaigns." (Emphasis added)

A similar broad view of commerce was again taken more recently by Court in *Shreveport Macaroni Manufacturing Co. v. Federal Trade Commission*, 321 F. 2d 404 (5th Cir. 1963).

WINDSOR DISTRIBUTING COMPANY

Docket 8773. Order, June 24, 1969

Order adopting the hearing examiner's recommendation that the hearings in this case be held in more than one place.

ORDER ON EXAMINER'S CERTIFICATION OF REQUESTS FOR HEARINGS
IN MORE THAN ONE PLACE

This matter is before the Commission upon the certification by the hearing examiner, of June 18, 1969, along with his recommendation that the parties' respective requests for hearings in this proceeding at more than one location be granted.¹ Specifically, complaint counsel have requested that in addition to hearings at the offices of the Federal Trade Commission in Washington, D. C., hearings be held at Casper, Wyoming, where he anticipates the calling of ten to twenty witnesses. He also requests that hearings be held at Pittsburgh, Pennsylvania, where respondents' main office is located and where he anticipates calling three witnesses. Respondents' counsel also requested hearings be held in Pittsburgh and anticipates the calling of five to seven witnesses immediately following the adduction of complaint counsel's testimony.

The general policy of the Commission calls for continuous hearings to be held in one location. However, Section 3.41(b) of the Commission's Rules of Practice accords the examiner, in unusual and exceptional circumstances and for good cause shown, the authority to order hearings at more than one place.

The examiner states that both parties believe their cases would be prejudiced were their requests not granted and that their position appears to be justified. In addition, the examiner feels that in view of the number of witnesses involved it would be more economical to the Government and in the public interest to grant the requests. We agree. The examiner's proximity to the proceeding places him in a singularly favorable position to rule on such requests and absent some overriding considerations his recommendations with respect thereto will not be disturbed. Accordingly,

It is ordered, That the examiner's recommendation as to hearings in more than one place be, and it hereby is, adopted by the Commission.

¹ Complaint counsel's request that hearings also be held in Dallas the examiner recommends be denied. Only one witness is involved and it would be more economical to transport this witness to one of the other hearing locations.

LITTON INDUSTRIES, INC.

Docket 8778. Order and Statement, June 27, 1969

Order denying complaint counsel's request for an injunction against respondent to prevent it from altering the production facilities of an acquired company.

CONCURRING STATEMENT

BY JONES, COMMISSIONER:

Counsel in support of the complaint challenging respondent Litton's acquisition of Triumph-Adler Co. petitioned the Commission to initiate injunction proceedings against Litton to prevent it from altering and expanding Triumph-Adler's preacquisition production facilities.¹

Complaint counsel have already negotiated a protective agreement with Litton designed to preserve Triumph-Adler as a sufficiently separate entity from Litton to insure the existence of a divestible business should the instant challenge to the legality of the acquisition be sustained.² Now it wishes to go beyond this agreement and enjoin Triumph-Adler's future expansion.

Complaint counsel argue that without an injunction forbidding Litton from expanding Triumph-Adler's typewriter facilities abroad, Triumph-Adler will have become so dependent on Litton as an outlet for its expanded capacity that, if the present challenge to Litton's acquisition is sustained, it would be impossible to restore Triumph-Adler to the same independent, viable competitive status which it enjoyed prior to the acquisition. Second, counsel argue that if Litton were not permitted to expand Triumph-Adler's production, it would not be able to look to Triumph-Adler to service its own needs and thus it would not be able to

¹ Counsel have not defined the contemplated terms of such an injunction. They simply referred to Litton's plans for shifting portions of Triumph-Adler's production facilities, expanding its production capacity and rearranging its R & D responsibilities. I am assuming that the request for an injunction against "altering in any way the preacquisition facilities of Triumph-Adler" would cover these enumerated contemplated changes with respect to Triumph-Adler.

² Litton submitted a proposed protective agreement with complaint counsel which it had executed on March 21, 1969. It asserts it withdrew from the proposed agreement on April 19, 1969, on its understanding that failure of complaint counsel to communicate their own acceptance to Litton in the four week interim meant rejection by complaint counsel. Complaint counsel have since confirmed execution of the agreement, and Litton now affirms that the protective agreement is in full force and effect.

close down its own typewriter production which counsel advises us it is in the process of doing.³

If Litton is reorganizing Triumph-Adler's foreign production facilities so as to threaten Triumph-Adler's future independent competitive viability,⁴ then it is possible that its actions *vis-a-vis* Triumph-Adler could be producing anticompetitive consequences which might be difficult to undo should the acquisition prove to be illegal and divestiture be ordered.

However, even if these consequences might result from its present expansion, it is not clear that an injunction against Triumph-Adler provides an acceptable or preferable remedy. Freezing Triumph-Adler's expansion now might put a brake on its current ability to compete effectively by preventing it from keeping pace with other firms in meeting changing resource needs in what appears to be a growing, expanding industry. (One source estimates that sales were up from \$352 million in 1963 to \$546 million in 1967.)⁵ Triumph-Adler has allegedly been an aggressive marketer and capable producer who has proven it knows how to capture new business in an expanding market. If so, the Commission must be careful not to impair its competitive viability now in an effort to preserve its competitive viability in the future.

Second, Triumph-Adler, operating under the pall of adjudication regarding its future, has already been forewarned not to develop such an umbilical relationship with Litton that its severance would be economically jarring. Indeed, I cannot assume that Litton would do anything so anticompetitive as to stifle Triumph-Adler's own research and development in the field of communications systems or denude Triumph-Adler of its potential in the development of the electric typewriter or to take any other actions which would destroy Triumph-Adler's competitive vigor. In any event, an injunction would add nothing in this regard to the obligation already undertaken by Litton in the protective agreement.

³ Counsel inform us that Litton recently closed down its ten-year old typewriter plant in Springfield, Missouri and counsel fear that Litton may also close its only remaining typewriter plant in Hartford, Connecticut because of the expense and labor difficulties being encountered there.

⁴ Complaint counsel state that Litton plans to absorb into its United States distribution a substantial portion of the increased capacity of Triumph-Adler's foreign plants and argue that future production activity of Triumph-Adler would be wholly dependent on Litton's United States sales organization to find an outlet for this greatly increased volume of typewriters now being planned.

⁵ *Facts for Industry*, Series M-35-C, 1948-1967, Bureau of the Census, U.S. Dept. of Commerce.

Third, it is of course quite clear that if this merger is found to be illegal the Commission can, without a previous injunction, take account of the existence of any dependency relationship between Triumph-Adler and Litton in tailoring whatever remedial order it regards as necessary to restore both potential and actual competition in this industry.

Complaint counsel also urge injunctive relief against Triumph-Adler's expansion because it hopes that such an injunction would confront Litton with the necessity of developing its own typewriter resources and facilities and perhaps even to reopen its closed plant. Complaint counsel contend that only by enjoining Triumph-Adler's planned alterations and expansion, thereby depriving Litton of the additional capacity, can there be any hope that Litton's domestic production facilities will in fact remain as a viable factor in the American market.

I have no doubt that the powers of the Commission and of the courts to preserve the competitive *status quo ante* during the challenge to a merger need not be confined solely to protecting the integrity of the acquired assets. Obviously, commingling of assets is not the only factor which could effect a permanent or irrevocable change in the competitive situation of the merged companies.

The anticompetitive consequences of a Litton withdrawal from the domestic market could be significant. If Litton abandons its Royal operations in the United States, the United States typewriter market will have lost what one source reports to be the second largest producer of typewriters in an industry where allegedly the top five as of 1967 had approximately 90 percent of the market.⁶ Litton has already informed the Commission of the difficulties of entering the typewriter field *de novo* because of the importance of patents and, of even more crucial significance, of access to know-how. Further additional barriers to *de novo* entry have been posited by students of the industry such as the need to develop essential skills in production, research and in marketing, the value of the trade acceptance of a name (such as Litton acquired when it acquired Royal), and the essentiality of a sizeable and seasoned broad national distribution, marketing, and service organization. With Litton's production abandoned, even if Triumph-Adler should be reconstituted, the existing United States market will still remain the poorer by one major producer even though an independent Triumph-Adler (assuming illegality and

⁶J. Fred Weston and George N. Engler, *The Typewriter Industry: The Impact of a Significant Technological Innovation* (A Preliminary Draft).

divestiture) presumably would exist as the same potential competitive factor which it is alleged to be today.

It would be material to our decision if it could be clearly demonstrated whether complaint counsel is correct in his assertions as to the causal relationship between Litton's internal restructuring of its domestic typewriter business and the Triumph-Adler acquisition. At this stage, however, the evidence is at best equivocal. Certainly a strong and convincing showing of such causative relationship would have to exist before the Commission should attempt to invoke a remedy which although purportedly designed to discourage such abandonment, would involve such drastic interference with Triumph-Adler's internal business activities and growth. Moreover, the fact remains that neither an injunction nor any protective order could prevent Litton from going out of the typewriter business if it so elects.

Perhaps of great relevance to this issue—relevant enough in fact to make discussion of the merits of an injunction academic—will be the manner in which Litton carries out its own internal restructuring. Presumably, should Litton decide to leave the business, its exit could be accomplished in such a way that the competition represented by the Royal-Litton typewriter production and sales could be carried on by another party or be preserved in such a way that it is capable of being carried on by a third party if and when Triumph-Adler is divested. It is not impossible that the Commission could take some remedial steps in these areas if a divestiture order is entered in this case.

At this stage in the litigation, however, it does not appear that a sufficient showing has been made to warrant the Commission to grant the request to seek an injunction as contended for by counsel supporting the complaint.

I agree, therefore, that the petition should be denied.

ORDER RULING ON HEARING EXAMINER'S CERTIFICATION OF
COMPLAINT COUNSEL'S REQUEST FOR INJUNCTIVE RELIEF
UNDER THE ALL WRITS ACT

This matter is before the Commission on the hearing examiner's certification of complaint counsel's request that the Commission seek preliminary relief under the All Writs Act against alterations by respondent of the operations of Triumph-Adler, and respondent's answer thereto. The Commission, in light of respondent's reaffirmation of the "Protective Agreement" executed by both parties, has determined that the request should be denied. Accordingly,

It is ordered, That complaint counsel's request, certified by the hearing examiner, that the Commission seek preliminary relief under the All Writs Act be, and it hereby is, denied.

