

INTERLOCUTORY ORDERS, ETC.

O. J. McCLURE TALKING PICTURES

Docket 6607. Order and Opinion, Aug. 9, 1957

Order denying—for lack of preliminary showing of conditions for modification—respondent's motion to reopen proceeding and set aside desist order.

ON MOTION TO REOPEN

By ANDERSON, Commissioner:

In a letter dated July 6, 1957, the respondent requested that he be granted a rehearing and that the order to cease and desist heretofore entered be set aside. The letter was treated as a motion to reopen, and counsel supporting the complaint has filed an answer in opposition thereto.

On July 31, 1956, the Commission issued its complaint charging respondent, O. J. McClure, a distributor of manually-operated sound slide film projectors, with disparaging the efficiency and value of competitors' automatic sound slide film projectors. Thereafter, under section 3.25 of the Commission's rules of practice, respondent and counsel supporting the complaint negotiated and executed an agreement containing a consent cease and desist order. The agreement was submitted to the hearing examiner, who accepted it as a basis for his initial decision which he thereupon entered. Pursuant to section 3.21 of the Commission's rules of practice, the initial decision became the decision of the Commission on November 24, 1956, of which fact the respondent was duly apprised by an appropriate order, and the order to cease and desist contained therein has now become final by operation of law.

Under section 3.25 of the Commission's rules of practice, provision is made for negotiation of an agreement containing a cease and desist order disposing of a proceeding. The office of such an agreement is to obviate adversary trials and to avoid, in the public interest, the necessity of the expenditure of time and expense both on the part of respondents and the Commission. Every such agreement includes the admission of jurisdictional facts, a provision that the complaint may be used in construing the terms of the order and that the order shall have the same force and effect as if entered after a full hearing. Each such agreement, including the one in the instant case, is required to contain a waiver of the requirement that the decision must contain

a statement of findings of fact and conclusions of law; and a waiver of further procedural steps before the hearing examiner and the Commission, as well as a waiver of all rights to challenge or contest the validity of the order to cease and desist. The order in the instant case, as contemplated by the rule, also contains a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by respondent that he has violated the law, as alleged in the complaint.

Finally, section 3.25 provides that an order to cease and desist issued on the basis of a consent agreement may be altered, modified or set aside in the manner provided by statute for other orders.

Under section 5 of the Federal Trade Commission Act, any order of the Commission which has become final 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. Ordinarily, the basis for such a determination is established by the introduction of evidence before a hearing examiner. As a prerequisite for such proceeding, there must, of course, be a preliminary showing that the conditions for modification may be present. The petition for reopening, modification or the setting aside of an order, therefore, should allege facts which, when assumed to be true, would justify the relief sought.

Respondent's letter of July 6, 1957, considered as a motion to reopen and set aside the order in this proceeding, which has become final, does not make the necessary preliminary showing. Respondent makes no contention that any condition of fact or of law has changed since entry of the order so as to require its modification. He states as his principal grounds that respondent never understood the reason for the Commission's decision and that respondent's evidence apparently never reached the Commission. The Commission has concluded that respondent's motion provides no basis for reopening the proceeding and it must, therefore be denied.

ORDER DENYING MOTION TO REOPEN PROCEEDINGS

This matter having been heard on the respondent's request, in the form of a letter dated July 6, 1957, for reopening of this proceeding for the purpose of having set aside 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 the said motion fails to establish a reasonable probability that material changes in conditions of fact or in law have occurred and fails to demonstrate a reasonable probability that

the public interest requires reopening of the proceeding and setting aside of the order to cease and desist:

It is ordered, That respondent's request that the proceeding be reopened and the order to cease and desist be set aside be, and it hereby is, denied.

ERIE SAND & GRAVEL CO.

Docket 6670. Order, Sept. 9, 1957

Interlocutory order denying respondent's appeal from rulings granting complaint counsel's motion to amend complaint to conform to evidence introduced by consent of the parties; denying respondent's motion to dismiss complaint as not showing justification; and denying respondent's request for oral argument as serving no useful purpose.

ORDER DISPOSING OF RESPONDENT'S INTERLOCUTORY APPEAL AND
REQUEST FOR ORAL ARGUMENT

This matter having come on to be heard upon respondent's interlocutory appeal from the hearing examiner's rulings on July 24, 1957, granting the motion of counsel supporting the complaint to amend the complaint and denying respondent's motion to dismiss the complaint, upon respondent's request for oral argument, and upon the answering briefs of counsel supporting the complaint in opposition thereto; and

It appearing to the Commission that the examiner's ruling on the motion to amend the complaint was in effect a ruling to conform the complaint to the evidence introduced by consent of the parties; and it being the opinion of the Commission that such a determination on the part of the examiner is entitled to great weight and not one to be disturbed in the absence of a clear showing of error; and it also appearing that to protect respondent's rights it is not required that the Commission render a ruling at this time, since respondent may raise this point on appeal from any initial decision which may be filed; and it having been determined that, under the circumstances, the ruling on the motion to amend is not one on which appeal will be granted under section 3.20 of the Commission's rules of practice; and

It further appearing that the examiner's denial of respondent's motion to dismiss the complaint is only a determination that a prima facie case has been established, a determination not affecting the final decision in the proceeding since that decision will be made on the basis of the whole record, including such evidence as may be received from the respondent; and it having been determined that there has been no showing of justification for appeal from the denial of the motion to dismiss, as required by said section 3.20; and

It additionally appearing that the Commission is now fully advised in the matter by the briefs of counsel and that oral argument would serve no useful purpose:

It is ordered, That respondent's interlocutory appeal from said rulings of the hearing examiner and its request for oral argument be, and they hereby are, denied.

AMERICAN HOME PRODUCTS CORP.

Docket 6755. Order, Sept. 10, 1957

Interlocutory order upholding hearing examiner's denial of motion to hold complaint in abeyance on the grounds that the Commission has not proceeded against all other products competitive with respondent's, etc.; and denying respondent's request for oral argument.

ORDER DENYING RESPONDENT'S INTERLOCUTORY APPEAL AND DENYING RESPONDENT'S REQUEST FOR ORAL ARGUMENT

This matter having come on to be heard upon respondent's interlocutory appeal from the hearing examiner's order, dated August 20, 1957, denying respondent's motion to hold the complaint and all proceedings thereunder in abeyance, upon respondent's request for oral argument, and upon answer to respondent's interlocutory appeal filed by counsel supporting the complaint; and

It appearing that the grounds asserted before the hearing examiner in support of respondent's motion, and renewed here on interlocutory appeal, are in substance that the Commission has not proceeded against all other products which are competitive with respondent's products; that such competitive products are advertised by representations similar to, or more far reaching than, those attacked in this proceeding; and that, if respondent is compelled to cease its representations and competitors are permitted to continue their practices, respondent's products would necessarily be forced off the market; and

The Commission being of the opinion that it is not prejudicially discriminatory for the Commission to proceed against respondent without pressing similar charges contemporaneously against respondent's competitors who allegedly engage in like practices; that, therefore, the ruling appealed from does not affect any substantial rights of respondent; that the ruling will not materially affect the final decision of the case; that a determination of the correctness of such ruling before conclusion of the trial is not required to better serve the interests of justice; and hence, the appeal is not one to be granted under section 3.20 of the Commission's rules of practice:

It is ordered, accordingly, That respondent's interlocutory appeal from the hearing examiner's order, dated August 20, 1957, denying

respondent's motion to hold the complaint and all proceedings thereunder in abeyance, and respondent's request for oral argument, be, and they hereby are, denied.

BURKLEIGH CO., ET AL.

Docket 6270. Order and Opinion, Oct. 9, 1957

Order denying—for lack of the requisite preliminary showing—motion to reopen proceeding and modify desist order.

OPINION OF THE COMMISSION

By ANDERSON, Commissioner:

By letter dated August 22, 1957, signed by respondent Edgar Kirby, apparently on his own behalf and in the interest of respondent Foreign Products Corp., it was requested that the Commission consider an accompanying sworn report of Dr. Reginald Milton as to the results of tests conducted by him for possible enhancement of bacterial activity and of nitrogen fixation in soil by reason of the addition of a product designated Actumus. The request seeks modification of the order to cease and desist heretofore entered in this proceeding through the setting aside of all but 3 of 14 inhibitory paragraphs of the order which has become final. The letter and report were treated as a motion to reopen the proceeding and to modify the order in the particulars indicated. Counsel supporting the complaint has filed an answer in opposition to the motion.

Respondents, by the order in question, were required to stop misrepresenting the qualities of Actumus as humus or as a soil conditioner. The order is based upon the hearing examiner's findings that respondents have claimed falsely that Actumus is humus; that it activates bacteria which create nitrogen; that it creates fertility in the soil; and that it is entirely natural and 100 percent organic. These findings are based upon contested issues fully tried and resolved by the hearing examiner. The 10 additional related prohibitions of the order are based upon an agreement containing a consent order to cease and desist executed by all parties to the proceeding.

Under section 5 of the Federal Trade Commission Act, any order of the Commission which has become final 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. Ordinarily, an informed determination on these premises is arrived at by the introduction of evidence before a hearing examiner. As a prerequisite for such proceeding there must, of course, be a preliminary showing that the conditions for modification may be present. Any motion for

reopening, modification or the setting aside of an order, therefore, should set forth facts which, when assumed to be true, would justify the relief sought.

Respondents' letter of August 22, 1957, together with the accompanying sworn report of Dr. Reginald Milton, does not make the requisite preliminary showing. Respondent Kirby makes no contention that any condition of fact or of law has changed since entry of the order so as to require its modification. Moreover, his letter and the accompanying report of tests performed by Dr. Milton furnish no information from which it might be concluded that the public interest otherwise requires the modification. On the contrary, Dr. Milton has shown that the difference, if any, in nitrogen between the treated and untreated samples of soil tested is too small to have any practical agricultural value. The report, if anything, tends to justify the inhibitions of the order sought to be set aside. It adds nothing significant to the scientific record made in this case on the basis of which the order to cease and desist was entered. The Commission, accordingly, has concluded that respondents' motion provides no ground for reopening the proceeding and it must, therefore, be denied.

ORDER DENYING MOTION TO REOPEN PROCEEDING AND MODIFY
ORDER TO CEASE AND DESIST

This matter having come on to be heard by the Commission upon the respondents' request for modification of the order to cease and desist contained in the hearing examiner's initial decision, as adopted by the Commission on February 8, 1957, and upon answer in opposition to the request filed by counsel supporting the complaint; and

The Commission having concluded, for the reasons stated in its accompanying opinion, that respondents' submittal does not constitute a sufficient showing, as contemplated under section 5 of the Federal Trade Commission Act, that conditions of fact or law may have so changed so as to justify the action requested, or that the public interest so requires:

It is ordered, That respondents' request dated August 22, 1957, to reopen this proceeding and to modify the order to cease and desist previously entered herein be, and it hereby is, denied.

BANTAM BOOKS, INC.

Docket 6802. Order and Opinion, Oct. 11, 1957

Interlocutory order granting complaint counsel's appeal from hearing examiner's denial of request for hearing to introduce expert testimony that an exhibit tendered was an abridged edition, as having a direct bearing on the allegations of the complaint.

ON INTERLOCUTORY APPEAL

By ANDERSON, Commissioner:

Respondent, Bantam Books, Inc., is charged in the complaint in this proceeding with the use of unfair and deceptive acts and practices and unfair methods of competition in commerce in the sale of its paperbacked books. In this connection it is alleged that respondent in some cases fails to disclose the fact that its books are abridged; that in other cases it discloses the fact of abridgement in small, inconspicuous letters; and that in the case of reprints bearing new titles it does not adequately disclose the original titles. In its answer, respondent denied the charges.

At the initial hearing counsel supporting the complaint offered and there was received in evidence 41 of respondent's books. The record discloses agreement that these books were reprints, or were abridged, or had been retitled. Counsel supporting the complaint also offered in evidence one other book, Commission's exhibit 42, for identification, the receipt of which was objected to, however, on the ground that the book was neither a reprint nor an abridgement and, therefore, not relevant to the issues in this proceeding. This objection was sustained by the hearing examiner who, also on the record, denied the request of counsel supporting the complaint for a hearing sought for the purpose of introducing expert testimony that the exhibit tendered was in fact an abridged edition from which large portions of the original text were omitted.

Commission's exhibit 42, for identification, is a paperbound volume entitled:

Alexander Dumas
THE COUNT OF MONTE CRISTO
a new translation
By Lowell Blair.

Counsel for respondent, on the record, vigorously denies that this book is an abridgment, or a reprint, claiming it to be "a new translation." For the reason that the proffered book did not disclose on its face that it was a reprint or an abridgement, the hearing examiner was of the opinion it was not proper evidence and, in response to counsel's request for another hearing, stated that a sufficient number of respondent's books had been received in evidence to establish respondent's practices so as to enable him to arrive at an initial decision on the case made. The request for the additional hearing was, therefore, denied.

The Commission has examined the record and finds that the only evidence adduced as to abridgment is that which tends to show inadequate disclosure of abridgment. There is no evidence presently in the record that in some cases respondent does not disclose in any manner

that certain of its books from which portions of the text have been deleted are, in fact, abridged editions. The purpose of the proffered evidence and testimony is to establish the fact that some of respondent's books are abridgments which contain no disclosure of that fact.

The Commission is of the opinion that the tendered evidence and testimony have a direct bearing on the allegations of the complaint. We are of the further opinion that the substantial right of counsel to support his case within the issues framed by the pleadings is involved in this interlocutory appeal. We also think that in the interest of justice this evidence and testimony should be received. We conclude, therefore, that the hearing examiner's ruling was erroneous and that the interlocutory appeal of counsel supporting the complaint should be granted.

ORDER GRANTING INTERLOCUTORY APPEAL OF COUNSEL SUPPORTING
THE COMPLAINT

This matter having come on to be heard upon the interlocutory appeal of counsel supporting the complaint from the hearing examiner's ruling denying the request of counsel for a hearing to receive certain expert testimony and evidence; and

The Commission having concluded, for the reasons stated in the accompanying opinion, that the hearing examiner's ruling was erroneous:

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

It is further ordered, That the case be remanded to the hearing examiner for further proceedings in conformity with the Commission's opinion.

