

IN THE MATTER OF
CASKET MANUFACTURERS ASSOCIATION
OF AMERICA ET AL.

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

Docket 6183. Complaint, Feb. 19, 1954—Decision, Mar. 13, 1956

Order dismissing, for insufficiency of evidence, complaint charging an association of some 160 of the larger manufacturers of burial caskets in the United States and its members, with collectively pushing the sale of higher priced caskets and thereby diminishing production of the lower priced caskets.

Mr. Raymond L. Hays, Mr. Floyd O. Collins and Mr. Everette MacIntyre for the Commission.

Waite, Schindel & Bayless, of Cincinnati, Ohio, for respondents generally.

McKenzie, Hyde, Willson, French & Poor, of New York City, for National Casket Co., Inc.

INITIAL DECISION DISMISSING COMPLAINT

BY FRANK HIER, HEARING EXAMINER

Complaint in this case charges the Casket Manufacturers Association of America (hereinafter referred to as C.M.A.) with conspiracy, agreement and understanding, a planned common course of action and collective and concerted action among the Association, its officers and members, to enhance, stabilize, fix and maintain prices of caskets and control and limit the production of such caskets. Boiled down to lay language, in the light of proof offered, the alleged agreement is that the Association members collectively pushed the sale of higher priced caskets in derogation of the lower priced caskets and thereby diminished the production of the latter.

The record at this stage consists only of the evidence offered in support of these charges and its sufficiency to constitute a prima facie case of violation of the Federal Trade Commission Act as to unfair methods of competition or unfair acts and practices in commerce, and is challenged by respondents by their collective motions to dismiss and other motions. The question for decision, therefore, is whether or not the present record would, in the event no further evidence were offered, sustain a finding of violation and adequately support the order attached to the complaint.

Speeches by the various Presidents and Executive Secretary of C.M.A. extending for the most part from 1930 to 1939, as well as one in 1949 and one in 1950, are heavily relied upon by counsel in support of the complaint to show the agreement alleged. These speeches reflect complaint of cut-throat competition; dog-eat-dog tactics; selling downward; sacrificing quality and price for temporary volume; and an influx of new competitors between 1930 and 1934, which competitors, bent on getting in on what they considered a depression-proof industry, were without "principle," and were bent on getting rich quick by cheapness and volume at the expense of "total opportunity of the industry." These speeches point out that lateral expansion is impossible, since industry demand is inelastic; that only upward selling, the stressing of quality and increasing the "total opportunity of the industry" will enable the industry member to meet rising costs and increase his gross and net margins. These speeches plead for cooperation in over-all price maintenance through C.M.A. and assert that if each casket manufacturer is going to engage in cut-throat competition without regard to his competitors, that C.M.A. might as well be disbanded; also assert that no casket manufacturer can expand his volume except at the expense of his competitors, thus inviting reprisals, but that he can increase his profit by selling upward if others do the same. In short, to increase or maintain prices generally. (Counsel for respondents insist that the phrase used is "selling higher quality merchandise" but to the examiner this means on this record selling higher priced merchandise.) Price fixation, as such, is impossible in this industry.

Perhaps the best expression of purpose, at least from the standpoint of counsel supporting the complaint, was that used by the President of C.M.A. in 1949:

Unquestionably, the most important characteristic of the industry that every manager should constantly keep in mind is that its unit demand is fixed by mortality. True, it varies up and down, but at any time the number of units that can be sold depends primarily on current mortality and secondarily on funeral directors' stocks.

While the unit pie cannot be increased, it can be cut up into any number of slices by competing manufacturers. But what is one man's gain is another man's loss—a loss that can't be made up as in other industries by creating a demand for more products.

However, a casket manufacturer *can* expand his dollar volume by the sale of better merchandise and his biggest opportunity has always been in that direction.

That type of expansion is most desirable because it adds to the total marketing possibilities of the industry without taking business away from a competitor.

These speeches, at least prior to 1939, were delivered at a time when the industry and its returns were at low ebb. Thus, in 1934, the average annual volume of the casket manufacturer was 2,000 caskets or a gross volume of \$100,000. The industry numbered then 604 manufacturers but, since 68 of these were branches of one ownership, the net total was 536. The C.M.A. membership at this time was 144. In 1937 the average net profit per funeral unit netted by the casket manufacturer was less than \$2.75; in 1936, it had been \$1.56 and for 1938 it was predicted to be \$1.38. Apparently during this period the net return on sales was 3% and still lower on investment.

There are many expressions in these speeches, which, as asserted by counsel in support of the complaint, found a reasonable inference of concert of action. But when they are read in their entirety this inference is considerably diluted.

Thus, one of these speeches, quite heavily relied upon by counsel, given in 1935, was prefaced by:

Before entering a detailed discussion of our opportunity and the problem of making the most of it, we ought to understand clearly the obligations of this Association to its membership.

Each of you has always been and always will be the one to run his own business. The management of your own business is your obligation and not an Association obligation. Simultaneously, however, it is distinctly an obligation of your Association officers and staff to red-lantern the industry danger spots and keep those signals burning until you have passed them; but you are the ones who must navigate your own individual businesses to positions of safety and continuity of profit.

Likewise, it is an Association duty to outline existent profit-making opportunities, but again what you do with those opportunities is distinctly your own administrative task in so far as they apply to your business.

Also contained in the 1949 speech of the then President of the Association, in which "cutting up the pie" was referred to, appears the following:

Your Association will endeavor in every legitimate way to be of service to the industry as a whole and as individuals. But, as in all human efforts, results will be dependent largely upon the individual.

Appearing in another speech, delivered in the 1930's is the following:

In particular it must be understood that The Casket Manufacturers Association of America is not a legislative body under any conditions as far as business of its members is concerned. It is organized to gather information, consider and analyze economic conditions and perform specific services for its members. It does not attempt to commit its members to any joint action and by its constitution is specifically forbidden to attempt to commit its members to any joint action.

In 1939, the President of C.M.A. also stated that the Association was responsible, through its pleas for cooperation in selling upward and maintaining the market, for raising the price index from \$47.55 in 1933 to \$55.00 and that in his opinion, and of course it is nothing more than an opinion, it was responsible for raising the gross industry returns of from thirty-five million to one-hundred million more than would have occurred had it not been for C.M.A.

