ON INTERLOCUTORY APPEAL

By the Commission:

This matter is before us on respondents' appeal from the hearing examiner's rulings excluding allegedly new evidence which respondents contend will demonstrate the following:

1. Changed circumstances relating to the sale of the business of respondent, Foster Type and Equipment Company, Inc., under an agreement containing a covenant not to compete for a period of ten years, demonstrating that the instant proceedings lack public interest.

2. That the two respondent corporations were operated as separate businesses and were so regarded by competitors of respondent, Foster Type and Equipment Company, Inc., advertising in "Printing Impressions."

3. That all competitors of respondent, Foster Type and Equipment Company, Inc., received and used costly direct mail advertising materials, photo-engravings, photographs and promotional displays made available free of charge to such competitors by suppliers of Foster Type and Equipment Company, Inc., advertising in "Printing Impressions," demonstrating that counsel in support of the complaint has failed to prove that any payments to respondent, Foster Publishing Company, Inc., for advertising in "Printing Impressions" resulted in a disproportionate payment for advertising to Foster Type and Equipment Company, Inc.

We have determined that, with the possible exception of the evidence outlined in paragraph 3, the proffered evidence is beyond the scope of our remand order of July 26, 1962, and that the hearing examiner properly excluded this evidence in the light of that directive. A review of the hearings on September 12 and 13, 1962, however, persuades us that as a practical matter the evidence proffered by respondents is already in the record though not officially received by the examiner. We could reject respondents' appeal, as counsel supporting the complaint suggests, on the ground that no prejudice to respondents will result since the evidence is available for the Commission's ultimate consideration. Nevertheless, we have determined that, on balance, the better course is to broaden the scope of the remand and direct the examiner to receive the proffered evidence. This will afford the parties the opportunity to consider this data in their proposed findings and we will have the advantage of the examiner's evaluation of the evidence when the initial decision comes before us for review. Accordingly, respondents' appeal is granted.

ORDER GRANTING INTERLOCUTORY APPEAL

This matter having come before the Commission on respondents' interlocutory appeal, filed October 18, 1962, from the hearing examiner's ruling excluding certain offers of evidence, and the answer of counsel supporting the complaint in opposition thereto; and

The Commission having determined, for the reasons stated in the accompanying opinion, that the scope of the remand should be broadened and that respondents' proffered evidence outlined on page 2 of their interlocutory appeal should be evaluated by the hearing examiner:

It is ordered, That the interlocutory appeal of respondents be, and it hereby is, granted.

It is further ordered, That the hearing examiner receive and consider the aforesaid evidence offered by respondents.

By the Commission.