

which it has complied with the order to cease and desist.
Commissioner Elman concurring in the result.

IN THE MATTER OF
SPRING HOSIERY CONVERTORS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE TEXTILE FIBER PRODUCTS
IDENTIFICATION ACTS

Docket C-913. Complaint, June 30, 1965—Decision, June 30, 1965

Consent order requiring New York City sellers of ladies' imperfect hosiery—
repaired, dyed, packaged and sold to wholesalers, distributors, and job-
bers—to cease misrepresenting their “irregular” and “second” hosiery
products as first or perfect quality, falsely representing their business as
manufacturers of nylon hosiery, and omitting required information on
labels.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act
and the Textile Fiber Products Identification Act, and by virtue of
the authority vested in it by said Acts, the Federal Trade Commis-
sion, having reason to believe that Spring Hosiery Convertors, Inc., a
corporation, and Yale Raul, individually and as an officer of said
corporation, hereinafter referred to as respondents, have violated
the provisions of said Acts and the Rules and Regulations promul-

1326

Final Order

running against a corporation the officers who control its policies, acts and practices should be named. If acts are done as an officer they are done for the corporate respondent, and the order against the corporation will run against the officer as officer. That is all that is required in this case on this record.

Respondents' assertion that the practices which they have engaged in are prevalent throughout the industry is no more than an assertion and has no basis in the record, since respondents did not see fit to adduce evidence that these practices were prevalent or that their prevalence required them to adopt them as a defensive measure to meet competition. This being so, the Commission has no reason for withholding an order against respondent corporation.

An appropriate order will issue.

Commissioner Elman concurred in the result.

FINDINGS OF FACT; CONCLUSIONS; FINAL ORDER

FINDINGS OF FACT

The Commission adopts the findings of fact contained at pages 1331 to 1334 of the hearing examiner's initial decision as its own findings of fact except page 1332, third paragraph, last sentence, which is stricken, as is footnote 2.

CONCLUSIONS

The acts and practices of respondent corporation herein found were and are to the prejudice and injury of the public and of respondent's competitors and constituted and now constitute a violation of Section 2(d) of the Clayton Act, as amended.

The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of the respondents. This proceeding is in the public interest.

FINAL ORDER

It is ordered, That respondent, The Lovable Company, a corporation, its officers, Arthur Garson, Dan Garson and Bernard Howard, and its other representatives, agents and employees, directly or through any corporate or other device, in connection with the manufacture, sale and distribution of women's wearing apparel, such as brassieres, girdles, panties, garter belts and other related products, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

or more persons subject to Section 3 of the said Act, with respect to such product.

2. To disclose the percentage of fibers present by weight.

PAR. 4. The acts and practices of respondents, as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, and constituted, and now constitute unfair methods of competition and unfair and deceptive acts or practices, in commerce, under the Federal Trade Commission Act.

PAR. 5. In the course and conduct of their business, respondents purchase hosiery which is imperfect. They cause such hosiery to be repaired, if required, and dyed and then sell such hosiery to wholesalers, distributors and jobbers who in turn sell it to the purchasing public. Such hosiery products are known in the trade as "irregulars" or "seconds," depending upon the nature of the imperfection.

PAR. 6. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, including hosiery when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 7. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of products of the same general kind as that sold by respondents.

PAR. 8. Respondents did not mark their said hosiery as "irregulars" or "seconds," or otherwise so as to inform purchasers thereof of its imperfect quality. The purchasing public in the absence of markings showing that hosiery products are "irregulars" or "seconds" understands and believes that they are of perfect quality. Respondents' failure to mark or label their product in such a manner as will disclose that said products are imperfect, has had, and now has, the capacity and tendency to mislead dealers and members of the purchasing public into the erroneous and mistaken belief that said products are perfect quality products and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

Official notice is hereby taken of the fact that, in connection with the sale or offering for sale of imperfect hosiery, the failure to disclose on such hosiery products that they are "irregulars" or

gated under the Textile Fiber Products Identification Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Spring Hosiery Convertors, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondent Yale Raul is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. The respondents are convertors of ladies' hosiery, purchasing said hosiery as seconds and after having said hosiery repaired and dyed, respondents then package said hosiery for sale to wholesalers, distributors and jobbers. The respondents have their office and principal place of business at 67 Spring Street, New York, New York.