Do these speeches evidence an agreement to maintain or increase prices, or, are they, as contended by counsel for respondents, merely invitations, exhortations or pleadings to each member to do so individually. It is, of course, normal competitive conduct for any seller to push his long profit merchandise in preference to his short profit merchandise. It would seem that, if there were an effective and binding agreement to maintain or to increase and maintain prices, the industry would not have continued to show either losses or such niggardly returns on investments. On these speeches alone it seems to the Hearing Examiner that the inference contended for by counsel for respondents is equally reasonable with that contended for by counsel in support of the complaint.

However, counsel in support of complaint point to considerable other evidence in the record to strengthen the inference they claim of agreement. Thus, it is urged that the alleged conspiracy was furthered and strengthened by the Progressive Service Conferences held, under C.M.A. auspices, jointly with various national associations of funeral directors representing 47 State organizations during 1938 and 1939. C.M.A. officials attended and spoke. Proper display of caskets, their construction, merchandising methods, suggested cost accounting general procedures and funeral management were demonstrated and discussed and the same theme of "selling upward" was also stressed. But the evidence is wholly what was said—there is nothing to show what was done or the results of these meetings. Although several witnesses attendant on some of these meetings were called, they were not questioned as to what happened.

The same insistence is made for the regional conferences or territorial meetings, presided over by C.M.A. officials or staff members, attended by local C.M.A. members as well as C.M.A. non-members. There is but one instance on the record of what was said at one such meeting, although dozens of such meetings were held each year over more than a decade, and this speech was by a witness who was not asked what was done thereat. There is no evidence of what was done or what resulted from these meetings. These Progressive Service Conferences and territorial meetings

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furnish no additional support for the inference of agreement contended for and it is indeed strange that, in view of the number of such meetings, the knowledge of who was present and the availability as witnesses of many who attended, there is nothing in the record except one or two speeches and nothing whatever as to what was done.

Much reliance is also placed on a 1940 address by the President of C.M.A. to its membership:

Had dog-eat-dog conditions prevailed instead of a steady succession of club meetings, mass conferences, joint conferences for business improvement, credit clubs, progressive service conferences, staff conferences in manufacturers' offices and well-timed economic stimulations, that \$700,000,000 (merchandise sold by industry in 1930-1940 decade) would unquestionably have been less than \$665,000,000, would probably have been less than \$630,000,000 and could easily have been below \$600,000,000. Even this last figure, representing a 14% drop in value level, is less than the customary depression experiences of our unorganized industry.

This is cited as evidence that C.M.A. through collective action succeeded in milking the public of anywhere from 35 million to 100 million dollars in ten years through conspiracy. But it is obvious from a reading of the speech as a whole that it is not fact, but mere speculation, used as a sales talk to increase membership which was then at such low ebb that disbanding was being seriously urged. There is no factual or statistical evidence in the record to corroborate this speculation, or to prove it independently.

Another merchandising aspect of this industry, claimed to show the agreement alleged, is, what is called, "suggested retail prices." Caskets are customarily displayed for sale in showrooms. In cities where a casket manufacturer has his factory or a branch, this showroom is maintained by him; in localities where there is neither, a funeral director will maintain one in connection with his funeral parlor. When the bereaved family selects a funeral director, the latter usually brings the family to one of these showrooms where the casket selection is made. The casket manufacturer, of course, is only interested, at least primarily, in obtaining the wholesale price of the casket but the funeral director is selling a funeral, including a casket. Hence, it has been a custom since the early 1900's for the casket manufacturer, at the request of the various funeral directors who use his showroom, to place on the casket a suggested retail price for the funeral, which price is calculated by the funeral director by taking the wholesale price of the casket and multiplying it by a set of multipliers ranging from 2.5 to 4.5 in inverse ratio to the price of the casket. Sales are made generally by the funeral director; occasionally by a representative

of the casket manufacturer on request from the funeral director; sometimes by both.

In 1930 the joint conference of C.M.A., with a national association of funeral directors, recommended "that in arriving at retail prices for caskets displayed in manufacturers' showrooms * * * manufacturers and funeral directors should reach mutually satisfactory conclusions by conference." This, together with the use of the multipliers—characterized by counsel as arbitrary and artificial and having no relation to costs—is claimed to show beyond cavil, agreement on price fixation to the public.

Respondents' counsel argue that these multipliers are calculated to cover the funeral directors direct and overhead costs but there is no direct proof of that in the record. Neither average nor specific costs are shown. It is true also that artificial or arbitrary prices, or pricing factors, producing relative or absolute rigidity, have often been held to be the indicia of price conspiracy or agreement. But price agreements are not entered into, or continued, unless reasonably effective; and indispensable prerequisites, or at least concomitants of them, are uniformity of final prices, or a pattern, flexible in area, or product; or a formula rigidly applied. There must somewhere be a fixed determinant uniformly applied. This is missing here. Nor is there any evidence that C.M.A. compiled or disseminated price books, code books or multiplier books used, or capable of being used, to arrive at uniform prices or uniform price brackets, to its membership or the industry generally, nor any evidence of the existence of such from any authority or source.

There is no evidence of the resultant suggested retail prices—hence, no comparison or examination may be made to detect either uniformity or rigidity horizontally. The evidence shows that a very substantial number of casket manufacturers do not use them; some have used them and then have abandoned them; others have not used them but have later done so. The multipliers used vary from manufacturer to manufacturer and from funeral director to funeral director; there is no uniformity mathematically or operationally. There is no showing that the wholesale casket price—the manufacturers' price—is either uniform or rigid; in fact, there are no such prices in the record for comparison or examination. Some of these suggested retail prices are in plain figures—others are in code known to the funeral director. In fact, it is plain on this record that such prices and their determination, their use and the manner of their use, is entirely at the instance of the funeral director and vary in all respects according to his desire or need.

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The "mutually satisfactory conclusions by conferences" between funeral directors and casket manufacturers referred to above must have meant individual conferences rather than mass agreements, because there is no evidence of any general discussion of suggested retail prices at any mass conference or territorial meeting and no evidence that any C.M.A. member knew whether his competitors used them, how they were arrived at, what multipliers were used or what the prices were. If these "conferences" were between the manufacturing and funeral directors' industries, it is strange that they should be recommended to the membership by the assembly; it would seem more logical that all the representatives there assembled would then and there confer and arrive at a conclusion. Furthermore, preceding all the joint conferences, discussions and minutes thereof and action taken, appears:

The conference has no legislative power. Therefore, its functions can only be those of discussion and exchange of information and recommendations. In particular, it must be understood that C.M.A. is not a legislative body under any conditions as far as the business of its members is concerned. * * * It does not attempt to commit its members to any joint action and by its constitution is specifically forbidden to attempt to commit its members to any joint action.