Commissioner Jones was recorded as concurring.

ADVISORY OPINION DIGESTS*

No. 314. Advertising by manufacturers in an independently published periodical.

The Federal Trade Commission was asked to express an opinion with respect to the legality of payment by manufacturers for the purchase of advertising space in a periodical published by a firm which has no connection whatever with any retail customer of such manufacturers and which will supply or otherwise make the periodical available without cost to all retailers.

The advisory opinion noted that payments by a manufacturer for the purchase of advertising space in a periodical published by a firm which is not owned or controlled by, or in any way directly or indirectly affiliated with, any customer of that manufacturer, or group or class of such customers, do not violate sections 2(d) or (e) of the amended Clayton Act where no discriminatory benefit is conferred by such payments on a particular customer, or class or group of customers, over competitors. The periodical will be given nationwide distribution and will be supplied and otherwise made available without cost to all industry retailers; the periodical is not designed to be usable only by particular retailers, or classes or groups of retailers; every effort will be made to distribute the periodical as broadly as possible among industry retailers; and distribution will not be limited to any particular retailer, or group or class of industry retailers.

The Commission advised that if the periodical is made available, in a practicable business sense, to all competing customers of a participating manufacturer, then no objection would be raised to payments by that manufacturer for advertising space therein. Further, that appropriate measures should be taken by the publisher to advise participating manufacturers that the periodical will serve to supplement, not supplant, their usual methods of notifying retail customers regarding the availability of their

*In conformity with policy of the Commission, advisory opinions are confidential and are not available to the public, only digests of advisory opinions are of public record. Digests of advisory opinions are published in the Federal Register.

sales programs and that advertising the details of such program in the periodical will not relieve them from this statutory obligation. (File No. 693 7064, released Jan. 17, 1969.)

No. 315. Foreign origin disclosure of wearing apparel partly made in a foreign country.

The Commission rendered an advisory opinion in regard to the question of whether it is necessary to disclose the origin of textile products processed in Puerto Rico and the Dominican Republic from fabric produced in the United States, and thereafter exported to the mainland United States.

Specifically, the Commission ruled upon the following two questions:

(1) Must a semimanufactured product with less than 50 percent of the value added in a foreign country be labeled in any way before entering the U.S. territory?

(2) If said product is then finished in Puerto Rico and shipped for distribution in the U.S. mainland, can it be labeled "Made in U.S.A.?"

In response to the first question, the Commission said that it will not be necessary to disclose the foreign country of origin where less than 50 percent of the value is added to the product insofar as the laws of the Commission are concerned.

In regard to the second question, the Commission expressed the opinion that it would be improper to label such a product as "Made in U.S.A." because this would constitute an affirmative misrepresentation that the product is made in its entirety in the United States. (File No. 693 7055, released Jan. 17, 1969.)

No. 316. Foreign origin disclosure of imported bearings.

The Commission rendered an advisory opinion in regard to the proper marking of imported bearings.

According to the facts presented in the matter, the top of the container in which the bearings will be packaged will carry the following statement: "The (word of a particular foreign country) Bearing". Also printed on the top of the container is the statement: "Made in (country of origin)". Etched on the outer race of each bearing is the inscription of the name of the foreign country of origin.

Most of the bearings are sold to domestic manufacturers who use said bearings in their manufacture of heavy earth moving equipment and farm machinery. The bearings normally represent less than 2 percent of the total cost of the finished equipment. Domestic manufacturers who use the bearings in their production

of machinery and equipment compete with one another for both domestic and foreign markets.

Specifically, the following two questions were raised:

(1) Are the bearings marked with sufficient clarity to disclose they are manufactured in a certain foreign country?

(2) Is it necessary for the manufacturers who use the imported bearings in their machinery and equipment to disclose the country of origin of the bearings?

In response to the first question, the Commission said that its examination of the markings revealed they were adequately marked to show their foreign country of origin.

With respect to the second question, the Commission said that it would not be necessary for the manufacturers who use the bearings in their machinery and equipment to disclose the foreign country of origin of the bearings. (File No. 693 7054, released Jan. 17, 1969.)

No. 317. Tuition refunded if no job offered within 90 days.

The Commission advised that it could not rule on advertising for a school which would offer a refund of all charges for tuition, registration and incidental fees to its graduates who do not receive an offer of employment within 90 days after graduation.

The offer will be subject to the following three qualifications:

1. It will not be made to students eligible for imminent draft into the armed forces.

2. The student must use the placement service of the school and must be available for interviews.

3. The student must work at placement through other sources.

Although the advertising did not so state, the offer of employment would not be considered valid by the school unless the offer is limited to the geographic area specified in the student's application form.

Because the proposed plan may be subject to such a wide variety of interpretations, and also depending upon the manner and extent of its implementation, the Commission expressed the view that it was not in a position to rule upon the legality of the plan. (File No. 693 7061, released Jan. 28, 1969.)

No. 318. Commission refusal to grant blanket approval to small dairy to be acquired by any corporation subject to Commission acquisition-prohibiting orders.

The Commission rendered an advisory opinion in response to a premerger clearance request from the owner of a small dairy who wants to sell the business to any one of three national firms in

the dairy industry, two of which are subject to Commission cease and desist orders containing provisions prohibiting further acquisitions without prior Commission approval.

The applicant was advised by the Commission that it cannot grant the blanket approval requested. The Commission pointed out that corporations covered by orders prohibiting certain acquisitions are free, of course, to apply for prior approval to acquire the applicant's business.

From the data submitted by the applicant, it appears that his business continues to operate profitably despite extremely competitive and rapidly changing conditions in the milk industry in his area. The applicant enjoys a substantial share of the markets in which he operates. No evidence was presented of any attempts to sell the business to any other independent dairy firm or to anyone now outside the dairy industry. (File No. 693 7072, released Feb. 4, 1969.)

No. 319 Sales price and lease rate for a book need not be identical.

The Commission issued an advisory opinion concerning charges by a publisher in connection with the distribution of its publications.

The publisher offers reference books to customers on lease (the publisher picks up the obsolete volumes upon the issuance of a new edition or upon the expiration of the lease) or for purchase.

The Commission advised the publisher that no law administered by the Commission requires it to charge the same amount for the lease as for the sale of a book (File No. 693 7075, released Feb. 4, 1969.)

No. 320. Disclosure of origin of imported components used in manufacture of firearms.

The Commission rendered an advisory opinion in regard to the question of whether it is necessary to disclose the origin of certain imported components to be used in the manufacture of revolvers and automatic pistols. If such disclosure is required, a question is raised as to the proper location of that disclosure.

Specifically, the advisory opinion involved the use of components imported from both Germany and Italy, such as barrels, cylinders, and hammers. The remaining components were of domestic origin.

With respect to the question of whether a disclosure of the origin of the imported components would be required, the Commission said: "In the absence of any evidence to the contrary, the Commission believes that the question of foreign origin dis-

closure largely depends upon the importance which prospective purchasers would attach to the fact, if known, that a substantial number of the components of the finished product are of foreign origin. It is the Commission's judgment that the imported components in both factual situations, namely, the barrels, cylinders, and hammers, represent such an integral and essential part of the finished product that prospective purchasers would in all probability manifest a deep concern over their origin and manufacture. If such is the case, then the failure to reveal the origin of the imported components would play a vital, if not decisive, role in the customers' selection or purchase. Under these circumstances, the Commission is of the opinion that the failure to reveal the country of origin of the imported components in both factual situations would likely result in deception to consumers and unfair injury to competitors."

In regard to the question of whether the disclosure should be made on the product or the container, the Commission cited the well-established general rule that the disclosure should be clear and conspicuous. This means, the Commission said, that it must be placed in a location at the point of sale where it would be readily observed by prospective purchasers making a casual inspection of the merchandise prior to, not after, the purchase thereof. If the merchandise is displayed in such a manner that a disclosure on the product would not be seen prior to the purchase thereof, it would be necessary to place the disclosure on the container. On the other hand, if the merchandise is displayed in a manner which would permit purchasers to observe the disclosure on the product, it would not be necessary to make a disclosure on the container. (File No. 693 7057, released Feb. 7, 1969.)

No. 321. Sale of unlabeled American made products.

The Commission issued an advisory opinion to an American manufacturer in response to his request concerning sale of one of his products, with or without labels. He asked for the opinion because a dealer in another State has recently placed a substantial order for the product, specifying that it must be shipped in unlabeled containers. The supplier believes the dealer may intend to resell the product in export trade. The manufacturer does not enjoy a monopoly.

The Commission advised the applicant that, under laws administered by the Commission,

- (1) You may legitimately refuse to sell a specific product to a customer who asks for it in an unlabeled container;
- (2) No labels are required on American made merchandise sold in export

trade; however, an American exporter should determine what foreign laws govern the operations; and

(3) Packaging and labeling of domestically sold consumer commodities are governed by the Fair Packaging and Labeling Act (Public Law 89-755) and the regulations issued thereunder. * * * The product described in correspondence, is a consumer commodity as defined in section 10(a) of the Act, therefore packaging or labeling of this product must be in accordance with the regulations. However, section 500.2(d) of the regulations which defines the term package contains several exceptions which appear to apply to the facts in your situation. In addition, your attention is invited to the exception contained in section 500.2(e) wherein the term "label" is defined. Subsection (2) excepts, from application of the regulations, written, printed, or graphic matter affixed to or appearing upon commodities sold or distributed to industrial or institutional users.

(File No. 693 7074, released Feb. 7, 1969.)

No. 322. Supplier advertising in an independently published periodical.

The Federal Trade Commission was asked to express an opinion with respect to the publication and distribution of a monthly publication designed to supply wholesale and retail outlets, without cost to them, with information concerning promotional allowance programs instituted by manufacturers selling to such outlets, and with particular reference to two specific questions:

(1) Will a manufacturer who places in the publication a clear and timely description of the terms of a promotional program offer and the conditions upon which payments will be made be regarded as having notified a customer, who in fact receives the publication, of the availability of that promotional offer?