PAR. 2. Subsequent to the effective date of the Textile Fiber Products Identification Act on March 3, 1960, respondents have been and are now engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and in the importation into the United States, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, textile fiber products, which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products; as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Certain of said textile fiber products were misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(b) of the Textile Fiber Products Identification Act and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded textile fiber products but not limited thereto were textile fiber products, namely ladies' hosiery, with labels which failed:

1. To disclose the name or other identification issued and registered by the Commission of the manufacturer of the product or one

violation of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Spring Hosiery Convertors, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 67 Spring Street, New York, New York.

Respondent Yale Raul is an officer of said corporation, and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents, Spring Hosiery Convertors, Inc., a corporation, and its officers, and Yale Raul, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, delivery for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or in the importation into the United States, of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, of any textile fiber product which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other tex-

"seconds," as the case may be, is misleading, which official notice is based upon the Commission's accumulated knowledge and experience, as expressed in Rule 4 of the Commission's amended Trade Practice Rules for the Hosiery Industry promulgated August 30, 1960 (amended June 10, 1964).

PAR. 9. Respondents in selling their hosiery as aforesaid have labeled certain of said packaged hosiery as "finest quality" thereby representing that said hosiery is of first quality. Respondents' practice of labeling their packaged hosiery as "finest quality" has had, and now has, the capacity and tendency to mislead dealers and members of the purchasing public into the erroneous and mistaken belief that said products are first quality products and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 10. In the course and conduct of their business the aforesaid Spring Hosiery Convertors, Inc., on their invoices refer to their corporation as "manufacturers of nylon hosiery" thus stating or implying that said corporation is a manufacturer of nylon hosiery. In truth and in fact, the respondents do not own or control the mills or factories where the hosiery sold by them is manufactured. Thus, the aforesaid representation is false, misleading and deceptive.

PAR. 11. There is a preference on the part of many members of the public to deal directly with a manufacturer, including the manufacturer of clothing, in the belief that by doing so, certain advantages accrue, including better prices.

PAR. 12. The use by such respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead dealers and other purchasers into the erroneous and mistaken belief that said statements and representations were, and are, true, and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts and practices of respondents, as herein alleged, were and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of Section 5(a)(1) of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with

ents are manufacturers of hosiery or other textile products unless respondents own and operate, or directly and absolutely control a mill, factory or manufacturing plant wherein said hosiery or other textile products are manufactured.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

1338

Decision and Order

tile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

Misbranding textile fiber products by:

Failing to affix labels to such textile fiber products showing each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

It is further ordered, That respondents, Spring Hosiery Convertors, Inc., a corporation, and its officers, and Yale Raul, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of "irregular" or "second" hosiery, as these terms are defined in Rule 4(c) of the Amended Trade Practice Rules for the Hosiery Industry (16 CFR 152.4(c)), in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Selling or distributing any such hosiery without clearly and conspicuously marking thereon the words "irregular" or "second," as the case may be, in such degree of permanency as to remain on the product until the consummation of the consumer sale and of such conspicuousness as to be easily observed and read by the purchasing public.

2. Using any advertisement or promotional material in connection with the offering for sale of any such hosiery unless it is disclosed therein that such article is an "irregular" or "second," as the case may be.

3. Using the words "finest quality" or words of similar import on the package in which such product is sold or in reference to any such product in any advertisement or promotional material.

4. Representing in any other manner, directly or by implication, that such products are first quality or perfect quality.