The use of these suggested retail prices by funeral directors for their own purposes of package deals may be socially iniquitous but it is apparent to the Hearing Examiner that such funeral director alone is responsible for the practice. It is obviously for his benefit primarily—the C.M.A. member gets his casket price regardless. The funeral director alone knows, on this record, what costs he must recover, what profit he wants and he alone determines whether to adhere to such package deal prices or not. There is no showing that he does so. No funeral director, or trade association of funeral directors, is a party respondent herein.

Next, counsel in support of the complaint point to, and rely upon, the statistical service of C.M.A. as a means of carrying out the alleged agreement. Since 1939 at least C.M.A. has invited its members, as well as non-members, to send in, confidentially, descriptions of their respective selling areas. The nation was then divided into sixteen broad geographical areas, and the reported sales area allocated accordingly. In 1951 there were 209 participants of C.M.A. statistical service, 176 of which were C.M.A. members and 33 of which were non-members. These participants, grouped geographically as described, are called clubs. Thus there was a New England Club and a Southern Club, the latter embracing

casket manufacturer participants mainly selling in the southeastern United States.

Each participant each month, on a form provided for that purpose, sends to C.M.A. statisticians the number of caskets and total dollar value thereof which the participant has shipped to funeral directors during the previous thirty days of: (1) adult cloth covered caskets, (2) hardwood caskets, (3) Class I metal caskets (sheet steel and aluminum, (4) Class II metal caskets (all other metals); (5) children's caskets, and (6) all other kinds of caskets (plastics, masonite, etc.). This is the only report sent into C.M.A. by a participant.

C.M.A. computes total estimated mortality for the area involved and sends back to the participant seven blue prints which show: cumulative mortality for previous years and previous months of the current year, together with estimated mortality for current month; the participant's total unit and total dollar volume shipments, cumulated over previous years, over previous months of the current year, and for the current month; percent mortality (mortality divided by units shipped) cumulated over previous years, previous months of the current year, and the current month; and the participant's average return (dollar volume divided by units) cumulated similarly, this over-all and also broken down into the described classes. These same figures for the entire selling area of the group or club are compiled and furnished. From these any participant can determine how his current month's shipments, total or by each class, compare with what he accomplished in previous years, in the previous months of the current year and how he likewise compares with the group as a whole, generally or by classes. In a word, is he forging ahead, slipping back or holding his own in relation to the whole group of his local competitors, and with his previous business.

It must be noted that these product classifications are not accurate price classifications since they overlap pricewise and that nowhere on any of these statistical blueprints does any price appear, only total dollar volume shipped, so that only an average price of all can be obtained by dividing such volume by total units; that individual sales are not reported, not reported, nor are customer's names, or prices; that no participant can learn how any particular competitor is faring but can only determine how he himself is doing in relation to his own past performance and in relation to the group or club as a whole; that no measure of prices is possible; that comparison by any participant of his own average index price

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with the general (group) average index price of his selling area can only be made by him because he alone has his own index; and that no participant receives or can obtain the figures of any other participant.

It should also be noted that C.M.A. does not allocate territory; does not restrict selling areas—that each participant may change, enlarge, diminish or abandon any selling area in which he is or has operated; that no production data is requested or furnished; and that no prospective sales or prices are reported. There is no evidence in the record as to how these statistics are actually used, although among the numerous witnesses called there were participants.

Respondents claim that this statistical service only enables a participant to compare his business health and efficiency with his own past performances and currently with his competitors as a group, whereas counsel in support of the complaint see in it a means whereby each participant can see whether his competition is carrying out the alleged agreement to sell upward and compare their combined alleged efforts in that direction with his own. If the latter is possible, there is no evidence that it is done.

Discussion in more detail of this service would unnecessarily lengthen this opinion. Suffice it to say that the hearing examiner has studied with great care the contrasting explanations of this service and its possible uses set out in considerable detail in the briefs and has studied also the voluminous statistics themselves and is of the opinion that it is no more than what counsel for respondents contend. The whole system is too amorphous, too lacking in central control, in policing or coercion, and too sketchy, by reason of secrecy, to serve as contended for by counsel for by counsel for the complaint.

The latter next contend that a shift in sales for the years 1946 through 1950 from the cloth covered wooden caskets to the higher priced metal caskets is proof in itself that an agreement to sell upward existed. Unfortunately there are no figures for other years since 1940 in the record. The five years chosen are hardly typical or reliable because it was in 1946 that metal first became available for caskets again after the war and in 1950 the Korean "police action" broke out with consequent widespread fear of restrictions on metal again. It is reasonable to assume that metal casket sales zoomed disproportionately in both years. Hence the years 1947, 1948 and 1949, being all else which are available, give a more reliable picture.

The record shows that shipments from 177 participants in the C.M.A. statistical service in these years were as follows:

	1947	1948	1949
Children's cloth-covered wood caskets	61,077	51,484	46,836
Adult, cloth-covered caskets	390,946	371,204	351,921
Hardwood caskets	113,793	110,465	104,534
Metal caskets	127,686	145,274	130,543
Other kinds	4,610	3,500	2,344

Index (average prices) for these years were:

	1947	1948	1949
Children's	\$16.95	\$18.90	\$19.75
Adult C. C. W.	59.25	61.95	61.95
Hardwood	113.80	118.55	115.75
Metal	175.25	172.35	155.25
Other kinds	213.95	205.60	209.55

The decline in children's caskets is accounted for by the decline in child mortality—on the average in excess of 20%. From the first above table it appears that from 1947 through 1949 approximately 10% less adult cloth covered caskets and approximately 8% less hardwood caskets were shipped, whereas approximately 2.2% more metal caskets were shipped. The latter are generally more expensive than the former two. Average prices of the former two remained relatively steady whereas average prices of the metal caskets substantially declined. The greatest variation seems to have been in "other kinds" of caskets where unit sales fell off nearly 50%, although average price declined but slightly. Industry price index lagged behind wholesale commodity index.

