

Decision

IN THE MATTER OF
GENERAL MOTORS CORPORATION

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

Docket 6477. Complaint, Dec. 8, 1955—Order, June 28, 1957

Order denying appeal of complaint counsel from the initial decision and dismissing for failure of proof, complaint charging the manufacturer of Chevrolet automobiles with advertising falsely that all the automotive replacement parts it sold were designed and manufactured exclusively by or for it, were identical to the parts used in Chevrolet automobiles at the factory, and superior to all other available replacement parts, and that such other parts were inferior.

Edward F. Downs, Esq., for the Commission.

William Simon, Henry M. Hogan and L. H. Bridenstine, Esqs.,
for respondent.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

THE PROCEEDING

The Federal Trade Commission, by virtue of authority vested in it pursuant to the provisions of the Federal Trade Commission Act, did, on December 8, 1955, issue its complaint against respondent, General Motors Corporation, a corporation organized and doing business under and by virtue of the laws of the State of Delaware, having its principal office and place of business located at No. 3044 West Grand Boulevard, Detroit, Michigan.

Said complaint alleges that respondent is engaged in the distribution and sale of automotive replacement parts, some of which are manufactured by it and some of which are manufactured by others and purchased by respondent, which parts are for use in the repair of Chevrolet automobiles; that respondent causes said parts to be sold in commerce as "commerce" is defined in the Act; that in so doing, respondent engages in substantial competition with others likewise engaged in the manufacture, sale and distribution of automotive replacement parts used in the repair of automobiles manufactured by respondent.

That in the course of its business respondent, through use of the term "Genuine Chevrolet Parts" in conjunction with other statements and pictorial representations contained in advertisements in newspapers and magazines, and in other types of advertising ma-

terial by it furnished to distributors, dealers and other sellers of its automotive parts, has compared its replacement parts with the replacement parts of its competitors and that said advertisements represent directly or by implication:

1. That all of the automotive replacement parts sold or distributed by it for use in the repair of Chevrolet automobiles are:

(a) Designed and manufactured exclusively by or for the respondent;

(b) Identical to the parts used in Chevrolet automobiles at the factory;

(c) Superior in material respects to all other replacement parts available for use in the repair of Chevrolet automobiles.

2. That all other automotive replacement parts available for use in the repair of Chevrolet automobiles are counterfeit or spurious, and will not function as efficiently as respondent's so-called "Genuine Chevrolet Parts."

That the foregoing representations and advertisements are false, misleading and deceptive and disparage the products of respondent's competitors.

Said complaint additionally charges that respondent purchases many of the aforesaid replacement parts, described by it as "Genuine Chevrolet Parts" from other manufacturers, some of whom design such parts themselves, some of whom sell the "same identical" parts to others than respondent, and some of whom sell "substantially" the same parts to others than respondent, which parts are at least equal in all material respects to the parts sold to respondent.

To the foregoing complaint respondent filed answer admitting the corporate setup and situs; that it is engaged in commerce within the purview of the Act and that it has made use of the term "Genuine Chevrolet Parts," but denies all other charges and, particularly, the conclusions pleaded in the complaint.

The respective parties, after considerable negotiation, decided to stipulate as to the facts rather than to offer testimony in support of their respective positions, as a result whereof a series of hearings were held at which there were received in evidence three stipulations being designated Commission's Exhibits Nos. 1 and 24, and Respondent's Exhibit No. 13.

All arguments received at the aforesaid hearings were stenographically reported, the record whereof, as well also all exhibits received in evidence, were duly filed in the office of the Federal Trade Commission, Washington, D. C., as required by law.

FINDINGS AS TO THE FACTS

The stipulations in lieu of testimony hereinabove referred to as Commission's Exhibits Nos. 1 and 24, and Respondent's Exhibit No. 13, each commence by reciting:

It is hereby stipulated and agreed by and between counsel supporting the complaint and counsel for the respondent, solely for the purposes of this case, for no other purpose whatever, and without admitting the facts hereafter stated *except for the purposes of this case*, that;

[Italics supplied.]

In view of the foregoing, and in the absence of countervailing testimony or evidence, the facts set forth in the several stipulations are used in making the findings and conclusions.

1. Respondent, General Motors Corporation, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, having its principal office and place of business at No. 3044 West Grand Boulevard, Detroit, Michigan.

2. Respondent is engaged in the distribution and sale of automotive parts, some of which are manufactured by it and some of which are manufactured by others and purchased by respondent, which parts are for use in the repair of Chevrolet automobiles.

3. Respondent has caused its automotive replacement parts, manufactured by it and purchased from other manufacturers or producers, to be transported from the State of Michigan, and from other states, to purchasers thereof located in states other than the state in which shipment originated so that it is found that respondent is engaged in interstate commerce within the meaning of the statute.

4. Respondent, in the conduct of its business, is engaged in substantial competition with other corporations, firms, partnerships and individuals likewise engaged in the manufacture, distribution and sale of automotive replacement parts in commerce between and among the various states of the United States.

5. Respondent, for the purpose of aiding and promoting the sale of its automotive replacement parts, meaning thereby those manufactured by it as well also those purchased from other producers or manufacturers, has used the term "Genuine Chevrolet Parts," applied indiscriminately to all such parts, and also other statements and pictorial representations in advertisements in newspapers, magazines and advertising material furnished to distributors, dealers and sellers of automotive replacement parts.

The term "Genuine Chevrolet Parts" needs no elaboration at this point, but the "other advertising" referred to in the complaint, and

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the pictorial representations and advertising material used, are set forth in abridged form next following, such being fairly representative of all typical advertising matter of record on which the Commission bases its case:

These two clutch discs may *look* alike * * * (photograph of the two discs) but *your Chevrolet* knows the difference.

What is the difference? Simply this:

One of these clutch discs was manufactured of the same fine materials and with the same high standards of precision used in your Chevrolet's original factory installed clutch disc. It's the one that's made to fit right—function better—last longer—the Genuine Chevrolet Part. This important difference means finer performance for your Chevrolet and it means more dependable and economical motoring for you. That's why you should always specify Genuine Chevrolet Parts—installed by your Chevrolet dealer and leading independent garages and service stations everywhere.

(Picture of display sign furnished by respondent to dealers and garages announcing availability of "Genuine Chevrolet Parts.") (Cx. 2.)

The foregoing is repeated substantially in many other specimens of respondent's advertising, varying only with picturizations of other replacement parts, such as gaskets (Cx. 3); water pumps (Cx. 4); valves (Cx. 6); piston rings (Cx. 8); brake shoes (Cx. 9); fan belts (Cx. 10); mufflers (Cx. 11); king pins (Cx. 12); universal joints (Cx. 13); transmission gears (Cx. 14); radiator hoses (Cx. 15); connecting rods (Cx. 16); etc., wherefore it is found that the foregoing is sufficiently representative of respondent's advertising to conclude that respondent has used so many of its replacement parts as it desired in these comparative depictions. In some of the advertisements listed in this paragraph appears certain language which, while lifted out of context, no doubt formed part of the bases for the charges herein, such being:

(a) These two cylinder head gaskets certainly *look* like duplicates in every respect—but that's where the similarity ends. For one was manufactured of the same fine quality materials and with the same high standards of workmanship used in your Chevrolet's original factory-installed gasket. It's made to fit right—function better—last longer. (Cx. 3.)

(b) In the first place they're [meaning "Genuine Chevrolet Parts"], designed by the same engineering staff that designed your Chevrolet. Then, too, they're built of the same fine materials and to the same *precision specifications* as the original factory-installed parts they replace in your Chevrolet. A rigid system of tests and inspections guards their *quality*. (Cx. 4.)

(c) You can't tell the quality of a water pump—or any other automobile part—by appearance alone. That's why you should always specify Genuine Chevrolet Parts. (Cx. 5.)

(d) Well, to begin with, one is a Genuine Chevrolet Part. That means it was built to the same *precision specifications* and of the same *fine material* as the original factory-installed [valves] in your Chevrolet.

But it means even more than that. For Genuine Chevrolet [valves] are developed and perfected through an unending program of research. They're produced under a rigid system of quality controls. And they're proved in mile after mile of gruelling tests at the world's largest proving ground. All this to bring you parts that are made to fit right—function better—last longer in your Chevrolet. Remember, only Genuine Chevrolet Parts offer this important difference to Chevrolet owners. (Cx. 7.)

(e) And, like all Genuine Chevrolet Parts, its structural and design soundness was proved in mile after mile of gruelling tests at the world's largest proving ground. (Cx. 17.)

(f) So when you replace a piston—or any other Chevrolet part—insist upon parts made of the same top-quality materials and with the same uncompromising standards of workmanship and precision as the original, factory-installed parts. To be sure, ASK FOR GENUINE CHEVROLET PARTS. (Cx. 20.)

All exhibits from which the foregoing quotations are excerpted, bear comparative photographs of "twin" automotive replacement parts, as also a reproduction of the display sign, "Genuine Chevrolet Parts," furnished by respondent to its distributors, such a full-size sign appearing herein as Respondent's Exhibit No. 15.

On the basis of consideration of the wording of all advertisements, and of the several stipulations of record, and of the entire record, the following findings of fact are made:

6. There is no evidence that respondent's advertising represented that all automotive parts sold or distributed by respondent for use in the repair of Chevrolet automobiles are designed and manufactured exclusively by or for respondent, as is alleged in the complaint.

7. There is no evidence that any automotive replacement parts sold or distributed by respondent for use in the repair of Chevrolet automobiles are not identical to the parts used at the factory in the manufacture of Chevrolet automobiles, except only for oversize and undersize to compensate for wear, as is alleged in the complaint.

8. There is no evidence that respondent's advertising represented that all automotive parts sold or distributed by respondent for use in the repair of Chevrolet automobiles are superior in "all" material respects to "all" other replacement parts available for use in the repair of Chevrolet automobiles.

9. There are approximately 15,000,000 Chevrolet motor vehicles, manufactured by respondent, now on the road in the continental United States, in use by the consuming public, of which approximately 11,800,000 are passenger automobiles.

10. Respondent employs a large number of engineers, and annually spends millions of dollars in engineering and design for the automobiles it manufactures, including Chevrolet automobiles, and including engineering and design for the component parts utilized

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in the manufacture of its automobiles. Respondent manufactures, in its own plants, all or a portion of its requirements of virtually every component part used in the manufacture of its automobiles, including Chevrolet. It is a general practice of respondent, although not its universal practice, to have an outside supplier for parts engineered and designed by it for use in the manufacture and repair of its automobiles. Respondent enters into contracts with such outside suppliers for the production, and the purchase by respondent, of such parts to be made according to blueprints and specifications furnished by respondent and generally on tools and dies owned by respondent. Respondent, and not the outside supplier, assumes responsibility for the engineering, design and adequacy of the part as shown by the blueprints and specifications furnished to such supplier by respondent.

11. Respondent also uses in the manufacture of Chevrolet automobiles, and sells for use in the replacement or repair thereof, parts manufactured by reputable outside manufacturers from basic engineering and designs in which both respondent and such manufacturer have participated, or from blueprints and specifications submitted by such manufacturers to respondent, with respondent approving each such part after making its own independent tests. In each such case respondent's engineers make a complete and thorough test of such manufacturer's part before an order therefor is placed. As a result of such tests, respondent may make substantial, may make relatively minor, or may make virtually no, changes in such part. Each such part, however, is approved for use in the manufacture, or for use in the replacement or repair, of Chevrolet automobiles before an order therefor is placed by respondent with such manufacturer. Following respondent's approval of the engineering, design specifications and blueprints for a part, an outside manufacturer contracts not to make any change in such part without respondent's prior approval.

12. Respondent designs and manufactures, or has manufactured for it, replacement parts exclusively for use in motor vehicles which it manufactures. Each such part is designed, engineered and manufactured to fit the particular requirements of respondent's motor vehicles. Competing manufacturers, on the other hand, frequently design a replacement part to permit that part to be used in the automobiles of two or more different manufacturers, thus reducing their tooling costs and the inventory investment of both the manufacturer and the jobber in carrying a full line of that replacement part for all makes of motor vehicles.

13. Respondent's Chevrolet Motor Division stocks, and makes available to the consuming public, the parts required or necessary for replacement purposes. Respondent publishes a parts catalog, listing all Chevrolet parts available for use in replacement or repair of Chevrolet automobiles. This catalog is available to all authorized dealers of genuine Chevrolet parts and to many others interested in replacement parts. Respondent maintains warehouses which stock all such replacement parts from which its dealers receive supplies to replenish their own stocks and from which dealers may order parts that they do not carry in stock. Respondent's current Chevrolet parts catalog contains approximately 29,000 separate part numbers (each representing a separate part or an identifiable variation of a part required for a particular motor vehicle), of which approximately 19,000 parts are for replacement use in Chevrolet passenger automobiles.

(a) The above count includes many parts not frequently used for replacement or repair purposes, such as major functional parts for Chevrolet models of past years. These are called slow-moving parts and are not generally stocked by most dealers.

(b) There are approximately 2,000 parts that are the most frequently used parts for replacement use or in the repair of the later model Chevrolets and which are generally stocked by most dealers. These are referred to as the fast-moving parts and account for the great bulk of the Chevrolet parts volume or business.

(c) The approximately 2,000 fast-moving parts are 7% of the total number of Chevrolet parts but account for 89% of respondent's dollar volume in Chevrolet replacement parts.

14. Approximately 75% of the aforesaid fast-selling Chevrolet parts are manufactured solely by respondent; more than 24% of the fast-moving parts are made by others or are made by both respondent and by others expressly for respondent pursuant to its specifications and expressly for use in Chevrolet motor vehicles; less than 1% of the fast-moving parts are engineered, designed and made by others, but in each such case the engineering and design of the part was approved by respondent's engineers expressly for use in Chevrolet automobiles.

15. Approximately 2800 parts, out of approximately 19,000 parts made available by respondent for replacement purposes in Chevrolet passenger automobiles, are parts of a character that are also manufactured by competitors of respondent and are similar to replacement parts that are available to consumers from competitive sources. Approximately 16,200 of the 19,000 parts are available only from

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or through respondent and are not manufactured competitively. Generally speaking, competitors manufacture the faster-moving parts in which there is the greatest volume of replacement demand, and do not seek to manufacture the slower-moving parts which, although not in as great demand, are generally indispensable to the continued use of an automobile when the replacement of such part becomes necessary.

16. Each year respondent brings out new model Chevrolet automobiles containing improvements over the prior years' models. Each new model includes some new parts for which there is ultimately a replacement market. When new models first become available to the public, replacement parts for many of the new items first incorporated in those models are available only from or through respondent. As to such of those new replacement parts for which competing manufacturers believe there will be a substantial demand, one or more competing manufacturers will endeavor to copy, tool up for, and manufacture such new replacement parts for use in Chevrolet automobiles manufactured by respondent. If and when the demand for other new parts introduced by respondent becomes sufficient to warrant the expenditure of their going into production for such parts, one or more competing manufacturers will endeavor to copy, tool up for, and manufacture other new parts introduced by respondent in its Chevrolet automobiles.

17. Every Chevrolet replacement part, whether manufactured by respondent or by an outside manufacturer according to respondent's specifications, or manufactured by an outside supplier according to specifications developed jointly by respondent and such outside manufacturer, or manufactured according to the specifications of an outside manufacturer which have been approved by respondent, is guaranteed by respondent to the consuming public, and respondent assumes the responsibility for the proper operation of the part in motor vehicles of respondent's manufacture.

18. There are manufacturers who make automobile replacement parts intended for use in Chevrolet automobiles that are of design, materials or workmanship inferior to Chevrolet parts sold by respondent, which parts are not equivalent in material respects to respondent's parts and should not work as efficiently in a Chevrolet automobile, or last as long as "genuine" Chevrolet parts.