It is further ordered, That respondents, Spring Hosiery Convertors, Inc., a corporation, and its officers, and Yale Raul, individually and as an officer of said corporation, and respondents' agents, representatives, and employees directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of hosiery or other textile products, in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or indirectly that the respond-

respondents' motion and complaint counsel's reply thereto, having concluded that respondents have raised issues which may be more properly considered and disposed of on the basis of a full and complete record:

It is ordered, That respondents' Motion to Reconsider Order Denying Request to File Interlocutory Appeal be, and it hereby is, denied. Commissioner Elman dissenting.

DIAMOND ALKALI COMPANY

Docket 8572. Order, Jan. 21, 1965

Order that respondent's motion for the postponement of oral argument be denied.

ORDER DENYING MOTION FOR POSTPONEMENT OF ORAL ARGUMENT

Respondent has filed a motion to postpone the date of oral argument before the Commission of the appeal in the above-captioned proceeding from January 26, 1965, to April 1, 1965, or any other date in April 1965. The ground for the motion is that respondent's attorneys are currently required to devote a large amount of time to other pending litigation and investigatory matters. Complaint counsel has filed an answer opposing respondent's request for a postponement.

Section 6(a) of the Administrative Procedure Act provides: "Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives." A number of provisions of the Commission's Rules of Practice are designed to assure reasonable dispatch of Commission adjudicatory proceedings. For example, Section 3.16(d) provides that "Hearings shall proceed with all reasonable expedition" and that "all hearings shall be held at one place and shall continue without suspension until concluded." And Section 3.21 requires the hearing examiner to file his initial decision within ninety days after completion of the reception of evidence in a proceeding. Obviously, the effectiveness of these and other provisions requiring the expeditious handling and reasonable dispatch of Commission proceedings would be vitiated if the Commission were to allow repeated and undue delays in the filing and argument of appeals to the Commission from the hearing examiner's initial decision. The requirement of reasonable dispatch does not terminate with the filing of the initial decision.

The initial decision in the above-captioned proceeding was filed on May 15, 1964 [72 F.T.C. 700], and respondent has requested and been granted extensions of time for the filing of its appeal and reply briefs. If the Commission were to grant the present motion to postpone the date of oral argument, the result would be that almost a year would be

INTERLOCUTORY, VACATING, AND
MISCELLANEOUS ORDERS

ALHAMBRA MOTOR PARTS ET AL.

Docket 6889. Order, Jan. 5, 1965

Order granting the request of an automotive parts trade association to file an *amicus curiae* brief.

ORDER GRANTING LEAVE TO FILE BRIEF AMICUS CURIAE

Upon consideration of the application of Automotive Warehouse Distributors Association, Inc., filed December 21, 1964, for leave to intervene in the above-captioned proceeding pursuant to Section 3.9 of the Commission's Rules of Practice (effective August 1, 1963) or to file a brief as *amicus curiae*, and of the answers thereto filed by complaint counsel and respondents in the above-captioned proceeding on December 23 and 28, 1964, respectively; and it appearing that the applicant desires only to file a brief with the Commission in support of the appeal from the hearing examiner's initial decision,

It is ordered, That the applicant, Automotive Warehouse Distributors Association, Inc., be, and it hereby is, granted leave to file an *amicus curiae* brief, provided that such brief does not exceed sixty (60) pages in length and is filed within the period provided for the filing of the appeal brief in this proceeding.

RODALE PRESS, INC., ET AL.

Docket 8619. Order, Jan. 5, 1965

Order denying motion to reconsider order which denied request for permission to file interlocutory appeal.

ORDER DENYING MOTION TO RECONSIDER ORDER DENYING REQUEST FOR
PERMISSION TO FILE INTERLOCUTORY APPEAL

Respondents having moved that the Commission reconsider its Order Denying Request for Permission to File Interlocutory Appeal, dated December 3, 1964; and the Commission, after duly considering

initial decision based on the record developed therein, with direction that such further proceeding be conducted as expeditiously as possible.