The above tables do not bear out the contention of counsel in support of the complaint. If average prices are to be trusted, the most expensive type of casket ("other kinds") declined nearly 50%, the next most expensive gained only 2.2% and the least expensive declined 8% and 10%, respectively.

The pattern here is too mixed, the shift too insignificant, to bespeak the active and effective agreement charged or to show its implementation or fruition.

The last major contention of government counsel is to apply the legal maxim "omnia praesumuntur contra spoliatorem" to supply any and all deficiencies of proof, which counsel thereby impliedly admit exist in their case. Just what these deficiencies are is not stated but apparently left up to the decisional authorities to determine.

The record shows that on June 10, 1946, C.M.A. was served with a subpoena duces tecum to appear before the Grand Jury of the

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District Court of the United States for the Northern District of Illinois at Chicago on July 15, 1946, with practically its entire files between January 1, 1933, and May 31, 1946. There is no point in setting out the detail of what was required to be produced because it is only what was actually produced which is of interest here and this is shown by the return to C.M.A. of what was produced.

On May 12, 1949, while the subpoenaed documents were still in the possession of the Antitrust Division of the Department of Justice at Chicago, Harry A. Babcock, Attorney in Charge, Washington Office of Investigation of the Federal Trade Commission, wrote counsel for respondents stating that an application for complaint against C.M.A. had been docketed; that he was assigned to investigate allegations that the industry and its members, by illegal concert of action and agreement, were fixing prices between manufacturers, maintaining resale prices illegally, selling or refusing to sell under circumstances other than the selection of customers on good faith and cooperating with morticians to artificially restrain commerce and suppress competition. Formal request was made to inspect C.M.A. minutes, records and correspondence with members from July 1, 1939 with the statement that if some of this material was in the possession of the Department of Justice, authority to examine it there was requested by appropriate letter to the Attorney General.

On June 1, 1949, counsel for respondents replied that the material was in Chicago and that until the grand jury investigation was disposed of, nothing would be made available in any manner. Thereafter on September 2, 1949, the Acting Chief of the Antitrust Division of the Department of Justice returned to John M. Byrne, as Secretary of C.M.A., all documents produced listed as follows:

- 557 Minutes of meetings of various committees of C.M.A.
- 8 Mimeographed bulletins.
- 297 Mimeographed proceedings of annual mass conferences, C.M.A., 1933-40.
- 2 Lists of officers and executive committees, 1939-46.
- 14 Lists of members of C.M.A. as of 5-31-46.
- 8 Statistical charts.
- 2 Mimeographed copies of Constitution (C.M.A.).
- 1 Printed pamphlet entitled "The Truth About the Casket Industry."
- 1 Photostat of membership insignia.

Upon receipt of the above, and without opening, the Secretary (Byrne) after advice from counsel that there was no law requiring

their preservation, had all the above destroyed by burning. His reasons for doing so appear in his testimony at an investigational pre-complaint hearing as follows: The Department of Justice had examined and considered the documents thoroughly in the more than 3 years it had them and no indictment had been returned or other charge preferred; that, although he thus had a clean bill of health from the Department of Justice, he had observed the development of administrative law in this country and knew that things that were considered perfectly proper at one time came to be considered improper or objectionable not by statute but by interpretation by precedents set, and he did not want the nuisance of being bothered with the papers. Byrne died on January 3, 1952.

On this factual basis, government counsel contend: that such destruction was a deliberate thwarting of Commission attempts to ascertain the facts; that it was an obstruction of justice in the nature of a fraud to the prejudice of the public interest;¹ that every presumption should be indulged against one who destroys records relevant to an issue to which he is "party." Counsel do not contend for a presumption of general guilt, namely, that findings and order could be made and entered on the presumptions alone, but contend that it should be presumed that wherever that proof is deficient, that it was contained in the destroyed documents, that the latter were injurious to respondents, that destruction operates against the whole case of the destroyer but nowhere is it stated just what is to be presumed, what evidentiary gaps are to be proved by what destroyed documents, what the latter contained, or what gaps are thus to be closed. No case has been cited or found where the contended-for-presumption has been applied in an administrative proceeding although many other cases have been cited by counsel.

The hearing examiner has studied these cases, as well as some others, and detailed discussion thereof would extend this opinion beyond any reader's patience. Analysis thereof though shows that all of them, where the quoted maxim was applied, involved either a single document, or group of related documents, whose very title imported its contents and demonstrated vital relevancy to the case; secondary evidence showing the nature and substance of the destroyed material; subornation of perjury, alteration of documents, or refusal to produce with independent evidence thereof; or specific allegations as to what the destroyed documents would show, which allegations were taken as true in view of the destruc-

¹ If so, quere: why was not Section 10 of the Federal Trade Commission Act invoked?

tion.² In many of these cases, destruction occurred after litigation commenced.

All of these elements are missing here. There is no evidence, secondary or primary, of the contents. There is nothing to show their relevancy to the issue presented here. True, they presumably referred, or were thought to refer, to some violation of the anti-trust laws but whether the Sherman Act, the Clayton Act or some other Act, whether criminal or civil, whether conspiratorial or individual, does not and cannot appear. The 890 destroyed documents listed above give no clue as to their contents from the standpoint of relevancy to this case. Officers and membership of C.M.A. are in this record, as are statistical charts, whether the same or different is unknown. The C.M.A. constitution or membership insignia can hardly be presumed to be incriminatory, but what was contained in minutes, bulletins, proceedings or in the pamphlet "The Truth about the Casket Industry," one can only speculate and therefore any contended relevancy is pure speculation also. Relevancy, competency and materiality cannot be speculated under the command of the Administrative Procedure Act. It must be established.

None of these destroyed documents import their substance and, therefore, their relevancy by their title, such as would a deed, bill of sale, receipt, ship's manifest, mortgage, will or contract. Here is a mass of documents which may be innocuous or damning. One cannot assume that minutes and bulletins contain the agreement charged here from the mere fact that they were minutes and bulletins.