19. More than ninety-nine percent of all fast-moving parts sold by respondent for replacement use in Chevrolet automobiles are:

(a) Designed by engineers employed or engaged by General Motors; and

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(b) Tested by General Motors engineering and manufacturing staffs both in the laboratory and in actual proving grounds tests; and

(c) Manufactured by or for respondent according to its own blueprints, specifications and directions; and

(d) So far as the record shows, available only from or through respondent.

20. With respect to the more than ninety-nine percent of such replacement parts described in the above paragraph, respondent's practice is in large part to manufacture such Chevrolet parts itself and in part, when feasible, both to manufacture such parts itself and to have them manufactured for it by independent suppliers, according to respondent's own design, specifications and directions. Outside suppliers of respondent contract to make such parts only according to respondent's blueprints, specifications and directions. They assume no responsibility for the design or engineering and contract not to deviate in any respect from the blueprints and specifications furnished by respondent. Replacement parts thus made by respondent's outside suppliers do not differ from those made by respondent.

21. As to the less than 1% of respondent's replacement parts referred to above, the basic design for which originated with an outside supplier, and which are manufactured according to blueprints, designs and specifications originating with such outside supplier, respondent's engineering and manufacturing departments subject each of such parts to detailed analysis, inspection and tests. These same tests are also applied to the replacement parts designed by respondent and manufactured according to its own design, blueprints and specifications.

22. Respondent has been a manufacturer of automobiles for more than thirty-five years. A great number of the consuming public have purchased, and are continuing to purchase, its automobiles, particularly Chevrolet. Respondent has an interest in protecting its good will with the consumer by protecting the consumer against "counterfeit," "gyp" or "spurious" parts and making it possible for the motorist driving a Chevrolet to identify replacement parts tested and approved by the manufacturer of his automobile for replacement use therein.

23. There are members of the public who have been injured through the use of defective parts of inferior quality sold to them for replacement in, or the repair of, their automobiles.

24. It is in the public interest that consumers be able to identify a replacement part for Chevrolet automobiles which is identical with the part used at the factory in the original manufacture of the auto-

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mobile, which parts as to design, engineering, quality and all other attributes insuring proper operation, satisfaction and adaptability, have been tested and approved by the manufacturer and producer of the automobile in which said parts are to be used as replacements.

25. It has long been industry practice, virtually for the entire life of the automobile industry, for manufacturers of automobiles to permit dealers, repair shops, garages and other places where automobiles may be repaired to make known to the consumer that such establishment has available the genuine parts of the manufacturer of a particular make of automobile. Respondent furnishes to certain establishments that stock genuine Chevrolet parts signs or insignia that identify to the consuming public the availability at that establishment of "Genuine Chevrolet Parts." Respondent furnishes such signs to businessmen making such parts available to consumers so that consumers may identify the establishments at which such parts are available.

26. Respondent's motor vehicles are sold with a warranty against defects which is not effective if parts not approved by respondent have been installed in the motor vehicle.

27. Evidence in support of the complaint as to replacement parts like those distributed by respondent being available through other distribution channels is limited to six items, viz:

(a) That Borg-Warner Corporation sells transmission replacement parts to respondent and sells like parts to other distributors. These Borg-Warner transmissions are used by respondent exclusively on heavy duty commercial vehicles with three speed transmission. Annual production of this vehicle is approximately 4,500 units compared with 1955 Chevrolet total production of approximately two million units. Respondent purchases no transmission gears or bushings from Borg-Warner for use in Chevrolet passenger vehicles.

(b) That respondent purchases clutch discs from Borg-Warner similar to those Borg-Warner sells to other distributors. Prior to the institution of this proceeding there had been substantial differences between respondent's clutch discs and those made by Borg-Warner which the latter sold to others but later, because of changes recommended by respondent's engineers to those of Borg-Warner, and by the latter adopted, the two products were brought in line consonant with respondent's standards set up for performance in its Chevrolet cars.

(c) That Perfect Circle Corporation makes piston rings for respondent and sells the identical product through other distribution channels. Piston rings are supplied in sets of three rings for the pistons on respondent's Chevrolet automobiles. Perfect Circle makes

23 different sets of piston rings for Chevrolet motor vehicles, each of which has three rings. Twelve of these sets are made exclusively for respondent. Of the remaining 11 sets, Perfect Circle also makes the steel ring for others for sale under its own brand name or under the brand name of others, but it does not manufacture for anyone, other than respondent, the two iron rings in each of those sets. Two of the rings in every set of piston rings made by Perfect Circle for use in Chevrolet motor vehicles are available only through respondent.

(d) That McCord Corporation and Detroit Gasket and Manufacturing Company make cylinder head gaskets for respondent and sell the same gasket to others. The evidence in support of the complaint is limited to the fact that McCord makes a cylinder head gasket for use in the Chevrolet V-8 engine. This is but one of 16 cylinder head gaskets currently distributed by respondent. Detroit Gasket sold to but two customers a gasket it sold to respondent. Detroit Gasket sold 37,000 gaskets in 1954 and 97,000 in 1955 compared to respondent's sales in 1955 of approximately 1,640,000 such gaskets for replacement purposes; and in 1953 Detroit Gasket had advised respondent that it did not sell such gaskets to any other person.

(e) That Firestone Tire and Rubber Company sells a radiator hose to respondent and "sells the same quality product to other sources for replacement sales purposes". This evidence is limited to the quality of the product Firestone sells to others, but lacks proof of the design, specifications, characteristics or functional purposes of such hose, or that same is suitable for use in Chevrolet automobiles.

(f) That Dayton Rubber Company manufactures a fan belt for respondent for use in Chevrolet automobiles and sells the identical part to others. The evidence shows that Dayton makes a large number of fan belts; that its catalogue lists certain Dayton fan belts as suitable for several makes of automobiles, including Chevrolet; that in a few cases the belt Dayton makes for others is the same as the belt it makes for respondent, but in many instances the belt Dayton makes for others and holds out as suitable for a Chevrolet automobile is not the same as the belt it makes for respondent; that the testimony of respondent's engineers is the Dayton belts will not function as well as respondent's belts.

28. There are 14 other manufacturers of clutch discs for use in Chevrolet automobiles, but only one is a supplier to respondent; there are 24 manufacturers of piston rings but only 5 supply respondent; there are 14 makers of gaskets but only 2 supply respondent; there are 20 makers of fan belts but only 6 supply respondent.

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29. Except by inference, and strained construction of the words involved, which this Examiner would be unjustified in making under the facts here presented, there is no evidence the respondent represented or affirmatively implied that all automotive parts not manufactured, sold or distributed by it for use in the repair of Chevrolet automobiles are "counterfeit" or "spurious" and will not function as efficiently as respondent's "Genuine Chevrolet Parts." Respondent stipulated with Commission counsel that there are competitive parts which are the equivalent of respondent's parts "in material respects and should function just as efficiently, fit just as well and last just as long as will 'Genuine Chevrolet Parts,'" but also "there are parts made by other manufacturers which are inferior to respondent's parts and which will not function as efficiently, last as long and fit as well as 'Genuine Chevrolet Parts'."

CONCLUSIONS

1. The gravamen of the charges of this complaint revolves primarily around the use by respondent of the words "Genuine Chevrolet Parts" to describe its automotive replacement parts, and it may well be doubted that, were it not for this, no action would have been instituted. The charges of the complaint, particularly those of Paragraph Five, impute to the respondent, by reason of the use of the aforesaid phrase, an attempt to defame and disparage the products of its competitors by branding such to be "counterfeit" or "spurious," and to mislead and deceive the public into the purchase of respondent's parts.

The word "genuine" is defined:

By Webster: (1) Actually belonging to, or proceeding from, the reputed source, origin or author.

(2) Of or pertaining to the original stock or source.

By Funk & Wagnalls: Belonging to the original or true stock; *having the character or origin represented*; not false, spurious or adulterated.

By Oxford: (1) Natural, not foreign or acquired; *proper or peculiar to a person or thing*; native. *Germane to; closely connected with; arising out of.* Giving an example of use of the word Oxford quotes the English Puritan, William Prynne, *anti armin*: "The self-same things in the same degree admit no inequality in their genuine and native operations."

(2) *Pertaining to the original stock*;

(3) *Really proceeding from its reputed source or author*; not spurious.

(4) *Having the character or origin represented.*

[All italics supplied.]

The word "spurious" is defined:

By Webster: (1) Illegitimate; bastard.

(2) Not proceeding from the true source; not genuine; counterfeit; false.

By Oxford: (1) Illegitimate; false

(2) Having an illegitimate or irregular origin; not properly qualified or constituted:

(3) Superficially resembling or simulating, but lacking the genuine character or qualities of, something; false, sham, counterfeit.

The word "counterfeit" is defined:

By Webster: (1) Made in imitation of something else with a view to defraud; hence, spurious;

(2) That which is made in imitation of something else with a view to deceive; a forgery.

By Funk & Wagnalls: To make a copy of; imitate; hence to feign; pretend. Specifically: To make without lawful authority and with intent to deceive and defraud, as something false and spurious in the semblance of something true and genuine; to practice deception.

Because the foregoing words, as defined, are all clearly in issue, and before proceeding with consideration of any set of facts the interpretations of which are directly predicated of use of these words, it has not been felt amiss to set down their definitions. It is recognized that words, even though used in their true and accepted sense, may yet, because of other circumstances, be false and misleading as interpreted under a given state of facts and it is here, where different or sinister meanings or ulterior motives are attempted to be attributed to such usage, that the burden of proof rests most heavily on him who would attempt to prove a divergent motive or result. It follows, therefore, that in arriving at the effect of the use of words, no interpretation may be made which would do violence to a sense of fair play and justice, and the use of strict literal definitions not employed in the ordinary day by day conduct and understanding which motivates the individual in the conduct of his daily affairs. It is here again, that the especial competence of the Commission comes into play, to see to it that fair and just decisions are made with due regard to the rights of those charged.

Following this reasoning, and under the set of facts delineated in the findings of facts above, it cannot be concluded otherwise than that respondent is not guilty of the charges made against it by reason of the use of the words "Genuine Chevrolet Parts." When it is borne in mind that respondent is the manufacturer of the Chevrolet automobile; designed, engineered and tested all of the parts entering into the composition of the car; contracted with outside suppliers for parts to be furnished it under strict specifications; that when such parts were produced by others and accepted and adopted by respondent it thereby gave its "blessing" and acceptance thereto, just as surely as an adopted child is the legal heir of an adoptive parent, and respondent properly made known to the public by use of the phrase "Genuine Chevrolet Parts," that it made no distinction between those parts produced by it and those produced by others for it and to its

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specifications; that the actual number of parts produced by others for respondent is infinitesimal as compared with the number of parts produced by respondent; that the object of respondent in the use of that phrase was threefold: (1) that its "genuine" parts were the same as those used in the original production of the car; (2) are the parts recommended by the manufacturer of the car for replacement purposes, and, (3) are warranted by respondent. All these, and other considerations, gives rise to the fair and reasonable conclusion that no fraud, misrepresentation or deception is inherent in, or attributable to the respondent as charged.

2. It is significant to note the extreme to which counsel in support of the complaint would go in prohibiting to respondent the use of the term, "Genuine Chevrolet Parts." In his Request for Proposed Order, Paragraph Four, he would enjoin respondent from:

Using the word "genuine" in any manner to describe or refer to *any automotive replacement part sold or distributed by it* for use in the repair of automobiles made by it. [Italics supplied.]

And in support thereof says:

The first impression might be that some of the parts sold by respondent are genuine and that it should be permitted to so describe them, but it is submitted this is an unusual situation in that if respondent is permitted to continue to use the word "genuine" to describe or refer to *any* of its replacement parts, it will thereby continue to harvest fruit seeded by its past unfair and deceptive acts and practices. [Italics supplied.]

In this argument no concurrence is possible, especially in view of counsel's position in urging strict interpretation and application of the definition of the word "genuine," as he would thereby deny to the respondent a substantive right to correctly identify and represent the genesis and properties of the vast majority of respondent's parts properly within the category of "genuine," even under his own definition of the word.

The corollary of the foregoing argument is that, in order to use the word "genuine," a manufacturer's operations would have to be 100% integrated in all its producing functions and the Examiner takes official notice that many large producers are not integrated or, perhaps, for reasons best known to themselves, prefer to sub-let production of various components.

3. It is concluded that the charge that respondent's use of the words "Genuine Chevrolet Parts," and the other advertisements quoted, in conjunction with the photographic depiction of "twin parts," constitutes a defamation and disparagement of competitors' products, has not been sustained by a preponderance of reliable and probative evidence, as required by law, nor in fact has any direct evi-

dence been adduced on this point. Likewise, no direct evidence has been produced to prove actual injury to competition. Any discussion as to the necessity to produce evidence of actual injury to competition under a Section Five case would serve no good purpose here. Suffice it to say there is none such of record, and possible or probable injury must be inferred by the Commission under its special expertise upon consideration of the entire record. This Examiner is unwilling and unable, upon consideration of the entire record in all of its ramifications, to make such an affirmative finding or conclusion and hence rejects the same as unwarrantable and unjustifiable.

4. Referring to the great preponderance of the number of parts produced by respondent, as compared with the relatively minor number of parts produced by others for the respondent, as delineated by Findings Nos. 13, 14, 15 and 16, and the further findings that all such latter parts are produced under the aegis and sponsorship of respondent, a grave doubt arises as to just who is actually chargeable with unfair competition in representing the origin and authenticity of parts—certainly not the respondent because, *imprimis*, it originated the design and production of the part and, ultimately, approved and adopted the same, that is, insofar as such parts were sold and distributed by respondent as a “Genuine Chevrolet Part.”

5. Counsel in support of the complaint cited several cases as authorities for his position on certain aspects of the Commission’s case, among such being:

Re: *Tungsten Contact Mfg. Co.*, F.T.C. Docket No. 5835.

The subject matter of this case was that respondents were dealing in *counterfeit* parts. The Commission passed an order prohibiting respondents from:

(1) Offering for sale * * * any automotive parts * * * marked with the trade-mark of or packaged in containers simulating those used by General Motors, Electric Auto-Lite or Ford Motor Company, when such * * * parts * * * *have not been made by or for* the said [three companies].

(2) Representing * * * that automotive * * * *parts not made by or for General Motors, Electric Auto-Lite or Ford Motor Company were made by or for such manufacturers.*

(3) Aiding and abetting any corporation * * * in the transportation, sale and distribution of *counterfeit* automotive * * * parts.

[Italics supplied.]

The citing of this case in support of counsel’s position is inapposite because that matter dealt clearly with spurious and counterfeit parts and the wrongful use of the names of the three manufacturers. There is no such question presented in the instant case. On the other hand, a reading of the underscored portions of the above order would seem to indicate that had the parts been made *by or for* the three named companies the order may not have been issued.

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Re: *Samuel Breakstone*, F.T.C. Docket No. 1457.

This is the so-called "A-C" Spark Plug case which was tainted with fraud and deliberate deception from beginning to end. Respondent there purchased 300,000 spark plug cores bearing the "A-C" trade-mark, all originally made by "A-C", sold to the Government which disposed of them as surplus to respondent in that case; the cores were intended for airplane motors and not suited to automobile motors; that respondent later purchased, by devious methods, a carload of scrap paper containing some one million "A-C" spark plug cartons, the use of which had been discontinued by the "A-C" company; that he thereupon used the cores bearing the "A-C" trade-mark to produce completed plugs and furnished to his purchasers of said plugs the discarded cartons aforesaid. The Commission issued an order.

There is nothing in the order, or in the case as an entirety, which remotely resembles the facts in the instant matter, hence the citation is disregarded.