SOUTHERN FRUIT DISTRIBUTORS, INC.

Docket 7566. Order, Jan. 26, 1965

Order denying respondent's petition to reopen proceeding involving the brokerage section of the Clayton Act.

ORDER DENYING PETITION OF RESPONDENT TO REOPEN PROCEEDING

This matter is before the Commission on petition of respondent to reopen proceeding, filed December 28, 1964, and answer in opposition thereto filed by the Bureau of Restraint of Trade January 7, 1965.

On February 13, 1960, the Commission issued its order to cease and desist against respondent prohibiting discounts in lieu of brokerage to buyers of its products. The complaint had alleged discounts in lieu of brokerage to "certain favored buyers," not otherwise identified, purchasing for their own accounts in violation of Section 2(c) of the Clayton Act as amended, U.S.C., title 15, sec. 13.

The matter was disposed of without hearings upon acceptance by the Commission of an Agreement Containing Consent Order to Cease and Desist executed pursuant to the then effective Rule 3.25, of the Commission's Rules, governing consent orders.

Thus, the entire record upon which the Commission's decision and order rests consists of the complaint and consent order.

The respondent's petition to reopen, citing the Commission's decision in *Hruby Distributing Company*, Docket 8068, December 26, 1962 [61 F.T.C. 1437], states that the challenged discounts in this matter paid by respondent were not discounts in lieu of brokerage because the recipient was an independent food distributor not competing on the same functional level with the wholesalers to whom he sold.

In support of this, respondent's petition cites *In the matter of Smith Grain Company, Inc., et al.*, Docket 7641, wherein the Commission's complaint, issued October 29, 1959 [58 F.T.C. 1058], charged Smith Grain Company with violation of 2(c) of the amended Clayton Act based upon discounts received by Smith from petitioner herein.

Petitioner states that it was sales by it to Smith Grain which formed the basis also of the Commission's complaint against petitioner in the instant matter and that a fair reading of the complaint in Docket 7641 reveals that Smith Grain was operating at a different functional

permitted to elapse between the completion of the proceedings before the examiner and the oral argument of the appeal from the examiner's decision. Such a delay would not be consistent with the Commission's policy of reasonable dispatch and, on the showing made by respondent in its motion, cannot be justified in terms of "due regard * * * for the convenience and necessity of the parties or their representatives." Accordingly,

It is ordered, That respondent's motion to postpone oral argument be, and it hereby is, denied.

THE ELECTRA SPARK COMPANY ET AL.

Docket 8274. Order, Jan. 18, 1965

Order vacating the initial decision and final order of June 5, 1964, 65 F.T.C. 877, reopening the proceeding and remanding the case to the hearing examiner.

ORDER REOPENING PROCEEDING

The Commission having issued its order on December 30, 1964 [66 F.T.C. 1590], granting respondents Electra Spark Company, Lectra Sales Corporation, Fred P. Dollenberg and Bernard L. Silver certain alternatives in response to their motion requesting that this proceeding be reopened for the purpose of setting aside or modifying the final order issued herein on June 5, 1964; and

The aforesaid respondents by motion filed January 11, 1965, and respondent Harry J. Petrick by motion filed January 12, 1965, having elected to withdraw the document entitled "Stipulation as to Facts and Proposed Order" received in the record by the hearing examiner by order filed February 27, 1964, and to proceed to trial; and

The Commission having noted that the parties requesting withdrawal of the document are the principal respondents named in the complaint and being of the opinion that the other respondents would desire the same action; and

The Commission having duly considered said requests and having determined that they should be granted:

It is ordered, That this proceeding be, and it hereby is, reopened.

It is further ordered, That the final order issued by the Commission on June 5, 1964, and the hearing examiner's initial decision filed March 31, 1964, be, and they hereby are, vacated and set aside.

It is further ordered, That the document entitled "Stipulation as to Facts and Proposed Order" dated November 20, 1963, and accepted by the hearing examiner's order filed February 27, 1964, be, and it hereby is, withdrawn from the record.