There is here, of course, no subornation of perjury or perjury, no fraudulent alteration of documents and no refusal to produce or any concealment of records nor any specific allegations as to contents or purport of the destroyed evidence. Without some specific evidence, without some reliable guide as to contents, the hearing examiner does not know what to presume specifically and has not been told and cannot presume guilt generally and is not asked to. The facts indeed give rise to a contrary presumption; that being, that no charge being preferred or indictment returned after over three years of examination and study, the destroyed documents were insufficient in the opinion of the responsible of-

² Even in the old case of *Pomeroy v. Benton*, 77 Mo. 64, which is most supportive of government counsel's contention, at least in language if not on the facts, there was a specific charge that plaintiff's profit had been \$200,000 and that such would be evidenced had not defendant destroyed the account books. In view of the latter, the court took plaintiff's allegation as true without further proof. In this proceeding, there is no pleaded or stated allegation that the destroyed records contained the agreement charged, nor any specific fact or Act from which its existence could be inferred.

ficials of the Department of Justice to constitute a violation of any antitrust statute over which that Department has jurisdiction. For these reasons the hearing examiner refuses to apply—indeed he cannot apply—the maxim contended for by government counsel.

Looking at the record as a whole, the deficiencies in the government's evidence which the hearing examiner believes to be fatal to the asserted inference or conclusion of agreement and concerted action are: that there is no evidence of allocation of sales, of territory or of production, nor any control of them; no system of discovery, checking, policing, coercion or punishment; no means of implementing or effectuating the asserted agreement; and no evidence of curtailment, restriction or stoppage of production of the cheaper merchandise in any or all producing units. While on the other hand, the record shows affirmatively that such merchandise is still freely and widely offered for sale and is nationally still available to all; that competition in its sale is still active and over-all competition in casket sales has not decreased—at least, there is no showing that it has; that while there is evidence of what was said, there is too little reliable or conclusive evidence of what was done; and that the purpose of the charged conspiracy on this record is just as reasonable and more consistent with normal individual competitive conduct as with a "planned common course of action."

There are few, if any, industries where the ultimate consumer is so psychologically and chronologically disadvantaged; where the normal bargaining power is so handicapped in an immediate and imperative, even desperate, need; therefore, the law should be especially vigilant to prevent advantage being taken of his helpless position. Because of this, the hearing examiner has given very detailed consideration to this record. The record herein presents a merchandising picture of many possibilities of unjustified consumer exaction. Whether these possibilities are translated into actualities is not known but, in any event, the record does not support with substantial evidence the claim that these respondents collectively did so. Any taking advantage of such possibilities on this record was individual and redress or correction must be found in other proceedings than this.

A painstaking study of this record convinces the hearing examiner that there is insufficient reliable and substantial evidence to sustain the order prayed for and, accordingly, the complaint should be dismissed.

This action makes unnecessary rulings on the other motions filed, or decision on the questions of joinder propriety of class action

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and the substantive question of whether an agreement among competitors to each push his long profit merchandise, is illegal.

ORDER

It is ordered, That the complaint herein be, and the same hereby is, dismissed as to all respondents.

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

The complaint charges a violation of Section 5 of the Federal Trade Commission Act in that respondents "from about 1930 to the present, by agreement, combination and planned common course of action (1) enhanced, stabilized, fixed and maintained prices of burial caskets; (2) controlled and limited the unit production and unit sales of burial caskets; (3) controlled and limited the production and sale of burial caskets in that the production and sale of higher-priced caskets were expanded while the production and sale of lower-priced caskets were curtailed; and (4) fixed and maintained uniform, artificial and noncompetitive suggested retail prices for burial caskets sold by funeral directors to the public from manufacturer-owned showrooms."

At the conclusion of the evidence in behalf of the complaint, the hearing examiner sustained respondents' motion to dismiss on the ground that a prima facie case had not been established. Counsel supporting the complaint appeals.

The respondents are Casket Manufacturers Association of America (C.M.A.), a trade association, its officers, and 13 corporation members of the association, the latter being named individually, also as members of C.M.A. and as representative of all of the members.

It is the claim of counsel supporting the complaint that the agreement, combination and planned common course of action is to be found in the following:

- (1) The power and capacity of respondents to accomplish the alleged unlawful activities;
- (2) Speeches and statements made by officers of C.M.A. at various meetings;
- (3) The C.M.A.'s statistical service;
- (4) The rise of the index price and the movement of sales from lower to higher price brackets;
- (5) Suggested resale prices by the casket manufacturers;
- (6) The destruction of certain documents by the Secretary of C.M.A.

The membership of C.M.A. consists of about 160 corporations, partnerships and individuals engaged in the manufacture and sale of burial caskets and funeral supply items to funeral directors. During much of the time in question, the membership consisted of many large casket manufacturers. According to the figures in the brief of counsel supporting the complaint, sales of C.M.A. members were, in 1946, 56% of the total national sales and in 1950, 49%.

From time to time, the Association and its members held meetings. For example, from 1930 to 1954, annual mass conferences were held, to which all members of the funeral supply industry were invited. In addition, territorial meetings were held in some 14 strategically located cities. These meetings were arranged by the Secretary of the Association under the direction of the Executive Committee. Some excerpts of speeches made by officers of C.M.A. at these meetings are:

(1) From a speech of the President in 1949:

Unquestionably, the most important characteristic of the industry that every manager should constantly keep in mind is that its unit demand is fixed by mortality. True, it varies up and down, but at any time the number of units that can be sold depends primarily on current mortality and secondarily on funeral directors' stocks.

While the unit pie cannot be increased, it can be cut up into any number of slices by competing manufacturers. But what is one man's gain is another man's loss—a loss that can't be made up as in other industries by creating a demand for more products.

However, a casket manufacturer *can* expand his dollar volume by the sale of better merchandise and his biggest opportunity has always been in that direction.

That type of expansion is most desirable because it adds to the total marketing possibilities of the industry without taking business away from a competitor.

* * * * *

Your Association will endeavor in every legitimate way to be of service to the industry as a whole and as individuals. But, as in all human efforts, results will be dependent largely upon the individual.

(2) From a speech made in 1935:

Before entering a detailed discussion of our opportunity and the problem of making the most of it, we ought to understand clearly the obligations of this Association to its membership.

Each of you has always been and always will be the one to run his own business. The management of your own business is your obligation and not an Association obligation. Simultaneously, however, it is distinctly an obligation of your Association officers and staff to red-lantern the industry danger spots and keep those signals burning until you have passed them; but you are the ones who must navigate your own individual businesses to positions of safety and continuity of profit.

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Likewise, it is an Association duty to outline existent profit-making opportunities, but again what you do with those opportunities is distinctly your own administrative task in so far as they apply to your business.