6. Respondent has a fundamental, substantive and unquestionable right to protect and further, by all proper and lawful means, the good will and esteem of the public for products manufactured by it. Inherent in that statement is the right of respondent to properly inform the public and users of its automobiles where appropriate parts may be procured, and to legally exercise all proper means to insure the installation of appropriate, workable and satisfactory replacement parts in automobiles of its manufacture, as only thus may its good will be preserved and strengthened and it be reasonably safeguarded in fulfilling its contractual obligations under its guarantees to purchasers of its automobiles and parts. That this is recognized by the courts, a few quotations from *Pick Mfg. Co. v. General Motors*, (80 Fed 2d 641), (aff. 229 U.S. 3), (a Clayton Act Sec. 3 matter charging as unlawful the restriction to the use of parts made by the manufacturer of an automobile in the repair of that manufacturer's automobile), will demonstrate:

In the minds of the owners, the cars are identified and associated with the manufacturer. If defective or inefficient repairs or replacements should be made, and the cars, as a result, should operate unsatisfactorily, the owners' recollections will naturally and inevitably revert to the specific name and manufacturer thereof. Defective parts, preventing efficient operation of cars, bring dissatisfaction with the automobiles themselves. The natural result is blame of the manufacturer and consequent loss of sales.

The automobile is a complicated mechanism, the refined product of scientific engineering after long investigation, close competition, experiment, and practical experience. Replacement and repair parts must be of accurate measurement, appropriate, satisfactory material, and proper mechanical construction. Otherwise disaster may result.

* * * The restriction is applicable only to appellees' cars. Clearly this protects appellees against the otherwise possible use of defective parts in repairing or making replacements in their products. The preservation of the good will of the public is directly involved.

And in citing with approval *U.S. v. United Shoe Machinery Co.* (264 F. 138) (Aff. 258 U.S. 451) the court quoted:

In the opinion of the court there is nothing unreasonable in this provision. [Restricting replacements to use of manufacturers' parts]. The evidence shows that most, if not all, parts of these machines, are very delicate, and unless perfectly adjusted will, if not entirely, at least very seriously, prevent the proper operations of the machine, and in some instances prove ruinous, necessitating costly repairs, thus depriving the lessee of a full output, and the lessor of royalties. They may also cause dissatisfaction with the machines, owing to the decreased and unsatisfactory output. The parts furnished by the defendants are all standardized and fit perfectly, so that by replacing broken or worn-out parts with the parts made by defendants, the machines will perform the work in as satisfactory manner as a new machine.

Citing as in accord, *F.T.C. v. Sinclair Refining Co.* (261 U.S. 463).

7. Having further reference to the specific charges of the complaint that respondent's advertisements are in derogation of competitors' products and that use of the term, "Genuine Chevrolet Parts," imports that all such parts are the sole and exclusive products of respondent, it must be concluded that such charges result from a forced and unnatural interpolation of a process of deduction or facile thinking attributed to respondent's advertising and not because of any proven facts. It is axiomatic that any prohibitory order must be supported by and in accordance with reliable, probative and substantial evidence, the sole evidence here, in the final analysis, consisting of the advertisements and such light as may be thrown on them by the several stipulations of record, as well also the reasonable interpretations and innuendoes to be accorded or read into them. This Examiner being of opinion, and so concluding, that the attempted construction placed upon respondent's advertisements is not reasonable or tenable, and does violence to a fair and just interpretation of the words as used in everyday transactions, in contradistinction to technical or dictionary definitions, it follows that the burden of proof has not been sustained and the charges fail.

Particular stress is hereby laid upon the necessity for "substantial" evidence as segregated from the "reliable and probative" categories. It may be conceded that all "evidence" herein is reliable and probative but lacks substantiality in proving the specific charges. On the question of "substantial evidence" the following is quoted from *Carlay Co. v. F.T.C.* 153 F. 2d 496:

Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. It must be of such character as to afford a substantial basis of fact from which the fact in issue can be reasonably inferred. It excludes vague, uncertain and irrelevant matter. It implies a quality and character of proof

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which induces conviction and makes a lasting impression on reason. *Cons. Edison Co. v. NLRB*, 305 U.S. 197; *NLRB v. Columbian Enameling Co.*, 306 U.S. 292, 299; *NLRB v. Thompson Products Inc.*, 97 F. 2d 13, 15. The rule of substantial evidence is one of fundamental importance and marks the dividing line between law and arbitrary power; and the requirement that a finding must be supported by substantial evidence does not go so far as to justify orders without a basis in evidence having rational probative force.

And again, in *International Parts Corp. v. F.T.C.* 133 F. 2d 886, the court said:

The Commission cannot interpolate into the petitioner's [respondent's] representations words not there, and then find the petitioner guilty of misrepresentation because the petitioner's product does not meet the Commission's revised representations. The word "prevents" is a word of common understanding, and the common acceptance of this word carries no connotation of permanency. The petitioner will be presumed to have used the word in its ordinary and commonly accepted understanding, in the absence of any showing to the contrary. Without the word "permanently" interpolated, there is no misrepresentation. The word "permanently" is the Commission's word, not the petitioner's. The petitioner answers for its own representations, and not those of the Commission.

In the foregoing, if we substitute the word "genuine" for "prevents," and the Commission's interpolated conclusions in this matter, in the place and stead of the interpolated word "permanently," the above quotation becomes particularly apropos.

8. During the course of the proceedings respondent introduced in evidence certain advertisements by:

Studebaker: "Genuine Factory Parts and Accessories." "Always insist on genuine factory parts for your Studebaker." "Genuine Studebaker Parts—Accessories." (Rx. 1.)

Thermoid: "Always Install Only Genuine Thermoid" brake linings. (Rx. 2.)

Chrysler: "Use Chrysler Corporation MoPar Parts and Accessories. Factory Engineered and Inspected." "Use parts that fit right and work right * * * Genuine MoPar parts." (Rx. 3.)

Chrysler: "When you need *any* part or accessory * * * insist on MoPar Genuine Chrysler Parts and Accessories." (Rx. 5.)

Ford: "Genuine Ford Parts.—Genuine Ford Parts are just naturally the *best* parts you can put into your Ford. Here's why: * * * They're Track Tested and proved by Ford Engineers who give them the toughest imaginable tests. When they meet Ford's high standards, they become Genuine Ford Parts and you can be sure they're built to last and LAST." (Rx. 6.)

Studebaker: "Don't get caught off base with questionable parts in your Studebaker! Always insist on factory engineered parts!" "It's risky to take chances on an unknown 'pinch hitter' for a genuine Studebaker part." "Genuine Studebaker Parts and Accessories." (Rx. 9.)

Ford: "Economy-minded fleet owners use Genuine Ford Part replacements * * * the parts that are made right to fit *right* to last longer in their Fords." (Rx. 10.)

Ford: "Who puts the "Genuine" in Genuine Ford Parts?—The same men who originally built your Ford set the specifications for Genuine Ford Parts. This means that Genuine Ford Parts are made right for your Ford, to fit right to last longer." (Rx. 11.)

Studebaker: "I insist on genuine factory parts!" "It pays to stay Studebaker all the way with genuine factory parts and accessories." (Rx. 12.)

The foregoing exhibits, while received in evidence, cannot be considered as a defense or justification for respondent's actions. Nevertheless, they cannot help but be revealing, having appeared in the public press, of the representative use, in the trade, of the "Genuine Parts" legend, and the general construction or adaptation of that characterization as used by others to extol their own "genuine" parts. Particularly is this true of Ford, respondent's active competitor, when it asks, in Respondent's Exhibit 11—"Who puts the 'Genuine' in Genuine Ford Parts?" and proceeds to answer: "The same men who originally built your Ford set the specifications for Genuine Ford Parts." And in Respondent's Exhibit 6—"When they meet Ford's high standards they become Genuine Ford Parts." Judicial notice having been taken of the fact that many large corporations are not 100% integrated, coupled with the wide distribution of the next foregoing advertisements, the contents thereof cannot be totally disregarded unless one is resolved to remain blind to the activities of the market place.

9. Respondent moved for dismissal of the complaint on the ground of lack of public interest and renewed the motion in its request for a Proposed Conclusion on that ground. Inasmuch as the complaint will be dismissed because of failure of adequate proof it is considered unnecessary to rule on the motion.

10. The Federal Trade Commission has jurisdiction over the respondent and over the subject matter of this proceeding, and that this proceeding is in the public interest.

11. It is concluded that counsel in support of the complaint has failed to establish the charges contained in the complaint by the preponderance of reliable, probative and substantial evidence, wherefore:

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

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

The complaint charges respondent with a violation of Section 5 of the Federal Trade Commission Act in the distribution and sale of automotive parts for use in the repair of Chevrolet automobiles. Specifically, the complaint alleges in Paragraph 4 that respondent in advertising such parts represents directly or by implication:

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1. That all of the automotive replacement parts sold or distributed by it for use in the repair of Chevrolet automobiles are:

(a) Designed and manufactured exclusively by or for the respondent;

(b) Identical to the parts used in Chevrolet automobiles at the factory;

(c) Superior in material respects to all other replacement parts available for use in the repair of Chevrolet automobiles.

2. That all other automotive replacement parts available for use in the repair of Chevrolet automobiles are counterfeit or spurious, and will not function as efficiently as respondent's so-called "Genuine Chevrolet Parts."

That the foregoing representations and advertisements are false, misleading and deceptive and disparage the products of respondent's competitors.

The evidence consists of stipulations and exhibits, from which the hearing examiner made findings of fact and conclusions and dismissed the complaint, from which counsel supporting the complaint has appealed. The issues presented in the appeal are:

(1) Has the respondent misrepresented certain of the automobile replacement parts sold and distributed by it.

(2) Has the respondent falsely defamed and disparaged the products of its competitors.

The facts may be briefly summarized as follows. The respondent manufactures and sells Chevrolet motor vehicles. Approximately 15 million are now in use in Continental United States, of which approximately 11,800,000 are passenger automobiles. Respondent also distributes a great number of parts for use in repairing said motor vehicles. In connection therewith, respondent has placed advertising in publications of national circulation, of which the following, set out in Commission Exhibit 2, is typical:

These two clutch discs may *look* alike * * * (photograph of the two discs) but *your Chevrolet* knows the difference.

What is the difference? Simply this: One of these clutch discs was manufactured of the same fine materials and with the same high standards of precision used in your Chevrolet's original factory installed clutch disc. It's the one that's made to fit right—function better—last longer—the Genuine Chevrolet Part. This important difference means finer performance for your Chevrolet and it means more dependable and economical motoring for you. That's why you should always specify Genuine Chevrolet Parts—installed by your Chevrolet dealer and leading independent garages and service stations everywhere.

Always ask for Genuine Chevrolet Parts. Available wherever you go. Made to fit right—function better—last longer.

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The advertisement also contains a picture of the display sign furnished by respondent to certain dealers and garages containing the following:

Genuine Chevrolet Parts.

Other exhibits contain similar advertising relating to various other repair parts for Chevrolet motor vehicles.

In the distribution of replacement parts, respondent publishes a parts catalog which is available to all authorized dealers of genuine Chevrolet parts and to many others interested in replacement parts. The current catalog lists approximately 29,000 separate parts, of which 19,000 are for replacement use in Chevrolet passenger automobiles. Of these 19,000 parts, approximately 16,200 are not manufactured competitively and are available only through respondent. 2,800 parts are to some extent manufactured by competitors of respondent.

Approximately 2,000 parts are most frequently used in replacement and repair and are generally stocked by most dealers. These are known as "fast-moving" parts. Although they constitute only 7% of the total number of Chevrolet parts, they account for 89% of respondent's dollar volume in Chevrolet replacement parts. Approximately 75% of the fast selling parts are manufactured solely by respondent; more than 24% are made by others or are made by both respondent and by others expressly for respondent and in accordance with its specifications and expressly for use in Chevrolet motor vehicles; less than 1% are engineered, designed and made by others, but in each case the engineering and design is approved by respondent's engineers expressly for use in Chevrolet automobiles.

Thus, it appears that every replacement part, to the sale of which respondent's advertising is directed, is either (1) manufactured by respondent in its own plant, or (2) manufactured for it by others in accordance with specifications acceptable to respondent and subjected to the same tests and governed by the same warranties as in the case of parts actually made by respondent's own employees in its own plant.

The first question is, does respondent's advertising misrepresent such replacement parts?

The argument here revolves around the use of the term "Genuine Chevrolet Parts". While most of the parts are made by respondent, it is true that some are made by other manufacturers. However, those parts are made in accordance with specifications acceptable to respondent and usually furnished by it. They are subjected to tests by respondent's engineers. They are used not only for replacement

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but in the original production of automobiles. They carry the same recommendation and warranty as parts made by respondent. The manufacturers who make these parts for respondent apparently assume no obligation for them except such as is defined in their contract with respondent. Respondent adopts the parts as its own and assumes responsibility for them. Under the circumstances and under the general practice in the motor vehicle industry, they are as much genuine parts as those which are made in respondent's own plant.

Exhibits introduced by respondent indicate that other motor vehicle manufacturers have used somewhat similar advertising, calling attention to their "genuine factory parts and accessories." These advertisements have some bearings on the general practices in the industry, and its general understanding of the term "genuine parts."

There is nothing in the dictionary definitions referred to in the record or in the court of Commission cases which justifies a different conclusion than the one reached by the hearing examiner. For example, *In the Matter of Tungsten Contact Manufacturing Company*, Docket 5835, the Commission prohibited the selling of replacement parts as "genuine" when such parts had not been *made by or for* the General Motors Company. See also *In the Matter of United Vacuum Cleaner Stores Corporation*, 34 FTC 1695.

In regard to specific charges made in Paragraph 4, Subparagraph 1 (a) and (b) of the complaint, the hearing examiner said:

There is no evidence that respondent's advertising represented that all automotive parts sold or distributed by respondent for use in the repair of Chevrolet automobiles are designed and manufactured exclusively by or for respondent, as is alleged in the complaint.

There is no evidence that any automotive replacement parts sold or distributed by respondent for use in the repair of Chevrolet automobiles are not identical to the parts used at the factory in the manufacture of Chevrolet automobiles, except only for oversize and undersize to compensate for wear, as is alleged in the complaint.

The next question is, has the respondent falsely defamed and disparaged the products of its competitors?

On this issue some additional facts are relevant. When new models of Chevrolets are put on the market by respondent, which contain new or different replacement parts, the demand for such parts is often more active. If competing manufacturers think certain parts will be in substantial demand, some of them will manufacture one or more of such parts. As to some of these parts, the hearing examiner found as follows:

There are manufacturers who make automobile replacement parts intended for use in Chevrolet automobiles that are of design, materials or workmanship inferior to Chevrolet parts sold by respondent, which parts are not equivalent

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in material respects to respondent's parts and should not work as efficiently in a Chevrolet automobile, or last as long as "genuine" Chevrolet parts.

* * * * *

There are members of the public who have been injured through the use of defective parts of inferior quality sold to them for replacement in, or the repair of, their automobiles.

It also appears that some of the manufacturers selling automotive parts to respondent for use in the repair of Chevrolet automobiles sell substantially the same parts to others than respondent, under their own or other trade names, which parts are equivalent in all material respects to the parts sold by such manufacturers to respondent. There are also manufacturers of parts who do not sell to respondent, who, nevertheless, manufacture, sell and distribute parts for Chevrolet cars that are equivalent in material respects and should function just as efficiently, fit just as well and last just as long as will the "genuine Chevrolet parts" sold by respondent.

The question of whether parts in the first of these categories set out above could properly be called "genuine Chevrolet parts" is not involved here. We have already concluded that respondent's use of that term for the parts it distributes is not misleading. The advertising does not say that those are the only genuine Chevrolet parts or that they are superior in all material respects to all other parts. In that connection, the hearing examiner found that:

There is no evidence that respondent's advertising represented that all automotive parts sold or distributed by respondent for use in the repair of Chevrolet automobiles are superior in "all" material respects to "all" other replacement parts available for use in the repair of Chevrolet automobiles.