It is further ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner for trial of this case and for an

On December 10, 1964, respondent filed its Motion to Vacate Complaint Addressed to Hearing Examiner. A subsequent amendment to its motion was filed December 31. Counsel supporting the complaint filed an answer in opposition to respondent's motion on December 22.

The hearing examiner by order dated January 4, 1965, denied respondent's motion on the ground that he had no authority to grant the relief requested, and he further refused to certify the motion to the Commission.

On January 5, 1965, respondent filed a Reply to Answer in Opposition to Motion to Vacate Complaint and on January 14, 1965, complaint counsel filed motion to strike this reply.

Respondent has now filed with the Commission its Memorandum Regarding Respondent's Motion to Vacate Complaint or in the Alternative Request for Interlocutory Appeal asserting that its original Motion to Vacate was filed "** * * with the Commission*" and the hearing examiner had no alternative but to certify it. Complaint counsel on January 18, 1965, filed answer in opposition to respondent's memorandum.

The hearing examiner in his order denying request to certify motion and denying motion to vacate complaint dated January 4, 1965, stated that while he had no authority under the Commission's Rules to grant the relief requested, nonetheless, it did not follow that he had no authority to deny it.

We think the hearing examiner's ruling was in error and that respondent's motion should have been certified.

Under § 3.6(a) of the Commission's Rules of Practice the hearing examiner must certify to the Commission any question on which he "** * ** has no authority to rule." He correctly concluded that he had no authority to grant the relief but construed the Section as implicitly authorizing him to deny it. Since the denial of a motion is as much a ruling as the granting of one, we conclude that the hearing examiner should have certified it to the Commission. And since the motion is before us on respondent's request for interlocutory appeal, we can dispose of it now.

Briefly, respondent's motion to vacate embraces three prayers: (1) a request for an informal conference with the Commission to show that the Commission's complaint was improvidently issued, (2) a motion to vacate complaint and (3) an opportunity to negotiate a consent order.

Regarding respondent's request for opportunity to dispose of this matter by consent order we have decided that § 2.4(d) of the Com-

level from the wholesalers to whom it sold and that under the ruling in *Hruby*, neither Smith nor Southern should be charged with a violation of Section 2(c).

Notwithstanding petitioner's assertion that the Commission's complaint herein was based on Southern's dealings with Smith Grain, it is obvious that the only record upon which the Commission can rely in this matter consists of the complaint and consent order wherein the challenged discounts in lieu of brokerage were alleged and found to be paid to "favored buyers," not further identified.

Whatever the character of Smith Grain in its relationship to petitioner, it cannot be held on this record to either identify or exhaust the class of customers described in the complaint and consent order as "favored buyers." *Russell-Ward Company, Inc.*, Docket 8207, order of June 24, 1963 [62 F.T.C. 1563].

Moreover, for the Commission to attempt to determine, at this time, whether in fact the complaint was predicated solely on transactions declared to be lawful in the *Hruby* decision would require inquiry into acts and practices now several years in the past. In this connection, we note that respondent has offered no explanation as to why it waited two years after the *Hruby* decision was rendered to file this petition. And since conduct in compliance with the requirements of law as stated in the *Hruby* decision would not violate the terms of the order against respondent, we fail to see, and respondent has made no attempt to explain, how it is prejudiced by the order.

Respondent has not therefore shown changed conditions of fact or law necessary under § 3.28(b) (2) of the Commission's Rules to support a petition to reopen for purposes of altering or modifying the order herein. Accordingly,

It is ordered, That respondent's petition to reopen be, and it hereby is, denied.

Commissioner MacIntyre not concurring.

R. H. MACY & CO., INC.

Docket 8650. Order, Feb. 4, 1965

Order denying respondent's request for informal conference and motion to vacate, suspending proceedings for thirty days, and granting opportunity to settle by consent order.