CROSSE & BLACKWELL CO.

Docket 6463. Order and Opinion, Nov. 13, 1957

Order vacating initial decision dismissing complaint for lack of jurisdiction—respondent claiming to be a "packer" within the meaning of the Packers and Stockyards Act—and remanding case for further proceedings.

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

The complaint charges violation of section 2(d) of the Clayton Act by the giving of promotional and advertising allowances to some but not all of respondent's customers competitively engaged in the resale of its products. Before evidence was taken as to the truth of this allegation, respondent filed a motion to dismiss on the ground that it is a "packer" within the meaning of the Packers and Stock-

yards Act (17 U.S.C. 191 et seq.) and that exclusive jurisdiction of the acts and practices in question was in the Secretary of Agriculture rather than the Federal Trade Commission. The hearing examiner sustained the motion and dismissed the complaint for want of jurisdiction, from which this appeal is taken.

The hearing examiner made findings of fact as to the jurisdictional feature as follows:

Factual allegations contained in the motion being controverted by counsel in support of the complaint, a hearing for that purpose only was held, from which it developed that respondent makes, manufactures or prepares some 14 products containing meat or "stock" extracted from meat, as follows:

<i>Name</i>	<i>Raw percentage</i>	<i>Cooked percentage</i>
Beef stew.....	25	18
Lamb stew.....	25	18
Corned beef hash.....	50	35
Chili con carne.....	25. 5	17. 5
Ham and tongue paste.....	36	24
Liver and beef paste.....	50	39
Scotch chicken soup.....	14	. 4
French onion soup.....	12. 5	-----
Cream of chicken soup.....	8. 7	-----
Chicken noodle soup.....	13. 8	-----
Chicken rice soup.....	9. 3	-----
Beef noodle soup.....	20	-----
Vegetable beef soup.....	19	-----
Vegetable soup with beef stock.....	10	-----

Sales of these items containing meat or meat stock amounted to \$339,211 in 1955 and \$380,250 in 1956 out of a total sales of manufactured products in 1955 of \$7,760,679, and in 1956 of \$7,897,162. The sales of said products have continued during the year 1957 at approximately the same rate.

Respondent sells approximately 150 products under 1 brand name, and some 35 under another, totaling approximately \$14 million a year. Its sales in 1955 of the 14 products containing meat constituted 2.3 percent of its 1955 total sales, and in 1956, 2.7 percent.

* * * * *

Respondent is not registered under the Packers and Stockyards Act with the Secretary of Agriculture, and does not own or control, directly or indirectly, through stock ownership or otherwise, any slaughterhouse or packing plant or any interest therein, nor does it do any slaughtering or shipment of carcasses in commerce. The meat which it incorporates in the 14 products enumerated above is purchased by it from a local slaughterhouse and by it trimmed, boned, cut up, cooked, mixed, and otherwise prepared for canning.

Title 7 United States Code section 191 is as follows:

Packer defined.

When used in this chapter—

The term "packer" means any person engaged in the business (a) of buying livestock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce, or (c) of manufacturing or preparing livestock products for sale or shipment in commerce, or (d) of marketing meats, meat food products, livestock products, dairy products, poultry, poultry products, or eggs, in commerce; but no person engaged in such business of manufacturing or preparing livestock products or in such marketing business shall be considered a packer unless—

(1) Such person is also engaged in any business referred to in clause (a) or (b) above, or unless

(2) Such person owns or controls, directly or indirectly, through stock ownership or control or otherwise, by himself or through his agents, servants or employees, any interest in any business referred to in clause (a) or (b) above, or unless

(3) Any interest in such business of manufacturing or preparing livestock products, or in such marketing business is owned or controlled, directly or indirectly, through stock ownership or control or otherwise, by himself or through his agents, servants, or employees, by any person engaged in any business referred to in clause (a) or (b) above, or unless

(4) Any person or persons jointly or severally, directly or indirectly, through stock ownership or control or otherwise, by themselves or through their agents, servants, or employees, own or control in the aggregate 20 per centum or more of the voting power or control in such business of manufacturing or preparing livestock products, or in such marketing business and also 20 per centum or more of such power or control in any business referred to in clause (a) or (b) above.

The Commission had occasion to consider this section *In the Matter of Food Fair Stores, Inc.*, docket 6458. In that case the facts were substantially different. Food Fair had since 1945 operated a meat packing plant and bought livestock in commerce for purposes of slaughter. Furthermore, it produced and distributed meat as that term is used commercially.

Respondent in the instant case does neither of these. Its motion to dismiss is based solely on the fact that the products it produces and sells contain certain percentages of meats. The claim is that it is a "packer" under section 191(b) because it is engaged in the business of manufacturing or preparing meat food products for sale or shipment in commerce. The ultimate question, therefore, is whether such products are included in the definition given in Title 7 U.S.C. sec. 182(3) which is as follows:

(3) The term "meat food products" means all products and byproducts of the slaughtering and meat-packing industry—if edible.

The initial decision calls attention to section 1.1(w) of the regulations governing meat inspection by the U.S. Department of Agriculture

which regulations are promulgated under authority of the Meat Inspection Act, 21 U.S.C. secs. 71-91. The above section defines meat food products as:

Any article of food, or any article intended for or capable of being used as human food which is derived or prepared, in whole or in substantial and definite part, from any portion of any cattle, sheep, swine, or goat, except such articles as organo-therapeutic substances, meat juice, meat extract, and the like, which are only for medicinal purposes and are advertised only to the medical profession.

Title 21 has to do with the production, sale and transportation of many articles of food, including meat and meat food products. Section 74 provides for the inspection of all "meat food products prepared for interstate or foreign commerce in any slaughtering, meat-canning, salting, packing, rendering, or similar establishment."

That the law contained in section 71 and following of Title 21 is a health measure to be given a broad construction to carry out its purpose is indicated by the following:

The determination of the meaning of the term "meat food products" is essential to the proper enforcement of the meat inspection law, and, as Congress has not defined the term, and it has no well defined meaning but is one of commercial usage, such determination is not a question of law upon which the Attorney General may express an opinion, but is a question of fact.—(1910) 28 Opinions of the Attorney General 369. The power to determine what is a meat food product rests in the Secretary of Agriculture subject to the restriction that the definition of the term adopted be not clearly and unquestionably outside the intent of such section. The definition of "meat food product" as given by the Secretary in regulation 3, section 8, to wit: "Any article of food intended for human use which is derived or prepared in whole or in part from any edible portion of the carcass of cattle, sheep, swine, or goats, if the said edible portion so used is a considerable definite portion of the finished food product" is valid.—(1911) 29 Opinions of the Attorney General 227.

In *Pittsburgh Milling Co. v. Totten* (1918) 248 U.S. 1, the court pointed out that one purpose of the act was to prevent shipment of impure, unwholesome, and unfit meat and meat food products in commerce, and that Oleo oil, a substance made from the fat of slaughtered beeves, seldom used by itself as food, but employed largely in making oleomargarine and somewhat in cooking, is a "meat food product" within the Meat Inspection Act, when manufactured fit for human consumption and not "denatured" and is barred from commerce unless inspected and passed under the act.

It is not disputed that respondent's products are meat food products as defined by the Secretary of Agriculture under the Meat Inspection Act. In fact, respondent is registered under said act and its products are inspected regularly.

However, the question in this case is not the meaning of "meat food products" under the Meat Inspection Act, but the meaning under

the Packers and Stockyards Act. The two acts are entirely separate. Although both touch and concern the general subject of meat and the production and distribution thereof, nevertheless, the objectives are entirely different. The Meat Inspection Act is a health measure to protect the public from the introduction of impure products into commerce. The Packers and Stockyards Act was enacted to remedy certain business practices of a designated industry.

We conclude that respondent's products are not meat food products under the definition of that term in the Packers and Stockyards Act for the following reasons:

- (1) The Packers and Stockyards Act contains no indication, either expressly or by implication that Congress intended to adopt therein the definition of meat food products which had been adopted by the Secretary of Agriculture under the Meat Inspection Act.
- (2) In fact the Packers and Stockyards Act has its own definition, differing in its language from that of the Meat Inspection Act.
- (3) In applying this definition, consideration should be given to the intent of Congress in adopting the legislation.

When the Packers and Stockyards Act was adopted, the Meat Inspection Act had been in operation for some time. Congress was familiar with the broad and sweeping definition of "meat food products" being enforced by the Secretary of Agriculture. Nowhere in the legislative history is there any express acceptance of such definition for the Packers and Stockyards Act. Nor is there an implied acceptance by failing to write a definition in the statute. On the contrary, a definition was expressly included, considerably limiting the sweep of the same language in the regulations under the prior legislation. Instead of including every article of food derived or prepared in part from any edible portion of the carcass of cattle, etc., the definition in the Packers and Stockyards Act covers only all edible products and byproducts of the slaughtering and meat-packing industry.

What Congress had in mind is illustrated by the following statement by Senator Wadsworth:

The discussions in the committee very clearly brought out the fact that the authors of the bill intended by this bill, and under these two definitions, to have these regulatory provisions apply to the packer as we know him, as he is generally considered, that is, a large concern engaged in purchasing animals, slaughtering them, selling the food products and processing the byproducts to a greater or lesser degree. That, I think, it is fair to say is the conception of the authors.

While there was considerable dispute as to the choice of language which would best express the congressional intent, nevertheless,

there were many other statements in substantial agreement with the above quotation from Senator Wadsworth.

In *Bishop v. City of Tulsa* (Okla. 1922) 27 A.S.R. 1008, the court said:

A byproduct is a secondary or additional product of value; something produced in the course of business in addition to the principal product. It is well known that packing houses, oil refineries, and some other kinds of manufacturers, make byproducts amounting in value to a material part of their gross income.

It is clear that respondent's products are not byproducts. The use of the term "byproducts" in the definition throws considerable light on what groups Congress intended to include under the Packers and Stockyards Act. The language used, the history and background of the legislation indicate that it was aimed at organizations buying livestock for slaughter or preparing therefrom meats as was customarily being done by the packers of that day. We do not believe that it was ever intended to cover an organization such as respondent, which buys no animals for slaughter, prepares no meat as that term is used commercially, and which only produces products of which meat may be an ingredient. In other words, respondent is not a member of the "slaughtering and meat packing industry" as envisioned by the framers of the Packers and Stockyards Act. This situation is similar to that of an independent processor of livestock products. As to that situation, the House Committee report points out:

An independent tannery would not be a packer, but if a packer sets up a tannery business as a separate corporation, it would be controlled.

To give the law the construction urged by respondent would bring strange results. For example, a baker who buys meat and puts it in pizza pies sold in interstate commerce would be a packer. A farmer might also be a packer in spite of the fact that the Meat Inspection Act exempts the farmer who engages only in traditional farming operations.

In construing the meaning of the words in the statute consideration must be given to the intent of the entire statute and to the evils it was designed to cure. This is true of such words as "meat" and "meat food products" which are used in a variety of meanings as is indicated by dictionary definitions and by court decisions. For example, see *Gardner v. State* (1915 Ind.), 108 N.E. 230; *State v. Nugent* (1955 N.C.), 89 S.E. 2 781; *State v. Morey* (Wis.), 60 Am. Dec. 439.

The general objective of the Packers and Stockyards Act was to regulate certain business practices of a group usually referred to as

the slaughtering and meat packing industry. To apply the act to respondent would be to go beyond what we consider to be the Congressional intent.

We conclude that the hearing examiner was in error in sustaining respondent's motion to dismiss. The appeal of counsel supporting the complaint is granted, the motion to dismiss is denied and the case is remanded to the hearing examiner for further proceedings in accordance with this opinion.

ORDER VACATING INITIAL DECISION AND REMANDING CASE TO HEARING
EXAMINER

This matter having come on for hearing upon the appeal of counsel supporting the complaint from the initial decision of the hearing examiner which granted the respondent's motion to dismiss the complaint for lack of jurisdiction; and

The Commission, for reasons stated in its accompanying opinion, having determined that the hearing examiner was in error in granting the motion to dismiss:

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

It is further ordered, That this case be remanded to the hearing examiner for further proceedings in accordance with the Commission's opinion.

AMERICAN HOME PRODUCTS CORP.

(formerly WHITEHALL PHARMACAL CO.)

Docket 6755. Order, Nov. 14, 1957

Interlocutory order granting complaint counsel's appeal from hearing examiner's rulings excluding from the record photographic prints of the video portions of particular frames of certain kinescopes or films of respondent's television commercials as not the "best evidence."

ORDER GRANTING INTERLOCUTORY APPEAL FROM RULING OF HEARING
EXAMINER

This matter having been heard upon an interlocutory appeal, filed by counsel in support of the complaint, from rulings of the hearing examiner excluding from the record photographic prints of the video portions of particular frames of certain kinescopes or films of the respondent's television commercials, which kinescopes or films had already been admitted in evidence; and

It appearing that the bases for said rulings were that the photographs are not the best evidence, and that they do not purport to show the films in their entirety; and

The Commission being of the opinion that inasmuch as the exhibits were not offered in substitution for the films, but in addition thereto, for the sole purpose of assisting the reviewing authorities in their study of the record after viewing the films, the rule excluding evidence because it is not the "best evidence" has no application; and

The Commission being of the further opinion that for the purpose indicated and in the circumstances of this case, the photographs constitute relevant, material and reliable evidence and that the advantages of having them in the record outweigh any technical objections to their admissibility:

It is ordered, That the rulings of the hearing examiner sustaining the respondent's objections to the exhibits designated as Commission's exhibits 25-A through K, 26-A through I, 27 and 28 for identification, be, and they hereby are, reversed.

It is further ordered, That said exhibits be, and they hereby are, received in evidence.

GIANT FOOD SHOPPING CENTER, INC.

Docket 6459. Order and Opinion, Dec. 19, 1957

Order vacating initial decision dismissing complaint for lack of jurisdiction—respondent operator of a supermarket chain claiming to be a "packer" within the meaning of the Packers and Stockyards Act—and remanding case to hearing examiner.