The respondent, because of its desire to maintain the good will of the motoring public and because of its responsibility under its warranties, is naturally interested in the use of replacement parts that are of a quality equal to those in the original car and that have been subjected to the tests of its own engineers. Its advertising simply notifies the public of at least one source where those parts may be secured.

On the whole record, we conclude that the hearing examiner decided the issues correctly. His findings, conclusions and order are adopted as the findings, conclusions and order of the Commission. The appeal of counsel supporting the complaint is denied and it is directed that an order issue dismissing the complaint.

FINAL ORDER

This matter having been heard on an appeal, filed by counsel in support of the complaint, from the hearing examiner's initial de-

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cision dismissing the complaint, and on the briefs and oral argument of counsel in support of and in opposition to said appeal; and

The Commission having rendered its decision denying the appeal and adopting as its own the findings, conclusions and order contained in the initial decision:

It is ordered, That the complaint in this proceeding be, and it hereby is, dismissed.

INTERLOCUTORY ORDERS, ETC.

BRILLO MANUFACTURING CO., INC. Docket 6557. Order, Sept. 10, 1956.

Order denying respondent's appeals from hearing examiner's denial of demand for answers to interrogatories.

This matter having come on to be heard on the respondent's appeals from the hearing examiner's ruling denying a demand for answers to certain interrogatories propounded to the Commission, and denying a request for a prehearing conference to enable the respondent to present oral argument in support of said demand; and

It appearing that none of the statutes administered by the Commission nor the Commission's Rules of Practice provide for discovery through service upon an adverse party of interrogatories such as that provided for by the Rules of Procedure for the District Courts of the United States; and

The Commission being of the opinion that the rulings complained of were free from error:

It is ordered, That the respondent's appeals from said rulings be, and they hereby are, denied.

THE GOODYEAR TIRE & RUBBER CO. and THE ATLANTIC REFINING CO. Docket 6486. Order, Oct. 26, 1956.

Order affirming hearing examiner's order amending complaint and denying complaint counsel's request for modification of said order.

This matter having come on to be heard on a motion, filed by counsel supporting the complaint, requesting the Commission to affirm the hearing examiner's order of May 22, 1956, amending the complaint herein, after modifying said order by adding thereto a new preamble and notice specifying the time and place of hearings on the complaint, as amended, which motion was certified to the Commission by the hearing examiner; and

It appearing that the order amending the complaint was clearly within the scope of the authority conferred upon the hearing examiner by § 3.9 of the Commission's Rules of Practice; and

The Commission being of the opinion that it was not necessary, nor would it have been appropriate, for the hearing examiner, in allowing the amendments, to have rewritten those portions of the

complaint which represent administrative determinations which were made by the Commission at the time the complaint was issued and which remain unaffected by the amendments allowed:

It is ordered, That the hearing examiner's order, filed May 22, 1956, amending the complaint in this proceeding be, and it hereby is, affirmed.

It is further ordered, That the request of counsel supporting the complaint for modification of said order be, and it hereby is, denied.

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

MASSACHUSETTS BONDING AND INSURANCE CO.
Docket 6447. Order and opinion, Nov. 7, 1956.

Interlocutory order denying respondent's motion to suspend proceeding on showing that it had discontinued use of the challenged advertising practices—while still maintaining they were not false or misleading—and had subscribed to the trade practice rules for its industry promulgated subsequent to issuance of the complaint—while denying Commission's jurisdiction.

ON MOTION TO SUSPEND PROCEEDING

By the COMMISSION:

The question for determination here is whether this proceeding should be suspended on the respondent's showing that it has discontinued use of the advertising representations alleged to have been unfair and deceptive and has subscribed to the Trade Practice Rules for the Accident and Health Insurance Industry which were promulgated by the Commission subsequent to issuance of the complaint.

Neither discontinuance of the practices involved nor subscription to trade practice rules covering such practices constitutes a defense to the charges in the complaint or entitles the respondent as a matter of right to a suspension of the proceeding. Disposition of the motion to suspend is within the sound discretion of the Commission, in the exercise of which it must consider all of the surrounding facts and circumstances.

One of the circumstances which, to the Commission, seems significant is the respondent's insistence throughout this proceeding that the Commission is without jurisdiction over any of the respondent's activities. Another is the respondent's contention, which it has maintained with equal vigor, that none of its advertising statements or representations, including those referred to in the complaint, were in any respect false or misleading. Thus, the respondent is in the position of having agreed to comply with trade practice rules which it believes are without force and effect, and to refrain from the use of advertising representations which it believes it has a legal

right to make. In these circumstances the Commission cannot find that the public interest would be served by a termination of this proceeding, and, accordingly, the respondent's motion must be denied. An appropriate order so providing and remanding the case to the hearing examiner will be entered.

Commissioner Tait did not participate in the decision of this matter.

ORDER DENYING RESPONDENT'S MOTION TO SUSPEND

This matter having been heard on the respondent's motion to suspend this proceeding, certified to the Commission by the hearing examiner pursuant to the provisions of § 3.15 of the Commission's Rules of Practice, and on briefs and oral arguments of counsel; and

The Commission having set forth in the attached opinion the reasons why the motion cannot be granted:

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

It is further ordered, That the case be, and it hereby is, remanded to the hearing examiner for further proceedings in regular course.

Commissioner Tait not participating.

CALIFORNIA FISH CANNERS ASSOCIATION, INC. ET AL. Docket 6623. Order, Nov. 28, 1956.

Order denying respondent union's appeal from hearing examiner's denial of motions requesting dismissal and for more definite complaint.

This matter having come on to be heard upon the appeal of the above-named respondents from the order filed by the hearing examiner on October 15, 1956, denying two motions filed by said respondents, one of which requested their dismissal from this proceeding and the other requesting that the complaint be made more definite and certain or, alternatively, that a bill of particulars be granted; and

The respondents in support of their motions below having argued (1) that the acts charged in the complaint to have been engaged in by them are not within the purview of the Federal Trade Commission Act or are immunized by other provisions of statutory law, and (2) that the complaint is vague and ambiguous and fails to afford adequate notice of matters of fact and law asserted and with respect to the place of initial hearing contrary to the provisions of the Administrative Procedure Act; and it being evident here that the hearing examiner's ruling denying the request for dismissal for alleged lack of jurisdiction merely contemplated informed decision on jurisdictional issues upon the basis of facts subsequently developed in the orderly course of hearings; and the Commission having concluded that the factual matters alleged in the complaint ade-

quately apprise as to the essential nature of the charges and clearly suffice to enable appellants to file answer to the complaint, and it further appearing that in the course of the hearings which are to be held herein at intervals said respondents will be fully informed, prior to the time when they will be required to offer evidence rebutting such charges, of all evidentiary matters relied upon in support of the charges of the complaint, and there accordingly being no indication that the respondents will be deprived in any way of their rights to full and fair hearing; and

The Commission having determined that no showing has been made, as required by § 3.20 of the Commission's Rules of Practice, that the challenged rulings of the hearing examiner affect appellants' substantial rights or that decision as to their correctness before conclusion of the trial would better serve the interests of justice; and

The respondents in their appeal having additionally requested an extension of time for the filing of answer to the complaint and postponement of the initial hearing, and the Commission having determined that the respondents' request for ruling by the Commission in those respects should be disallowed for the reason that the hearing examiner by order entered on November 1, 1956, duly extended the time for filing of answers to January 21, 1957, and likewise rescheduled the initial hearing herein for that date; and

The Commission having duly considered the matter and being now fully informed in the premises:

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

MA-RO HOSIERY CO., INC., REX SOX CO., INC., ROXY HOSIERY CO., INC., and MAX ROUNICK, JACK ROUNICK and HERBERT ROUNICK, individually and as officers of said corporations. Docket 6436. Nov. 29, 1956.

Order vacating Commission's decision, and granting respondents' request for oral argument.

The Commission, on November 1, 1956, having rendered its decision denying the respondents' appeal from the hearing examiner's initial decision herein and adopting as its own the initial decision, as modified; and

Said decision having been rendered under the impression that oral argument on the appeal had not been requested; and

The Commission having now satisfied itself that the privilege of oral argument was timely requested by the respondents and being of the opinion that its former decision should be reconsidered and the request for oral argument granted:

It is ordered, That the Commission's decision of November 1,

1956, denying the respondents' appeal and adopting the initial decision, as modified, be, and it hereby is, vacated and set aside.

It is further ordered, That the respondents be, and they hereby are, granted permission to present oral argument before the Commission in support of their appeal.

It is further ordered, That the Secretary inform counsel for the respondents and counsel in support of the complaint of the time and place of said argument.

EMERSON RADIO AND PHONOGRAPH CORP. Docket 6614. Order, Nov. 29, 1956.

Order denying appeal from hearing examiner's denial of respondent's motion that a stipulation as to the facts and a voluntary agreement to desist be accepted.

This matter having come on for hearing upon the respondent's interlocutory appeal from that part of the order filed by the hearing examiner on October 11, 1956, which denied the respondent's motion that a stipulation as to the facts and voluntary agreement by the respondent to cease and desist from the unlawful practices alleged in the complaint be accepted in disposition of this proceeding; and

It appearing that the provision made under the Commission's published policies for disposition through its stipulation procedure of appropriate matters affords such opportunity not as a matter of right but as a privilege which the Commission reserves the right in all cases to withhold, and there being no showing that the Commission's administrative determination to the effect that the public interest required disposition of this matter through institution of adversary proceedings was improper; and there being similarly absent here any showing, as required by § 3.20 of the Commission's Rules of Practice with respect to adjudicative proceedings, that the hearing examiner's ruling affects the respondent's substantial rights inasmuch as such ruling merely contemplates that informed decision on the merits of the charges of the complaint, including the question of whether public interest is present in the respondent's practices, will be duly made on the basis of facts subsequently developed in the orderly course of hearings; and

The respondent having additionally requested the privilege of oral argument on the merits of its appeal but the Commission having concluded that the appeal and the answer thereto of counsel supporting the complaint suffice for informed decision on the appeal and the Commission having determined that the request for oral argument should be denied; and

The Commission having duly considered the matter and being now fully advised in the premises:

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

THE GOODYEAR TIRE & RUBBER CO. and THE ATLANTIC REFINING CO. Docket 6486. Order, Dec. 5, 1956.

Order sustaining appeal of complaint counsel from hearing examiner's exclusion of evidence re commission agreements between each respondent and other oil companies.

This matter having been heard on an interlocutory appeal, filed by counsel in support of the complaint, from rulings of the hearing examiner excluding from the record certain evidence relating to the extent and effect of the commission agreement between the respondent, The Atlantic Refining Company (hereinafter referred to as Atlantic) and The Firestone Tire and Rubber Company (hereinafter referred to as Firestone), and other evidence relating to the existence, extent and operation of alleged commission agreements between the respondent, The Goodyear Tire & Rubber Company, Inc. (hereinafter referred to as Goodyear, Inc.) and a number of oil companies other than Atlantic; and

It appearing that the basis for the rulings complained of was that evidence of the relationships between Atlantic and Firestone and between Goodyear, Inc., and oil companies other than Atlantic have no bearing on the issues in this proceeding, which proceeding is concerned only with the contractual relationship between Atlantic and Goodyear, Inc., and the acts and practices engaged in pursuant thereto; and

It further appearing, however, that the allegations of the complaint are not limited to the existence of and activities under the commission contract between respondents Atlantic and Goodyear, Inc., but relate also to a general course of competitive action by each of said respondents, under which respondent Atlantic is charged with having unlawfully entered into and acted under contracts with both Goodyear, Inc., and Firestone providing for the receipt by it of commissions on the sales of all tires, batteries and accessories sold by Goodyear, Inc., and Firestone to service stations controlled by Atlantic, and respondent Goodyear, Inc., is alleged to have unlawfully entered into and acted under similar contracts with a number of oil companies, including Shell Oil Company and Atlantic, providing for the payment by it to said oil companies of commissions on the sales of all tires, batteries and accessories sold by Goodyear, Inc., to service stations controlled by said oil companies; and

The Commission being of the opinion that the evidence rejected by the hearing examiner apparently was relevant and material to

the direct issues thus raised by the complaint and that, if so, it should have received in support of said issues:

It is ordered, That the appeal of counsel in support of the complaint be, and it hereby is, sustained.

It is further ordered, That the hearing examiner be, and he hereby is, directed to receive into the record such relevant, material and reliable evidence as has been or may be offered concerning the details, operation and competitive effects of the override commission contract between respondent Atlantic and Firestone and of the alleged similar commission contracts between respondent Goodyear, Inc., and each of a number of oil companies other than respondent Atlantic. Such evidence relating to the contract between Atlantic and Firestone should be admitted as against respondent Atlantic unconditionally and as against respondent Goodyear, Inc., subject to a subsequent motion to strike upon a proper showing; and the evidence relating to the alleged contracts between Goodyear, Inc., and the oil companies other than Atlantic should be admitted as against respondent Goodyear, Inc., unconditionally and as against respondent Atlantic subject to the same type of motion.

FRUEHAUF TRAILER CO. Docket 6608. Order and opinion, Dec. 7, 1956.

Interlocutory order in Sec. 7 proceeding denying respondent's appeal from the hearing examiner's denial of motion for an order requiring complaint counsel to submit a more definite statement as to lines of commerce and sections of the country concerned.

OPINION OF THE COMMISSION

By the COMMISSION:

This matter is before the Commission for its consideration of an appeal filed by the respondent from the hearing examiner's order of November 15, 1956, which denied in part the respondent's motion for an order requiring counsel supporting the complaint to submit a more definite statement in respects designated in such motion.

The complaint charges, among other things, that the respondent, in violation of both the Clayton Act, as amended, and the Federal Trade Commission Act, has been and is now engaged in a pattern of acquisitions of the stock, assets and facilities of other corporations which also act in commerce and engage in or supply the nation's truck-trailer manufacturing industry. It additionally alleges that the effect of the acquisitions there described, singly or cumulatively, may be to substantially lessen competition or tend to create a monopoly in the line or lines of commerce in which those named corporations and the respondent were and have been engaged. The

additional information which appellant requested be supplied includes factual data concerning particular lines of commerce and sections of the country in which competition allegedly existed between the respondent and certain of the acquired companies and a statement as to the manner in which the acquisition in 1947 of the assets of two named corporations and the subsequent acquisition of the stock of a named former supplier of the respondent are claimed to constitute a violation of law and whether divestitures thereof are being contended for.

Unless additional particulars concerning matters of fact and law relied upon in support of a complaint are necessary to enable the party to prepare his responsive pleading, request for that information ordinarily should be denied. The instant complaint sufficiently informs the respondents as to the nature of the statutory violations with which it is charged in a manner enabling it to answer those charges. Hearings in proceedings instituted by the Commission are held at intervals and a respondent is not required to proceed with its defense until after conclusion of the case in chief and opportunity to prepare for and meet the charges. The denial of a definite or supplementary statement concerning the matters to which the respondent's appeal relates, therefore, cannot operate to deprive it of full and fair hearing. Order denying the appeal is being issued herewith.

ORDER DENYING INTERLOCUTORY APPEAL OF THE RESPONDENT

This matter having come on for hearing upon the appeal filed by the respondent from the hearing examiner's order of November 15, 1956, and the answer of counsel supporting the complaint in opposition to such appeal; and

The Commission having determined, for reasons stated in its accompanying opinion, that the appeal should not be granted:

It is ordered, That said appeal be, and it hereby is, denied.

INTER-OCEAN INSURANCE CO. Docket 6392. Order, Feb. 26, 1957.

Order waiving requirement for written application and authorizing filing of brief on appeal as *amicus curiae* by State of Indiana.