ORDER DENYING MOTION TO VACATE COMPLAINT AND GRANTING REQUEST FOR OPPORTUNITY FOR CONSENT SETTLEMENT

This matter is before the Commission on respondent's Memorandum Regarding Respondent's Motion to Vacate Complaint or in the Alternative Request for Interlocutory Appeal, filed January 13, 1965.

ORDER GRANTING LEAVE TO PARTICIPATE IN ORAL ARGUMENT AND
ALLOTING TIME THEREFOR

Upon consideration of the request of Automotive Warehouse Distributors Association, Inc., which has heretofore been granted leave to submit an *amicus curiae* brief in the above-captioned proceeding, for leave to participate in oral argument of the appeal,

It is ordered, That the request be, and it hereby is, granted, and a period of thirty (30) minutes is allotted to the *amicus curiae* for such purpose.

It is further ordered, That respondents be, and they hereby are, granted an additional fifteen (15) minutes for presentation of their oral argument.

RICHARD S. MARCUS trading as STANTON BLANKET
COMPANY

Docket 8610. Order, March 4, 1965

Order denying respondent's motion to reopen case on the grounds of introducing more evidence.

ORDER DENYING PETITION TO REOPEN PROCEEDING

The Commission issued its final order in the above-captioned proceeding on December 18, 1964 [66 F.T.C. 1290]. In the order, the Commission stated:

Especially since respondent, who is not a lawyer, has appeared throughout this proceeding *pro se*, the Commission has given the most careful consideration to the record of this proceeding, the initial decision of the hearing examiner, and the briefs and arguments of the parties. We are satisfied that respondent has had a fair hearing and full opportunity to conduct his defense; that he conducted his defense with vigor and skill throughout the entire proceeding; and that he was not handicapped by not having the aid of counsel.

The record clearly demonstrates that respondent has engaged not only in serious, but in flagrant, violations of the Wool Products Labeling Act; and an order to cease and desist is clearly necessary in the public interest to prevent recurrence of the unlawful conduct. The Commission has concluded that the findings and conclusions of the hearing examiner in the initial decision adequately and correctly disposes of all the issues of this case, and that the cease and desist order contained in the initial decision is appropriate in all respects.

On February 15, 1965, after respondent had filed a petition for review of the Commission's order in the United States Court of Appeals for the Second Circuit but before the filing of the record in the court, respondent, by counsel, filed with the Commission a motion to reopen the above-captioned administrative proceeding for the reception of additional evidence. See Section 3.28(a) of the Commission's Rules

mission's Rules should be waived and respondent be given an opportunity under §§ 2.3 and 2.4 of the Rules to execute an appropriate agreement for consideration by the Commission Accordingly,

It is ordered, That respondent's request for informal conference and its motion to vacate be, and they hereby are, denied.

It is further ordered, That proceedings in connection with the Commission's complaint herein be suspended for thirty (30) days following service of this order and that respondent be afforded an opportunity to dispose of this matter by the entry of a consent order.

MAGNAFLO COMPANY, INC., ET AL.

Docket 8422. Order, Feb. 18, 1965

Order remanding case to the hearing examiner pursuant to a decision of the U.S. Court of Appeals for the District of Columbia, 7 S.&D. 1112.

ORDER REOPENING CASE AND REMANDING IT TO HEARING EXAMINER

The United States Court of Appeals for the District of Columbia Circuit, by its judgment entered on February 4, 1965 [7 S.&D. 1112], having remanded this case for the further proceedings directed in its opinion of the same date:

It is ordered, That the matter be, and it hereby is, reopened.

It is further ordered, That the matter be, and it hereby is, remanded to Hearing Examiner Joseph W. Kaufman for such further proceedings, including hearings, as are necessary to comply fully with the directions contained in the opinion and judgment of the Court that respondent be given an expeditious and full opportunity to show that its trade name can be limited by the use of qualifying words so as to make unambiguous the claim that its product will conserve battery charge and prolong battery effectiveness.