There were other speeches and statements of similar import. Concerning this phase of the case, the initial decision contains the following:

Speeches by the various presidents and Executive Secretary of C.M.A. extending for the most part from 1930 to 1939, as well as one in 1949 and one in 1950, are heavily relied upon by counsel in support of the complaint to show the agreement alleged. These speeches reflect complaint of cut-throat competition; dog-eat-dog tactics; selling downward; sacrificing quality and price for temporary volume; and an influx of new competitors between 1930 and 1934, which competitors, bent on getting in on what they considered a depression-proof industry, were without "principle", and were bent on getting rich quick by cheapness and volume at the expense of "total opportunity of the industry." These speeches point out that lateral expansion is impossible, since industry demand is inelastic; that only upward selling, the stressing of quality and increasing the "total opportunity of the industry" will enable the industry member to meet rising costs and increase his gross and net margins. These speeches plead for cooperation in over-all price maintenance through C.M.A. and assert that if each casket manufacturer is going to engage in cut-throat competition without regard to his competitors, that C.M.A. might as well be disbanded; also assert that no casket-manufacturer can expand his volume except at the expense of his competitors, thus inviting reprisals, but that he can increase his profit by selling upward if others do the same. In short, to increase or maintain prices generally. (Counsel for respondents insist that the phrase used is "selling higher quality merchandise" but to the examiner this means on this record selling higher priced merchandise.) Price fixation, as such, is impossible in this industry.

During a membership drive in 1940, the President of the C.M.A. said:

Except for the N.R.A. period, membership and financial support of the Casket Manufacturers Association have been diminishing steadily since 1929. Nevertheless, the Casket Manufacturers Association kept on fighting the forces of demoralization and depression and each year seemed to bob up with enough energy, surplus and vitality to perpetuate itself each succeeding year.

Even in the face of those difficulties, its work has been outstanding. Over \$700,000,000 worth of merchandise has been sold by casket manufacturers to funeral directors during the past ten years.

Had dog-eat-dog conditions prevailed instead of a sturdy succession of club meetings, mass conferences, joint conferences for business improvement, credit clubs, progressive service conferences, staff conferences in manufacturer offices, and well-timed economic stimulations, that \$700,000,000 would have unquestionably been less than \$665,000,000, would probably have been less than \$630,000,000 and could easily have been below \$600,000,000. Even this last figure, representing a 14 percent drop in value level, is less than the customary depression experiences of an unorganized industry. (Com. Ex. 181, p. 1; Ap. Br. 43.)

At many of these meetings, the following also was said:

The conference has no legislative power. Therefore, its functions can only be those of discussion and exchange of information and recommendations. In particular, it must be understood that C.M.A. is not a legislative body under any conditions as far as the business of its members is concerned. * * * It does not attempt to commit its members to any joint action and by its constitution is specifically forbidden to attempt to commit its members to any joint action.

The statistical service, operated under the direction of C.M.A. officials, is participated in by both members and non-members. The number has varied; in 1951, of 209 participants, 176 were members and 33 were non-members. The country is divided into 16 areas; the participants in the several areas include the manufacturers selling mainly in that area. Each participant reports once each month to C.M.A. the total number of caskets and total dollar volume thereof, which the participant has shipped to funeral directors that month. The figures are broken down to cover the six principal classifications of caskets.

The C.M.A. sends to all participants various reports or "blue-prints" which contain certain compiled information applicable to the particular area. Included are reports of mortality for the preceding year, and the preceding month, and estimates for the current month. These figures are based upon mortality figures of the Bureau of Vital Statistics of the United States Government. The reports also show for the participant and also for the area, the following: total unit and dollar volume of shipments over previous years, over previous months of the present year, and for the present month; percent mortality (mortality divided by units shipped) over previous years, previous months, and current month; the average return (dollar volume divided by units shipped). All these figures are broken down into the various classifications of caskets.

On the question of the rise of the index prices (average prices) and the movement of sales from lower to higher price brackets, counsel supporting the complaint submits a table based on sales of 177 manufacturers participating in the statistical service. A part of this table is reproduced showing for the various classifications of caskets, total units shipped, the percent of total units shipped, the percentage of total dollar volume, and the index price:

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	1946	1947	1948	1949	1950
Childrens C. C. W. caskets:					
1. Units.....	58,034	61,077	51,484	46,836	42,889
2. Percent of total units.....	8.3	8.7	7.6	7.4	6.2
4. Percent of total dollar volume.....	1.4	1.5	1.4	1.4	1.2
5. Index price.....	\$14.50	\$16.95	\$18.90	\$19.75	\$22.05
Adult cloth-covered caskets:					
1. Units.....	405,311	390,946	371,204	351,921	360,491
2. Percent of total units.....	57.9	56.0	54.4	55.3	51.7
4. Percent of total dollar volume.....	34.4	33.6	31.9	33.4	30.0
5. Index price.....	\$51.65	\$59.25	\$61.95	\$61.95	\$63.60
Hardwood caskets:					
1. Units.....	128,562	113,793	110,465	104,534	111,161
2. Percent of total.....	18.3	16.3	16.2	16.4	15.9
4. Percent of total dollar volume.....	22.1	18.8	18.1	18.6	17.3
5. Index price.....	\$104.75	\$113.80	\$118.55	\$115.75	\$118.85
Metal caskets (total of class I and class II metals):					
1. Units.....	100,293	127,686	145,274	130,543	181,544
2. Percent of total.....	14.3	18.3	21.3	20.5	26.0
4. Percent of total dollar volume.....	27.2	32.4	34.7	32.6	38.5
5. Index price.....	\$165.25	\$175.25	\$172.25	\$155.25	\$157.05
Class I metal caskets:					
1. Units.....			137,865	124,304	173,527
2. Percent of total.....			20.2	19.5	24.9
4. Percent of total dollar volume.....			30.4	28.6	33.9
5. Index price.....			\$159.05	\$149.05	\$149.70
Class II metal caskets:					
1. Units.....			7,409	6,149	8,017
2. Percent of total.....			1.1	1.0	1.1
4. Percent of total dollar volume.....			4.3	4.0	4.6
5. Index price.....			\$420.60	\$427.40	\$440.70
Other kinds of caskets:					
1. Units.....	8,190	4,610	3,590	2,344	1,613
2. Percent of total.....	1.2	0.7	0.5	0.4	0.2
4. Percent of total dollar volume.....	2.6	1.4	1.0	0.8	0.5
5. Index price.....	\$196.85	\$213.95	\$206.60	\$209.55	\$241.80

Concerning this data, the hearing examiner points out that:

The decline in children's caskets is accounted for by the decline in child mortality—on the average in excess of 20%. From the first above table it appears that from 1947 through 1949 approximately 10% less adult cloth covered caskets and approximately 8% less hardwood caskets were shipped, whereas approximately 2.2% more metal caskets were shipped. The latter are generally more expensive than the former two. Average prices of the former two remained relatively steady whereas average prices of the metal caskets substantially declined. The greatest variation seems to have been in "other kinds" of caskets where unit sales fell off nearly 50%, although average price declined but slightly. Industry price index lagged behind wholesale commodity index.