It appearing that the hearing examiner on April 24, 1956, denied the application and motion of the State of Indiana for leave to intervene in this proceeding, but authorized said State to file a brief *amicus curiae*; and

It appearing that the hearing examiner on November 5, 1956, filed his initial decision dismissing the complaint herein for lack of public

interest; and that counsel supporting the complaint have perfected an appeal therefrom; and

It appearing that the Attorney General of the State of Indiana has submitted an appeal brief as *amicus curiae* without having made appropriate written application to the Commission as contemplated in § 3.11 of the Commission's Rules of Procedure; and

The Commission having concluded that in the circumstances the requirement for written application should be waived and that permission to file the aforesaid brief on appeal as *amicus curiae* should be granted.

It is ordered, That leave to file a brief *amicus curiae* on appeal be granted the Attorney General of the State of Indiana and that the said appeal brief submitted to the Commission on February 15, 1957, be, and it hereby is, ordered to be received and filed with the Commission *nunc pro tunc*.

It is further ordered, That counsel supporting the complaint may within thirty (30) days after service of this order file an answer to the aforesaid brief *amicus curiae*.

NUCLEAR PRODUCTS CO. Docket 5949. Order and opinion, Mar. 4, 1957.

Order denying, as not making the necessary preliminary showing of facts which would justify the relief requested, respondent's application for modification of desist order reported in 49 F.T.C. 229.

ON RESPONDENT'S REQUEST FOR MODIFICATION OF
ORDER TO CEASE AND DESIST

By ANDERSON, Commissioner:

In a letter dated January 7, 1957, the respondent has requested modification of the order to cease and desist which became a part of the Commission's decision in disposition of this proceeding on September 20, 1952. The modification is necessary, the respondent asserts, to relieve the respondent of from an unfair competitive position in which it has been placed as a result of requirements imposed upon it which have not been imposed upon certain of its competitors.

The respondent manufactures and sells two devices containing radio-active polonium, one of which is a brush used for the removal of static electricity, dust and lint from photographic film and other appliances, and the other of which is a wand or probe used in connection with the teaching of physics and chemistry, and in industry for the elimination of static and dust from instruments. The paragraph of the order to which objection is made requires the respondent, in connection with the interstate sale of these devices to imprint

upon or permanently attach to them cautionary or warning notices indicating possible harmful effects of ingesting or inhaling polonium. As a basis for the request for modification of this requirement, the respondent alleges that the Commission has accepted from certain other manufacturers of devices containing radioactive elements voluntary agreements to cease and desist under which these manufacturers are not required to imprint the cautionary or warning notices on the devices, but are permitted to place them upon the cartons or permanent containers in which said devices are sold. The modification requested would accord to the respondent the same privilege.

Under Section 5 of the Federal Trade Commission Act, any report or order of the Commission which has become final through the expiration of time allowed for filing a petition for review may be reopened and altered, modified, or set aside, in whole or in part, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require. Thus, while the Commission has the unquestionable authority to modify an outstanding order, it must determine as a prerequisite to the modification that changed conditions of fact or of law require it or that the public interest so requires. Ordinarily, the facts necessary for this determination are established by the introduction of evidence in an orderly proceeding before a duly appointed hearing examiner. Even before a case is assigned to a hearing examiner, however, there must first be a preliminary showing that the conditions for modification may be present. Hence, the application or petition for modification should allege facts which, when assumed to be true, would justify the full relief requested.

The application here does not make the necessary preliminary showing. The order about which the respondent complains was entered in 1952, and has long since become final. The necessity for the requirement that the respondent imprint or permanently attach to its devices adequate warning notices was determined after a full hearing on the record in which it was established, among other things, that polonium is extremely dangerous if inhaled or ingested. The contamination of the hands by touching this substance could result in a person spreading the contamination to the lungs and digestive tract. The devices are not only useful to adults, but they are also interesting and attractive to children. The polonium contained in them is protected by gold and silver foil and set in a stainless steel container with a grid; but any dismantling or careless use of either device, or any break in or damage to the foil or protective covering might result in serious injury.

The respondent makes no contention that any condition of fact or of law has so changed since the order was entered as to now require its

modification. It contends only that the Commission has accepted from two of the respondent's competitors who manufacture devices also containing radioactive elements, voluntary agreements to cease and desist containing requirements somewhat less burdensome than those imposed upon it. This, however, is not necessarily controlling. The question is not whether the respondent and its competitors have been treated identically, but, rather, whether the circumstances are such that it is unfair to the respondent and to the public for them to have been treated differently; and on this point the respondent's letter is completely silent. The respondent has made no showing, for example, that the active ingredient in the competitors' devices has the same or substantially the same capacity for harm to human health as does the polonium in the respondent's devices. It makes no allegation that the competitors' devices are of similar construction to the respondent's devices, or that the conditions of use of said devices are such as to produce the same or similar hazards as those produced by use of the respondent's devices; and it provides no basis for concluding that there may be other facts or circumstances which render inequitable or unjust the allegedly different requirements as to the manner in which the cautionary or warning notices must be displayed.

In the circumstances, the respondent's application for modification must be denied, but the denial will be without prejudice to the respondent's right to renew its application and, if possible, to make the showing required by Section 5(b) of the Federal Trade Commission Act and Section 3.27 of the Commission's Rules of Practice.

ORDER DENYING RESPONDENT'S REQUEST FOR MODIFICATION OF ORDER TO
CEASE AND DESIST

This matter having been heard on the respondent's request, in the form of a letter dated January 7, 1957, for modification of the order to cease and desist heretofore entered in disposition of this proceeding; and

The Commission, for the reasons set forth in its accompanying opinion, having concluded that said motion fails to establish a reasonable probability that material changes in conditions of facts or of law have occurred since the order was entered or to demonstrate a probability that the public interest requires the modification requested:

It is ordered, That the respondent's motion be, and it hereby is, denied, without prejudice, however, to the respondent's right to renew it in conformity with the requirements of § 5(b) of the Federal Trade Commission Act and § 3.27 of the Commission's Rules of Practice.

FOOD FAIR STORES, INC. Docket 6458. Order and opinion, Mar. 12, 1957.

Interlocutory order denying appeal of complaint counsel from hearing examiner's denial of motion to amend complaint, and granting the alternative request that the Commission direct amendment of the complaint.

OPINION OF THE COMMISSION

By the COMMISSION:

An interlocutory appeal has been filed by counsel supporting the complaint from the hearing examiner's order of December 17, 1956, denying counsel's motion to amend the complaint.

The respondent, Food Fair Stores, Inc., operates a large chain of grocery stores in the eastern part of the United States. The complaint under which this proceeding was instituted charges, in substance, that the respondent induced and received payments or compensation by suppliers of its merchandise for advertising and other services rendered by it, which payments allegedly were not made available on proportionally equal terms by those suppliers to other of their customers competing with the respondent in the resale of the respective suppliers' merchandise. Alleging that the respondent knew or should have known the facts in that latter regard and that 278 suppliers entered into agreements calling for payments ranging from \$200 to \$3750 resulting in payments to the respondent aggregating \$216,770 as exemplified by one Anniversary promotion, the complaint additionally charged that the respondent's acts and practices in inducing such allegedly disproportionate payments have obstructed and hindered competition and constitute unfair methods of competition and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

The matters contained in counsel's requested amendment include allegations to the effect that the amounts solicited by the respondent were paid by its suppliers for advertising to be done by the respondent in promoting each of their products during certain sales events; but add in such connection, among other things, that it has been the respondent's regular and continuous practice not to use the entire amounts received to advertise the products of the respective suppliers but to divert substantial amounts thereof to its own use. This practice, the amendment would charge additionally, is to the prejudice and injury of the respondent's suppliers and competitors and the public and likewise constitutes an unfair method of competition and unfair act and practice in commerce within the meaning and intent of the Federal Trade Commission Act. In denying counsel's motion, the hearing examiner expressed views that the amendatory matters were outside the scope of the original proceeding and that the

provisions of § 3.9 of the Commission's Rules of Practice, duly authorizing amendments by hearing examiners when reasonably within the scope of the original proceeding, were inapplicable.

In that connection, however, it is to be noted that certain of the acts and practices challenged under the original charges and proposed for challenge under the amended charge have stemmed from the same transaction or transactions. Furthermore, many commercial situations could exist in which salient features of a program for soliciting allowances, including those envisioning the proceeds' use for advertising other merchandise, might be relevant to the question of whether the payee indeed had knowledge or should have known that the pattern of compensation being induced by him was disproportionate to that being afforded his competitors. By the same token, evidence relating to the manner in which proceeds received from sellers cooperating in the respondent's Anniversary plans were expended by it might have bearing on state of mind and competitive objectives motivating respondent's adoption of its special programs in the first instance. Presumably, the hearing examiner considered these matters, and hearing examiners necessarily are vested with broad discretion in ruling on motions of the type contemplated under § 3.9 of the Rules. Because of the determinations reached by us, however, with respect to the appeal's alternative request that the Commission itself direct amendment of the complaint, no necessity appears for further consideration of the hearing examiner's ruling.

Turning now to the appeal's aforesaid alternative request that the Commission direct amendment, we have carefully considered the tabulated material submitted in that connection, which data relate to amounts allegedly expended by the respondent for advertising the products of its cooperating suppliers and other merchandise in the course of one of its special promotions. Those matters constitute grounds for preliminary administrative determinations or "reason to believe" that the respondent's practices may be attended by adverse competitive effects in respects particularized in the mandatory proposal and violative of the public policy expressed in the Federal Trade Commission Act; and it is clear too that informed determinations as to the legality of the practices adopted by the respondent in connection with its special promotions would be facilitated by amendment of the complaint. The arguments advanced by the respondent in support of its contentions that amendment is unwarranted or inequitable at this stage of the hearing have been considered and are deemed without merit. Under procedures provided for the conduct of the Commission's adjudicative proceedings, the rights of respondents to full and fair hearings on charges contained in original and amended pleadings are fully protected.

Having considered the data presented by counsel supporting the complaint, the Commission, with due regard to its duty to act administratively in factual situations wherein there is reason to believe that the law is being violated, has determined that amendment of its complaint is required in the public interest. Our order denying the appeal and the Commission's amended and supplemental complaint are issuing herewith.

ORDER DISPOSING OF INTERLOCUTORY APPEAL AND DIRECTING ISSUANCE OF
AMENDED AND SUPPLEMENTAL COMPLAINT

This matter having come on to be heard upon the interlocutory appeal of counsel supporting the complaint from the hearing examiner's order of December 17, 1956, denying counsel's motion for an amendment of the complaint, or, in the alternative, for an order of the Commission amending the complaint by adding supplementary charges substantially similar to those requested in counsel's motion below; and

The Commission having duly considered such appeal and the matters urged by the respondent in opposition thereto and having determined, for reasons stated in its accompanying opinion, that exercise of its administrative responsibility to issue an amended and supplemental complaint is required in the public interest and that no necessity, accordingly, is presented for ruling on the correctness of the hearing examiner's order;

It is ordered, That counsel's appeal from the ruling of the hearing examiner be, and the same hereby is, denied.

It is further ordered, That the amended and supplemental complaint of the Commission issue herewith and be served upon the respondent, Food Fair Stores, Inc.

It is further ordered, That the evidence heretofore introduced in support of and in opposition to the original complaint shall have the same force and effect as though received at hearings under the complaint as amended and supplemented, this action being without prejudice to the hearing examiner's authority and duty to rule on the merits of any motion which may be filed requesting opportunity to further cross-examine witnesses heretofore appearing in the proceeding or to take such further action as may be appropriate to protect any of the respondent's rights.

FOREMOST DAIRIES, INC. Docket 6495. Order and opinion, Mar. 13, 1957.

Interlocutory order in Sec. 7 proceeding granting in part appeal of complaint counsel from hearing examiner's quashing of subpoena duces tecum as too broad and limiting it to the areas in which acquisitions took place.

ON APPEAL FROM RULING QUASHING SUBPOENA

By the COMMISSION :

This matter has come on for hearing upon the appeal of counsel supporting the complaint from the hearing examiner's ruling of December 11, 1956, granting respondent's motion to quash a certain subpoena duces tecum and upon respondent's answer in opposition thereto.

The subpoena in question is directed to J. R. Lindley, Foremost Dairies, Inc. It requests the production of records and material, covering a period from 1950 through 1955, relating to respondent's loans to purchasers of dairy products; the furnishing by respondent of equipment to purchasers of dairy products; respondent's advertising expenditures; respondent's price lists and discount schedules; and various other matters.

The hearing examiner, while apparently satisfied with the general relevance of the records requested, quashed the subpoena on the ground that it is too broad and sweeping to be considered reasonable. He ruled, however, that at least certain paragraphs of the subpoena would be reasonable if confined to the areas where respondent had acquired corporations as disclosed by the record, and granted the motion to quash the subpoena in its present form without prejudice to the issuance of a new subpoena in accordance with his ruling.

The Commission is of the opinion that the hearing examiner erred to the extent that he would limit the subpoena in this matter in relation to the areas in which acquisitions took place. Counsel supporting the complaint in their brief argue as to the complexity and variety of corporate mergers governed by Section 7 of the Clayton Act, and point out that each case has its own significant and salient aspects. In the instant case, it is claimed, the competitive power of respondent, as manifested by exclusionary practices, constitutes a type of evidence which is relevant and material, and to limit counsel to a showing of some of respondent's power actually used in some areas would foreclose them from showing the actual use of all of respondent's manifested power and its total potential competitive power. Considering the section of law involved and the stated purpose of counsel for the use of the records sought, we cannot say that it would be appropriate to limit this request to certain geographical areas. We believe, therefore, that the hearing examiner incorrectly ruled in this respect, and that the appeal of counsel supporting the complaint should be granted to this extent but otherwise denied.

The hearing examiner has not clearly indicated in just what respects he considers some of the paragraphs of the subpoena to be unreasonable other than in relation to geographic scope. That appears

to be the primary issue, and any question as to the abuse of discretion on the part of the examiner in other respects has not been particularly presented. In this instance, therefore, it is not believed that the Commission has a sufficient basis for ruling on any other question relative to the reasonableness of individual paragraphs of the subpoena. It is contemplated, in this connection, that the hearing examiner, in the exercise of his reasonable discretion, will make the appropriate determinations warranted by the circumstances. Accordingly, this proceeding will be remanded to the hearing examiner for further consideration with due regard to the views expressed in this opinion.

ORDER RULING ON APPEAL OF COUNSEL SUPPORTING THE COMPLAINT FROM
HEARING EXAMINER'S RULING QUASHING SUBPOENA

This matter having come on for hearing upon the appeal of counsel supporting the complaint from the hearing examiner's ruling quashing a subpoena duces tecum and respondent's answer in opposition thereto; and

The Commission having considered the matter and having determined, for the reasons appearing in the accompanying opinion, that the appeal should be granted in part and denied in part and that the matter should be remanded to the hearing examiner for further appropriate consideration:

It is ordered, That the appeal of counsel supporting the complaint be, and it hereby is, granted in part and denied in part in accordance with the opinion.

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

THE BLANTON CO. Docket 6197. Order and opinion, Mar. 14, 1957.

Order denying respondent's motion to reopen proceedings and modify findings and desist order reported herein at p. 580.

ON MOTION TO REOPEN PROCEEDINGS AND MODIFY DECISION

By the COMMISSION:

This matter has come on for hearing upon the motion of respondent to reopen proceedings and to modify and clarify the findings and order of the Commission and upon the answer of counsel supporting the complaint.

Respondent requests several changes in the Commission's decision, one of which relates to a modification of Paragraph 2 of the order contained in the initial decision and adopted by the Commission. The argument upon which this first request is based is in substance that,

whereas the statute (Section 15(a)(2) of the Federal Trade Commission Act) prohibits the use of dairy terms only when they represent or suggest that margarine is a dairy product, as stated in the Commission's opinion, Paragraph 2 of the order is not so qualified and, consequently, is inconsistent with the statute and the opinion. Thus, respondent moves for modification of this paragraph in such a manner that the prohibition will extend to the use of the dairy terms set forth therein only when they represent or suggest that margarine is a dairy product. In the same connection, it is moved that the Final Order, in the part which modifies the findings, be modified by including the following sentence:

This finding does not mean or imply that the use of the terms "cream" or "milk" in and of itself suggests that the product is a dairy product, or that such terms could not be used without necessarily suggesting that the product is a dairy product.