(2) In the case of a promotional offer which extends over a 6-month period, will such manufacturer be regarded as having so notified a retailer, who in fact receives the publication each month, if the description is placed therein only once, prior to or at the beginning of the 6-month period? If not, how often must the notice be republished? At 3-month intervals? In each monthly issue?

The advisory opinion noted that payments by a manufacturer for the purchase of advertising space in a periodical published by a firm which is not owned nor controlled by, or in any way directly or indirectly affiliated with, any customer of that manufacturer, or group or class of such customers, do not violate section 2(d) or (e) of the amended Clayton Act where no discriminatory benefit is conferred by such payments on a particular customer, or class or group of customers, over competitors. The periodical will be given nationwide distribution and

will be supplied and otherwise made available without cost to all industry wholesalers and retailers. The periodical is not designed to be usable only by particular resellers, or classes or groups of resellers; every effort will be made to distribute the periodical as broadly as possible among industry resellers; and distribution will not be limited to any particular reseller, or group or class of industry resellers.

The Commission advised that if the periodical is made available, in a practical business sense, to all competing industry resellers of a participating manufacturer's products, then no objection would be raised to payments by that manufacturer for advertising space therein.

Regarding the two specific questions, the Commission advised that although a listing by a manufacturer of the details of his promotional allowance program in the publication would appear to be adequate and sufficient notification to recipients thereof that such programs are available and under what specific conditions, such listing does not, however, relieve any manufacturer-advertiser from his statutory obligation of informing those resellers who may not receive the publication regarding the availability of such program.

And further, as to the second specific question, in view of the fact that the publisher will update the master mailing list every 3 months, the Commission required that notices of extended promotional offers be republished each calendar quarter. It was pointed out, however, that the quarterly notice republication requirement was being imposed to coincide with presented facts and that notice given at less frequent intervals may be adequate in other situations. If the required notice is in fact given it is immaterial whether it is republished at any particular interval of time so long as all those entitled to promotional assistance are made aware in timely fashion of any benefits to which they may be entitled under a published program. (File No. 693 7076, released Feb. 7, 1969.)

No. 323. Disclosure of imported electronics equipment.

Rather than labeling an imported product as "made" in a certain foreign country, the Commission said it would interpose no objection to a disclosure which stated that the merchandise was a "product" of a certain foreign country.

The advisory opinion was rendered in response to a request from an importer of electronics equipment which enters the United States in a completely finished state. Included in the

equipment are radios, tape recorders, transceivers, etc. (File No. 693 7073, released Feb. 13, 1969.)

No. 324. "Free hosiery for life" offer to obtain sales representatives.

The Commission rendered an advisory opinion in regard to the propriety of advertising which offers information for "free hosiery for life" in connection with the sale of hosiery.

According to the proposed plan, one who responds to the advertisement will receive information offering the recipient a job selling hosiery, and for every certain number of hosiery which is sold the recipient will receive a free pair of hosiery.

In the advisory opinion which was rendered, the Commission said that the use of the word "free" under the above circumstances would be deceptive and therefore in violation of section 5 of the Federal Trade Commission Act, unless the initial advertisement and any subsequent promotional material contains a clear and conspicuous disclosure of all of the conditions or prerequisites to the receipt and retention of the free merchandise. (File No. 693 7049, released Feb. 27, 1969.)

No. 325. Marketing 10-year-old unused equipment as new as deceptive.

The Commission issued an advisory opinion concerning the marketing now as "new" of 10-year-old equipment which has never been used and is still in the original shipping cartons.

The Commission wrote the applicant for the advisory opinion:

According to the information you submitted, your company is not the original manufacturer of the equipment you are interested in marketing as "new." Further, it is understood you have recently obtained a license to manufacture similar equipment. Also, you state there have been no model changes since the 10-year-old equipment was produced. Having considered the matter, the Commission hereby advises you that you would risk violating section 5 of the Federal Trade Commission Act if you marketed the 10-year-old equipment as "new;" such an act would clearly be deceptive. Of course, you are free to describe the equipment accurately and disclose that it is 10 years old and has never been used.

(File No. 693 7080, released Feb. 27, 1969.)

No. 326. Country of origin marking requirements for product assembled in Puerto Rico of domestic and foreign components.

The Commission's opinion was requested as to the legality of marking as "Made in the U.S.A." a Puerto Rican produced product composed for the most part of domestic components

but containing some components originating in the United Kingdom.

In the Commission's view, the unmodified marking "Made in U.S.A.," or equivalent, would be an affirmative representation that the product in question is in its entirety of domestic origin.

Since in the situation described, the product in question is not wholly of domestic origin the Commission is of the opinion that the marking "Made in U.S.A.," or equivalent, would be improper, unless additional and accurate disclosure is made of the presence of the imported components.

The requesting party was further advised that the Commission would not object if the product in question were to be marketed with no accompanying identification of, or claim as to, country of origin. (File No. 693 7027, released Feb. 27, 1969.)

No. 327. Disclosure not required of origin of imported materiel used in shoes.

The Commission rendered an advisory opinion to a manufacturer of athletic shoes stating that it would not be necessary to disclose the country of origin of the imported upper material.

The imported upper material will represent approximately one-third of total material costs, and the remaining two-thirds will be composed of material made either in the United States or Puerto Rico. Concluding that a disclosure of the imported upper material would not be required, the Commission said:

In the absence of any affirmative misrepresentation as to origin, the Commission is of the opinion that, under the facts as presented, it will not be necessary to disclose the country of origin of the imported upper material.

(File No. 693 7082, released March 4, 1969.)

No. 328. Organization of warehouse distribution center for a jobber buying group.

The Commission issued an advisory opinion warning of probable violations of law in the proposed organization by an automotive replacement parts manufacturers' representative of a warehouse distribution center buying group of jobbers.

According to the information submitted, the applicant is now, and intends to continue to be, a sales agent for several automotive parts manufacturers. He proposes to organize and operate a warehouse distribution center for automotive parts, obtaining quantity discounts on purchases from suppliers and then reselling at a 5 percent to 7 percent markup to "member" jobbers. The quantities will be the result of pooled orders from the jobbers.

Jobbers will be "members" only in the sense that they will contribute \$1,000 each to the applicant in return for the privilege of sharing some of the quantity discounts on purchases from suppliers. The applicant and his wife will be the sole owners, operators, and employees of the warehouse distribution center. Drop shipments will be used when orders are large enough to obtain quantity discounts for the particular orders. The applicant intends to organize only one jobber in each of the smaller towns and perhaps two or more in larger towns "where they would not be competing for the same customers." The center will place orders with manufacturers, receive goods not otherwise drop-shipped and distribute them, bill jobber-customers (i.e., "members"), and slowly accumulate an inventory in its warehouse.

The Commission is of the opinion that the applicant would probably violate section 2(c) of the amended Clayton Act if he receives commissions from manufacturers whom he represents as a sales agent on purchases for his own account for resale to jobbers.

The Commission also pointed out that, while buying groups of jobbers are not illegal per se, they may function in ways to violate section 2(f) of the amended Clayton Act if they refuse membership to jobbers who compete with each other and thereafter obtain unjustified price discriminations. (File No. 693 7087, released March 4, 1969.)

No. 329. Dissemination of uniform warranty plan by trade association to members.

The Commission rendered an advisory opinion to a trade association of retailers that its proposal to circulate a uniform warranty among its membership would likely result in violation of Commission administered laws. The warranty in question, applicable within 100 miles of a dealer's store, provides:

(1) The extent of the liability of this firm to service merchandise purchased from us is limited to this policy and it is in addition to any written guarantee included from the manufacturer involved.

(2) Under conditions of normal usage, our store warrantees (sic) our (products) to be free from defects in workmanship and structural materials for a period of 1 year from the date of purchase. This guarantee does not apply to damages resulting from negligence, misuse, or accidents.

(3) We will repair or replace at our option any defective item, or part, at absolutely no charge. In determining the cause or nature of the defect, and the manner of repair; the judgement of this firm will be final.

The Commission concluded that it could not render advice with respect to that portion limiting retailer liability to the

warranty terms nor to the comment that the warranty is in addition to any manufacturer's written guarantee. This position was taken for the reason that the question of warranties is being currently examined, specifically as they relate to the automotive industry, and any Commission statement along these lines at this time would be premature.

Nor could the Commission approve the remainder of the proposed warranty for the reason that it is not a simple, generalized guideline intended to assist the membership in drafting warranties embracing their own terms but is, in fact, an actual 1 year warranty incorporating predetermined and definite terms and conditions for use without change by members. For this reason the Commission advised that should the proposed warranty be selected by all or a substantial number of Association members the likely purpose and probable result would be the adoption of anticompetitive uniform terms and conditions by the membership and would, therefore, be objectionable. (File No. 693 7065, released March 19, 1969.)

No. 330. Proposed advertising for orthopedic pillow.

The Commission was requested to render an advisory opinion with respect to proposed advertising for a pillow intended for orthopedic and therapeutic purposes, which would represent that the device was designed for use in cervical spine, low back pain cases and by cardiac patients.

The opinion advised the advertisers that while the Commission has no objection to representations that the device might afford temporary relaxation and comfort under certain conditions, any representations in advertising that the pillow is a health device particularly useful for cervical spine, low back pain and cardiac cases would appear to have the capacity and tendency to deceive. (File No. 693 7088, released March 19, 1969.)

No. 331. Disclosure of origin of imported food product.

The Commission rendered an advisory opinion to a trade association which involved the question of whether it is necessary to disclose the origin of an imported food product. Imported in its entirety, the product is later sliced and packed in containers in the United States for sale to the general public.

Ruling that the product's origin must be disclosed, the Commission said:

* * * as to this product, the country of origin may be a material fact to many consumers in deciding whether to make a purchase, and that it should therefore be disclosed to them in an appropriate manner at the point of sale.

(File No. 693 7084, released March 19, 1969.)

No. 332. Publication of advertising standards by private association.

The Commission announced its approval of advertising and selling standards proposed for publication by a private association.