The above tables do not bear out the contention of counsel in support of the complaint. If average prices are to be trusted, the most expensive type of casket ("other kinds") declined nearly 50%, the next most expensive gained only 2.2% and the least expensive declined 8% and 10% respectively.

The pattern here is too mixed, the shift too insignificant, to bespeak the active and effective agreement charged or to show its implementation or fruition.¹

In the matter of suggested resale prices, it appears that caskets are usually displayed for sale in showrooms either in that of the

¹ The hearing examiner discounts the value of the figures for 1946 and 1950 because 1946 was the first year after the war when metal became available for caskets, and 1950 marked the beginning of the Korean "police action," with consequent widespread fear of the restriction on metal again.

manufacturer or that of the funeral director. For many years, it has been the custom of some casket manufacturers at the request of the funeral director to place on the casket a suggested resale price. This price is calculated by the funeral director by multiplying the wholesale price by a set of "multipliers" ranging from 2.5 to 4.5 in inverse ratio to the price of the casket.

On the occasion of a joint conference of C.M.A. with National Association of Funeral Directors in 1930, a recommendation was made that "in arriving at retail prices for caskets displayed in manufacturers' showrooms * * * manufacturers and funeral directors should reach mutually satisfactory conclusions by conference."

On this feature of the case, the initial decision states:

There is no evidence of the resultant suggested retail prices—hence, no comparison or examination may be made to detect either uniformity or rigidity horizontally. The evidence shows that a very substantial number of casket manufacturers do not use them; some have used them and then have abandoned them; others have not used them but have later done so. The multipliers used vary from manufacturer to manufacturer and from funeral director to funeral director; there is no uniformity mathematically or operationally. There is no showing that the wholesale casket price—the manufacturers' price—is either uniform or rigid; in fact, there are no such prices in the record for comparison or examination. Some of these suggested retail prices are in plain figures—others are in code known to the funeral director. In fact, it is plain on this record that such prices and their determination, their use and the manner of their use, is entirely at the instance of the funeral director and vary in all respects according to his desire or need.

The "mutually satisfactory conclusions by conferences" between the funeral directors and casket manufacturers referred to above must have meant individual conferences rather than mass agreements, because there is no evidence of any general discussion of suggested retail prices at any mass conference or territorial meeting and no evidence that any C.M.A. member knew whether his competitors used them, how they were arrived at, what multipliers were used or what the prices were.

The claim as to the destruction of documents is based on the burning of certain records by the then Secretary of C.M.A., Mr. John M. Byrne. In response to a subpoena duces tecum, C.M.A. had turned over these documents to the District Court Grand Jury for the Northern District of Illinois. While the papers were still in the possession of the Antitrust Division of the Department of Justice, the Federal Trade Commission's Washington Office of Investigation wrote counsel for respondent that a complaint had been docketed against C.M.A. Demand was made for examination of certain records and documents. Some time later, no indictment having been returned, the documents were returned to Mr. Byrne. These documents are listed as follows:

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- 557 Minutes of meetings of various committees of C.M.A.
- 8 Mimeographed bulletins.
- 297 Mimeographed proceedings of annual mass conferences, C.M.A., 1933-1940.
- 2 Lists of officers and executive committees, 1933-46.
- 14 Lists of members of C.M.A. as of 5-31-46.
- 8 Statistical charts.
- 2 Mimeographed copies of Constitution (C.M.A.).
- 1 Printed pamphlet entitled "The Truth About the Casket Industry."
- 1 Photostat of membership insignia.

After advice of counsel, Mr. Byrne burned the documents. The reasons later given for this action were in substance that: the Federal Grand Jury had returned no indictment, the nuisance of keeping the papers, and "I had seen the development of administrative law in this country and I knew that those things that were considered perfectly proper at one time came to be considered improper or objectionable, not by statute, but by interpretation, by precedents set and I didn't want to be bothered with the papers."

The evidence establishes, *prima facie*, first that officials of C.M.A. did urge the pushing of higher priced caskets, that is, "selling upward", and second, that the statistical program did give the participants the opportunity to compare their results in selling upward, with the general result of all.

There is, however, no evidence of what the members did in response to the urgings, no evidence of what use they actually made of the statistical service. There is no evidence that territory was allotted, that prices were fixed, or even uniform, or that production of any type of casket was restricted or that any type was made unavailable to purchasers. There was no system of checking the activities of individual members, nor is there satisfactory evidence of adoption by them of any restrictive program, nor of results which would naturally flow only from a planned common course of action. It cannot be said that there was any variation in the types of caskets sold or in the prices thereof which is not as consistent with natural causes as with an agreement or planned action. Injury to competition because of any conduct of respondents has not been established, *prima facie*.

Many cases have pointed out that a formal agreement to restrict competition is not necessary, but may be inferred from other proven facts. But the facts relied on in those cases are not present here. See *Fort Howard Paper Company v. FTC* (1940), 156 F. 2d 899; *U. S. Maltsters Assn. v. FTC* (1945), 152 F. 2d 161;

Milk and Ice Cream Can Institute v. FTC (1946), 152 F. 2d 478; *Bigelow v. RKO Radio Pictures* (1945), 152 F. 2d 877. From a factual standpoint, the instant case has more in common with *Maple Flooring Manufacturers Assn. v. U.S.*, 268 U. S. 563, and *Tag Manufacturers Institute v. FTC*, 174 F. 2d 452.

There still remains to be considered the evidentiary value of the admitted fact that certain documents and records of C.M.A. were destroyed by its Secretary after he knew that the Federal Trade Commission desired to examine them.