OPINION OF THE COMMISSION

By KERN, Commissioner:

Respondent was charged with violating section 5 of the Federal Trade Commission Act through, among other things, inducing payments of discriminatory advertising allowances by suppliers of its merchandise, which allowances it knew or should have known to be discriminatory. In the course of the hearings, respondent moved for dismissal of the complaint on the ground that it is a packer within the meaning of the Packers and Stockyards Act of 1921,¹ and that the acts and practices to which the charges related are within the exclusive jurisdiction of the Secretary of Agriculture. The hearing examiner granted the motion and filed an initial decision dismissing the proceeding. Counsel supporting the complaint have appealed.

Since 1936 respondent has operated a chain of supermarkets for retailing food—including meat, poultry, and dairy products—and household articles. After this proceeding was commenced and im-

¹42 Stat. 160; 7 U.S.C. 191, et seq.

mediately before filing its motion to dismiss, respondent registered as a packer with the U.S. Department of Agriculture. According to its moving papers, respondent buys from its suppliers slaughtered carcasses of various animals, including steers, calves, and lambs. It receives its beef and veal as quarter- and half-carcasses, respectively, and the lamb in whole carcasses. Upon delivery these meats are cut and trimmed by butchers in the individual stores into steaks, roasts, and chops for display and sale over the counter. The butchers also make meat loaf and country sausage. The meat loaf is prepared by grinding predetermined quantities of beef, pork, and veal and adding spices; the sausage is composed of ground pork loins and spices.

Section 202 of the Packers and Stockyards Act ² proscribes use by any packer of unfair or discriminatory practices or other acts there specified. Section 406(b) ³ provides, with exceptions not here material, that as long as that act remains in effect, the Federal Trade Commission "shall have no power or jurisdiction" relating to "any matter" made subject by the act to the jurisdiction of the Secretary of Agriculture. Section 2(a)(3), ⁴ defines the term "meat food products" as "all products and byproducts of the slaughtering and meat-packing industry—if edible." Of the various definitions of the term "packer" contained in section 201 of the act, ⁵ the one here relevant reads:

The term "packer" means any person engaged in the business (a) of buying livestock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce * * *.

On the basis of his interpretation of the foregoing, the hearing examiner concluded that the respondent's cutting and boning of its purchased meats for resale, together with the grinding of hamburger meat, did not render respondent a packer within the meaning of the act. He concluded, however, that the processing activities incident to the sale of meat loaf and sausage did constitute the manufacture or preparation of meat food products which are separate and distinct from meat alone and that the respondent must accordingly be regarded as a packer within the meaning of the act and hence subject to the Secretary's exclusive jurisdiction.

We concur in the hearing examiner's conclusion that the preparation of meats as roasts, hamburger, and other cuts does not suffice

² 42 Stat. 161; 49 Stat. 649; 7 U.S.C. 192.

³ 42 Stat. 169; 7 U.S.C. 227.

⁴ 42 Stat. 158; 7 U.S.C. 182.

⁵ 42 Stat. 160; 7 U.S.C. 191.

under the statute to constitute a meat-packing enterprise. We disagree with his conclusion that by making some of its meat into meat loaf and sausage respondent became a packer under the act.

The hearing examiner's conclusion that respondent's grinding and seasoning of some of its meats transform the legal identity of such meats under the act from "meat" to "meat food products" is plainly erroneous. As we have previously noted, the act defines "meat food products" as edible products and edible byproducts of the slaughtering and meatpacking industry. Edible meat, accordingly, is a meat food product within the meaning of the act. Hence, the meats which respondent elects to grind and season already are meat food products at the very time they are received by respondent, and they remain such when offered at retail as meat loaf and country sausage. Respondent does no more than engage in the activities which are customary in the retail merchandising of meat; these activities do not of themselves constitute the manufacture and preparation of meat or meat food products for sale or shipment in commerce within the purview of the act.

After the hearing examiner filed his initial decision, we held in the matter of *Crosse & Blackwell Co.*, docket No. 6463 (decided November 13, 1957), that the preparation of soups or other table foods containing meat purchased by the processor from a local slaughterhouse did not, under the act, confer upon the processor the status of packer. And we noted that through this legislation Congress was seeking to regulate the practices of the business concerns (and their financial affiliates) which composed the slaughtering and meatpacking industry. The law was aimed at controlling the packer *as Congress knew him*, and the legislative target was the large concern engaged in purchasing animals, slaughtering them, selling food products and processing the byproducts to greater or lesser degree. This congressional intent appears plainly in the previously noted definition of "meat food products." That definition does not purport to include every article of food derived or prepared in part from edible portions of cattle or other livestock. To the contrary, it is confined to edible products and edible byproducts of "the slaughtering and meat-packing industry." This language thus logically excludes from the category of articles to which the act applies those which are manufactured or prepared by persons not members of the slaughtering and meatpacking industry.

Of the 36 supermarkets operated by respondent, 14 are located in the District of Columbia. According to the definition of "commerce" in the statute, respondent's sales to the public throughout the latter

stores are sales "in commerce," that is, interstate commerce. However, neither this aspect of respondent's operations nor its recent registration with the Department can govern our determination of its status under the Packers and Stockyards Act. Respondent buys no livestock in commerce for purposes of slaughtering. There has been no showing that it owns or controls any interest in a packing establishment or that any substantial stock interest in respondent is held by a member of the slaughtering and meatpacking industry. Furthermore, respondent's processing operations are essentially limited to point-of-sale preparation and over-the-counter sale of its meat loaf and country sausage—ordinary and usual in the retailing of meat. It clearly is not a member of the industry group whose practices Congress sought to regulate—the slaughtering and meatpacking industry. To hold otherwise would make a "packer" out of almost every food retailer in the District of Columbia. That respondent itself senses the fallacy of such a position is, we think, evidenced by its belated registration as a "packer," as noted earlier.

The facts here differ materially from those under consideration in the matter of *Food Fair Stores, Inc.*, docket No. 6458 (decided September 27, 1957), where the respondent operated a meatpacking plant and engaged in the preparation of meats which it resold both to independent jobbers and through its own stores.

The appeal of counsel supporting the complaint is accordingly granted. The initial decision will be vacated and the case remanded for further proceedings consistent herewith.

ORDER VACATING INITIAL DECISION AND REMANDING CASE TO HEARING
EXAMINER

This matter having come on for hearing upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision granting the motion of the respondent to dismiss the complaint for lack of jurisdiction; and

The Commission, for reasons stated in the accompanying opinion, having determined that the hearing examiner was in error in granting said motion:

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

It is further ordered, That this case be remanded to the hearing examiner for further proceedings in accordance with the Commission's opinion.

COLUMBUS COATED FABRICS CORP., ET AL.

Docket 6677. Order and Opinion, Dec. 23, 1957

Interlocutory order upholding hearing examiner's rulings limiting request for production of certain statements of witnesses, quashing certain specifications in subpoenas, and denying motion to strike testimony of witness; and denying request for oral argument.

OPINION OF THE COMMISSION

By the COMMISSION:

This matter is before the Commission upon the interlocutory appeal of respondent Philan, Inc., from several rulings of the hearing examiner made in the course of hearings conducted in New York City from September 9 through September 12, 1957, as follows:

(1) Ruling of September 9, 1957, which, in response to Philan's motion in part requesting an order to require counsel supporting the complaint to produce for examination documents in his possession containing statements of certain named witnesses "to any investigator or other representative of the Federal Trade Commission prior to their testimony in this proceeding," ordered the production of only certain interview report documents with some deletions;

(2) Ruling of September 10, 1957, quashing certain specifications in two subpoenas duces tecum served upon Oscar Siperstein; and

(3) Ruling of September 12, 1957, denying Philan's motion to strike the testimony of Oscar Siperstein.

In connection with the ruling granting limited examination of certain documents in possession of counsel supporting the complaint, Philan argues first that, while the examiner ordered the turning over of interview reports with certain witnesses, he did not order the turning over of other prior statements of the *same witnesses* in forms other than interview reports. The hearing examiner considered the motion as "sort of a blunderbuss motion" and refused to grant the request to the extent that examination, direct or cross, brought out no indication of any report, statement, or interview of a witness. The result was to confine the requested production to interview reports only, and, in addition, to only the reports of this kind relating to the several witnesses in which cases it was apparent from the testimony that such reports were in existence; excluded were reports relating to other witnesses, as well as other prior statements of any of the witnesses. In other words, the request which involved an excursion to see what documentary material, if any, might be uncovered was limited to reasonable dimensions; it was limited to those documents immediately related to the testimony of the witnesses. Under the circumstances,

we do not believe that the hearing examiner abused his discretion in such ruling.

Philan additionally argues, relative to the September 9th ruling, that it was error for the examiner to excise those portions of the reports which he considered to be privileged and irrelevant or simply irrelevant. The deletions included portions which make reference to an applicant in this proceeding; information which we believe was properly withheld. For one thing, the identification of one who has complained to the Commission is irrelevant, since Commission action is taken only in the public interest. No applicant is a party to this proceeding. Furthermore, the status of a complainant is such that a strict policy of protecting his identity is warranted.¹ We have examined all of the parts deleted and conclude, as the examiner did, that they contain nothing relevant to this proceeding; consequently, we are in accord with the examiner's action.

Philan argues that it was denied the right to be heard relative to the excisions. It appears, however, that to be heard in the matter, Philan would have to be shown the deleted material. This would defeat the purpose of the action taken. Under all the circumstances, we cannot find that Philan was in any way prejudiced by the deletion of irrelevant parts of the reports in question.

In reference to the ruling quashing certain specifications in the subpoenas served upon Oscar Siperstein, Philan argues that quashing item 14 in the one and item 6 in the other was in error. These items are substantially similar, differing only with respect to the company involved and the period of time covered. The request is for any and all correspondence, or copies thereof, by or between N. Siperstein, Inc. [St. George Paint & Wallpaper Supply in the other] (or any officer or agent thereof) and any agency or department in the U.S. Government in the specified periods, containing statements which relate to or describe the purpose or sale of Wall-Tex or any difficulties in connection with such sale or purchase. The examiner construed this as reasonably calling for complaints to the Federal Trade Commission. He concluded that section 10 of the Federal Trade Commission Act made any such records absolutely privileged. This section prohibits any officer or employee of the Commission from making public any information obtained by the Commission without its authority.

We are of the opinion that in an administrative proceeding, such as this, statements in writing to the Commission by applicants or complaining parties should be strictly protected from disclosure, as a general rule. Philan concedes that the specifications in question call

¹ Even under criminal procedure, it has been held where a court concludes that material obtained by the Government from third persons ought to be produced, the court should be solicitous to protect against disclosure of the identity of informants. *Borman Dairy Co. v. United States*, 341 U.S. 214.

for complaints by the parties named made to the Federal Trade Commission. It asserts, however, that such production is necessary for Philan to be accorded the right of cross-examination. The question here is not dissimilar from that presented with respect to the request for documents in the possession of counsel supporting the complaint, and should be resolved on a similar basis. Not only has there been no use of any such statement in this proceeding, nor any reference thereto in the witness' testimony, the record fails to disclose that any written statement was ever made by the parties to the Commission. Under circumstances where confidential documents of this character might be revealed, we believe that some stronger relationship to the witness' testimony or to the proceeding in general is needed than is here shown to warrant the production requested.

Moreover, this question should not be viewed merely with respect to the specifications quashed. Philan has requested and has been granted by the examiner subpoenas to witness Oscar Siperstein covering a wide range of data and documentation adjudged to be relevant to this proceeding and concerning matters testified to, against which the witness' credibility might be tested. Furthermore, Philan has been given access to all interview reports with the witness, except so far as there has been some deletions of irrelevant matter. In short, access has been broadly granted to relevant matter requested having a bearing on the testimony of the witness. Under such circumstances, we do not believe Philan has suffered prejudice by way of any denial of its right to cross-examine.

The final question on this appeal is whether it was error for the examiner, having denied in part the requests for production, to deny Philan's motion to strike the testimony of witness Oscar Siperstein. Since we have already concluded that Philan has not been denied its right to cross-examination with respect to this witness, it follows that it was proper to deny the motion to strike.

Philan, Inc., has made a request for oral argument, but it appears that the briefs are entirely adequate to fully advise the Commission as to the matters in issue and that no useful purpose would be served thereby.

The interlocutory appeal and request for oral argument of Philan, Inc., are denied.

ORDER DENYING INTERLOCUTORY APPEAL AND REQUEST FOR ORAL
ARGUMENT

This matter having come on to be heard upon the interlocutory appeal of respondent Philan, Inc., from certain rulings of the hearing examiner denying or limiting its request for production of certain records by motion and by subpoena duces tecum and denying its

motion to strike the testimony of a witness and upon said respondent's request for oral argument; and

The Commission having determined, for the reasons appearing in the accompanying opinion, that the appeal and the request for oral argument should be denied:

It is ordered, That the interlocutory appeal and request for oral argument of respondent Philan, Inc., be, and they hereby are, denied.

COLUMBUS COATED FABRICS CORP., ET AL.

Docket 6677. Order and Opinion, Dec. 23, 1957

Interlocutory order upholding hearing examiner's ruling denying in part respondents' motion to quash subpoenas duces tecum served upon one of them as involving trade secrets.

OPINION OF THE COMMISSION

By the COMMISSION:

This matter is before the Commission upon the interlocutory appeal of Oscar Siperstein, a witness in this proceeding, N. Siperstein, Inc., and St. George Paint & Wallpaper Supply, from the ruling of the hearing examiner which denied in part their motion to quash two subpoenas duces tecum served at the request of respondent Philan, Inc., upon said Siperstein, in the one instance as an officer of N. Siperstein, Inc., and in the other as an officer of St. George Paint & Wallpaper Supply. Brief has been filed in support of the appeal by counsel supporting the complaint. Respondent Philan, Inc., has filed briefs in opposition to the appeal and in answer to the brief of counsel supporting the complaint.

The requested documents, relative to which the motion to quash was denied, include, for various specified periods of time, the following:

(a) Records relative to the returns of Wall-Tex by N. Siperstein, Inc., to any vendor other than Philan, Inc.

(b) Records showing the names and addresses of all customers who purchased Wall-Tex from N. Siperstein, Inc., who returned Wall-Tex to N. Siperstein, Inc., as damaged or defective, for which return was made by N. Siperstein, Inc., to Philan, Inc., in the regular course of business, as well as the amount of credit extended or cash refunded to each such customer.