The association has come to believe that certain unfair and deceptive practices are being used by a number of firms providing a particular service. It has therefore devised a "Statement," similar to a Code of Ethics, setting forth a number of practices which have heretofore been found unlawful by the Commission and which should not be engaged in by members of the industry. It proposes to invite industry members voluntarily to agree to avoid such practices as "bait" advertising, false disparagement of competitors, deceptive pricing, deceptive advertising of guarantees, and misleading use of the word "free."

The objective of the "Statement" is to maintain accuracy and truth in advertising and selling of the service involved. Among other things the "Statement" provides, "all advertising shall be accurate and clearly disclose the true nature of the offer. Advertising as a whole should not create a misleading impression, even though each statement or illustration, when considered separately, may be literally truthful. Advertisers at all times should be in a position to substantiate the accuracy of any claims made in their advertising."

The Commission advised that:

"As long as each signer of the document agrees to, and abides by, its provisions without coercion, expressed or implied, the Commission would have no objection to your proposed document as written, or its proposed use."

(File No. 693 7094, released March 19, 1969.)

No. 333. Manufacturer-wholesaler relationship; different discounts; refusals to deal; termination or further sales.

The Commission issued an advisory opinion in response to a request from a manufacturer concerning several courses of action he proposes to take in his sales relationships with wholesalers.

The manufacturer now grants all wholesalers a 40 percent discount off the list price of his products. Proposed are new contracts, providing the 40 percent discount to a Full Service Dealer or Wholesaler who performs certain specified functions, and only 25 percent to a Part Service Dealer or Wholesaler "who does not fulfill all the functions set forth" in the definition provisions for a Full Service Dealer or Wholesaler.

The Commission advised:

(1) To the extent that an additional discount is sought to be justified on the basis of functional services such as stocking and display performed by so-called Full Service Dealers or Wholesalers [function No. 4 of applicant's proposed wholesaler agreement], no advisory opinion can be provided at this time because the Commission contemplates an inquiry looking toward a rule-making proceeding involving this question as it pertains to another industry.

(2) Moreover, as to the other functional criteria for Full Service Dealers or Wholesalers set forth in applicant's proposed wholesaler agreement, the Commission will not approve any standards whereby a wholesaler's eligibility for added discounts is contingent upon the imposition of specified restrictions upon his customers by him.

(3) You also ask if you may refuse to deal with a wholesaler in one town who is reselling your products to wholesalers in another town. The Commission is of the opinion that such refusal to deal could amount to a violation of section 5 of the Federal Trade Commission Act. Therefore, the Commission cannot approve the proposal.

(4) Additionally, you ask if you may terminate further sales to a wholesaler who is establishing his own network of wholesale dealers, obligated by contract to purchase their supplies exclusively from him. This wholesaler, as does the one involved in your second request, is departing from the traditional role of the wholesaler in the beauty and barber supply business by refusing to confine his sales to beauty schools and salons and has, in effect, entered into competition with your company as a supplier of [your] products to wholesale dealers. The facts provided do not give any basis for viewing the wholesaler's exclusive dealing arrangements as violative of the antitrust laws. Without reaching the question of whether you might terminate further sales to the wholesaler if the exclusive dealing contracts were illegal, the Commission believes your proposed termination of the wholesaler would appear to be anticompetitive and thus contrary to the provisions of section 5 of the Federal Trade Commission Act. The proposal, therefore, cannot be approved.

(File No. 693 7075, released April 18, 1969.)

No. 334. Location of foreign origin disclosure.

The Commission advised an importer of candles and candle holders in regard to the proper location of the foreign country of origin disclosure thereof.

After importation, the product will be assembled in a combination blister package of eight candles and eight holders on a display card for resale to the general public. The imported holders and candles will be marked with their respective country of origin. However, this identification as to foreign origin will not be readily seen by prospective purchasers making a casual inspection of the merchandise prior to the purchase thereof.

In regard to the question of whether the disclosure should be made on the product or on the face of the display card, the Commission said:

* * * the general rule is that the disclosure must be clear and conspicuous. This means that it must be placed in a location where it would be readily observed by prospective purchasers making a casual inspection of the merchandise prior to, not after, the purchase thereof.

(File No. 693 8095, released April 18, 1969.)

No. 335. Refusal of membership in trade association.

A national trade association asked the Commission if the association might properly refuse membership to a member's competitor at the member's insistence.

The Commission noted that, as a general rule, a trade association may deny membership for failure to meet reasonable qualifications, but may not deny membership to a potential member if to do so would unreasonably restrain interstate or foreign trade or commerce.

Since no information was submitted as to why a member publisher would want to refuse membership to a competitor or as to what the competitive effects of such a refusal would be, the Commission was unable to be more specific with respect to the question than the statement of the general rule set forth above. In the absence of such information, the Association would have to make its own determination as to the propriety of any specific denial of membership within the confines of the general rule as it applies to conditions which exist in its industry.

Thus, while the Commission could not categorically rule that denial of membership under the conditions described would be illegal, it also could not give its affirmative approval to the proposal because of the factual uncertainties involved. (File No. 693 7078, released April 18, 1969.)

No. 336. Legality of membership by brewer in beer wholesalers' trade association.

Responding to an application from a beer wholesalers' association the Commission advised the applicant that:

* * * it is not illegal per se for suppliers to belong to a wholesalers' trade association, but particular care must be exercised to avoid violation of law. In the case of an industry where distributors are in a weak bargaining position, vis-a-vis, their suppliers and where the industry on the supply side is concentrated, these circumstances may lead to vertical restraints on the distributors violative of the antitrust laws for example in the area of pricing decisions. These considerations may apply in the case of the beer industry. The necessity of preserving its members' independence in making business decisions should, of course, be taken into consideration by trade association when they formulate membership policies.

"The Commission further advised the applicant that it is not

a violation of the antitrust laws to exclude suppliers from membership in a wholesalers' organization." (File No. 693 7086, released April 18, 1969.)

No. 337. Disclosure or origin of imported hand sprayers and squeeze bottles.

The Commission issued an advisory opinion concerning the proper labeling as to the origin of imported, small, plastic, hand-operated sprayers and two-piece plastic squeeze bottles.

The applicant advised the Commission that the imported articles would be sold in quantity to manufacturers or suppliers of cleaning liquids or other industrial accounts. These purchasers would furnish the imported articles to industrial users for dispensing cleaning liquids supplied by these purchasers.

The Commission advised the applicant that on the basis of the facts as presented the country of origin of the imported sprayers or squeeze bottles should appear conspicuously on the cartons in which they are shipped to his customers. In the absence of any affirmative representation that these products are made in the United States or any other representation that might mislead the ultimate purchasers or users as to the country of origin and in the absence of any other facts indicating actual deception, the failure to mark the origin of these articles on them would not be regarded by the Commission as deceptive. Accordingly, no marking is required on these articles with reference to the country of origin. (File No. 693 7104, released April 25, 1969.)

No. 338. Disclosure of origin of imported seam ripper blades.

The Commission rendered an advisory opinion concerning the proper marking of the origin of seam ripper blades imported from Germany. The imported blades will be assembled with handles of domestic origin.

The Commission advised the party seeking the opinion that it would be necessary to make clear and conspicuous disclosure of the foreign country of origin of the imported blades. (File No. 693 7091, released April 25, 1969.)

No. 339. Disclosure of origin of imported fishing lures.

In response to a request for an advisory opinion, the Commission ruled that it would be necessary for the requesting party to make a clear and conspicuous disclosure at the point of sale of the foreign country of origin of its imported fishing flies.

Under the factual situation presented in the ruling, the flies will be shipped to retailers for resale packaged 1 dozen loose in a plastic box. Each box will contain from 1 to 4 flies made in a foreign country and 8 to 11 flies of domestic origin. Fishermen normally will purchase the flies singly and not by the dozen. (File No. 693 7089, released April 29, 1969.)

No. 340. Location of foreign origin label on imported engine parts.

In response to a request for an advisory opinion, the Commission advised an importer of fuel injection parts and units, which are to be used as replacement parts in engines, that it could disclose the foreign origin thereof on the container rather than on the product.

The engines are purchased by industrial and commercial users, and by individual consumers as well. Whenever possible, the imported products will be marked with the country of origin on the nameplate. Furthermore, the imported parts and units may be packaged individually or in certain specific quantities per box. Because a number of the imported replacement parts are either too small to permit country of origin identification on the product itself, or may have highly finished surfaces which would be destroyed with marking, the question was raised as to whether it would be permissible to make the disclosure only on the container. (File No. 693 7096, released April 29, 1969.)

No. 341. Disclosure of origin of imported motors.

In response to a request for an advisory opinion, the Commission ruled that it would not be necessary to disclose the foreign origin of certain electric motors or components thereof which are imported from Poland.

According to the facts presented by the requesting party, the imported motors will be attached in the United States to domestically made gear trains. Moreover, the imported motor will represent approximately one-third of the total cost of the finished unit, i.e., the motor and the gear train.

Concluding that a disclosure would not be required under these circumstances, the Commission said:

In the absence of any affirmative representation that the imported motors are made in the United States, or any other representation that might mislead purchasers as to the country of origin, the Commission is of the opinion that, under the facts presented, the failure to mark the origin of the imported motors or components thereof will not be regarded by the Commission as deceptive.

(File No. 693 7105, released May 1, 1969.)

No. 342. Location of term "irregular" to describe shirts.

In response to a request for an advisory opinion, the Commission advised a manufacturer that irregular men's dress and sport shirts should be stamped "irregular" on the neck band, not on the shirrtail.

Whenever an affirmative disclosure is required, the Commission said, it is a well-established principle that it must be made with such clarity that it will likely be observed by prospective purchasers making a casual inspection of the merchandise prior to, not after, the purchase thereof. Because of the manner in which shirts are ordinarily folded and displayed at the point of sale, the Commission added, an "irregular" stamp on the shirrtail would not normally be seen by prospective purchasers until after the sale has been consummated.