The famous legal maxim, "omnia praesumuntur contra spoliatores", has often been considered by the courts. The general rule is that, under certain circumstances, the refusal to produce certain evidence or the destruction of it, permits an inference to be drawn that the evidence would have been unfavorable to the party who destroyed it or who refused to produce it.

The inference does not automatically arise in every case from the mere fact of spoliation. As said in *Wigmore on Evidence*, Volume 2, Section 291:

Upon the same general principle, namely, that the inference can arise only where the document was one that could have been used if produced, it is obvious that the inference is not available from mere non-production where the document would have been inadmissible on the possessor's or the demandant's behalf or is declared by the Court to be unnecessary or useless.

The inference arising from the destruction of evidence ordinarily would not dispense with the necessity for the introduction by the other party of some secondary evidence as to the contents of the document to prove facts which said party claims would have been shown thereby. It merely diminishes the force of the spoliator's evidence and enhances the probative value of that adduced by his opponent. 31 CJS, Sec. 152. Thus, in *re Enos' Will* (1921), 187 N.Y.S. 756, the court said that the unfavorable inference will not dispense with the necessity of the other party introducing some evidence of its contents that it may appear that the documents destroyed were, in fact, relevant to the case. In *Equitable Trust v. Gallagher* (1950) Del., 77 Atl., Sec. 548, a great deal of evidence was taken in an effort to reconstruct the contents of the destroyed instruments, after which the Chancellor applied the rule that where a party to an instrument deliberately destroys it, the natural inference is that its provisions are against his interests. In *Waters v. Lawler* (1921) Ill., 130 N.E. 335, it appeared that the grantor destroyed the only memorandum of direction regarding the control and disposition of a deed placed in escrow; the inference thus arising, "while not relieving the opposite party from the burden of

establishing delivery, nevertheless must prevail where the evidence on the point is vague and uncertain."

In some instances, the very nature of the document itself or the surrounding circumstances may be a sufficient showing of secondary proof to permit the inference. For example, a showing that the destroyed document was in fact a deed might be sufficient, whereas the fact that it was only some other document between the parties might not be. In *re Herman* (1913) 207 Fed. 594, the documents destroyed by the bankrupt's wife and mother-in-law were letters between them concerning claimed loans by the mother-in-law to the bankrupt. In *The Sam Sloan* 65 Fed. 125 (a libel suit against The Sam Sloan for damages in a collision), the paper destroyed was the first report of the accident made by the ship's captain and filed with the public authorities. See also *The Bermuda*, 70 U.S. 514.

In these cases the admitted character of the documents was such that a reasonable conclusion could be drawn that they did have to do with some material fact involved in the litigation. In other words, the documents under the circumstances carried their own proof.

That is not, however, the situation in the instant case. Some of the documents seem to have been in the same categories as others actually introduced, such as statistical charts, etc. Others, such as mimeographed copies of the C.M.A. constitution, could probably have been introduced at the trial. Others, such as minutes of meetings and reports of proceedings at mass conferences, were records which an investigator would naturally explore; and it is within the realm of conjecture that such records may have thrown some light on important issues in the case.

For the purpose of this appeal, we assume that a prima facie showing has been made that certain officials did recommend "upward selling." Whether any action was taken on the proposal was therefore in issue. If there were some secondary proof that the destroyed records did in fact bear on this issue, the destruction might give rise to an inference unfavorable to the spoliator. There is, however, no such proof nor any proof that the destroyed records contained any matters relevant to the issues in the case.

The above conclusion makes it unnecessary to consider the circumstances of the destruction and the alleged reasons therefor as bearing on the weight to be given to any possible inference.

The record indicates that Mr. Byrne died prior to the filing of the complaint. We do think it proper, however, to call attention to Section 10 of the Federal Trade Commission Act which provides

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a penalty for the willful destruction of records and documents under certain circumstances.

An examination of the whole record leads to the conclusion that the hearing examiner decided the issue correctly. His findings, conclusion and order are adopted as the findings, conclusion and order of the Commission.

The appeal is denied and the complaint is dismissed as to all respondents.

It is directed that an order issue accordingly.

Commissioner Kern did not participate in the decision in this case.

FINAL ORDER

Counsel in support of the complaint having filed an appeal from the hearing examiner's initial decision dismissing the complaint, and the matter having been heard on the whole record, including briefs and oral argument of counsel; and the Commission having rendered its decision denying the appeal and adopting as its own the findings, conclusion and order contained in said initial decision:

It is ordered, That the complaint herein be, and it hereby is, dismissed.

Commissioner Kern not participating.

IN THE MATTER OF
ABEL ALLAN GOODMAN TRADING AS WEAVERS GUILD

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

Docket 6153. Complaint, Dec. 22, 1953—Decision, Mar. 14, 1956

Order requiring a seller in Hollywood, Calif., to cease, in advertising for agents to sell a correspondence course designed to prepare students for work as commercial reweavers, representing falsely that highly exaggerated earnings were typical and that he furnished sales agents with names of prospects and everything necessary to make sales; and to cease representing falsely in statements made to prospects by his salesmen and otherwise: the scope of the course, ease of learning, personal assistance to students, earnings of persons completing the course, value of supplies, and refund of monies paid if persons were unable to complete the course; to cease representing falsely that his courses had been approved for training by State and Federal authorities; and to cease use of the word "Guild" in his trade name or otherwise.

Mr. William L. Pencke and Mr. Edward F. Downs for the Commission.

Wolver & Wolver, of Los Angeles, Calif., for respondent.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

HISTORY OF THE PROCEEDING

On December 22, 1953, the Federal Trade Commission issued its complaint in this proceeding, charging the respondent with false, deceptive and misleading statements and representations in connection with the advertising and sale in interstate commerce of a course of study in reweaving, in violation of the Federal Trade Commission Act. On January 11, 1954, the respondent submitted an answer thereto, denying the principal charges of the complaint and praying that the said complaint be dismissed, and that no order be issued against him. In due course, evidence for and against the allegations of the complaint was received into the record. Thereafter proposed findings as to the facts and conclusions were presented by both parties.

IDENTITY AND BUSINESS OF RESPONDENT

Respondent Abel Allan Goodman is an individual who, until January 1, 1954, traded under the name of Weavers Guild, with his principal office and place of business located at 4634 Hollywood