(c) Records showing the volume of Wall-Tex purchased by N. Siperstein, Inc., and St. George Paint & Wallpaper Supply, with the names of the vendors, and the volumes of sales of the product by N. Siperstein, Inc., and St. George Paint & Wallpaper Supply.

(d) Tear sheets of advertisements of Wall-Tex placed by N. Siperstein, Inc., and other related memoranda.

(e) Minutes of meetings of directors and stockholders showing the election of officers of the respective companies, as well as records relating to the identification of officers and employees.

The argument of the appellants seems to be principally that the subpoenas violate their right to privacy of records, particularly where allegedly little or no relevance has been shown. It is also strongly urged that the hearing examiner erred in allegedly delegating authority to counsel for respondent Philan, Inc., to decide whether or not the records should be produced.

Counsel supporting the complaint argues primarily that the records ordered to be produced contain trade secrets and thus are privileged from disclosure, citing authorities such as *E. B. Muller & Co., et al. v. Federal Trade Commission*, 142 F. 2d 511.

There does not appear to be any question here as to the general relevance and reasonable scope of the records ordered to be produced. The hearing examiner carefully and specifically considered the relevant nature of the documents in each instance. He also considered the reasonableness of the several requests, as evidenced by the fact that some specifications were stricken entirely or limited in their coverage. We find no reason to overrule his judgment in these respects.

The contention that the examiner delegated authority to decide whether or not the records should be produced is without foundation. The questions directed to counsel for Philan, Inc., were simply for the purpose of determining if said counsel had a reasonable basis for requesting various documents covered by the subpoenas. From the answers the examiner was better informed to decide the appropriateness of the requests. Such a procedure is proper and does not constitute a delegation of authority.

The argument that the documents ordered produced involve trade secrets apparently is most directly in point in connection with the request for records intended to identify certain customers of N. Siperstein, Inc. A customers list has been held to be a valuable property right, entitled to protection, and in general privileged against disclosure. *E. B. Muller & Co., et al. v. Federal Trade Commission*, *supra*. One of the subpoenas in this instance calls for the names of certain customers, but not an exhaustive listing by any means. The request is limited so that it calls for the names of only those customers who purchased Wall-Tex from N. Siperstein, Inc., and returned it as damaged or defective, and for which returns were made by N. Siperstein, Inc., to Philan, Inc. It does not appear that this would in any way involve a wholesale disclosure of the names of customers of N. Siperstein, Inc. We do not believe that the names of the several customers which might be revealed fall in the category of trade information protected by privilege. Moreover, there is no absolute privi-

lege against disclosure of trade secrets. If there are such secrets contained in the documents here involved, it is further believed that the circumstances of this proceeding justify an order requiring production.

The interlocutory appeal of Oscar Siperstein, N. Siperstein, Inc., and St. George Paint & Wallpaper Supply is denied.

ORDER DENYING INTERLOCUTORY APPEAL

This matter having come on to be heard upon the interlocutory appeal of Oscar Siperstein, a witness in this proceeding, N. Siperstein, Inc., and St. George Paint & Wallpaper Supply, from the ruling of the hearing examiner denying in part their motion to quash subpoenas duces tecum served upon said Oscar Siperstein as an officer of N. Siperstein, Inc., and as an officer of St. George Paint & Wallpaper Supply; and

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

It is ordered, That the interlocutory appeal of Oscar Siperstein, N. Siperstein, Inc., and St. George Paint & Wallpaper Supply be, and it hereby is, denied.

FIDELITY STORM SASH CO. OF D.C., INC., ET AL.

Docket 6804. Order, Jan. 7, 1958

Interlocutory order upholding hearing examiner's orders amending the complaint to correct the names of the corporate respondents and denying motion to postpone hearing dates.

ORDER DENYING INTERLOCUTORY APPEAL

Counsel for respondents having filed an interlocutory appeal from the hearing examiner's order of November 14, 1957, amending the complaint to correct the names of the corporate respondents therein, and having also appealed from the examiner's subsequent order denying respondents' motion to postpone hearing dates set for January 20, 1958, et seq.; and

It appearing that the rulings made in both orders were clearly within the scope of the authority conferred upon the hearing examiner by section 3.9 of the Commission's rules of practice; and

It further appearing that no showing has been made that either ruling involves respondents' substantial rights or will materially affect the final decision of the case; and

The Commission being of the opinion that the appeals are not in the category of those to be granted under section 3.20 of the rules of practice:

It is ordered, That the aforesaid appeals, including respondents' request for oral hearing, be, and they hereby are, denied.

SURPLUS TIRE CO., INC., ET AL.

Docket 7004. Order, Feb. 26, 1958

Interlocutory order upholding hearing examiner's denial of respondents' motion for continuance, to limit situs of all hearings to Chicago, and for disclosure of names and addresses of all complainants.

ORDER DENYING INTERLOCUTORY APPEAL

Respondents having filed an interlocutory appeal from orders of the hearing examiner denying respondents' motions for continuance, to limit the situs of all hearings to Chicago, Ill., and for disclosure of the names and addresses of all complainants, and upon answer in opposition thereto filed by counsel supporting the complaint; and

The Commission, being of the opinion that no showing has been made that the rulings appealed from involve substantial rights or that such rulings will materially affect the final decision in this proceeding, has concluded that respondents' appeal does not come within the category of those to be granted under section 3.20 of the Commission's rules of practice:

Accordingly, it is ordered, That respondents' interlocutory appeal filed February 19, 1958, be, and it hereby is, denied.

GULF OIL CORP.

Docket 6689. Order, Feb. 28, 1958

Interlocutory order upholding hearing examiner's order directing complaint counsel to furnish opposing counsel lists of witnesses to be called at scheduled hearings.

ORDER DENYING INTERLOCUTORY APPEAL

Counsel supporting the complaint having filed an interlocutory appeal from that part of the hearing examiner's order of October 16, 1957, which directs that counsel furnish to opposing counsel, not less than two weeks prior to the date of each scheduled hearing or series of hearings, a list of the names and addresses of the witnesses whom they expect to call at such hearings; and

It appearing that no clear showing has been made that the challenged ruling constitutes an abuse of the hearing examiner's discretion or that said ruling involves substantial rights or will materially affect the final decision of the case; and

The Commission being of the opinion that in the circumstances the appeal is not one to be granted under section 3.20 of the Commission's rules of practice:

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

VOSS HAIR EXPERTS OF GEORGIA

Docket 6498. Order, Mar. 20, 1958

Interlocutory order upholding hearing examiner's rulings denying respondent's motions to dismiss complaint for alleged failure to establish a prima facie case respecting jurisdiction and public interest, and to strike scientific testimony of complaint counsel's physician witness.

ORDER DISPOSING OF INTERLOCUTORY APPEALS FILED BY THE
RESPONDENT

The respondent having filed on February 27, 1958, and March 3, 1958, interlocutory appeals from the hearing examiner's rulings denying motions by the respondent (1) to dismiss the complaint for alleged failure to establish a prima facie case respecting jurisdiction and public interest and (2) to strike the scientific testimony of a physician called as a witness by counsel supporting the complaint; and

It appearing that the challenged rulings of the hearing examiner do not constitute a decision on the merits of the case, nor do they affect the final decision or any of the respondent's rights to present fully his defense to the charges against him; and

The Commission having determined that neither of the appeals come within the category of those to be granted under section 3.20 of the Commission's rules of practice and that the respondent's request to present oral argument in support of the appeals should be denied:

It is ordered, That the respondent's interlocutory appeals be, and the same hereby are, denied.

PURE OIL CO.

Docket 6640. Order and Opinion, Mar. 20, 1958

Interlocutory orders upholding hearing examiner's ruling directing that complaint counsel produce a certain interview report, and vacating and setting aside his rulings conditionally denying said counsel's requests for production by respondent of certain statements and for a subpoena duces tecum for production thereof.

INTERLOCUTORY APPEAL FROM CERTAIN RULINGS

By the COMMISSION:

This matter is before the Commission on an interlocutory appeal of counsel supporting the complaint from several rulings of the hearing examiner made during the course of hearings held June 27, 1957, and December 10 and 11, 1957. The June 27 ruling appealed from is that directing counsel supporting the complaint to produce a Commission investigator's report of an interview with J. F. Liles, who appeared as a witness and testified at the instance of counsel supporting the complaint. The December 10 and 11 rulings appealed from

are those conditionally denying counsel supporting the complaint's requests for production by respondent of certain affidavits or statements of designated witnesses who also testified in support of the complaint, and requests for issuance of a subpoena duces tecum directed to Pure Oil Co., respondent, for production of such documents.

The circumstances surrounding the appeal are as follows:

On June 27, 1957, during the testimony of J. F. Liles, a Commission witness, respondent's counsel requested the production of an interview report with this witness said to have been prepared by a Commission investigator identified as Francis J. Stewart. Liles testified that he had been interviewed by this investigator. The hearing examiner directed production of the interview report and noted in effect that he would examine it for relevancy and then make the relevant portions, if any, available to respondent. Counsel supporting the complaint refused to comply with this order, it appearing generally that the grounds relied upon were the lack of authority of the examiner and the discretion invested in said counsel with respect to confidential documents.

Subsequently, during the hearing of December 10, 1957, counsel supporting the complaint requested that counsel for respondent be directed to produce a certain affidavit signed by witness Samuel Ray Harris. This witness was then on the stand testifying for counsel supporting the complaint. During the course of the examination of this and some other dealer witnesses, it was shown that they had given statements to representatives of respondent. Apparently, these were signed and notarized statements taken following the issuance of the complaint and related to matters alleged in the complaint. The hearing examiner denied the request on the ground that it was inequitable to order respondent to produce this document while counsel supporting the complaint stood in defiance of the examiner's order to produce the interview report concerning witness Liles. The examiner indicated he would order the production of the Harris affidavit if counsel supporting the complaint would agree to produce the Liles interview report.

The hearing examiner made similar rulings with respect to requests of counsel supporting the complaint for production of the statements or affidavits of witnesses Charles E. Allgood and Seth Calvin Gordon. On December 11, 1957, counsel supporting the complaint requested production of a statement signed by witness William Arthur Burke, then testifying in support of the complaint. At this time said counsel agreed to produce the interview report with Liles in conformity with the examiner's prior order, as the examiner had indicated he must to obtain production of any such document. Counsel, however, specifi-

cally limited his agreement to produce to the Liles report only. The examiner then ruled that he would not order respondent to produce such statement unless counsel supporting the complaint agrees that he would comply with all future orders of the hearing examiner respecting the production of documents.

The examiner likewise refused to grant the requests made by counsel supporting the complaint on December 10 and 11, for the issuance of a subpoena duces tecum for the production of such statements or affidavits. The December 10 request was for a subpoena directed to Pure Oil Co. for the production of all statements taken by any representative of that company from their independent dealers with respect to a certain alleged plan. The request for subpoena of December 11, was not particularized. These requests were denied as to the witnesses testifying for the same reasons that production of the documents was not directed. Counsel supporting the complaint thereupon appealed from these several rulings.

The ruling of June 27, 1957, directing production of the report of interview with Liles was not appealed from within the time permitted by section 3.20 of the Commission's rules of practice, and, thus, this ruling is not now subject to interlocutory appeal. The fact that counsel in support of the complaint may have considered an appeal within such time unnecessary because of the examiner's failure to insist upon immediate compliance with his direction is wholly immaterial. Under the Commission's procedures for adjudicative cases, the primary responsibility for the orderly conduct of hearings for the receipt of evidence rests with the hearing examiner. This officer, in the discharge of his duty, has the necessary authority to rule on all motions and other requests which may be appropriate in adversary proceedings, and it seems elementary that he is entitled to expect counsel, both in support of and in opposition to the complaint, to govern themselves accordingly. Unless and until it is reversed or modified, an examiner's ruling represents the law of the case on the points covered, and it should not be necessary to remind counsel that it is his obligation to either obey such ruling or take the steps provided in the rules of practice to have it reviewed. Under no circumstances can he be permitted to arrogate to himself the right to decide whether or not he will be bound by it or when he will appeal from it.

Although the ruling of June 27 is not subject to interlocutory appeal, consideration of the rulings of December 10 and 11, 1957, involves also a review of the June 27 ruling, since compliance therewith was one of the conditions attached to the later rulings.

In the opinion of the Commission, the ruling of June 27 was erroneous. The Commission considers data and information received from any informant to be confidential as well as privileged and permits

disclosure only in accord with the provisions of section 1.133 of the Commission's rules of practice, subject, however, to the rules of law with respect to privilege in the conduct of any proceeding.

In this instance, there was no action which deprived the interview report with witness Liles of its status as a privileged document. This witness testified that he had been interviewed by an attorney-examiner named Stewart. Respondent, on the basis of this admission, requested production of the interview report for the purpose, it was stated, of seeing whether the witness made any statements to Mr. Stewart inconsistent with his testimony. There is no showing that the interview report was used in any way during the course of the hearings. It was a report prepared not by the witness but by an outside party. Such report, in addition to being privileged, is pure hearsay and would be inadmissible if offered as evidence. Furthermore, it could not be successfully used to impeach the testimony of the witness. The fact, if it be a fact, that a third party had reported what the witness had said would be wholly immaterial. This situation is entirely different from that in *Jencks v. U.S.*, 353 U.S. 657 (June 3, 1957), whether or not the rule of that case may be held to apply to administrative proceedings. Among other things, in *Jencks* the production requested was for documents prepared by witnesses on the stand concerning activities as to which they testified.

Respondent in its brief in opposition to the appeal cites our opinion *In the Matter of Columbus Coated Fabrics Corporation, et al.*, docket No. 6677 (decision on interlocutory appeal, December 23, 1957). The cases are not comparable. There the Commission was considering in pertinent part the appeal of that respondent from the examiner's ruling which denied production of an indefinite number of unidentified documents other than interview reports and also the excised portions of certain interview reports. We held that, under the circumstances, the examiner properly ruled in denying production of the documents other than interview reports and that he did not err in excising nonrelevant parts of the interview reports ordered turned over to respondent. In ruling on the propriety of excising irrelevant material in reports, we did not thereby rule as to the correctness of the order for production of these reports. That question was not before us. Counsel in support of the complaint had not appealed from the ruling requiring such production.