Concluding that the disclosure should be made in the neck band, the Commission said:

Although the disclosure may be placed in any location so long as it complies with the aforementioned principle, experience indicates that the best possible location in most cases would be in the neck band. This is where most prospective purchasers look at a shirt because this is where the size and fiber identification normally are placed. Under these circumstances, therefore, the Commission would not accept a disclosure made on the shirrtail. It would, however, accept a legible disclosure made in the neck band as being in compliance with sec. 5 of the FTC Act.

(File No. 693 7103, released May 1, 1969.)

No. 343. Disclosure of origin of imported circular saw discs.

In response to a request for an advisory opinion, the Commission ruled that it would not be necessary to disclose the foreign origin of imported circular steel saw discs.

After importation, the manufacturer will add tungsten carbide tips to the imported discs. Domestic parts and labor represent approximately 80 percent of total production costs, with the remaining 20 percent representing the cost of the imported discs. The finished blades will be sold to cabinet shops, schools, builders, industrial concerns, and hobbyists. (File No. 693 7107, released May 2, 1969.)

No. 344. Premerger clearance not granted; grocery stores in concentrated market.

The Commission advised an applicant for an advisory opinion that it cannot grant clearance for a proposed merger of two grocery retailing corporations operating in the same metropolitan marketing area.

Applicant is the owner of three supermarkets having 1.5 percent share of the particular market. The proposed purchaser is a regional supermarket chain having 18 percent to 20 percent of the same market with a ranking of second among all the companies selling groceries in the area. The market is concentrated with the four leading companies sharing 57 percent according to one survey and 74 percent of all sales as calculated by another analyst.

The Commission advised the applicant that it believes that the proposed merger would raise substantial questions of legality under the merger laws and that it therefore cannot grant the clearance requested. (File No. 693 7100, released May 2, 1969.)

No. 345. Survey of professional compensation by employing institutions.

The Commission issued an advisory opinion with respect to a proposed survey of certain professional compensation in employing institutions.

The applicant proposed to conduct a survey of employing institutions by means of a questionnaire to ascertain the compensation being paid to specified professionals. Respondents to the questionnaire would not be identified. The results of the survey would be reported as national and regional averages and they would be published and distributed to the trade and public press. No conclusions would be drawn nor would recommendations be made.

The Commission advised the applicant that implementation of the proposed course of action in the manner described probably would not violate any of the laws administered by the Commission. (File No. 693 7113, released May 5, 1969.)

No. 346. Promoter's responsibility in tripartite promotional assistance plan.

The Commission issued an advisory opinion relative to the duty and responsibility under the laws administered by the Commission of a promoter or intermediary in a tripartite promotional assistance plan.

The Commission expressed the view that the fact that an intermediary is positioned between the supplier and the supplier's customers does not affect the applicability of the law to the plan. Such a plan must still provide all of the supplier's customers who compete with each other in reselling his products an opportunity to participate on proportionally equal terms. In this regard, the plan should contain suitable alternatives for cus-

tomers who may be unable, as a practical matter, to participate in the primary proposal.

The legality of such arrangements, in the Commission's view, is measured by whether the promoter and the suppliers using the plan have met this obligation toward the suppliers' customers or whether participating customers have actual or constructive knowledge that they disproportionately benefit under the plan.

In the light of these general principles, the Commission declined to approve the proposed promotional plan for two reasons—(1) The proposal did not appear to be a complete plan offering practical alternatives for those customers unable to participate in the primary proposal, and (2) even if it did contain alternatives usable by all competing customers, they would, apparently not all be notified of the entire plan so that each may choose which alternative is suitable for his own use.

The Commission stated that if the proposed promotional assistance plan were implemented, section 2(d) or (e) of the Clayton Act, as amended, and/or section 5 of the Federal Trade Commission Act would probably be violated. (File No. 693 7077, released May 5, 1969.)

No. 347. Disclosure of origin of imported shoes.

In response to a request for an advisory opinion, the Commission ruled that it would be necessary for the requesting party to make a clear and conspicuous disclosure of the foreign country of origin of its imported shoes.

Under the factual situation present in the ruling, it was assumed that the shoes were entirely of foreign manufacture and after importation they were to be sold to the general public. (File No. 693 7108, released May 8, 1969.)

No. 348. Disclosure of origin of imported turpentine.

The Commission advised a company that a "Packaged in U.S.A." statement standing alone would not be sufficient, and that it would be necessary to make a clear and conspicuous disclosure on the package of the foreign country of origin of the imported turpentine.

Under the factual situation presented for a ruling, the company plans to import turpentine from either Portugal or the U.S.S.R. After importation, the turpentine will be repackaged here in the United States into 1 gallon, 1 quart, and 1 pint containers for resale for general consumer use. (File No. 693 7118, released May 24, 1969.)

TABLE OF COMMODITIES ¹

DECISIONS AND ORDERS

	Page
Advertising material	417
Air conditioning units	540
Aluminum siding	223, 465, 514
Apartment rental	210
Appliances, ranges and refrigerators	928, 982
Food Freezers	364, 928
Television sets	506, 928, 947
Automobile protective undercoating	965
Batteries	410
Books	241, 445
Boys' wearing apparel	358, 1042
Bracelets	548
Cabinets, sewing machine	25
Cement, portland	32
Chenille products, flammable	153
Chinchillas	212, 337, 735, 744
Coats:	
Fur	524, 772, 790
Textile	524, 772
Wool	772, 790, 952, 961, 970
Coin-operated vending machines	561
Concrete	32, 813
"Corduroy" coats	772
Corn chips	394
Corn products	305
Correspondence courses	11, 19
Dairy products	305
Department store	374
Dictionaries	445
Drugs	529, 990
Encyclopedia	241, 434, 445
Fabrics:	
Apparel	1
Drapery	681
Flammable	153, 371
Industrial	1
Upholstery	681
Wood fiber chips	371
Yardgoods	681

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

DECISIONS AND ORDERS

	Page
Flammable products:	
Bath sets, bedspreads, robes, rugs	153
Wood fiber chips	371
Floor coverings:	
Backing, fillings, and paddings	231
Broadloom	1
Carpeting	1, 153, 231, 922, 1036
Rugs	1, 231
Food freezers and food plans	364
Food products	305, 364
Baked goods	394
Beef	139
Corn chips, flour, potato chips	394
Produce, wholesale	974
Sweetners and syrup	305
Franchises, restaurant	497
Freezers, food plans and food	364, 928
Frozen products, ice cream, ice milk, sherbert, water ices	305
Fur products	132,
148, 186, 301, 346, 374, 405, 429, 519, 753, 761, 772, 781, 786, 803	
Ladies' coats	524, 790
Ladies' garments	933
Mink	132
Wearing apparel	186, 193, 781
Furnaces	957
Furniture	112, 374, 928, 982
Games, coin-operated amusement	561
"Geri-Gen," vitamin	529
Gloves, industrial work	808
Handkerchiefs	1036
Hearing aids	561
Heating units	540
Helbros watches	333
"Hemotrex," vitamin	529
Home appliances	364, 506, 928, 947, 982
Home improvement products	223, 465, 798
Home furnishings	112
Hose assemblies and ends	319
Hosiery	1, 453
Houses, residential	168
"Hungrex with P.P.A.," weight-reducing preparation	990
Industrial fittings	319
Industrial steel wool	811
Insurance policies	200
Jewelry products	769
Ladies apparel	772
Ladies garments, fur	429
Ladies ready-to-wear:	
Fur	186, 193, 358

TABLE OF COMMODITIES

1127

DECISIONS AND ORDERS

	Page
Garments	421, 447
Textile fiber	352
Wool	352
Lottery devices	716
Magazines	417
Materials:	
Quilted interlining and lining	724, 730
Yardgoods	681
Meat products	139, 305, 364, 394
Men's wearing apparel:	
Hosiery	453
Jackets	411
Wool clothing	970, 1042
Metal expansion watchbands	548
Milk products, ice cream and ice milk	305
Music systems, background	561
Organs, electronic	561
Paper products, converted	716
Phonographs, coin-operated	561
Pillowcases	1
Portland cement	32
Potato chips	394
Produce, wholesale	974
Promotional material	417
Protective undercoating, automobile	965
Publications	241, 417, 434, 445
Punchboards	716
Quilted interlining material	724, 730
Radio-television-stereo combination sets	506
Radio tubes and tube testing devices	457
Radios	506
Rainwear, rubber	944
Real estate, unimproved	168
Reference service	434
Regulators for transmissions and fluid power products	319
Rentals, apartment	210
Residential siding materials	325, 798
Restaurant franchises	497
Robes, flammable	153
Rugs	1, 231
Sewing machines, cabinets, new and used	25
Siding	798
Aluminum	223, 465, 514
Residential	325, 514, 798
Steel	514
"Silkana" coats	772
Steel siding, residential	514
Stereos	506, 928
Storm doors and windows	465

DECISIONS AND ORDERS

	Page
Sugar, refined	305
Suits, ladies' wool	790
Sweaters, wool	174
Sweeteners and syrups	305
Television sets	506, 928, 947
Television tube testing devices, tubes and sets	457
Textile fiber products	1, 156, 772
Bedsheets and pillowcases	1
Coats, ladies'	524
Fabrics	1, 681
Floorcoverings	1, 231, 922, 1036
Greige fabric	106
Handkerchiefs	1036
Hosiery	1
Industrial work gloves	808
Jackets, men's	411
Ladies' apparel	510, 352
Ladies' ready-to-wear garments	421, 447
Quilted material	724, 730
Rugs	1, 922
Yarns	1
Tires	410
Tubes and tube testing devices, radio and television	457
Undercoating, automobile protective	965
"Univox" teaching aids	434
Valves	319
Vending machines	561
Vitamins, "Geri-Gen," "Hemotrex"	529
Watchbands	548
Watches, Helbros	333
Wearing apparel	153, 174, 374
Boys'	358, 970, 1042
Children's	358, 772
Infants'	358
Ladies'	358, 429, 510, 781, 938, 772
Men's	358
Misses'	772, 781
Weight-reducing preparation, "Hungrex with P.P.A."	990
Wholesale produce	974
Wool products	346, 772
Apparel, ladies'	352, 790, 938
Coats	790, 952, 961, 970, 1042
Garments, ladies' ready-to-wear	421, 447
Hosiery, men's	453
Jackets, men's	411
Linings and interlinings	790
Quilted interlining material	724, 730
Sweaters	174
Yarns	720, 977