In respect to Paragraph 2 of the order, the question raised is fundamentally one which concerns the Commission's choice of remedy. Clearly, respondent was found to have violated the pertinent statute by the use in advertising of certain dairy terms, and there can be no question about the Commission's authority to prohibit such a practice when engaged in in the same manner as in the past. The issue is whether or not the Commission has the authority to prohibit the use of such terms in a manner not precisely the same as that in which they previously have been used. In other words, has the Commission an allowable discretion in this instance to choose the type of remedy appropriate under the circumstances? We think that it does.

The courts have plainly stated that the Commission has the authority to make its orders broad enough to prevent evasion. *E. B. Muller & Co., et al. v. Federal Trade Commission*, 142 F. 2d 511; *P. Lorillard Co. v. Federal Trade Commission*, 186 F. 2d 52. Moreover, the Commission in carrying out its function of preventing illegal practices in the future is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. "If the Commission is to attain the objective Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *Federal Trade Commission v. Ruberoid Co.*, 343 U. S. 470; *Federal Trade Commission v. National Lead Company, et al.*, United States Supreme Court, February 25, 1957.

In this case, the order in Paragraph 2 would be of little value if limited to the precise violations of the past. It can hardly be ex-

pected that respondent would ever confine itself to the use of the dairy terms set forth therein in the same manner as used in former advertising. The order, if it is to be effective, must prohibit the use of such terms not only as they have been employed but also as they are likely to be used in the future. The necessity for this type of order becomes obvious when it is considered that, without a definite prohibition, respondent would have to vary only slightly the scheme of its advertising to raise a doubt as to whether the dairy terms as so differently used are representing or suggesting that its margarine is a dairy product. Evasion would be a simple matter. In addition, every change in advertising would raise a new issue and invite continual litigation.

At the same time, Paragraph 2 does not contain an undue restriction. It is possible perhaps that some of the dairy terms might be used in such a manner so as not to have the prescribed statutory effect, although, considering the nature of the terms, the prospect appears quite remote. Under the circumstances, we believe that the issuance of an effective order which cannot be easily evaded far outweighs any merit there may be in the modification of Paragraph 2 sought by respondent. It is also believed that the findings, as modified, are sufficiently clear so that there is no necessity for the modification requested in this respect, particularly in light of the view expressed above.

Respondent further requests a modification of Paragraph 3 of the order, as modified, stating that the merchandising of the product requires that retail grocers list it in various forms of advertising which customarily carry only the name of the product and the price. It appears that respondent pays for a portion of the cost of such advertisements. Respondent, while asserting that it could be held in violation of the order if such advertisements did not carry the full list of ingredients, contends, in effect, that it is impractical in this type of merchandising to meet the requirements of the order. The modification of Paragraph 3 requested is that an addition be made after the word "ingredients," as follows:

provided, retail grocer advertisements carrying listings of products and prices thereof shall not be required to include a list of ingredients when respondent's product is listed in an advertisement carrying only the brand name, Creamo margarine, and the price per pound.

In the alternative, a request is made for a proviso applying to such retail grocer advertisements which would permit a listing of respondent's product with only the words "Creamo margarine, a non-dairy spread," and the price.

The Commission has no question before it as to whether or not retail grocer advertisements will violate the order. The question

here is whether the order should be modified so that a certain type of advertising will be specifically privileged in some manner.

Respondent is requesting, in effect, that the Commission decide anew as to some advertisements, a question heretofore settled by our decision in this matter. We amended the order contained in the initial decision in such a manner as not to prohibit the use of the word "Creamo" in advertisements when accompanied by the designated qualification. It was so held because we did not believe that the use of the word "Creamo," as so qualified, would have the proscribed statutory effect. In spite of the finding that the word "Creamo" alone, as used in respondent's advertisements, suggests that its product is a dairy product, respondent would have us modify the order, it appears, so that, in part, it would not prohibit respondent from doing that which the statute proscribes. Obviously, the Commission would not be faithful to its duties to take such an action. The mere fact that the use of the word "Creamo" with the required qualification may at times be rendered difficult or impractical is clearly no justification for the modification requested. The Commission is also of the opinion that the alternative request would not be appropriate under the circumstances appearing in this matter. Respondent's motion will be denied.

Commissioner Kern did not participate in the decision herein.

ORDER DENYING MOTION TO REOPEN PROCEEDINGS AND MODIFY DECISION

This matter having come on to be heard by the Commission upon respondent's motion to reopen proceedings and to modify the findings as to facts and the order to cease and desist, and upon the answer thereto of counsel supporting the complaint; and

The Commission having given due consideration to the matter and having decided, for the reasons appearing in the accompanying opinion, that the motion should be denied:

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

Commissioner Kern not participating.

INTERNATIONAL PAPER CO. Docket 6676. Order, Mar. 25, 1957.

Order denying appeal from hearing examiner's denial of respondent's motion for bill of particulars.

This matter having been heard on the respondent's appeal from an order of the hearing examiner, dated February 8, 1957, denying respondent's motion for a bill of particulars, and answer thereto, filed by counsel supporting the complaint; and

The Commission being of the opinion that the complaint herein states a cause of action under Section 7 of the Clayton Act, as amended, and further that it sufficiently informs the respondent as to the nature of the statutory violation with which it is charged to enable it to answer those charges in the manner described in § 3.7 of the Commission's Rules of Practice; and

The Commission being of the further opinion that, in the circumstances, the hearing examiner's ruling denying the motion for further particulars did not constitute an abuse of his discretion:

It is ordered, That the respondent's appeal from said ruling be, and it hereby is, denied.

CARTER PRODUCTS, INC., ET AL. Docket 4960. Order and opinion, Mar. 29, 1957.

Order denying petition for modification of desist order (49 F.T.C. 1424, 1426) as not making preliminary showing of changed conditions or of competitive inequity of prohibitions.

ON PETITION FOR MODIFICATION OF
ORDER TO CEASE AND DESIST

By ANDERSON, Commissioner:

The petitioner, Carter Products, Inc., requests modification of paragraph 1(a) of the outstanding order to cease and desist so as to permit said petitioner to represent in advertising that its preparation Arrid for a temporary period "stops perspiration." The grounds in support of the petition are (1) that the order is unreasonable and inconsistent on its face in that it prohibits use of the expression "stops perspiration" even when limited or qualified as to time or circumstances, but permits representations that the preparation will prevent the appearance of perspiration and will keep the armpits dry or odorless "when used as directed, namely 'daily' or as frequently as you find necessary"; and (2) that under the terms of the order petitioner is prohibited from claiming for Arrid benefits which producers of certain competitive products are currently claiming for theirs, namely, that they "stop perspiration," against which claims the Commission allegedly has not proceeded.

Under Section 5 of the Federal Trade Commission Act, any report or order of the Commission which has become final either through the expiration of time allowed for filing a petition for review or after disposition of a petition for review by the Court of Appeals may be reopened and altered, modified, or set aside, in whole or in part, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require. Thus, while the Commis-

sion unquestionably has the authority to modify an outstanding order, its power under the statute is not without limitation, and it must determine as a prerequisite that changed conditions of fact or of law require the modification or that the public interest so requires. Ordinarily, the facts necessary for this determination are established by the introduction of evidence in an orderly proceeding before a duly appointed hearing examiner, which, together with the examiner's recommendation, become a part of the record of the case. The necessity for this is obvious in view of the further provision of the statute "That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate circuit court of appeals of the United States, in the manner provided in subsection (c) of this section" (§ 5(b), Federal Trade Commission Act).

Even before an application for modification is assigned to a hearing examiner, the Commission in the interest of sound administration must insist that some preliminary showing be made that the statutory conditions for modification may be present. Hence, the application or petition should allege facts which, when assumed to be true, would justify the full relief requested.

The respondent's petition here does not make this necessary preliminary showing. The prohibition complained of was included in the order and approved by the Court of Appeals on the basis of findings that while Arrid will reduce for a time the flow of sweat, it will not terminate or bring to an end the flow of underarm perspiration. Nor does petitioner now claim that its preparation will in fact have that result. It contends only that use of the expression "stops perspiration," when properly qualified, which the order prohibits, is no more deceptive than use of the expression "keeps armpits dry," which the order does not prohibit; and that, in any event, the expression "stops perspiration" is being used in advertisements of certain competitive products, which places petitioner at a distinct disadvantage.

The first of these contentions is not substantially different from arguments previously made to and rejected by both the Commission and the Court of Appeals. In the absence of a showing of some change in conditions of fact or circumstances which would render the former determination now inapposite, this point requires no further consideration.

The alleged effect of the order on petitioner's competitive position is in a somewhat different category. To succeed on this point, however, petitioner must show not only that it and other sellers of deodorant preparations have not been treated identically, but also

that the circumstances are such that it is unfair to the petitioner and to the public for them to have been treated differently; and on this the petition is wholly inadequate. Petitioner has made no showing, for example, that the active ingredients of the competitive products and Arrid are the same or substantially the same. It makes no allegation that the competitive products are in fact no more effective in stopping the flow of perspiration than is the petitioner's preparation; and it provides no basis for concluding that there may be other facts or circumstances which render inequitable or unjust the present prohibitions in the order to cease and desist.

The petition for modification will be denied. This action will be without prejudice, however, to the petitioner's right to file a new petition and, if possible, make the showing required by Section 5(b) of the Federal Trade Commission Act and § 3.27 of the Commission's Rules of Practice.

ORDER DENYING PETITION FOR MODIFICATION OF ORDER TO
CEASE AND DESIST

This matter having been heard on a petition for modification of the modified order to cease and desist issued in this proceeding on May 24, 1951; and

The Commission, for the reasons set forth in its accompanying opinion, having concluded that said petition fails to establish a reasonable probability that material changes in conditions of fact or of law have occurred since the order was entered or to demonstrate a probability that the public interest requires the modification requested:

It is ordered, That the petition be, and it hereby is, denied, without prejudice, however, to the petitioner's right to file a new petition in conformity with the requirements of Section 5(b) of the Federal Trade Commission Act and § 3.27 of the Commission's Rules of Practice.

POSTAL LIFE AND CASUALTY INSURANCE CO. Docket 6276. Order, Apr. 3, 1957.

Order denying respondent's motion to strike portions of opposing brief and extending time for filing answering brief.

This matter having come on for hearing upon two motions filed by counsel for the respondent on February 28, 1957, and the answers in opposition filed by counsel supporting the complaint; and

Whereas, one of the motions requests that certain portions of the brief filed by counsel supporting the complaint be stricken and deleted, and states that such brief improperly includes certain

N.A.I.C. rules not in evidence, as well as matters not pleaded or relied upon in the hearings; and

It appearing that the appeal brief constitutes the appeal itself under § 3.22 of the Commission's Rules of Practice and Procedure, and that a party appealing has, short of scurrility or scandal, wide scope in presenting it on terms which he deems fitting and proper, while his adversary is free in his brief to argue that the issues of the appeal have been incorrectly and improperly analyzed and that the appeal is lacking in merit; and

It further appearing that consideration of this aspect of the appeal would be more appropriate when the entire appeal of counsel supporting the complaint comes before the Commission; and

Whereas, the other motion of respondent's counsel requests an extension of time to file respondent's brief until thirty (30) days after the Commission ruling on its motion to strike and delete portions of the appeal brief of counsel supporting the complaint; and

It appearing to the Commission that this request is reasonable and should be allowed:

It is ordered, That the motion of respondent's counsel to strike and delete portions of the appeal brief of counsel supporting the complaint be, and it hereby is, denied.

It is further ordered, That the time within which respondent's counsel may file his answering brief be, and it hereby is, extended to thirty (30) days after service upon him of this order.

VICTOR B. HANDAL & BRO. INC., ET AL. Docket 6375.
Order and opinion, Apr. 11, 1957.

Interlocutory order denying respondents' appeal from hearing examiner's denial of application for issuance of subpoena duces tecum directing the Secretary of Commerce to produce certain records, as irrelevant to the issues.

ON INTERLOCUTORY APPEAL FROM RULING OF HEARING EXAMINER

By the COMMISSION:

The respondents have appealed from the hearing examiner's order of February 12, 1957, denying their application for issuance of a subpoena duces tecum directing the Secretary of Commerce, or his duly appointed designee, to produce certain documents and records at hearings in this proceeding before the hearing examiner. The requested material includes minutes of committee meetings and reports from the year 1945 to date, relating generally to the development of commercial standards dealing with flammability of clothing textiles and particularly with respect to formulation of Commercial Standard 191-53 as promulgated by the Department of Commerce

on January 30, 1953. In denying the application, the hearing examiner stated that the requested information was outside the scope of the proceeding and unnecessary to informed determination of the issues of this proceeding on their merits.

The complaint under which this matter was instituted charges violations of the Flammable Fabrics Act with respect to the marketing here of silk scarves manufactured in Japan. The statute was enacted on June 30, 1953, and an amendment of Section 4 thereof was approved August 23, 1954. The Act provides, among other things, that any fabric or article of apparel shall be deemed so highly flammable as to be dangerous when worn if that fabric or an uncovered or exposed part of such article of apparel exhibits rapid and intense burning when tested under the conditions and in the manner prescribed in the standard identified as Flammability of Clothing Textiles, Commercial Standard 191-53. Because a prefatory note to CS191-53 contains reference to visual observation of flame intensity and makes mention of garment design, the respondents contend that the Act's flammability standards must be construed to require separate and distinct evaluations of rate of burning and intensity of burning for all textiles, and that flame tests on scarf material must utilize swatch specimens comprising dual layers of fabric inasmuch as scarves customarily are worn by women in a folded state. Production of the documentary material was requested by the respondents as relevant to the legislative history of the Act.

The textiles marketed by the respondents apparently are free from nap, pile, or other type of raised surface fiber. Paragraph (c) of Section 4 of the Act, the amendatory provision approved more than a year after original enactment of the statute, expressly directs that textiles having no nap or other type of raised fiber surface be classified "as Class 3, rapid and intense burning," when, pursuant to tests conducted under conditions and in the manner prescribed by the commercial standard, time of flame spread is less than three and one-half seconds. Thus, it is clearly evident that whether a textile lacking raised fiber surfaces is to be classified as Class 3 or dangerously flammable under the Act turns solely on the burning rate of duly tested specimens of that textile. A construction that separate evaluations of rate of burning and intensity of burning are contemplated under the Act with respect to that category of textiles manifestly would transgress and contradict the express language of the statute.

The procedures for preparing test specimens which are prescribed in minute detail in the commercial standard, and incorporated by reference into the Act, do not provide for folding of the swatch specimens into dual layers as advocated by the respondents and,

moreover, the protocols there specified in effect preclude their preparation in such manner. It is clear, therefore, that garment design is wholly irrelevant and immaterial to the Act's prescribed testing procedures.

Inasmuch as the documentary material requested in the respondents' application is entirely irrelevant to the issues of this proceeding, there was sound legal basis for the hearing examiner's denial thereof. The appeal from that ruling accordingly is being denied.

ORDER RULING ON INTERLOCUTORY APPEAL

The respondents having filed an appeal from the hearing examiner's order of February 12, 1957, denying their application for issuance of a subpoena duces tecum; and

The Commission, for reasons stated in its accompanying opinion, having concluded that said appeal should not be granted:

It is ordered, That the respondent's appeal be, and the same hereby is, denied.

MUTUAL BENEFIT HEALTH & ACCIDENT ASS'N. Docket 6248. Order, Apr. 12, 1957.