Because the ruling of June 27 was in error, the rulings of December 10 and 11 were necessarily erroneous also since they imposed upon counsel supporting the complaint the obligation to produce a document which the examiner had no power to require and should not have required. Furthermore, it was unreasonable to attach a condition that counsel supporting the complaint must agree to produce any thing

else the examiner ordered. Each order for production must be determined on its own merits when made.

In granting the appeal from the rulings of December 10 and 11, we are deciding only that the examiner erred in conditioning his order for the production of documents sought by counsel supporting the complaint upon the production of the Liles report or upon an agreement to produce any other document which the examiner might order. The question whether or not counsel supporting the complaint are entitled to the affidavits or statements they seek is not before the Commission, and on this point no decision is made.

Accordingly, the appeal is denied insofar as it is from the June 27 ruling and granted insofar as it is from the rulings of December 10 and December 11, 1957.

ORDER RULING ON INTERLOCUTORY APPEAL

Counsel supporting the complaint having filed an interlocutory appeal from the hearing examiner's ruling of June 27, 1957, directing that said counsel produce a certain interview report, and from the examiner's rulings of December 10 and 11, 1957, conditionally denying the requests of said counsel for an order by the examiner directing the production by respondent of certain statements and conditionally denying requests for a subpoena duces tecum for production of such documents; and

The Commission, for the reasons stated in the accompanying opinion, having denied the appeal insofar as it is from the ruling of June 27, 1957, and having granted the appeal insofar as it is from the rulings of December 10 and 11, 1957:

It is ordered, That the rulings of December 10 and 11, 1957, involved in this appeal, be, and they hereby are, vacated and set aside.

B. F. GOODRICH CO., ET AL.

Docket 6485. Order, March 26, 1958

Interlocutory order upholding hearing examiner's ruling denying respondent's motion to withdraw from instant proceeding any issue as to its dealings, etc. with Firestone Tire & Rubber Co., since the question thus presented was determined adversely to respondent on an earlier appeal.

ORDER DENYING INTERLOCUTORY APPEAL

Respondent, the Texas Co., having filed with the Commission an interlocutory appeal from the hearing examiner's ruling of February 24, 1958, denying its motion to withdraw from this proceeding any issue as to dealings, practices, contracts, agreements or arrangements between the Texas Co. and the Firestone Tire & Rubber Co.,

and to strike all evidence heretofore received in this case with respect to any such issue; and

It appearing that it is the respondent's contention that because of the reception of evidence by the same hearing examiner, concerning contracts and dealings between the Texas Co. and the Firestone Tire & Rubber Co. in both this proceeding and docket No. 6487 in which the Texas Co. is not a party, this respondent is deprived of a fair hearing; and

It further appearing that the question thus presented was considered and in effect determined adversely to the respondent in the Commission's disposition on November 28, 1956, of an interlocutory appeal theretofore filed by counsel in support of the complaint from rulings of the hearing examiner excluding from the record evidence of the type here involved; and

The Commission being of the opinion that the aforesaid determination of the question renders unnecessary its further consideration at this time:

It is ordered, That the respondent's appeal, together with its motion for deferment of decision thereof and for permission to file additional briefs and its request for oral argument, be, and they hereby are, denied.

PROCTER & GAMBLE CO.

Docket 6901. Order, March 26, 1958

Interlocutory order in merger proceeding reversing hearing examiner's rulings excluding from subpoena as irrelevant respondent's records showing acquisitions, advertising expenditures for acquired products, etc. and limiting demand for acquired company's records.

ORDER SUSTAINING APPEAL FROM HEARING EXAMINER'S RULING
LIMITING SUBPENA

This matter having come on to be heard upon an interlocutory appeal filed by counsel in support of the complaint from the hearing examiner's rulings granting in part the respondent's motion to limit or quash a subpoena duces tecum theretofore served on the respondent; and

It appearing that the effects of the rulings are to exclude from the subpoena as irrelevant to any of the issues in this proceeding the respondent's records showing its domestic acquisitions from 1946 to the date of the subpoena, its advertising and promotional expenditures, including designated surveys and advertising research reports, concerning certain products recently acquired or developed by the respondent, for the years 1952 through 1957, and the records of the Clorox Chemical Co. showing its domestic acquisitions from 1952

through 1957, and to limit to material actually used in 1956 and 1957 the subpoena's demand for production of the Clorox Chemical Co.'s 1952-57 records showing the company's merchandising practices, the prices of its products, the geographical areas served by each of its producing facilities and the dollar volume sales in each such area, and samples of the labels and wrappers used on each of its products; and

The Commission having considered the matter in the light of all of the circumstances, including the allegations of the complaint, with particular reference to the nature of the acquisition charged to have been unlawful and the scope of the inquiry concerning the potential effects on competition which is necessary, and having reached the conclusion that the records and documents excluded from the subpoena are generally relevant to the basic issues involved in the proceeding and further, that a requirement for their production need not expand the case beyond manageable proportions:

It is ordered, That the hearing examiner's rulings granting in part the respondent's motion to limit or quash the subpoena as aforesaid be, and they hereby are reversed, it being understood, however, that this does not constitute a ruling on the respondent's contention that the requirement for the production of certain of said records and documents is an unreasonable burden on the respondent and involves an unnecessary disclosure of its trade secrets, or a determination of the admissibility of any of the records or documents into the record as evidence, neither of which questions was involved in the appeal.

J. H. CAMP, ET AL.

Dockets 4446, 4893. Order and Opinion, April 9, 1958

Order denying respondent's motion to reopen proceedings to set aside desist order.

OPINION OF THE COMMISSION

By TAIT, Commissioner:

In a petition filed March 18, 1958, respondent in these proceedings requests that the order entered in docket No. 4446 on March 12, 1941, and the order entered in docket No. 4893 on June 27, 1944, be set aside. This petition has been treated as a motion to reopen and set aside the said orders. Counsel supporting the complaint has filed an answer in opposition thereto.

In both proceedings, respondent entered into stipulations as to the facts with counsel supporting the complaint. The Commission in each case made its findings as to the facts and conclusion, based on the facts as stipulated and entered an order to cease and desist. The orders have become final.

Respondent's motion makes no showing as to a change in conditions of fact or of law or that the public interest requires the reopening of these proceedings and the setting aside of the orders to cease and desist. The basis for the request is, in substance, that the decision in *Federal Trade Commission v. Carter Products, Inc.*, 346 U.S. 327 (1953), represents a change in conditions of law. That decision, however, was not a ruling on the merits; rather, it was a ruling on procedure in a matter involving contested issues of fact.¹ It could have no possible effect on these proceedings in which the facts were stipulated. The Commission, accordingly, has concluded that respondent's motion provides no ground for reopening the proceedings and it must, therefore, be denied.

ORDER DENYING MOTION TO REOPEN PROCEEDINGS

This matter having been heard upon respondent's petition filed March 18, 1958, for reopening of this proceeding for the purpose of having set aside 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 petition fails to establish a reasonable probability that material changes in conditions of fact or in law have occurred and fails to demonstrate a reasonable probability that the public interest requires reopening of the proceeding and setting aside of the order to cease and desist:

It is ordered, That the respondent's request that the proceeding be reopened and the order to cease and desist be set aside be, and it hereby is, denied.

GULF OIL CORP.

Docket 6689. Order, April 17, 1958

Interlocutory order upholding hearing examiner's denial of complaint counsel's application for issuance of subpoena duces tecum directing respondent to produce contracts for sales of natural gasoline and liquefied petroleum gas as providing little relevant information beyond that already in record.

ORDER DENYING APPEAL FROM HEARING EXAMINER'S RULING

This matter having come on to be heard upon an appeal filed by counsel in support of the complaint from the hearing examiner's ruling denying counsel's application for the issuance of a subpoena duces tecum directing Warren Petroleum Corp. to produce all of its contracts for the years 1954, 1955, and 1956 to sell natural gasoline and lique-

¹ Upon remand of the case to the Commission, the Commission after further proceedings issued its decision with an order to cease and desist. This matter is now on appeal to the Court of Appeals for the Ninth Circuit.

fied petroleum gas to the 20 largest purchasers of each of said products; and

It appearing that the ruling was based, in part at least, on the hearing examiner's determination that the contracts involved would provide counsel with little, if any, information relevant to the issues in this proceeding other than that which is already contained in the record; and

Such a determination being a matter within the sound discretion of the hearing examiner, and no clear showing having been made that in this instance such discretion was abused:

It is ordered, That the aforesaid appeal be, and it hereby is, denied
Commissioners Secrest and Kern dissenting.

CONSOLIDATED FOODS CORP.

Docket 7000. Order, April 25, 1958

Interlocutory order in merger proceeding upholding hearing examiner's denial of respondent's motion for leave to file memorandum in support of its proposed motion to dismiss complaint, to argue said motion orally, etc.

ORDER DISPOSING OF RESPONDENT'S INTERLOCUTORY APPEAL AND MOTION TO DISMISS COMPLAINT

This matter having come on to be heard upon the respondent's appeal from the hearing examiner's order of April 2, 1958, denying the respondent's motion for leave to file on or before May 10, 1958, a memorandum in support of a proposed motion to dismiss the complaint and to argue said motion orally, and for postponement of a hearing theretofore set for April 29, 1958, to a date to be fixed after final decision on the motion to dismiss; and

It appearing that the basis for the hearing examiner's order was that he would have no authority to rule on the questions to be raised in the proposed motion to dismiss, namely, the propriety and timeliness of the Commission's action in issuing the complaint in the first instance and the sufficiency of the complaint as issued to state a cause of action under section 7 of the Clayton Act, as amended; and

It further appearing that the respondent has made no showing that the hearing examiner was in error in so ruling, and, thus, has failed to demonstrate that the order is or may be one to be entertained under section 3.20 of the Commission's rules of practice; and

The Commission, however, having considered the respondent's motion to dismiss the complaint, filed April 7, 1958, and having determined that the issues presented therein can best be resolved after the development of a complete factual record:

It is ordered, That the respondent's appeal from the hearing examiner's order of April 2, 1958, be, and it hereby is, denied.

It is further ordered, That the respondent's motion to dismiss the complaint be, and it hereby is, also denied, without prejudice, however, to the right of the respondent to renew said motion after introduction of all of the evidence in the case.

NATIONAL RESEARCH CO. ET AL.

Docket 6236. Order and Opinion, May 22, 1958

Order remanding case to hearing examiner to consider whether changes in conditions of law or fact, or the public interest, require modification of desist order.

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

This matter is before the Commission on a notice and opportunity for hearing in the matter of modification of the order heretofore entered. Both parties have presented written briefs and oral arguments.

The original complaint charged respondents with violation of the Federal Trade Commission Act by engaging in unfair and deceptive acts and practices through the dissemination and use of "skip tracing" forms. After a hearing, the hearing examiner found against respondents and entered an order requiring respondents to cease and desist from:

- (1) Using or placing in the hands of others for use, any form, questionnaire, or other material, printed or written, which represents, directly or by implication, that the purpose for which the information is requested is other than that of obtaining information concerning delinquent debtors;
- (2) Representing, or placing in the hands of others any means of representing, directly or by implication, that money is being held for or is due, persons concerning whom information is sought, or is collectible by such persons, unless money is in fact due and collectible by such persons and the amount of such money is accurately stated;
- (3) Using the terms "Claims Office," "Reverification Office," or "United States Credit Control Bureau" or the picturization of an eagle, or any other word or phrase, or picturization of similar import to designate, describe or refer to respondent's business; or otherwise representing, directly or by implication, that requests for information concerning delinquent debtors are from the U.S. Government or any agency or branch thereof, or that their business is in any way connected with the U.S. Government;
- (4) Using the name "New Employment Status Questionnaire," or any other name of similar import to designate, describe, or refer to respondents' business; or otherwise representing directly or by implication that respondents' business is that of gathering and furnishing information relative to employment;
- (5) Using the name "Disbursements Office," or any other name of similar import to designate, describe or refer to respondents' business; or otherwise representing, directly or by implication, that money has been deposited with them

for persons from whom information is requested, unless or until the money has in fact been so deposited, and then only when the amount so deposited is clearly and expressly stated;

(6) Using the name "Cigarette and Tobacco Research Bureau," or "National Gasoline Research Bureau," or any other name of similar import to designate, describe or refer to respondent's business; or otherwise representing, directly or by implication, that respondents are a research bureau, or are engaged in research.

Counsel supporting the complaint urges that the Commission reopen the proceedings and modify the order as set forth in its notice and opportunity for hearing. Respondents' answer, among other matters, denies the jurisdiction of the Commission to so modify such order, because there is no showing since the issuance of the original order that there are changed conditions of fact or of law, or that the public interest requires the reopening and modification, and requests that a hearing be granted before the Commission in respect to the proposed modification.

Section 5(b) of the Federal Trade Commission Act provides in part:

Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the transcript of the record in the proceeding has been filed in a circuit court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify or set aside, in whole or in part, any report or order made or issued by it under this section, 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:

Clayton Act orders do not become final merely by lapse of time. Consequently, that Act contains the following provision as to modification:

Until a transcript of the record in such hearing shall have been filed in a U.S. court of appeals, as hereinafter provided, the Commission or Board may at any time upon such notice, and in such manner as it shall deem proper, modify or set aside in whole or in part any report of any order made or issued by it under this section.

See also *In the Matter of National Biscuit Co.*, docket No. 5013.

The Federal Trade Commission Act's provision for modification was considered by the court in *American Drug Corp. v. Federal Trade Commission* (1944) 149 F. 2d 608. There, the Commission, in 1934, had issued an order against respondent. In 1944, the staff of the Commission moved to set aside the order and dismiss the complaint without prejudice. In response to a show cause order, respondent filed a return, challenging the jurisdiction of the Commission to set

aside its earlier order on the ground that such action was not in the public interest. The Commission set aside its 1934 order and dismissed the complaint without prejudice, from which the appeal to the court was taken. The Commission moved to dismiss the appeal on the grounds (a) that the court had no jurisdiction to review the order, and (b) that respondent was in no way aggrieved by the order. The court held it did have jurisdiction and, as to (b), held as follows:

Whether the petitioner is aggrieved by this order depends upon the merits of the controversy and is not open to us upon this motion to dismiss.