TABLE OF COMMODITIES

1129

ADVISORY OPINION DIGESTS*

Wood fiber chips, flammable	Page
Yardgoods	371
Yarns	681
	1, 720, 977

TABLE OF COMMODITIES

ADVISORY OPINION DIGESTS*

Advertising	(314) 1106	(322) 1111
Advertising Program	(324) 1113	(330) 1116
Advertising Standards		(332) 1117
Bearings, Imported		(316) 1107
Blades, Seam Ripper, Imported		(338) 1120
Books, Sales Price and Lease Rate		(319) 1109
Candles and Candle Holders, Imported		(334) 1118
Circular Saw Discs, Imported		(343) 1122
Dairy, acquisition of		(318) 1108
Electronics Equipment, Imported		(323) 1112
Equipment, 10-year-old Unused as New		(325) 1113
Engine Parts, Imported		(340) 1121
Firearms, Components, Imported		(320) 1109
Fishing Lures, Imported		(339) 1120
Food Products, Imported		(331) 1116
Full Service Dealer or Wholesaler		(333) 1117
Grocery stores, premerger clearance		(344) 1122
Hand Sprayers, Imported		(337) 1120
Pillow, Orthopedic		(330) 1116
Product, Domestic and Foreign Components		(326) 1113
Products, Unlabeled		(321) 1110
Promotional Assistance Plan		(346) 1123
Refund, Tuition		(317) 1108
Shirts, "Irregular"		(342) 1122
Shoes, Imported		(347) 1124
Shoes, Material for, Imported		(327) 1114
Squeeze Bottles, Imported		(337) 1120
Survey to ascertain professional compensation		(345) 1123
Textile Products		(315) 1107
Trade Association Membership	(335) 1119	(336) 1119
Turpentine, Imported		(348) 1124
Uniform warranty by trade association		(329) 1115
Warehouse distributing center—quantity discounts		(328) 1114

*The numbers in parentheses indicate digest numbers

INDEX ¹

DECISIONS AND ORDERS

	Page
Acquiring corporate stock or assets:	
Clayton Act, Sec. 7	1, 32, 374, 394, 561, 813
Federal Trade Commission Act, Sec. 5	32
Additional charges unmentioned, misrepresenting as to	506, 928
Advertising and promotional expenses, discriminating in price through.	
<i>See Discriminating in price.</i>	
Advertising falsely or misleadingly:	
Apartment availability, nonrestricted	210
Business status, advantages or connections	
Advertising and promotional services	417
Connections or arrangements with others	540
Government endorsement	19, 200
Kaiser Aluminum and Chemical Corporation	325
U. S. Steel Corporation	325
United States Steel Company	798
Dealer being, manufacturer	156
Direct dealing advantages	132
Endorsement or approval	200
Financial condition	965
Location	540
Nature	25
Producer status of dealer or seller, manufacturer	465
Qualities or properties of product or service	990
Retailer as wholesaler	156
Size and extent	540
Composition of product	
Fur Products Labeling Act	132, 358, 753, 761
Textile Fiber Products Identification Act	231, 411, 772, 922
Condition of goods	168
Dealer or seller assistance	11, 212, 337, 457, 497, 735, 744
Earnings or profits	11, 212, 337, 497, 735, 744, 965
Financing arrangements	11, 506
Franchises	497
Free goods or services	241, 982
Guarantees	11, 25, 132, 156, 168, 212, 223, 325, 337, 465, 514
Identity of product	769
Individual's special selection or situation	465, 514, 798
Jobs and employment	11, 19

¹Covering practices and matters involved in Commission orders. For index of commodities, see Table of Commodities. References to matters involved in vacating or dismissing orders are indicated by *italics*.

DECISIONS AND ORDERS

	Page
Advertising falsely or misleadingly—Continued	
Legality or legitimacy	200
Prices—	
Additional charges unmentioned	506
“Bait” offers 25, 132, 139, 168, 223, 325, 465, 947	947
Catalog as regular	333
Demonstration reductions 156, 223, 325, 465, 514, 798	798
Exaggerated, fictitious as regular and customary	25,
179, 186, 193, 231, 333, 358, 364, 753, 761	761
Percentage savings	231, 325, 928
Refunds	11
Repossession	25, 928
Savings, discount	132
Special or limited offers 112, 241, 325, 947	947
Supply or limited offers 156, 168, 223, 947	947
Terms and conditions	139, 497, 982
Usual as reduced or special	156,
223, 241, 325, 364, 465, 514, 753, 761, 798, 947	947
Qualities or results of product—	
Durability or permanence	223, 325
Medicinal, therapeutic, healthful, etc.	529
Nutritive	529
Quality of product or service 139, 156, 212, 337, 735, 744, 769	769
Quantity, offered	139
Reputation, success or standing	497
Services 212, 223, 337, 417, 497, 735, 744, 769	769
Size or weight	364
Source or origin of products, maker or seller	514
Statutory requirements:	
Fur Products Labeling Act 179, 186, 193, 358, 753, 761	761
Textile Fiber Products Identification Act .. 231, 411, 681, 772, 922	922
Surveys	241
Terms and conditions	200, 210
Advertising matter, supplying false and misleading	417
Allowances for services and facilities, discriminating in price through.	
<i>See</i> Discriminating in price.	
Apartment availability, misrepresenting as nonrestricted	210
“Association,” individual or private business falsely representing	
self as	434
“Bait” offers, using to obtain leads to prospects	25,
132, 168, 223, 325, 445, 465, 947	947
Brokerage payments, unlawful, discriminating in price through	974
Buyers’ agents, discriminating in price through	305
Catalog list, as regular selling price	333
Claiming or using endorsements or testimonials falsely or misleadingly, United States Government	19
Clayton Act:	
Sec. 2—Discriminating in price—	
Sec. 2(a)—Illegal price differentials	

DECISIONS AND ORDERS

	Page
Clayton Act—Continued	
Arbitrary or improper functional discounts	319
Quantity rebates or discounts	319
Sec. 2(c)—Illegal brokerage payments and acceptances	
Buyers' agents	305
Sec. 7—Acquiring corporate stock or assets	1,
	32, 374, 394, 561, 813
Combining or conspiring:	
To limit distribution or dealing to regular, established or	
acceptable channels or classes	305
To restrict competition in buying	305
Composition of products, misrepresenting as to:	
Fur Products Labeling Act	186,
358, 405, 421, 429, 519, 524, 753, 761, 772, 781, 790, 803, 933	
Textile Fiber Products Identification Act	106,
231, 411, 510, 681, 724, 772, 922, 938, 1036	
Wool Products Labeling Act	174,
346, 411, 453, 720, 724, 730, 772, 790, 938, 952, 961, 970, 977, 1042	
Concealing, obliterating, or removing law-required markings.	
Fur Products Labeling Act	186, 193, 421
Textile Fiber Products Identification Act	352, 421, 447
Wool Products Labeling Act	352, 421, 447
Conditions of goods	25, 168
Connections or arrangements with others, misrepresenting as to:	
Kaiser Aluminum and Chemical Corp.	325
United States Government	19, 200
U. S. Steel Corporation	325
United States Steel Company	798
Contracts restricting customers' handling of competing products ..	410
Dealer falsely representing self as manufacturer	156, 465
Dealer or seller assistance	11, 212, 337, 434, 457, 497, 735, 744
Dealing on exclusive and tying basis	410
Deception, securing orders by	325, 957
Demonstration reductions	156, 223, 325, 465, 514, 798
Devices for lottery selling	716
Discounts, arbitrary or improper functional	319
Discriminating in price in violation of:	
Sec. 2, Clayton Act—	
Sec. 2(a)—Illegal price differentials—	
Arbitrary or improper functional discounts	319
Quantity rebates or discounts	319
Sec. 2(c)—Illegal brokerage payment and acceptances—	
Buyers' agents	305
Direct buyers	305
Lowered price to buyers	974
Sec. 2(f)—Knowingly inducing or receiving discriminating	
price	
Inducing and receiving discriminations	305

DECISIONS AND ORDERS

	Page
Fur Products Labeling Act—Continued	
Misbranding under	132, 148, 179, 186, 193, 301, 346, 405, 421, 429, 519, 524, 753, 761, 772, 781, 790, 803, 933
Government, falsely representing approval, connections or endorse- ment by	19, 200
Guarantees, misleading	11, 25, 156, 168, 212, 465, 514, 735, 744, 798
Guaranties, furnishing false:	
Fur Products Labeling Act	132, 148, 301, 405, 519, 524, 781, 790, 803, 933
Textile Fiber Products Identification Act	524
Wool Products Labeling Act	174, 453, 961
Identity, misrepresenting as to	241, 769
Illegal brokerage payments and acceptance of commissions and other compensations	974
Importing, manufacturing, selling or transporting flammable wear ..	153, 371
Individual or private business being educational, religious or re- search, etc.	445
Individual or private business falsely represented self as "Associa- tion," "Guild," or "Society"	434
Individual's special selection or situation, misrepresenting as to	325, 434, 445, 465, 514, 798
Inducing or receiving discriminations in violation of:	
Clayton Act, Sec. 2(f)	305
Federal Trade Commission Act, Sec. 5	168
Insurance coverage, misrepresenting through terms and conditions ..	200
Interlocutory orders: <i>See also</i> Interlocutory orders with opinions.	
Adopting—	
Hearing examiner's recommendation that hearings be held in more than one place	1100
Denying—	
Applications to appeal hearing examiner's orders denying motions to quash subpoena duces tecum	1067
Motion that Commissioner Jones withdraw from case, with two explanatory memoranda by Commissioner Jones	1091
Motion that hearing examiner be disqualified from hearing case	1089
Motion to withdraw matter from adjudication	1062
Petition for reconsideration of Commission's order	1046
Request for production of confidential documents	1053
Request that case be withdrawn from adjudication, but ordered to resubmit case	1080
Request to subpoena certain officers of the U. S. Pipe & Foundry Company	1082
Granting—	
Hearing examiner's request for withdrawal of his certifica- tion for enforcement of a subpoena duces tecum	1086
Respondent's request for a stay of the date for evidentiary hearings	1090