Order denying respondent's motion to remand proceeding to hearing examiner, proper course being to present matters alleged directly to Commission.

This matter having been heard on the respondent's motion to remand this proceeding to the hearing examiner to make a determination as to the extent to which the respondent's advertising practices are not regulated by the laws of the respective states in which the respondent is licensed to do business; and

It appearing that the ground for said motion is that the hearing examiner rejected the respondent's proposed findings and conclusions on this subject, which action, the respondent alleges, was erroneous in the light of the decision of the United States Court of Appeals for the Ninth Circuit in the case of *James F. Crafts v. Federal Trade Commission*, decided February 27, 1957; and

It further appearing that under the Commission's Rules of Practice any ruling made by a hearing examiner during the time a proceeding is pending before him which substantially affects the rights of a party may properly be assigned as error in a subsequent appeal to the Commission from the hearing examiner's initial decision and, further, that the Commission, in rendering its decision on the appeal, exercises all the powers it could have exercised if it had made the initial decision, including the making of any finding or conclusion which the hearing examiner erroneously failed to make; and

The Commission being of the opinion that the respondent's proper

course is to present directly to the Commission in its pending appeal the matters alleged in support of its motion and that there is no basis for a remand of the proceeding to the hearing examiner:

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

Commissioner Kern not participating.

E. EDELMANN & CO. Docket 5770. Order, Apr. 15, 1957.

Order dismissing respondent's petition for modification of desist order in process of court review.

The respondent, E. Edelmann & Company, on March 18, 1957, having filed with the Commission a petition for an order reopening this proceeding and modifying the order to cease and desist entered April 29, 1955, or, in the alternative, reversing the hearing examiner's ruling excluding from the record certain testimony and remanding the proceeding to the hearing examiner for further hearings; and

It appearing that the respondent, on June 24, 1955, filed in the United States Court of Appeals for the Seventh Circuit a petition to review and set aside said order to cease and desist; and

It further appearing that said Court, on December 14, 1956, entered its final decree affirming the order to cease and desist; that on January 16, 1957, it entered its order denying the respondent's petition for rehearing; and that on February 7, 1957, it entered its order denying the respondent's petition to sit *en banc* to consider modification of the order or remand of the case to the Commission; and

It further appearing that the case is now pending in the United States Supreme Court on the respondent's petition for a writ of certiorari to the Court of Appeals for the Seventh Circuit¹; and

The Commission being of the opinion that it has no present jurisdiction to entertain the respondent's petition for modification or to enter any order thereon except an order of dismissal:

It is ordered, That said petition be, and it hereby is, dismissed.

THE VENDO CO. Docket 6646. Order, Apr. 24, 1957.

Order quashing outstanding subpoenas and authorizing new subpoenas, following courts' sustaining of Commission's subpoena power in Clayton Act cases.

This matter having been heard on the respondent's application for determination of the status of certain subpoenas duces tecum, or, in the alternative, its appeal from the hearing examiner's rulings

¹ Certiorari denied, 355 U.S. 411; rehearing denied, 356 U.S. 905. For case before Commission, see 51 F.T.C. 978.

disposing of its motions to quash and limit said subpoenas; and

It appearing that the respondent's contentions are (1) that the subpoenas are invalid for the reason that the Commission has no power to issue subpoenas in a proceeding instituted under Section 7 of the Clayton Act (15 U.S.C. § 18); and (2) that the hearing examiner erred in his rulings modifying the subpoenas on the respondent's motions to quash and limit them; and

It further appearing that on February 11, 1957, the hearing examiner, acting on a motion by counsel supporting the complaint, suspended further proceedings in this case pending authoritative determination of the question of the Commission's power to issue subpoenas in actions brought under the Clayton Act; and

It further appearing that since said date the Commission's power to issue such subpoenas has been sustained by three different United States Courts of Appeals, namely, the Court of Appeals for the Fourth Circuit, in *John T. Menzies, et al. v. Federal Trade Commission*, No. 7352, March 7, 1957; the Court of Appeals for the Second Circuit, in *Federal Trade Commission v. W. W. Tuttle*, No. 3425, April 2, 1957; and the Court of Appeals for the Seventh Circuit, in *Federal Trade Commission v. William T. Reed*, No. 11839, April 11, 1957; and

The Commission being of the opinion that these decisions dispose of the respondent's first contention and at the same time remove the cause of the suspension of this proceeding; and

The Commission being of the further opinion that in the circumstances of this case it will be in the interest of orderly procedure for the outstanding subpoenas to be quashed and for new subpoenas, limited in the respects indicated in the hearing examiner's rulings, to be issued upon proper application therefor, thus rendering unnecessary any further consideration of the respondent's second contention:

It is ordered, That the subpoenas heretofore served on Robert W. Wagstaff, Executive Vice President of The Vendo Company, and Harry S. Childers, Chairman of the Board of Vendorlator Manufacturing Co., directing them to appear and produce certain documents at a hearing in Kansas City, Missouri, on February 11, 1957, be, and they hereby are, quashed, it being understood that this action is without prejudice to the right of the hearing examiner to issue new subpoenas directed to the same parties; and

It is further ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner with directions to proceed with the trial thereof.

MAURICE J. FEIL ET AL. TRADING AS THE ENURTONE CO. Docket 6564. Order and opinion, May 2, 1957.

Interlocutory order denying motion to disqualify and remove hearing examiner.

ON MOTION TO DISQUALIFY AND REMOVE HEARING EXAMINER

By the COMMISSION :

Respondents, pursuant to § 3.15(f) (2) of the Commission's Rules of Practice, filed with the Commission, on March 27, 1957, a motion to disqualify and remove Hearing Examiner Earl J. Kolb, substituted as hearing examiner in this proceeding, alleging that he is disqualified to preside, or to continue to preside, in this proceeding upon the grounds set forth in the affidavit of Harold Easton, counsel for respondents, annexed to said motion. The affidavit enumerates the following grounds:

By Order dated March 1, 1957, Earl J. Kolb was substituted as Hearing Examiner herein in the place and stead of Everett F. Haycraft, before whom this proceeding had theretofore commenced.

Hearing Examiner Haycraft, after lengthy arguments both oral and written, had on two occasions ruled that hearings in this matter should take place in Los Angeles.

Counsel in support of the complaint had urged that the hearings be held elsewhere than Los Angeles.

Under date of March 13, 1957, Hearing Examiner Kolb made an Order setting hearings in Los Angeles on March 26, 1957, and in San Francisco, three days, commencing May 6, 1957.

Said action was taken by Hearing Examiner Kolb without affording counsel for the respondents any opportunity to be heard and in utter disregard of the two Orders made by Hearing Examiner Haycraft.

By his actions in this regard, Hearing Examiner Kolb has demonstrated unequivocally his subservience to the wishes of counsel for the Commission and that he does not have the independence required by Section 3.15(e) of said Rules of Practice and Procedure and by the Administrative Procedure Act.

Respondents cannot obtain a fair and impartial hearing herein before Hearing Examiner Kolb.

The record discloses that Hearing Examiner Haycraft did not, as respondents assert in effect, order that hearings be held only in Los Angeles. His rulings were that hearings would not be held in Chicago and would be reconvened in Los Angeles. Respondents' contention in this regard is not supported on the record and is rejected.

The next ground advanced by respondents in support of their motion to disqualify and remove substitute Hearing Examiner Kolb is that his order of March 13, 1957, setting hearings in Los Angeles and San Francisco was made "without affording counsel for the respondents any opportunity to be heard and in utter disregard of the two orders made by Hearing Examiner Haycraft." There is no sub-

stance to this objection. The record discloses that counsel for the respondents were afforded full opportunity to be heard, and were heard, in the premises at a reconvened hearing held before Hearing Examiner Kolb in Los Angeles on March 26, 1956, where he ruled on the record that his order setting hearings in San Francisco commencing May 6, 1957, would not be disturbed and that counsel supporting the complaint would be required to furnish respondents' counsel, ten days prior thereto, with a statement of what the expert medical witnesses would testify to in order to assist respondents' counsel in cross-examination. This ground in support of respondents' motion accordingly is rejected.

The remainder of respondents' grounds in effect charge the substitute examiner with bias and prejudice and assert that respondents cannot obtain a fair and impartial hearing before Hearing Examiner Kolb.

In the absence of a statutory provision for the disqualification of a hearing examiner, a party is entitled to an order of disqualification and removal only if it is able to demonstrate "personal bias" or other disqualifications on the part of the examiner. In this respect respondents must assume a burden similar to that imposed by Section 21 of the Judicial Code (28 U.S.C. Sec. 144) providing for the disqualification of a district trial judge. In other words, as the courts have repeatedly held, the "personal bias or prejudice" which must be shown to disqualify must not only be "personal" as against the party claiming it, but must be of such a character as to overcome the presumption of the hearing officer's integrity and of the clearness of his perceptions and of such strength as to beget a mental or moral condition which renders the officer either willing to do wrong, although he sees the right, regarding the justiciable matters before him, or, else, incapable of rightly seeing the justice of the cause, or impartially enforcing the right involved as between the parties before him. The bias and prejudice must be personal bias and prejudice as distinguished from judicial, and must be based on something other than adverse procedural rulings in the case. Even assuming the truth of the facts stated in the aforesaid affidavit of Harold Easton, it has not been established that bias and prejudice in the personal sense indicated are present here. An order in conformity with the foregoing will be entered.

ORDER

This matter having come on to be heard upon a motion filed March 27, 1957, by respondents to disqualify and remove Hearing Examiner Earl J. Kolb and upon the annexed supporting affidavit; and

The Commission being of the opinion, for the reasons stated in the accompanying opinion, that said motion should be denied:

It is ordered, That respondents' motion filed March 27, 1957, to disqualify and remove Hearing Examiner Earl J. Kolb be, and it hereby is, denied.

TRACTOR TRAINING SERVICE ET AL. Docket 5943.
Order and opinion, May 10, 1957.

Order denying—for lack of preliminary showing by respondents of change in facts or circumstances—request for modification of desist order reported in 50 F.T.C. 762.

ON PETITION FOR MODIFICATION OF ORDER TO CEASE AND DESIST

By ANDERSON, Commissioner:

In its decision of March 3, 1954, the Commission found that the respondents had engaged in the unfair and deceptive acts and practices as there described in connection with the offering for sale and distribution in commerce of their home study courses of instruction on diesel engines and heavy equipment. The order to cease and desist contained in that decision directed the respondents' cessation from the practices found to be deceptive. One of its provisions, Paragraph 5, directs the parties named to cease and desist from representing that individuals to whom the courses are sold are selected on any basis other than their ability to make the respondents' required down payments. Two of the parties named in the order, Tractor Training Service and Tractor Training Service, Inc., have filed a petition requesting the order's modification by deleting Paragraph 5 or, in the alternative, that such paragraph be amended to permit the respondents to represent in effect that purchasers are selected pursuant to standards duly established and adhered to by them.

In this connection, the petition avers that enrollment in the course is now limited to those who will benefit from the course and that selection procedures have been adopted for screening out prospective enrollees failing to meet standards and qualifications now imposed by the petitioners and duly promulgated for the guidance of salesmen. The six specific qualifications assertedly established by the petitioning respondents for screening of purchasers are: eighth grade education or the equivalent; satisfactory completion of an aptitude test; age between 17 and 45 years; mechanical experience; job stability; and financial ability by purchasers to meet payment commitments of the courses. Petitioners further state that the interview data sheets prepared by salesmen during sales interviews, together with the results of respondents' job aptitude test, furnish ac-

curate bases for grading all prospective purchasers and demonstrate their qualifications to participate in the course. These changed circumstances, the petitioners maintain, warrant modification of the order.

Under Section 5 of the Federal Trade Commission Act, any report or order of the Commission which has become final either through the expiration of time allowed for filing a petition for review or after disposition of a petition for review by the Court of Appeals may be reopened and altered, modified or set aside in whole or in part whenever, in the opinion of the Commission, conditions of fact or of law have so changed as to require such action or if the public interest shall so require. Thus, while the Commission unquestionably has the authority to modify an outstanding order, its power under the statute is not without limitation, and it must determine as a prerequisite that changed conditions of fact or of law require the modification or that the public interest so requires. Ordinarily, the facts necessary for this determination are established by the introduction of evidence in an orderly proceeding before a duly appointed hearing examiner which, together with the examiner's recommendation, become a part of the record of the case. The necessity for this is obvious in view of the further provision of the statute "That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate circuit court of appeals of the United States, in the manner provided in subsection (c) of this section." (§5(b), F.T.C. Act.)

Even before an application for modification is assigned to a hearing examiner, the Commission in the interest of sound administration must insist that some preliminary showing be made that the statutory conditions for modification may be present. Hence, the application or petition should include allegations of fact which would justify the relief requested.

The Commission's order, including the prohibition objected to by the petitioners, was affirmed by the United States Court of Appeals for the Ninth Circuit on November 7, 1955.¹ The Commission's findings as to the facts relevant to this aspect were to the effect that respondents would enroll any prospective purchaser with some schooling who evidenced an interest in the course and willingness to make the required down payment, irrespective of his mechanical aptitude and experience. Typical of the advertisements being used at the time to which the original proceeding related were those announcing that the respondents' representative was coming to an area to

¹ *Tractor Training Service, et al. v. F.T.C.*, 227 F. 2d 420, cert. denied 350 U.S. 1005 (1956).

interview those qualified for its training and placement advisory service program or that selections were being made by the respondents with respect thereto and inviting readers to write for further information. Those responding were forwarded a circular relative to opportunities for advancement offered in the growing diesel field, together with a questionnaire to be returned which was addressed to "Diesel Committee on Admissions." Further details were promised upon return of the completed questionnaire, the recipient was admonished that "A prompt reply is necessary" and such information was requested for asserted purposes of determining qualifications and adaptability.

The advertisements which the respondents now propose to use similarly state that mechanically minded men are needed to train for jobs, but also announce that free scientific aptitude tests are being conducted, and they invite the reader to ascertain if he can qualify for this field. Under the advertising program, persons requesting information are informed that the respondents' bonded field representative will contact them in reference to appointment time and receive a pamphlet identifying Tractor Training Service as a "service" organization in the diesel and heavy equipment field. In emphasizing the company's reputation for supplying employers with capable men, the pamphlet also refers to aptitude testing and vocational guidance counselling as recognized aids for which some universities and testing agencies charge as much as \$30 to \$50.

Respondents' bonded field representatives are commission salesmen and it is they who, in initial stages of subsequently arranged interviews, conduct the aptitude tests consisting of 40 questions and fill out the interview form sheet. That the test is designed to veil the actual purpose of the interview until an appropriate time in the sales presentation and that the prospect is unaware or confused at the outset as to the interview's real objective seem clear inasmuch as the salesman's manual includes the statement that "Very *naturally* they (the prospect and his wife) are wondering if you will turn out to be a hot shot salesman with a fast pitch, that he will have to throw out of the house to get rid of. You have quite a hurdle to overcome in the first couple of minutes of that call." [Emphasis as it appears in the manual.]

The aptitude test is so designed that irrespective of his knowledge and experience, no one can achieve a perfect score in the time allotted. Whether correct answering by the prospective purchaser in the allotted time of a minimum of 10 of the 40 questions contained in the test indicates that he would derive benefit from the course or repre-

sents an accurate index to his mechanical aptitude are questions which need not be here resolved. According to the sales manual, the "prime objective" of the test, from an interview standpoint, is to convince the person interviewed that he lacks knowledge in this field irrespective of his prior experience and requires the respondents' training in diesel theory.