While these were the only matters actually decided, nevertheless, the following from the court's opinion indicates the procedure to be followed by the Commission in these matters:

Subsection (b) provides that until the time allowed for filing a petition for review has passed or until the transcript of the record in the proceeding has been filed in the circuit court in a review proceeding, the Commission may at any time upon notice "and in such manner as it shall deem proper modify or set aside, in whole or in part, any report or any order made or issued by it." This subsection further provides that if no petition for review has been filed within the allowable time, the Commission may, at any time, "after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, 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." The just quoted provision as to reopening carries a proviso "that the said person, partnership, or corporation may, within 60 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."

The just quoted proviso seems to settle the right of this petitioner to file a petition for review. Here no petition for review had been filed to the order of 1934 and the time for such filing had long expired. In this situation the statute clearly gives the Commission the power at any time to "reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section." However, the sentence governs such action by the Commission in two respects: (1) it requires the opinion of the Commission as to changed conditions of fact or law or the opinion of the Commission that the public interest requires the exercise of such power; and (2) it requires that the exercise of such power be only "after notice and opportunity for hearing." Acting under these conditions and limitations the Commission may reach any result it deems proper. Among these specifically authorized results are to "set aside, in whole or in part, any report or order made or issued by it under this section." What the Commission has done here is to set aside in whole the order made by it in 1934. Whether it took that action because of changed conditions of fact or law or because the public interest so required is not revealed in the papers now before the court. But whatever may have prompted its action, the before quoted proviso expressly gives the right to review to the petitioner from this "order entered after such a reopening."

Obviously, changed conditions of fact or of law may be contestable issues. No less true is the issue of whether such action is required by "the public interest" (*Federal Trade Commission v. Klesner*, 280 U.S. 19, 23, 27, 30) [13 F.T.C. 581; 1 S. & D. 1166].

In the instant case, no petition has been filed for review of the original decision and order and the time therefor had expired prior to the application for modification.

Since the effective date of the order, respondents have been using some new forms. Counsel for the complaint claims that there is difficulty and confusion in securing compliance, that the public is still being deceived, and that the language of the order appears to be susceptible of interpretation contrary to the real intent and purpose of the Commission in using it. Some of these claims are controverted by respondents.

The Commission concludes that further consideration should be given to the question of whether changed conditions of fact or of law or the public interest require that the original order entered herein be reopened, altered, modified, or set aside in whole or in part.

The case is remanded to the hearing examiner for the holding of such hearings as may be necessary, and for consideration and report with recommendation to the Commission for its determination of the question above referred to.

ORDER REMANDING CASE TO HEARING EXAMINER

This matter having been heard on briefs and oral arguments of counsel in support of and in opposition to a proposal for alteration of the outstanding order to cease and desist by a modification of paragraph 1 thereof in the manner designated in a notice and opportunity for hearing issued February 6, 1958; and

The Commission, for reasons set forth in its accompanying opinion, having determined that further consideration should be given to the question of whether conditions of law or fact have so changed as to require such action or if the public interest so requires:

It is ordered, That this case be, and it hereby is, remanded to Hearing Examiner Abner E. Lipscomb for the purpose of receiving such evidence as may be offered with respect to said question.

It is further ordered, That the hearings shall be conducted in accordance with the Commission's rules of practice for adjudicative proceedings insofar as such rules are applicable; that the hearing examiner shall have all the powers and duties as provided for in section 3.15 of said rules, except that of making and filing an initial decision; and that the respondent shall have the usual rights of due notice, cross-examination and the presentation of evidence in rebuttal.

It is further ordered, That the hearings shall be held at such times and at such places as the hearing examiner may designate, the initial hearing to be held on a day at least thirty (30) days after service of notice thereof on the respondent.

It is further ordered, That upon completion of the hearings the hearing examiner shall certify the record to the Commission with his report and recommendation thereon.

BRILLO MANUFACTURING CO., INC.

Docket 6557. Order and Opinion May 23, 1958

Order remanding merger case to hearing examiner for further consideration of respondent's motion to dismiss complaint.

OPINION OF THE COMMISSION

By SECREST, Commissioner:

The respondent produces steel wool and steel wool products.¹ In July 1955, it acquired all the capital stock and assets of the Williams Co. which processed similar products. In challenging such acquisition as unlawful, the complaint issuing in this proceeding alleged that its competitive effects may be those proscribed in section 7 of the Clayton Act, as amended.² Contending that counsel in support of the complaint had failed to make out a prima facie case by not showing, first, that the relevant markets or lines of commerce affected by the acquisition are industrial steel wool and household steel wool, and, second, that the effect of the acquisition may be substantially to lessen competition, respondent, at the close of the case-in-chief filed with the hearing examiner a motion to dismiss the complaint. This motion the examiner granted in part and denied in part, and in so doing he ruled (1) that the relevant markets involved in the proceeding are industrial and household steel wool products, because these are the products produced by respondent and Williams and thus constitute the area of effective competition between the two corporations; (2) that when, as here, the record shows that the acquiring and the acquired corporations each enjoy a substantial share of the industrial steel wool market, the acquisition as a matter of law substantially lessens competition in that market and thus constitutes a violation of section 7 of the Clayton Act, as amended; and (3) that, on the other hand, the record showing that the acquired corporation had only $\frac{3}{10}$ of 1 percent of the household steel wool market necessarily precludes a finding of competitive injury in that market and hence cannot constitute a violation of section 7. Interlocutory appeals have been filed by the re-

¹ These articles are marketed for household use in the cleaning of pots and pans and also used as abrasives in the paint and other trades.

² 64 Stat. 1125, 15 U.S.C. 18:

"* * * [N]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

spondent and counsel supporting the complaint from the rulings adverse to them.

The respondent's appeal excepts to the standards applied by the hearing examiner when determining industrial steel wool to be a line of commerce. We think the hearing examiner in concluding as a matter of law that industrial steel wool was the relevant market erred in basing his determinations solely on the fact that those were the wares being produced by the acquired and acquiring companies. The test instead is whether these products are shown by the facts to have such peculiar characteristics and uses as to constitute them sufficiently distinct from others to make them a "line of commerce" within the meaning of the act. *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957). That the acquired and acquiring corporations both made industrial steel wool was only one circumstance to be considered. Additional factors which could have been taken into account include data relating to the manner in which the products are marketed, their physical characteristics, prices and possibly other things bearing on the question of whether or not they may be distinguished competitively from other wares. On the other hand, as the examiner in essence held, the mere fact that articles other than steel wool are marketed for industrial use as abrasives is not adequate legal warrant for including all abrasive products in the relevant line of commerce. The determinations as to the area of effective competition should have been made on the basis of all record facts delineating the relevant market or markets. Inasmuch as the hearing examiner's ruling was based on a standard other than the foregoing, this aspect of the appeal is granted.

The respondent further states that the hearing examiner's ruling bars it from proving on defense that the relevant market in fact includes other industrial abrasives. No showing has been made in the appeal that the hearing examiner heretofore has excluded evidence pointing to a substantial competitive interrelationship between industrial steel wool and other abrasives. As noted above, the issue as to the bounds of the relevant market in section 7 proceedings is one of fact. Thus, the respondent's right to present evidence showing that products other than steel wool are included within the area of effective competition and, therefore, are a part of the relevant line of commerce is fully protected. This, however, should not be construed as a holding that all economic data having an indirect or casual bearing on the marketing of the products concerned should be received in section 7 proceedings. Manifestly, the scope of the investigation should not be expanded beyond manageable proportions, and only evidentiary material from which significant market or competitive impact may be evident need be received.

In his ruling, the examiner further stated that in the light of respondent's substantial share of the market for industrial steel wool, its acquisition of another manufacturer which similarly had been a substantial factor in that market must of necessity be attended by reasonable probabilities of substantial lessening of competition in such line of commerce. We do not concur in the holding that a significant increase in a producer's already substantial share of the market necessarily demonstrates likelihood of statutorily forbidden effects in every distributional situation. This is not to say that the dimensions of the market segment being eliminated from competition between merging corporations may not in some evidentiary situations support inferences of substantial anticompetitive effects. Nevertheless, informed determinations as to actual or probable competitive effects can only be based on an analysis of all facts of record pertaining to the relevant market. In addition to the facts concerning market shares, likewise important is such evidence as was received herein pertaining to the general competitive situation, number of competitors and degree of concentration prevailing in the industry. Hence, it was error for the hearing examiner to find as a matter of law that the record showing of substantiality of the market shares involved in the acquisition established a violation of section 7.

A corollary concept of quantitative unsubstantiality was the basis for the hearing examiner's ruling dismissing the charges pertaining to the household steel wool market, from which ruling counsel supporting the complaint has appealed. In 1954, the year preceding the acquisition, the share of the household market for steel wool held by the acquired corporation comprised $\frac{3}{10}$ of 1 percent. In such year, the hearing examiner noted, the respondent's share of that market was 45.3 percent, which was exceeded only by one other manufacturer. Because no area of substantial competition had previously existed between the acquired and acquiring companies in the household line of commerce, he concluded that no substantial lessening of competition could result from the acquisition. The facts emphasized by the courts in the decisions cited by the hearing examiner in support of his holding differ materially from those apparently presented in this proceeding. Hence, those decisions³ construing section 7 prior to its amendment are not deemed controlling to decision here.

In the *Thatcher* case, the acquired corporation, Woodbury, had decided prior to the stock transfer to stop the manufacture of milk bottles. Its share of that relevant market was less than 1 percent, and the acquiring corporation took over and filled its "one or two" outstanding contracts for milk bottles. The acquired company was not

³ *Federal Trade Commission v. Thatcher Manufacturing Co.*, 5 F. 2d 615 (C.A. 3, 1925); affirmed in part reversed in part 272 U.S. 554 (1926); *International Shoe Co. v. Federal Trade Commission*, 280 U.S. 291 (1930).

licensed to use any of the automatic feeding machines then in successful use for manufacturing such bottles; and, furthermore, the court of appeals found that the prime purpose of the acquiring corporation was to secure Woodbury's license to use certain automatic machinery for manufacturing containers other than milk bottles. Those matters, it was held, precluded inferences as to competition being substantially lessened or tendency to monopoly.

In the *International Shoe* case, less than 5 percent of the products of the acquired and acquiring companies were in competition; and the decision emphasized that the resources of the acquired corporation were depleted and its insolvency probable.

The prime test of legality at the time when the foregoing decisions were rendered was thought to be the prior existing competition between the corporations involved in joinders of interest. Preacquisition competition is not necessarily a prerequisite under the Act, as amended. All acquisitions are within its reach whenever reasonable likelihood appears of forbidden competitive effects. *United States v. du Pont, supra* (592). For the reasons set forth above, we think the ruling granting the motion to dismiss as to the household line of commerce for steel wool is based on an improper standard. That the household market share of the acquired corporation had been less than 1 percent was a circumstance as to which due cognizance was to be taken. It was error, however, for the hearing examiner to deem such fact exclusively controlling as a matter of law and to fail to accord due consideration to other relevant market information of record, including post-acquisition production and marketing data.

No factual analysis or evaluation of the evidence presented for delineating the relevant markets, and any competitive effects which reasonably may result from the acquisition, appears in the hearing examiner's order for us to review. The motion to dismiss should be ruled on on the basis of the facts. Accordingly, the proceeding is being remanded to the hearing examiner for further consideration of the merits of respondent's motion in the light hereof.

ORDER REMANDING CASE TO HEARING EXAMINER

This matter having come on for hearing upon the cross interlocutory appeals from the hearing examiner's rulings which granted in part and denied in part the respondent's motion to dismiss the complaint; and the Commission having granted the appeals for the reasons and in the manner indicated in the opinion accompanying this order:

It is ordered, That the case be remanded to the hearing examiner for further consideration of the respondent's motion to dismiss and ruling thereon in the light of the Commission's opinion.

TIMKEN ROLLER BEARING CO.

Docket 6504. Order and Opinion, May 27, 1958

Order vacating and setting aside initial decision dismissing complaint in section 3 Clayton Act proceeding and remanding case to hearing examiner for further action.

OPINION OF THE COMMISSION

By KERN, Commissioner:

This matter comes before us on the appeal of counsel supporting the complaint from the hearing examiner's initial decision wherein he dismissed the complaint. Briefs in support of and in opposition to the appeal have been filed, and oral argument of counsel has been heard.

The complaint, issued February 13, 1956, charged respondent with violation of section 3 of the Clayton Act in the sale of its tapered roller bearings in interstate commerce.¹ At the close of the introduction of evidence in support of the complaint, respondent moved for dismissal on the ground that a prima facie case had not been established. The hearing examiner granted the motion and dismissed the complaint.

The appeal raised two questions:

1. Does the record show prima facie that respondent has sold its tapered roller bearings to distributors or jobbers on the condition, agreement, or understanding that the distributors or the jobbers will not handle tapered roller bearings sold by any competitor with the probable effect of substantially lessening competition or tending to create a monopoly in any line of commerce?

2. Did the hearing examiner err in refusing to admit into evidence some 94 exhibits offered as relevant to the issues raised by the complaint?

Respondent, an Ohio corporation with headquarters in Canton, Ohio, is the largest manufacturer and seller of tapered roller bearings in the United States. It sells its products both for use as original equipment and for replacement and repairs in automobiles, tractors, and other machines. Only sales for ultimate purposes of replacement and repairs are involved in this proceeding.

Respondent's total sales in the replacement market run between \$10 million and \$20 million a year. Its closest competitor does a yearly business of between \$1 million and \$2 million a year in the sale

¹ The pertinent text of this section is as follows:

"SEC. 3. That it shall be unlawful for any person engaged in commerce * * * to * * * make a sale or contract for sale of goods * * * for * * * resale within the United States * * * on the condition, agreement, or understanding that the * * * purchaser thereof shall not use or deal in the goods * * * of a competitor or competitors of the * * * seller, where the effect of such * * * sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." [38 Stat. 731; 15 U.S.C. 14.]

of tapered roller bearings, and the next competitor, only between \$400,000 and \$800,000. Respondent manufactures more than 11,000 different items in its line of tapered roller bearings; its closest competitor, only 780; and the next competitor, a mere 586. Between 65 and 75 percent of all tapered roller bearings manufactured in the United States are produced by respondent. Its pre-eminence in the market would seem beyond dispute.