DECISIONS AND ORDERS

	Page
Interlocutory orders—Continued	
Ordering—	
Filing of briefs on question of whether evidence minus that excepted by 7th Circuit Court supports issuance of an order	1080
Remanding—	
To hearing examiner, a request for modification of an agree- ment relative to a divestiture	1064
Interlocutory orders with opinions:	
Denying—	
Appeal from examiner's denial of respondent's motion to subpoena Commission records	1055
Motion to dismiss proceeding for lack of public interest	1065
Motion to quash the subpoena duces tecum	1097
Petition to cancel two paragraphs of final order	1060
Request for an injunction against respondent to prevent it from altering the production facilities of an acquired company	1101
Request for modification of anti-merger order	1087
Respondent's motion to disqualify hearing examiner	1066
Third party's motion to modify or quash a subpoena	1047
Instructing hearing examiner to extend three weeks the time set for trial to commence	1050
Remanding case to hearing examiner for trial of the issues <i>de</i> <i>novo</i>	1069
Invoicing products falsely:	
Federal Trade Commission Act	720, 724, 730, 977
Fur Products Labeling Act	132, 148, 179, 186, 193, 301, 346, 358, 405, 421, 429, 519, 524, 753, 761, 781, 786, 790, 803, 933
Textile Fiber Products Identification Act	524, 772
Jobs and employment, misrepresenting as to	11, 19
Kaiser Aluminum and Chemical Corporation, dealer falsely claiming connections or arrangements with	325
Knowingly inducing or receiving discriminations in violation of:	
Clayton Act, Sec. 2(f)	305
Federal Trade Commission Act, Sec. 5	168
Legality or legitimacy, misrepresenting as to	200
Limit distribution, combining and conspiring to	305
Limited offers or supply, misrepresenting as to	223, 241, 947
List or catalog as regular selling misrepresenting through purported ..	333
Location of business, misrepresenting as to	540, 1036
Lottery devices, supplying	716
Lowered price to buyers, in violation of Sec. 2(c), Clayton Act	974
McCarran-Ferguson Act	200
Maker or seller, misrepresenting as to	514
Manufacturer, dealer falsely representing self as	156, 465
Materials, disparaging competitors	957
Medicinal, therapeutic, healthful, etc., qualities of product, misrepre- sented as to "Hemotrex" and "Geri-Gen"	529

DECISIONS AND ORDERS

	Page
Merger proceedings. <i>See</i> Acquiring corporate stock or assets	
Misbranding or mislabeling:	
Composition of product—	
Fur Products Labeling Act	148, 179, 186, 193, 301, 405,
421, 429, 519, 524, 753, 761, 772, 781, 790, 803, 933	
Textile Fiber Products Identification Act	106,
231, 510, 524, 681, 772, 922, 938, 1036	
Wool Products Labeling Act	174,
346, 411, 453, 720, 724, 730, 772, 790, 938, 952, 961, 970, 977, 1042	
Price	179, 186, 193, 333
Source or origin of product, foreign	548
Statutory requirements—	
Fur Products Labeling Act	148, 179, 186, 193, 301, 346, 405,
421, 429, 519, 524, 753, 761, 772, 781, 803, 933	
Textile Fiber Products Identification Act	106, 156, 231, 352,
411, 421, 447, 510, 681, 724, 730, 772, 808, 922, 938, 1036	
Wool Products Labeling Act	174, 346, 352, 411, 421, 447, 453,
720, 724, 730, 772, 790, 938, 952, 961, 970, 977, 1042	
Misrepresenting business status, advantages, or connections:	
Concealed subsidiary, fictitious collection agency, etc.	445
Connections and arrangements with others	540
Government endorsement	200
Kaiser Aluminum and Chemical Corporation	325
Mink rancher (wholesaler)	132
U. S. Steel Corporation	325
United States Steel Company	798
Dealer being manufacturer	156, 465
Earnings or profits	497
Endorsement of approval	200
Financial condition	965
Franchises	497
Government connection	19, 200
Individual or private business as professional person, associa- tion or guide	434
Legality or legitimacy	200
Location	540, 1036
Nature	25
Operations as educational or religious	445
Producer or laboratory status of seller	106
Reputation, success or standing	497
Retailer as wholesaler	156
Services	417
Size, extent of equipment	540
Misrepresenting directly or orally by self or representatives:	
Business status, advantages or connections—	
Connections or arrangements with others—	
Kaiser Aluminum and Chemical Corporation	325
Mink ranchers	132

DECISIONS AND ORDERS

	Page
Misrepresenting directly or orally by self or representatives—(Continued)	
U. S. Steel Corporation	325
United States Government	19
United States Steel Company	798
Composition	753
Fur Products Labeling Act	761
Textile Fiber Products Identification Act	411, 772, 922
Condition of goods	168
Dealer or seller assistance	11, 212, 337, 434, 457, 497, 735, 744
Earnings or profits	11, 212, 337, 457, 497, 735, 744
Endorsements	19, 434
Financial arrangements	11, 506
Free goods or services	241, 434, 445, 982
Guarantees	11, 25, 156, 168, 212, 223, 325, 337, 465, 514, 735, 744, 798
Identity of product	769
Individual's special selection	325, 434, 465, 514, 798
Jobs and employment	11, 19
Limited offers and/or supply	223, 947
Prices—	
Additional charges unmentioned	506, 928
"Bait" offers	25, 223, 445, 947
Demonstration reductions	156, 223
Exaggerated, fictitious as regular and customary	25, 753, 761, 928
Repossessed, mdse through purported	25
Usual as reduced or special	223, 753, 761, 947
Qualities or results of product—	
Durability or permanence	223, 325
Medicinal, therapeutic, healthful, etc.	529
Nutritive	529
Reducing, nonfattening, low-calorie, etc.	990
Quality of product	156, 212, 325, 337, 735, 744, 769
Refunds	11
Services	212, 223, 337, 735, 744, 769
Terms and conditions	168, 497
Size or weight	364
Source or origin—	
Maker or seller	514
Place—imported products or parts as domestic	548
Special or limited offers	156, 241, 325, 445, 947
Surveys	241, 434
Terms and conditions	223, 982
Misrepresenting prices:	
Additional charges unmentioned	506, 928
"Bait" offers	25, 132, 139, 168, 223, 325, 465, 947
Demonstration reductions	156, 223, 325, 465, 514, 798
Discounts	132

DECISIONS AND ORDERS

	Page
Misrepresenting prices—Continued	
Exaggerated, fictitious as regular and customary	25, 179, 186, 193, 231, 333, 358, 434, 753, 761
Fictitious preticketing	333
Financing	506
Percentage savings	231, 325
Reductions for prospect referrals	325
Retail as wholesale	156
Savings	132
Special or limited offers	112
Terms and conditions	139, 223, 497, 982
Usual as reduced or special	156, 223, 241, 325, 514, 753, 761, 798, 947
Modified orders:	
Ban on acquisition of additional stores without prior Commission approval extended for additional three years	374
Industrial steel wool order modified by vacating fourth paragraph which required stopping manufacture in acquired company	811
Order against oil company modified by deleting paragraph 5 pursuant to a Supreme Court decision	410
Order against seller of encyclopedia modified by eliminating provision requiring respondent to withhold commissions from salesmen	445
Rainwear manufacturer's order modified to allow use of words "Goodyear—Made by Rettinger"	944
Nature of business, misrepresenting as to	25
Neglecting, unfairly or deceptively, to make material disclosure:	
Composition of product—	
Fur Products Labeling Act	179, 186, 193, 346, 358, 405, 429, 753, 761, 781, 790
Textile Fiber Products Identification Act	231, 922
Wool Products Labeling Act	772, 790, 970
Identity	241
Prices	506, 928, 982
Source of origin—foreign product as domestic	548
Statutory requirements—	
Fur Products Labeling Act	148, 179, 186, 193, 301, 346, 358, 429, 519, 524, 753, 761, 772, 781, 786, 790, 933
Textile Fiber Products Identification Act	106, 156, 231, 352, 421, 447, 510, 681, 724, 730, 772, 808, 922, 938
Wool Products Labeling Act	174, 346, 352, 411, 421, 447, 453, 720, 724, 730, 790, 938, 952, 961, 970, 1042
Terms and conditions	168, 210, 223, 325, 364, 465, 506, 928, 982
New, misrepresenting old or used product as	25
Nondisclosure of—	
Additional charges	506
Producer or laboratory status of seller	106
Terms and conditions of sales contract	506

DECISIONS AND ORDERS

	Page
Nutritive, qualities of product, misrepresenting as to "Hemotrex"	529
Old or used product, misrepresenting as new	25
Operations as educational or religious, misrepresenting as to	445
Percentage savings, misrepresenting prices through	231, 325, 928
Performance of competitors products, disparaging	957
Place, misrepresenting source or origin of product	548
Preticketing merchandise misleadingly, price	333
Price discrimination. <i>See</i> Discriminating in price	
Production, misrepresenting as to	106
Price-fixing conspiracy. <i>See</i> Combining or conspiring.	
Qualities or results of product, misrepresenting as to	540
Durability or permanence	223, 325
Medicinal, therapeutic, healthful, etc.	529
Reducing, nonfattening, low-calorie, etc.	990
Quality of product, misrepresenting as to	139, 156, 212, 325, 337, 735, 744, 769
Quantity of product, misrepresenting as to	139
Quantity rebates or discounts	319
Reducing, nonfattening, low-calorie, misrepresenting product as	990
Referrals, misrepresenting prices through purported	325
Refunds, misrepresenting as to	11
Removing, obliterating, concealing law-required or informative markings. <i>See</i> Concealing, obliterating or removing.	
Repossession, misrepresenting prices through	25
Repossession balances, misrepresenting prices through	928
Reproductive potentials of chinchillas, misrepresenting as to	212, 337, 735, 744
Reputation, success or standing, misrepresenting as to	497
Restrain and monopolize trade, combining or conspiring to	305
Restrict competition in buying	305
Retailer, misrepresenting self as wholesaler	156
Safety of competitors products, disparaging	957
Savings, misrepresenting prices through	132
Securing:	
Dealer or seller assistance	457, 497
Earnings	457, 497, 965
Franchise, terms and conditions	497
Signatures wrongfully	506, 982
Services, misrepresenting as to	212, 223, 337, 417, 434, 497, 735, 744, 769
Medicinal, therapeutic, healthful, etc.	529
Nutritive	529
Size or extent of business, misrepresenting as to	540
Size or weight of product, misrepresenting as to	364
Source or origin of product, misrepresenting as to	548
Maker or seller	514
Special or limited offers, misrepresenting as to ..	156, 241, 325, 445, 761, 947
Special selection, misrepresenting as to	434