From the exhibits submitted in support of the petition, it seems conclusive that the aptitude test and revised interview procedures are facets of a sales program intended to assist respondents' representatives in deferring disclosures of their status as vendors of correspondence courses until a late stage or climax in sales presentations and for persuading prospects as to their need for respondents' training. Except for slight variations in basic theme, the sales program outlined in the exhibits for dealing with prospective purchasers is essentially similar to that used by the respondents prior to the original proceedings herein. In these circumstances, it cannot be concluded that the changes by the respondents in matters selected for special emphasis in current sales presentations are in any manner indicative that they are adhering to standards for screening and selecting their enrollees or that the respondents' sales decisions are controlled primarily by considerations other than purchasers' willingness to buy and ability to meet payment requisites. It follows that the petition does not make the necessary preliminary showing that a change in facts or circumstances has occurred, and the petition is being denied accordingly. Inasmuch as the conclusions reached above are based on our consideration of exhibits submitted in support of the request for modification and their documentary import is at variance with the allegations of the petition, we are similarly denying petitioners' additional request that this matter be set for further hearings in the event the petition is deemed an insufficient basis for granting the relief requested.

ORDER DENYING REQUEST FOR MODIFICATION OF ORDER TO CEASE AND DESIST

This matter having been heard on a petition for modification of the order to cease and desist heretofore entered in disposition of this proceeding on March 3, 1954; and

The Commission, for reasons set forth in its accompanying opinion, having concluded that said petition fails to establish a reasonable probability that material changes and conditions of fact or of law have occurred since the order was entered or to demonstrate a probability that the public interest requires the modification requested:

It is ordered, That the petition be, and it hereby is, denied.

RENAIRE CORPORATION (PENNSYLVANIA) ET AL.
Docket 6555. Order and opinion, May 15, 1957.

Interlocutory order upholding the hearing examiner's adverse ruling on motion to dismiss complaint as to certain respondents before conclusion of trial.

ON INTERLOCUTORY APPEAL
FROM RULING OF HEARING EXAMINER

By the COMMISSION:

An appeal has been filed from the hearing examiner's order of March 21, 1957, denying the respondents' motion to dismiss the complaint as to certain respondents.

The complaint under which this proceeding was instituted charged that the respondents were engaging in unfair and deceptive acts and practices in commerce in connection with the advertising, sale and distribution of freezers and frozen foods under a food purchase plan called the "Renaire Plan." Joined as parties respondent in the complaint were eleven corporations and also eight individuals whom the complaint alleged directed and controlled their corporate policies and served as their officers; and the complaint's additional allegations respecting each of the corporate respondents being a separate corporate entity and soliciting sales in separate trade areas, and being operated as a joint enterprise in such connection, have been admitted in the respondents' answer.

The motion to dismiss which was ruled on adversely by the hearing examiner was filed on behalf of nine of the eleven corporate respondents, and the grounds asserted were that they were not shown to be engaged in interstate commerce. Its denial by the hearing examiner was made without prejudice to renewal thereof at the time of closing of the case for the reception of evidence. In their appeal, the respondents state that immediate decision on jurisdictional questions is required to obviate prejudice to them in defending against a proceeding which has been improperly instituted.

§ 3.20 of the Commission's Rules of Practice provides that interlocutory appeals from rulings of hearing examiners will not be entertained unless showing is made that the ruling being appealed from involves substantial rights and will materially affect final decision, and that a determination of the correctness of such ruling before conclusion of the trial would better serve the interests of justice. The ruling of the hearing examiner does not restrict the appealing respondents in the presentation of their defense, and their rights, as well as those of other respondent co-members of the Renaire family of corporations, to have all questions of law and fact subsequently passed upon by the Commission are fully protected. The hearing

examiner's order is not a decision on the merits or a final decision, and his ruling nowise affects any of the respondents' substantial rights. In order to justify an interlocutory appeal under the rule, a party ordinarily must demonstrate a likelihood of adverse effects from the challenged ruling more substantial than the inconvenience attending his presentation of a defense to the charges against him.

Having determined that the respondents' appeal does not come within the category of those to be granted under § 3.20 of the Commission's Rules of Practice, our order accordingly provides for denial of the appeal.

ORDER RULING ON INTERLOCUTORY APPEAL

The respondents having filed an interlocutory appeal from the hearing examiner's order of March 21, 1957, denying the respondents' motion to dismiss the complaint as to certain of the respondents; and

The Commission, for reasons stated in its accompanying opinion, having concluded that said appeal should not be granted:

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

ERIE SAND AND GRAVEL CO. Docket 6670. Order, May 29, 1957.

Order amending respondent's answer and denying its motions to dismiss complaint and quash subpoena and requesting oral argument.

This matter having come on to be heard upon respondent's interlocutory appeal from the hearing examiner's rulings denying motions (1) to dismiss the complaint; (2) to amend respondent's answer; and (3) to quash a certain subpoena duces tecum, upon respondent's request for oral argument, and upon the answers in opposition to the appeal and request for oral argument filed by counsel supporting the complaint; and

The Commission having duly considered the matter and having determined that the appeal should be granted in part and denied in part, and that the request for oral argument should be denied:

It is ordered, That respondent's answer be, and it hereby is, amended in the manner requested in its motion to amend, but without prejudice to the right of counsel supporting the complaint to make such use of the original answer of the respondent as the law permits.

It is further ordered, That respondent's interlocutory appeal from the hearing examiner's rulings denying its motions to dismiss the complaint and to quash a subpoena duces tecum, and respondent's request for oral argument, be, and they hereby are, denied.

SOUTHERN OXYGEN CO. Docket 6372. Order and opinion, June 13, 1957.

Interlocutory order denying complaint counsel's appeal from hearing examiner's ruling interpreting and applying stipulation between opposing counsel.

ON INTERLOCUTORY APPEAL

By ANDERSON, Commissioner:

In this proceeding respondent is charged with price discrimination in violation of Section 2(a) of the amended Clayton Act. The complaint alleges that respondent's pricing practices have resulted in diversion of substantial business to it from competitors and that competitors' efforts to meet respondent's discriminatory prices have lessened their profits and affected, adversely, their ability to compete. Subsequent to completion of the case-in-chief, and during the course of hearings for receipt of respondent's evidence, counsel supporting the complaint objected to certain testimony sought to be adduced on respondent's behalf. The hearing examiner thereupon indicated on the record that the questioned testimony, and other similar proof, would be received in evidence pursuant to a stipulation theretofore agreed to by counsel for both sides and entered on the record. The hearing examiner's action was based upon his interpretation and application of the stipulation. Counsel supporting the complaint noted and perfected an interlocutory appeal. There is before the Commission, therefore, the question of whether the hearing examiner's interpretation and application of the stipulation is erroneous. No question of the admissibility of any particular evidence is presented to, or determined by, the Commission on this appeal.

The stipulation, entered into of record February 15, 1956, reads as follows:

* * * it is stipulated by Counsel on both sides that either party to this proceeding may offer in evidence without objection, without possible objection under the hearsay rule, sworn testimony as to what was told the witness by a customer or prospective customer concerning the price that customer was paying a competitor or was offered by a competitor for oxygen or acetylene business, and such testimony shall be given such weight as the Examiner believes it is entitled to.

Throughout more than two thousand pages of testimony, counsel supporting the complaint has utilized the stipulation fully, even to the extent of broadening it in usage to present hearsay evidence of all competitive circumstances surrounding the change of customers from one supplier to another. He also has been permitted to adduce hearsay evidence with considerable latitude as to the point of time when certain occurrences or conversations took place. He now, in effect, seeks, however, to limit the availability of the stipulation to

respondent by restricting the testimony of respondent's witnesses under it to reports of conversations which, according to the hearing examiner, occurred "at the time of the instance which is in issue, that is to say, the changing of a customer or the alleged receiving by the customer of a lower price from some competitor" (Tr. 2358).

In the interest of fairness and justice, the Commission is of the opinion that counsel for respondent should be afforded equal opportunity under the stipulation. The interpretation placed upon the stipulation by the hearing examiner is in accordance with the general rule as to such agreements between counsel, namely, that "they should receive a fair and liberal construction, in harmony with the apparent intention of the parties and the spirit of justice, and in furtherance of fair trials upon the merits, rather than a narrow and technical one, calculated to defeat the purpose of their execution * * *." 25 R.C.L. 1095. We find no error in the hearing examiner's ruling in question here.

Further, recognizing the evidentiary questions involved, but without ruling thereon, the Commission notes that the hearing examiner has stated on the record that he would rule on a witness-by-witness basis and would restrict as far as possible the testimony to "conversations which took place at or about the time of the happening of the thing which is at issue * * *." (Tr. 2359). It must be assumed, therefore, that the record will be protected.

In view of the foregoing consideration, the appeal of counsel supporting the complaint will be denied.

ORDER DENYING INTERLOCUTORY APPEAL

This matter having come on to be heard by the Commission upon the appeal of counsel supporting the complaint from a ruling made by the hearing examiner on the record on March 26, 1957, interpreting and applying a stipulation entered of record February 15, 1956, by and between counsel supporting the complaint and counsel for respondent, and upon briefs of counsel in support of, and in opposition to, said appeal; and

The Commission having determined, for the reasons appearing in the accompanying opinion, that the ruling appealed from was correct:

It is ordered, That the appeal of counsel supporting the complaint be, and it hereby is, denied.

MAURICE J. FEIL ET AL. TRADING AS THE ENURTONE CO. Docket 6564. Order and opinion, June 21, 1957.

Order denying respondents' interlocutory appeal from hearing examiner's granting of complaint counsel's motion to amend original complaint, striking exhibits and section of transcript, and directing trial de novo.

ON INTERLOCUTORY APPEAL
FROM RULINGS OF THE HEARING EXAMINER

By ANDERSON, Commissioner:

At a hearing held on May 6, 1957, the hearing examiner granted a motion of counsel in support of the complaint for an amendment of the complaint. At the same time he ordered stricken from the record Commission's Exhibits 1 to 13, inclusive, and pages 1 through 69 of the transcript of testimony. From these rulings the respondents have appealed.

The complaint as originally issued alleges that the respondents have represented that the use of their device will stop bed-wetting and correct the bed-wetting habit in all cases. In controverting the truth of these representations, paragraph 5 alleges, among other things, that said device in fact will not be effective in stopping bed-wetting or correcting the bed-wetting habit, "except in cases of functional bed-wetting not involving organic defects or diseases." Thus, while attacking the representations concerning the efficacy of the respondents' device, the complaint expressly excepts from attack cases of functional enuresis not involving organic defects or diseases.

After the present counsel in support of the complaint was assigned to the case, he learned that the expert witnesses to be called in support of the complaint were prepared to testify not only that an instrument such as the respondents' device is ineffective in cases of bed-wetting caused by organic defects or diseases, but also that it is ineffective in cases of functional bed-wetting involving emotional disturbances. In order to conform the allegations of the complaint with this anticipated testimony, a statement of which had been furnished to counsel for the respondents, counsel in support of the complaint moved for an amendment, which the hearing examiner, over the objection of counsel for the respondents, allowed.

According to the transcript, counsel in support of the complaint requested the amendment in these words:

Delete the period at the end of paragraph 5 and add the following: "or in cases of functional bed-wetting involving emotional tensions."

As so charged, paragraph 5 of the complaint would read as follows:

The said representations were and are false, misleading and deceptive. In truth and in fact, the use of said device will not be effective in stopping bed-wetting or correcting the bed-wetting habit, except in cases of functional bed-wetting not involving organic defects or diseases or in cases of functional bed-wetting involving emotional tension.

This, obviously, is not the result that was intended. It is clear from the record that the purpose of counsel in support of the complaint was to amend the complaint so that it would allege that the

respondents' device will not be effective in cases of functional bed-wetting due to emotional disturbances as well as in cases due to organic defects or diseases. It is equally clear that it was the intention of the hearing examiner to allow such an amendment; and the fact that counsel for the respondents likewise so understood the amendment is shown by his vigorous objection stated on the record and the answer he has now filed to the complaint as amended. The Commission, therefore, interprets the hearing examiner's ruling concerning the amendment to have been that paragraph 5 of the complaint is amended to read as follows:

Paragraph Five: The said representations were and are false, misleading and deceptive. In truth and in fact, the use of said device will not be effective in stopping bed-wetting or correcting the bed-wetting habit in cases involving organic defects or diseases or in cases of functional bed-wetting involving emotional tensions.

Under the complaint as thus amended, the efficacy of the respondents' device in cases of functional enuresis due to emotional disturbances is clearly questioned. It appears, however, that certain of the exhibits theretofore received in evidence had been offered and received pursuant to a stipulation between counsel in which it was expressly recognized that the value of the device in cases of functional enuresis was not in issue. In view of the fact that this was no longer true, the examiner, after allowing the amendment, ruled that these exhibits and all of the testimony with respect to them be stricken from the record. The effect of this ruling was to direct a trial *de novo*.

The respondents do not in their appeal question the authority of the hearing examiner to allow an amendment to a complaint or to strike from the record exhibits and testimony. Their position is, rather, that the examiner, in allowing the amendment and striking the exhibits and testimony here abused his discretion. This is true, the respondents argue, because the case has been long pending in a status in which the sole issue framed has been whether or not respondents' device is effective in cases of enuresis involving organic defects or diseases. Respondents contend that the scope of the issues was so narrowed as not to bring into issue cases of functional enuresis and that this was with the full understanding and agreement of counsel for both sides and the hearing examiner. Respondents in this appeal, in effect, argue that allowing amendment of the complaint operates to their prejudice.

Counsel supporting the complaint, as previously indicated, has furnished respondents' counsel with a statement of anticipated testimony, including testimony to the effect that respondents' device will not be effective in functional cases of enuresis involving emotional

tensions. Counsel supporting the complaint was not informed of the nature of this testimony, or that it would be available, until the statement in question was being prepared.

Counsel for respondents is thus upon full notice as to what is involved in this proceeding under the complaint as amended and, in fact, is apprised now as to what to cross examine upon when witnesses are presented.

The hearing examiner is expressly authorized by § 3.9 of the Commission's Rules of Practice to permit amendment of pleadings if and whenever determination of a controversy on the merits will be facilitated thereby. He is especially enjoined when so acting to proceed upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties and provided the amendment allowed is reasonably within the scope of the proceeding initiated by the original complaint.

The Commission is of the opinion that the hearing examiner, in permitting the amendment of the complaint here involved, acted strictly in accordance with the terms of, and pursuant to the procedures prescribed by the rules of practice. His ruling does not prejudice any substantial rights of the respondents and clearly subserves expeditious presentation of the case on the merits. The gist of the action, or subject of controversy, remains essentially the same. The amendment of the complaint allowed clearly is reasonably within the scope of the proceeding initiated by the original complaint.

As to the hearing examiner's action in striking pages 1 through 69 of the testimony and Commission Exhibits 1 through 13, we likewise find no abuse of discretion there; although the Commission feels that Exhibit 13 and testimony relevant to it possibly could have been retained in the record. Exhibit 13 is the device involved in this proceeding and the testimony relevant to it is in explanation of its methods of operation. Neither was involved in the stipulations which appear to have been the basis for the hearing examiner's action in striking the aforesaid testimony and exhibits. The hearing examiner indicated on the record, however, that the amendment of the complaint was of such a nature that, in order fully to preserve respondents' rights, it would be better to place the proceeding on the basis of trial de novo rather than retain in the record any of the exhibits or evidence theretofore adduced. In the circumstances, the Commission is of the opinion that his action was in every sense correct and equitable and directed to a just result.

In view of the foregoing considerations, the Commission is of the opinion that respondents' appeal is without merit and should be denied.

ORDER DENYING INTERLOCUTORY APPEAL

The respondents having filed an interlocutory appeal from the hearing examiner's rulings of May 6, 1957, made in open hearing, granting the motion of counsel supporting the complaint to amend the original complaint and, on his own motion, striking Exhibits 1-13, inclusive, and pages 1 through 69 of the transcript and ordering that the matter proceed de novo; and

The Commission, for reasons stated in its accompanying opinion, having concluded that said appeal should not be granted:

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