Timken distributes its bearings through two main classes of customers: Authorized distributors and authorized jobbers. The distributors buy directly from respondent; the jobbers buy through the distributors. Both pay the same price, but respondent allows a specified credit to distributors for sales which they make to jobbers. Generally speaking, the distributors carry a larger and more complete stock of bearings than do the jobbers.

In 1956, respondent had sales contracts with 1,541 authorized distributors, who, along with their branch stores, controlled 3,360 outlets for respondent's bearings, and with 3,406 authorized jobbers. These contracts were subject to cancellation by either party upon 10 days' written notice. Neither type provided that the purchasers must not deal in the bearings of respondent's competitors. Hence, if respondent has indeed made sales or contracts for sale on the understanding that the buyers should not handle competitive bearings, proof of that fact must be found elsewhere than in the written contracts. The complaint alleged that respondent's requirement of exclusive dealing was "a consistent policy" and did not particularize the form in which the alleged policy was manifested.

From the fact that the statute is not limited to express contractual provisions imposing exclusivity but encompasses sales made "on the condition, agreement or understanding that the * * * purchaser * * * shall not use or deal in the goods * * * of a competitor," it is clear that any type of coerced exclusivity is unlawful, whether imposed by written instrument or not. See *Carter Carburetor Corporation v. FTC*, 112 F. 2d 722, 732 (8th Cir. 1940).

From our examination of the present record we are satisfied that the evidence received affords the basis for reasonably concluding, in the absence of countervailing proof, that during the period covered by the complaint respondent regularly and consistently required its authorized distributors and authorized jobbers not to deal in the tapered roller bearings manufactured by others. We fully recognize that at the present stage of the proceeding respondent has not had the opportunity to explain or contradict that evidence, but we are convinced that the allegations of the complaint have been prima facie made out.

The evidence includes documentary exhibits consisting of correspondence between Timken officials and members of the Timken sales force and memoranda authorizing cancellation of respondent's agreements with distributors and jobbers in consequence of failure to adhere to the company's exclusive-dealing policy. This evidence consists of more than mere isolated, disconnected fragments of information indicating possibly sporadic or unauthorized activity by minor employees. On the contrary, it implicates respondent's branch managers in Atlanta, Cincinnati, Dallas, Detroit, Los Angeles, Minneapolis, New York, Philadelphia, Pittsburgh, San Francisco, and Seattle, and it shows that General Manager Austin not only received reports of deviations from the 100 percent-loyalty-requirement policy but authorized cancellation of the recalcitrants' agreements.

Throughout these letters and memoranda runs a constant pattern. New accounts were given to understand that they were to liquidate their stocks of competitive bearings and "go Timken 100 percent" or to show "100 percent loyalty." Established accounts detected in handling competitive lines of bearings were canceled by top management on the recommendation of branch managers. All this conduces to the inference that exclusive dealing has been an important and regular feature of respondent's relations with its Authorized Distributors and Authorized Jobbers.

In the present posture of the case we, of course, draw no conclusions on the merits. Our sole task at the present time is to ascertain whether a prima facie case has been established in support of the complaint. In our decision of November 29, 1955, in *Vulcanized Rubber & Plastics Company*, Docket No. 6222, we said:

The ruling of a hearing examiner denying a motion to dismiss a complaint for failure of proof, made at the conclusion of the case in chief, obviously is not a decision on the merits of the case. Such a ruling is merely a determination that there is in the record reliable evidence which, when considered in connection with reasonable inferences which may be drawn therefrom, and if not overcome by the respondent's evidence, would support an order to cease and desist. The ultimate decision of whether an order to cease and desist will be issued, even in the absence of further evidence, is not reached; and it could well be that a hearing officer, upon full consideration of a proceeding submitted for final decision, after making appropriate determinations concerning the credibility of witnesses, the weight to be given conflicting evidence, and other pertinent questions involved, would dismiss the complaint even though he had theretofore denied a motion to dismiss for failure of the record to establish a prima facie case.

A hearing examiner in ruling on a motion to dismiss for failure of proof, made at the close of the case in chief, like a Federal district court in ruling on a similar motion in a nonjury trial, views the evidence and inferences reasonably to be drawn therefrom in the light most favorable to the complaint. Thus, an appeal from a ruling denying such a motion should be granted only when it is apparent that there is in the record no substantial evidence in support of the complaint

and the ruling was obviously erroneous. The instant appeal does not present this situation. The record in this case contains considerable respectable evidence which, if not overcome by rebutting evidence, would support an order to cease and desist. * * *

In the light of the holding just quoted, the hearing examiner applied a wholly erroneous test when he held that a prima facie case is not established unless "the record under consideration (including, of course, inferences reasonably to be drawn therefrom) warrant[s] a finding and conclusion of violation of law on the part of the respondent and the issuance of an order to cease and desist." Furthermore, despite his recognition that certain exhibits "indicate that in some instances respondent has entered into agreements with customers that they would not handle competing lines," he proceeded to discount their probative value for what he called their "remoteness in point of time" and "their extremely small number in relation to the number of respondent's dealers." The alleged "remoteness in point of time" goes "as far back as 1949." On the other hand, many of the exhibits bear dates of 1952 and 1953, and one is as late as 1954. Taking into account the fact that the complaint recited that respondent "is now and for many years has been engaged in the manufacture" of tapered roller bearings, documents relating to transactions within the 5-year period of 1949-54 can hardly be thought inapposite to a proceeding instituted early in 1956 by issuance of a complaint charging that respondent "has made and is now making sales and contracts for sale of its tapered roller bearings * * * on the * * * understanding that the purchasers thereof shall not use or deal in like or similar tapered roller bearings sold or supplied by a competitor or competitors of respondent."

In holding that "the number of instances reflected by the documents appears negligible—insufficient to warrant an inference of a general policy of exclusive dealing" the examiner has failed to follow the applicable precedents. To ascertain the prevalence of a particular type of business dealing, and the degree to which it may constitute a general policy, the Commission is not bound to undertake an exhaustive enumeration. Thus, the United States Court of Appeals for the Second Circuit held in *Standard Distributors, Inc. v. FTC*, 211 F. 2d 7, 12 (1954):

* * * There were 31 witnesses called by the Commission who testified to about that number of instances, and the petitioners called 13 witnesses in an effort to refute such testimony. While the instances of misrepresentation so proved ranged through a period roughly of 9 years and were comparatively small, both in numbers per year and in total numbers of sales of sets of encyclopedias which ran to over 160,000 and were made by over 2,000 salesmen, they were enough to show a pattern of conduct sufficiently extensive to support the findings made by the Commission. * * *

To like effect are *Steelco Stainless Steel, Inc. v. FTC*, 187 F. 2d 693, 696 (7th Cir. 1951); *Consumer Sales Corp. v. FTC*, 198 F. 2d 404, 407 (2d Cir. 1952); *Tractor Training Service v. FTC*, 227 F. 2d 420, 425 (9th Cir. 1955).

Because the exhibits cover a range of about 5 years and relate to the acts of widely scattered branch offices of respondent and reports made by those branch offices to respondent's general sales manager, we believe that there is raised the presumption that they evince a standard policy of the Timken Co. to oblige its authorized distributors and authorized jobbers to handle Timken tapered roller bearings to the exclusion of all other brands.

There remains the necessity of deciding whether there has been a prima facie showing that respondent's exclusive-dealing requirement "may be to substantially lessen competition or tend to create monopoly in any line of commerce." We think that respondent's overwhelming ascendancy in the manufacture and sale of its bearings, as shown by its dollar sales figures compared with those of its two closest rivals, and its superlatively more varied product line, together with the fact that there is some evidence in the record, so far uncontradicted, showing specific and substantial loss of sales by respondent's competitors in the replacement market, clearly suffice to constitute a prima facie showing of a likelihood of the lessening of competition or tendency toward the creation of monopoly.

Viewing the evidence in the record and inferences to be drawn therefrom in the light most favorable to the complaint, we conclude that a prima facie case has been established and that the hearing examiner accordingly erred by dismissing the complaint. Respondent will have ample opportunity to rebut, explain, or contradict the proof adduced in support of the complaint in the next stage of the proceeding.

Finally, for determination is the appeal of counsel supporting the complaint from rulings of the hearing examiner refusing to admit into evidence some 90-odd documents which were offered as being relevant and germane to the issue of whether respondent Timken has an established policy of requiring its distributors and jobbers to handle its products exclusively. These documents consisted of salesmen's reports of calls and intercorporate correspondence regarding the respondent's relations with distributors and jobbers who carry a competitive line of bearings. Appendix A to the appeal brief of counsel supporting the complaint consists of a summary of excerpts from the documents excluded. Counsel for the respondent in his brief in opposition to the appeal brief appears to characterize the excerpts contained in the summary appendix as being meaningless, the significance of which can be understood only by examining the entire exhibit from which each is taken. This the Commission has done,

and it is of the opinion that certain of the documents in question should have been admitted as being relevant to the principal issue presented in this matter, namely, whether respondent does follow a consistent general policy of exclusive dealing.

Typical of the rejected documents is Commission's exhibit 38 for identification. This is a salesman's report of a call upon one of respondent's customers, Pat Murphy, president, Quality Parts and Equipment Co., Laurinburg, N.C. The hearing examiner rejected this exhibit, apparently because he viewed it merely as a report of the "ordinary day-to-day effort of a salesman's endeavor to sell his employer's goods * * * to establish a new account or to improve an account which was already in existence * * *." It was the hearing examiner's view that the proffered exhibit had no "probative value on the question as to whether Timken had a policy to the effect charged in the complaint." The pertinent statements in the exhibit are in the first two paragraphs as follows:

Called he. for further talks with these people about their going Timken 100 percent.

During this talk Pat Murphy told me that they were perfectly willing to go Timken 100 percent. * * *

From our examination of this rejected exhibit we deem it relevant to the issue of exclusivity. It bears directly on the question of whether there was an understanding, or agreement, between respondent's salesman and a customer that the latter was going to handle Timken 100 percent.

In this connection we note the close similarity between the character of this salesman's report and others which were received in evidence and can see no persuasive reason for treating them any differently. If some were admissible, the others likewise should have been received as being relevant and material.

Commission's exhibit 45A and B for identification evidences even more clearly the constant pattern running through the letters and memoranda, some of which are already in evidence. This rejected document is a report to respondent's general manager, Service Sales Division, from respondent's Pittsburgh, Pa., branch manager in regard to the Forbes Motor Co., Monroeville, Pa. The letter recommends that Forbes be considered for a Timken distributorship and reads in pertinent part as follows:

We are recommending this company be considered for a direct appointment on a distributorship for Timken roller bearings. * * *

Currently, they are one of the better Bower roller bearing accounts in our territory and have been selling, according to Mr. Magan, approximately, \$4,500 to \$6,000 worth of Bower bearings per year.

* * * * *

It is my understanding with Mr. Magan that he has return privileges with the Federal-Mogul Co. so that it will be possible for him to return the better part of his present stock of Bower roller bearings and he will be in a position, thereby, to replace same, with a stock order for Timken bearings.

We are quite anxious to make this appointment for many reasons. The first reason being that we can use an authorized distributor at this particular location and also one specializing in heavy-duty fleet contacts. The second good reason is, that we have the opportunity of taking one of the better Bower accounts from the Federal-Mogul Co.

* * * * *

An examination of this exhibit in its entirety clearly shows the possibility that purchases by Forbes from Timken were to be on the condition, agreement, or understanding that Forbes was to handle Timken products exclusively and eliminate from his stock any competitive products. It fits exactly into what may be reasonably argued to be the matrix of respondent's consistent general policy of exclusive dealing, and the exhibit clearly is relevant evidence on this phase of the case.

Another typical rejected exhibit is marked for identification 90A and is a letter from respondent's general manager, Austin, to respondent's Atlanta, Ga., branch manager. It has reference to a salesman's report of a call on a customer who had on his shelves "a quantity of A.B.C., Bower and unboxed bearings." The document reads as follows:

Judging from their sales volume and Jones' report of March 17, the subject company are not entitled to contract jobber arrangements with us.

Since they apparently are not loyal to us as a source of supply, I think we should do one of two things—either get their support or eliminate this account.

This may indicate that respondent's salesmen "policed" their customers, reporting the presence of competitive bearings in the customer's place of business. The general manager's comment that the customer "is not loyal to us as a source of supply" and his conclusion that the customer's support should be secured or the account eliminated speaks for itself. This exhibit likewise is relevant to the main issue in this case and should have been admitted.

Other relevant evidence of policing of accounts appears in rejected Commission's exhibit for identification 97A, a salesman's report of a call on Modern Automotive Parts Co., Dorchester, Mass., in which the following appears:

Leo Abrahamson would like to be recognized as an Authorized Distributor but at the same time he did not hesitate to purchase a quantity of L & S bearings the early part of this year. We pointed out to Leo that consideration for an A.D. depends very much on volume and, by diverting some of his business to L & S, he

certainly does not strengthen his position with Timken. We told him that we have ample distribution in this area.

* * * Leo assured us that he has not purchased from L & S in the last six months and that it was not his intention to do so in the future.

We will keep close check on this stock and, if additional L & S bearings are purchased, we will take necessary action."

The foregoing are but a few typical examples of the rejected documents. As indicated, we have examined each of them and have concluded that those listed in the margin below ² are all relevant to the issue of exclusivity presented by the pleadings in this case.³ Respondent's contentions in opposition to receipt of these documents in evidence essentially are directed to the weight they should be accorded rather than to the question of their admissibility or relevance. Listed also ⁴ are the other documents rejected by the examiner, the relevancy of which is not so apparent and the exclusion of which is not found to be erroneous.

In view of the foregoing considerations the appeal of counsel supporting the complaint will be granted, with the result that the initial decision will be vacated and the matter remanded to the hearing examiner for further proceedings in due course. An appropriate order will be entered.

Commissioner Gwynne dissented to the decision in this matter.