DECISIONS AND ORDERS

	Page
Statutory requirements, failing to comply with:	
Fur Products Labeling Act	186, 193, 301, 346, 358, 405, 421, 429, 519, 524, 753, 761, 772, 781, 786, 790, 803, 933
Textile Fiber Products Identification Act	106, 156, 231, 352, 411, 421, 447, 510, 681, 724, 730, 772, 808, 922, 938, 1036
Wool Products Labeling Act	174, 346, 352, 411, 421, 447, 453, 720, 724, 730, 772, 790, 938, 952, 961, 970, 977, 1042
Surveys, misrepresenting as to	241, 434
Tags, labels or identification. <i>See</i> Concealing, obliterating or removing.	
Terms and conditions, misrepresenting as to	139, 168, 210, 223, 325, 364, 465, 497, 506, 928, 982
Insurance coverage	200
Textile Fiber Products Identification Act:	
Failing to reveal information required by	106, 156, 231, 352, 411, 421, 447, 510, 681, 724, 730, 772, 808, 922, 938, 1036
False advertising under	106, 156, 231, 411, 772, 922
False invoicing under	524, 772
Furnishing false guaranties under	156, 524
Misbranding under	106, 156, 231, 352, 411, 421, 447, 510, 524, 681, 724, 730, 772, 808, 922, 938, 1036
Mutilating or removing law-required markings under	352, 421, 447
Trade name, simulating	540
U. S. Steel Corporation, dealer falsely claiming connections or arrangements with	325
Unauthorized advertising, falsely representing	417
Unfair methods or practices, etc., involved in this volume:	
Acquiring corporate stock or assets illegally.	
Advertising falsely or misleadingly.	
Combining or conspiring.	
Concealing, obliterating or removing law required and informative marking.	
Dealing on exclusive or tying basis.	
Discriminating in price.	
Disparaging competitors and their products.	
Furnishing means and instrumentalities of misrepresentation or deception.	
Guarantees, misleading.	
Guaranties, furnishing false.	
Importing, manufacturing, selling, or transporting flammable wear.	
Invoicing products falsely.	
Misbranding or mislabeling.	
Misrepresenting oneself and goods.	
Neglecting to make material disclosures.	
Preticketing merchandise misleadingly.	
Securing information by subterfuge.	
Securing orders by deception.	
Securing signatures wrongfully.	

DECISIONS AND ORDERS

	Page
Unfair methods or practices, etc., involved in this volume—Continued	
Using misleading product name or title.	
United States Steel Company, misrepresenting connections with	798
Using misleading product name or title:	
Composition	174, 970, 977
Identity	769
Producer or laboratory status of seller	106
Quality	769
Source or origin, place, domestic product as imported	548
Using misleading name:	
Appropriating trade name or trademark wrongfully	156, 540
Concealed subsidiary, fictitious collection agency	445
Individual or private business being "Association," "Guild," "Society"	434
Individual or private business being educational, religious or research institution or organization	445
Producer or laboratory status of seller	106
Using, selling, or supplying lottery devices	716
Usual prices, misrepresenting as reduced or special	112, 156, 223, 241, 325, 364, 465, 514, 753, 761, 798, 947
Wool Products Labeling Act:	
Concealing, obliterating or removing law-required and informa- tive marking	352, 421, 447
Failing to reveal information required by	174, 346, 352, 411, 421, 447, 453, 720, 724, 730, 772, 790, 938, 952, 961, 970, 977, 1042
False invoicing	174, 720, 724, 730, 977
Furnishing false guaranties under	174, 453, 961
Misbranding or mislabeling	174, 346, 352, 411, 421, 447, 453, 720, 724, 730, 772, 790, 938, 952, 961, 970, 977, 1042
Using misleading product name or title in composition	970, 977

INDEX

ADVISORY OPINION DIGEST*

	Page
Acquiring corporate stocks or assets. <i>See</i> Clayton Act, Sec. 7.	
Advertising falsely or misleadingly:	
Qualities or results of product—	
Medicinal, therapeutic, healthful, etc.—	
Orthopedic pillow	(330) 1116
Source or origin of product—nondisclosure of origin of imported product not deceptive	(316) 1107
	(341) 1121
	(327) 1114
Terms and conditions—tuition offers	(317) 1108
Advertising standards	(332) 1117
Clayton Act:	
Sec. 2—Discriminating in price—	
Sec. 2(c)—Illegal brokerage payments and accep- tance—	
Warehouse distribution center—jobber mem- bers	(328) 1114
Secs. 2(d) and 2(e)—Promotional assistance—	
Promotional assistance plan, independent pub- lication	(314) 1106
Promotional assistance plan, tripartite	(322) 1111
Promotional assistance plan, tripartite	(346) 1123
Sec. 2(f)—Inducing or receiving discriminations—	
Receiving commissions from manufacturers	(328) 1114
Sec. 7—Acquiring corporate stocks or assets.	
Merger of—	
Small dairy by corporations under Commission orders, blanket approval denied	(318) 1108
Grocery stores in concentrated area, approval denied	(344) 1122
Discriminating in price. <i>See</i> Clayton Act, Sec. 2.	
Domestic and foreign made components, misrepresenting source or origin of product as domestic only	(315) 1107
(320) 1109 (326) 1113 (331) 1116 (338) 1120	(339) 1120
Fair Packaging and Labeling Act: Resale in export trade ..	(321) 1110
Federal Trade Commission Act:	
Sec. 5—Deceptive Acts or Practices—	
Disclosure statement, location of	(342) 1122
10-year-old unused equipment as “new”	(325) 1113
Use of term “free”	(324) 1113
Sec. 5—Unfair methods of competition—	
Manufacturer-wholesaler relationships	(333) 1117

*The numbers in parentheses indicate digest numbers.

INDEX

1143

ADVISORY OPINION DIGEST*

	Page
Federal Trade Commission Act—Continued	
Trade association memberships, beer brewers -----	(336) 1119
Trade association memberships, refusal of -----	(335) 1119
Tripartite promotional assistance plan -----	(346) 1123
Uniform warranty plan -----	(329) 1115
Misbranding or mislabeling:	
Qualities or results of product-orthopedic pillow -----	(330) 1116
Source or origin of product—	
Disclosure of origin of imported product required -	(315) 1107
(320) 1109 (326) 1113 (331) 1116 (337) 1120	
(338) 1120 (339) 1120 (347) 1124 (348) 1124	
Disclosure of origin of imported product not required -----	(316) 1107
(327) 1114 (341) 1121 (343) 1122	
Location of foreign disclosure ----- (334) 1118	(340) 1121
Location of term "irregular" -----	(342) 1122
Use of term "Product of _____" -----	(323) 1112

INDEX

ADVISORY OPINION DIGESTS

	Digest No.	Page
Advertising by manufacturers in an independently published periodical	314	1106
Foreign origin disclosure of wearing apparel partly made in a foreign country	315	1107
Foreign origin disclosure of imported bearings	316	1107
Tuition refunded if no job offered within 90 days	317	1108
Commission refusal to grant blanket approval to small dairy to be acquired by any corporation subject to Commission acquisition-prohibiting orders	318	1108
Sales price and lease rate for a book need not be identical	319	1109
Disclosure of origin of imported components used in manu- facture of firearms	320	1109
Sale of unlabeled American made products	321	1110
Supplier advertising in an independently published periodi- cal	322	1111
Disclosure of imported electronics equipment	323	1112
"Free hosiery for life" offer to obtain sales representatives	324	1113
Marketing 10-year-old unused equipment as new is deceptive	325	1113
Country of origin marking requirements for product as- sembled in Puerto Rico of domestic and foreign compo- nents	326	1113
Disclosure not required of origin of imported upper material used in shoes	327	1114
Organization of warehouse distribution center for a jobber buying group	328	1114
Dissemination of uniform warranty plan by trade associa- tion to members	329	1115
Proposed advertising for orthopedic pillow	330	1116
Disclosure of origin of imported food product	331	1116
Publication of advertising standards by private association	332	1117
Manufacturer-wholesaler relationships; different discounts; refusals to deal; termination of further sales	333	1117
Location of foreign origin disclosure	334	1118
Refusal of membership in trade association	335	1119
Legality of membership by brewer in beer wholesalers' trade association	336	1119
Disclosure of origin of imported hand sprayers and squeeze bottles	337	1120
Disclosure of origin of imported seam ripper blades	338	1120

INDEX

1145

ADVISORY OPINION DIGESTS

	Digest No.	Page
Disclosure of origin of imported fishing lures	339	1120
Location of foreign origin label on imported engine parts	340	1121
Disclosure of origin of imported motors	341	1121
Location of term "irregular" to describe shirts	342	1122
Disclosure of origin of imported circular saw discs	343	1122
Premerger clearance not granted; grocery stores in concentrated market	344	1122
Survey of professional compensation in employing institutions	345	1123
Promoter's responsibility in tripartite promotional assistance plan	346	1123
Disclosure of origin of imported shoes	347	1124
Disclosure of origin of imported turpentine	348	1124

THE UNIVERSITY OF CHICAGO
DEPARTMENT OF CHEMISTRY

MEMORANDUM FOR THE RECORD
DATE: 1/15/54
SUBJECT: [Illegible]

[Illegible text follows, appearing to be a list of items or a report summary.]

[Extremely faint and illegible text, likely the main body of a report or list.]