ORDER REMANDING CASE TO HEARING EXAMINER

Counsel supporting the complaint having filed an appeal from the initial decision of the hearing examiner, dated October 14, 1957, dismissing the complaint in this proceeding; and the matter having been heard by the Commission upon the whole record, including briefs and oral argument; and the Commission having rendered its decision granting said appeal:

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

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

² Commission Exhibits for identification 38, 45A and B, 69, 70, 71, 79, 90A, 90B, 91A, 91B, 92, 94, 95, 96, 97A, 97B, 98, 99A, 99B, 100, 101, 103A, 103B, 103C, 104, 105, 106A, 106B, 106C, 107, 108A, 108B, 108C, 108D, 111, 112, 114A, 114B, 114C, 117, 118A and B, 119A and B, 120, 121, 125A and B, 126, 127, 128, 129A, 129B, 130A and B, 131, 132, 133, 134, 135, 136A, 136B, 137, 138A, 138B, 139A and B, 140, 141, 143, 144, 145, 146A, 146B, 148A, 148B, 149, 151, 153A, 153B, 157A and B, 158, 160, 161, 162, 163, 164.

³ Illustrative of the important part such evidence may play in the disposition of a case such as this is the consideration given similar documentary matter, including salesman's reports of calls on customers, in the matter of *Harley-Davidson Motor Co.*, Docket No. 5698, where it was found that the respondent was selling its motorcycles on the condition, agreement or understanding that the purchaser would deal in Harley-Davidson products exclusively.

⁴ Commission Exhibits for identification 76, 89A, 89B and C, 93, 102A, 102B, 110A and B, 147, 152, 154, 159.

HAFNER COFFEE CO.

Docket 6961. Order and Opinion, June 4, 1958

Order remanding motion for amendment of complaint to hearing examiner for his determination.

OPINION OF THE COMMISSION

By the COMMISSION:

This matter is before the Commission on a motion filed by counsel in support of the complaint requesting the hearing examiner, in effect, (1) to permit the substitution of Simon Hafner, an individual, as the party respondent in lieu of Hafner Coffee Company, a corporation, and (2) to issue and direct service on Mr. Hafner of an amended complaint. The hearing examiner, being of the opinion that he had no authority to entertain the motion, certified it to the Commission for consideration.

In stating that he has no authority to issue and direct the service of an amended complaint the hearing examiner was correct. However, to the extent that he stated or implied that he has no authority to allow an amendment of an outstanding complaint he was in error. The difference lies in the distinction between the issuance of a complaint, which the Commission reserves to itself and in the performance of which it exercises the administrative function of determining when there is reason to believe the law has been violated and, in the case of proceedings under the Federal Trade Commission Act, when the public interest requires action, as well as that of framing the charges, and the amendment of a complaint already issued, the authority to accomplish which the Commission has expressly delegated to its hearing examiners under the conditions and subject to the limitations prescribed in § 3.9 of its Rules of Practice. Thus, a hearing examiner, when presented with a motion for amendment of a complaint, should consider it, and if it meets the requirements of § 3.9(a)(1) he may, in the exercise of his discretion, allow it, being careful, however, that the action he takes is but an exercise of his quasi-judicial power to permit the amendment of an outstanding complaint and not an impingement on the Commission's administrative responsibility to issue a new or substitute complaint.

Under section 3.9(a)(1) of the Rules, the only limitation on a hearing examiner's authority to allow an amendment of a complaint is that the amendment must be one which is reasonably within the scope of the proceeding initiated by the original complaint. Whether or not this is so must of necessity depend on the circumstances of each case. In this case, the pertinent facts are that the Commission, on November 26, 1957, issued the complaint, alleging violation by

"Hafner Coffee Co., a corporation" of section 2(d) of the Clayton Act, as amended. On April 18, 1958, an answer to the complaint was filed by Simon Hafner, "an individual trading and doing business as Hafner Coffee Co., a sole proprietorship, incorrectly termed a corporation, as respondent herein." In his answer, Mr. Hafner admitted in part and denied in part the allegations of the complaint, and stated, among other things, that "Hafner Coffee Co. is not a corporation but is a sole proprietorship constituting the individual business of Simon Hafner." On May 7, counsel in support of the complaint filed his motion for amendment.

The essence of the complaint is that in connection with the operation of the business of Hafner Coffee Co. certain alleged violations of law have occurred. The Commission, it appears, was under the impression that Hafner Coffee Co., the party engaged in the practices, was a corporation, and accordingly so designated the party respondent. It developed, however, that Hafner Coffee Co. is not in fact a corporation but a trade name under which Mr. Hafner, an individual carries on the same business. The sole purpose of the amendment is to correct this misnomer. No new or different acts or practices are alleged. No changes in the circumstances which led the Commission to issue the complaint are present. No different determinations with respect to the belief that a violation of law has occurred are necessary. The Commission's previous actions on all these questions remain unchanged, and the proposed amendment, while it would redesignate the respondent, is actually only an effort to correctly identify the party engaging in the activities dealt with and thus effectuate the Commission's purpose in issuing the complaint. In these circumstances, the amendment is clearly one "reasonably within the scope of the proceeding initiated by the original complaint," and consideration of it is well within the authority conferred upon the hearing examiner by the rule.

The situation here differs materially from that existing in *Waltham Watch Company, et al.*, Docket No. 6914, cited by the hearing examiner. In that case, the original corporate respondent, Waltham Watch Co., a Massachusetts corporation, was shown to have changed its name to Waltham Precision Instrument Co., and to have gone out of the business with which the complaint was concerned. This business had been taken over by a new corporation, Waltham Watch Co., a Delaware corporation, which was not a party to the proceeding and whose operation of the business was said to be different from that of the respondent. These and other changes in circumstances raised questions as to the adequacy of the complaint and required a complete reappraisal of the facts, with the result that the Commission, after

considering them anew, issued and caused to be served an amended and supplemental complaint in which allegations appropriate in the light of the new developments were made.

One further point perhaps needs clarification. The motion of counsel in support of the complaint requesting the amendment was served on Mr. Hafner on May 9, who, on May 19, requested an extension to May 26 within which to file an answer. In the meantime, on May 13, the hearing examiner had entered his order certifying the motion to the Commission. In view of the disposition to be made of this matter, it is here noted that while section 3.9(a)(1) of the rules refers to a move for amendment of a complaint as an "application for amendment," it is nevertheless a motion within the meaning of section 3.8(e) and is subject to the provisions thereof, including the right of a party to answer.

The motion for amendment of the complaint will be remanded to the hearing examiner for appropriate action in conformity with the foregoing views.

ORDER REMANDING MOTION FOR AMENDMENT TO HEARING EXAMINER

The hearing examiner, by order filed on May 13, 1958, having certified to the Commission a motion for amendment of the complaint, theretofore filed by counsel in support of the complaint; and

The Commission, for the reasons set forth in its accompanying opinion, having determined that said motion should have been considered and ruled upon by the hearing examiner:

It is ordered, That the aforesaid motion be, and it hereby is, remanded to the hearing examiner for appropriate action in conformity with the Commission's opinion.

WARD BAKING CO.

Docket 6833. Order and Opinion, June 23, 1958

Order vacating initial decision dismissing complaint in section 2(d) Clayton Act proceeding and remanding matter to hearing examiner for further consideration of effectiveness of discontinuance of challenged practices, etc.

OPINION OF THE COMMISSION

By TAIT, Commissioner:

The complaint in this matter, charging a violation of section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., title 15, sec. 13), was dismissed without prejudice in an initial decision by the hearing examiner on the ground that respondent voluntarily abandoned the alleged practices under exceptional circumstances. Counsel supporting the complaint has appealed from this holding.

The sole question is whether the examiner, under the circumstances, properly ordered the dismissal.

It appears that the allegations of the complaint are specifically directed to a certain sales promotion plan employed by respondent during the past several years in connection with sales of bakery products to retail establishments. Under the plan, agreements were entered into with many of its customers whereby, if a customer's purchases from respondent exceeded \$50 a week, the customer, in return for certain in-store advertising, was paid a 5 percent discount from such purchases.

The complaint was issued July 8, 1957. Thereafter, on December 3, 1957, respondent, prior to a hearing on the merits, moved for dismissal. Attached to its motion are the affidavit of Alexander M. Grean, Jr., vice president and general counsel for Ward Baking Co., and other exhibits. One of the exhibits is the form of the announcement distributed to customers participating in the contested plan advising that, in view of the Commission's proceedings, the advertising program was to terminate on December 28, 1957. The affidavit declares that respondent has wholly discontinued the challenged program and that it has no intention of entering into any other contracts having the same provisions or provisions having substantially the same effect.

The discontinuance of a practice found by the Commission to constitute a violation of law does not render the controversy moot. *Federal Trade Commission v. Goodyear Tire & Rubber Company*, 304 U.S. 257 (1938). Nevertheless, where the practice has been surely stopped by the act of the party offending and the object of the proceeding has been attained, no order is necessary, nor should one be entered. *Eugene Dietzgen Co. v. Federal Trade Commission*, 142 F. 2d 321 (1944). The cases most commonly dismissed on such grounds are those in which the practice has been long abandoned and/or in which the conditions which led to the violation have so changed as to render a resumption highly unlikely. *Federal Trade Commission v. Civil Service Training Bureau, Inc.*, 79 F. 2d 113 (1935); *National Lead Co., et al. v. Federal Trade Commission*, 227 F. 2d 825 (1955), reviewed on other grounds, 352 U.S. 419 (1957); *Stokely Van Camp, Inc., et al. v. Federal Trade Commission*, 246 F. 2d 458 (1957); In the Matter of *Bell & Howell Company*, Docket No. 6729 (Decided July 19, 1957).

Dismissal is rarely warranted, however, in cases where a party waits until the Commission has acted and only then discontinues his illegal practice. *Federal Trade Commission v. Wallace*, 75 F. 2d 733 (1935); *Perma-Maid Company, Inc. v. Federal Trade Commission*, 121 F. 2d 282 (1941); *Eugene Dietzgen Co. v. Federal Trade Commission*,

supra; *Galter v. Federal Trade Commission*, 186 F. 2d 810 (1951). In the *Dietzgen* case, the court's view was that "parties who refused to discontinue the practice until proceedings are begun against them and proof of their wrongdoing obtained, occupy no position where they can demand a dismissal." It is apparent that the Commission would have no power at all if it lost jurisdiction every time a practice is halted just as the Commission is about to act or has acted. *Hershey Chocolate Corporation, et al. v. Federal Trade Commission*, 121 F. 2d 968 (1941).

In any case of the discontinuance of a practice, the Commission is vested with a broad discretion in the determination of whether the practice has been surely stopped and whether an order to cease and desist is proper. *Deer, et al. v. Federal Trade Commission*, 152 F. 2d 65 (1945); *Keasbey & Mattison Co. et al. v. Federal Trade Commission*, 159 F. 2d 940 (1947); *Eugene Dietzgen Co. v. Federal Trade Commission, supra*; *Automobile Owners Safety Insurance Company v. Federal Trade Commission* (C.A. 8, May 16, 1958). This discretion is limited only to the extent that it may be abused. *National Lead Co., et al. v. Federal Trade Commission, supra*.

The Commission, in the exercise of its proper discretion, may dismiss a complaint even after proceedings have been initiated, but we believe that a dismissal in any such circumstance should be limited to the truly unusual situation. One such situation was involved in the matter of *Argus Cameras, Inc.*, Docket No. 6199 (Decided October 20, 1954), the case largely relied upon by the examiner in support of his holding. In that matter, there was a clear showing of unusual circumstances which in the interest of justice required dismissal. Such circumstances included the Commission's finding that the course of dealing over the years between Federal Trade Commission representatives and Argus was such as to justify that respondent in the belief, prior to the issuance of the complaint, that no challenge was being made to its practices. While the discontinuance did not take place until after the Commission had acted, this fact had no great significance in view of the nature of the assurances to respondent by Commission personnel, and, consequently, the matter could be treated the same as if the practices had been abandoned on an entirely voluntary basis. The *Argus* case, however, is not precedent for a dismissal where, in ordinary circumstances, a respondent discontinues practices only in response to Commission action in the apparent hope that it will thereby avoid the issuance of an order to cease and desist. The rule in such a situation is that the abandonment comes too late.

The instant proceeding contains none of the unusual circumstances which existed in the *Argus* case, or any other factors so out of the

ordinary that they would call for dismissal. The plain fact is that here we have simply a showing of a discontinuance following the issuance of the complaint and a promise not to resume in the future. On the other hand, the same competitive conditions which allegedly induced respondent to initiate the challenged advertising program apparently still exist. Clearly, the Commission would not be required to rely on the promise not to further engage in the practices. *Sears Roebuck & Co. v. Federal Trade Commission*, 258 Fed. 307 (1919); *Moir, et al. v. Federal Trade Commission*, 12 F. 2d 22 (1926).

The hearing examiner based his conclusion for dismissal, it seems, on the several numbered findings in the initial decision. These include findings as to the effectiveness of the discontinuance and the likelihood that the practices have been permanently abandoned. In addition, he found that respondent, when inaugurating its sale-promotion program, openly and publicly announced it to all customers alike in the trading areas affected and that respondent acted in good faith in the belief that the plan did not violate the law. If the latter findings have a bearing on respondent's good faith, they still do not constitute such exceptional circumstances as to be proper grounds for dismissal where the respondent discontinues the practices subsequent to the issuance of the complaint.

We conclude that the hearing examiner was in error in dismissing the complaint. Accordingly, the appeal of counsel supporting the complaint is granted. In the order to accompany this opinion, the initial decision will be vacated and set aside and the matter will be remanded for further proceedings consistent with the views herein expressed.

ORDER VACATING INITIAL DECISION AND REMANDING CASE TO HEARING
EXAMINER

This matter having come on to be heard upon the appeal of counsel in support of the complaint from the hearing examiner's initial decision dismissing the complaint, and the briefs and oral argument in support thereof and in opposition thereto; and

The Commission, for the reasons stated in the accompanying opinion, having determined that the hearing examiner was in error in dismissing the complaint:

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

It is further ordered, That this case be remanded to the hearing examiner for further proceedings consistent with the Commission's opinion.