It is further ordered, That the hearing examiner, upon completion of the further proceedings, shall file a supplemental initial decision based upon the record made prior to the remand and any additional evidence that may be received.

ALHAMBRA MOTOR PARTS ET AL.

Docket 6889. Order, Mar. 2, 1965

Order granting leave to a trade association which had filed an *amicus curiae* brief to participate in the oral argument.

himself. As the presiding member of the Commission stated at the conclusion of oral argument on respondent's appeal, "I think I should say that the Commission is very much impressed by the vigor and the skill with which you have handled yourself not only this afternoon but throughout this entire proceeding. Not being represented by counsel certainly has been no handicap to you. No matter how the case comes out I think you should feel you have not been prejudiced." (Transcript of Oral Argument, p. 56.) Respondent's motion completely fails to demonstrate wherein respondent would have benefited materially from being represented by counsel and how the additional evidence which respondent now seeks to adduce could change the Commission's decision.

Respondent in his motion states that he "did not realize that he should have, or could have, introduced testimony from the manufacturers of his blankets as to the unavailable variation, the exercise of due care, and what would constitute a reasonable manufacturing variance," so as to bring himself within one of the defenses provided in the Wool Products Labeling Act to a charge of misbranding. From our reading of the record we were, and remain, convinced that respondent was well aware of what kind of evidence was required to establish the defense. In any event, since respondent testified that he destroyed all labels placed by suppliers on the blankets sold by him during the period relevant to the charges in the complaint, and since it appears, therefore, that the blankets which the Commission found to be misbranded cannot be traced to particular lots manufactured by particular manufacturers, it does not appear that evidence as to a particular manufacturer's manufacturing processes would excuse respondent's misbranding. Moreover, respondent's blankets were found to be misbranded not only because they misstated the fiber content, but also because they failed to reveal the presence of certain fibers. The defense of unavoidable variations in manufacture would not be pertinent to this phase of respondent's misbranding, and it would not affect the cease and desist order which the Commission has entered.

The second area in which respondent in his present motion seeks leave to adduce additional evidence relates to the finding that respondent's employees removed the suppliers' labels and substituted therefor labels setting forth different fiber amounts. Respondent characterizes such evidence as "highly prejudicial," as a "complete surprise," and as improper rebuttal. On the contrary, it was proper rebuttal. Respondent had testified that he placed the same information that appeared on his suppliers' labels on his own labels. (Transcript of Hearings, pp. 7, 361.) The rebuttal testimony introduced by complaint counsel contradicted respondent's testimony on this point. In his

of Practice (effective August 1, 1963), and Section 5(c) of the Federal Trade Commission Act. In the motion it is alleged that respondent, in representing himself without the aid of legal counsel throughout the entire proceeding before the Commission, was denied a fair trial. On February 19, 1965, complaint counsel filed an answer in opposition to respondent's motion to reopen. The Commission has determined that the motion should be denied.

First. No contention is made that respondent was not aware from the outset of this proceeding of his right to be represented by counsel, or that he was unable for financial or other reasons to retain counsel, or that he was in any way discouraged or prevented by the Commission or by anyone from retaining counsel, or that he was incompetent to decide for himself whether or not he desired the services of counsel. At the outset of the hearings in this matter, respondent stated to the hearing examiner: "Well, if your Honor doesn't mind, I feel I can represent myself." (Transcript of Hearings, p. 2.)

When respondent advised the examiner that he would represent himself, the examiner and the Commission were, of course, bound by his decision. The Commission could not compel respondent, a competent adult, to retain counsel to assist him if he wished to represent himself. All the Commission could do was to take every possible step to ensure that respondent would not be penalized or prejudiced by his lack of counsel but would have every reasonable opportunity to make his defense; and a reading of the record will show that the hearing examiner, complaint counsel, and the Commission, fully mindful that respondent is a layman, made every effort to assist respondent in presenting his defense. Nor does respondent contend otherwise.

In these circumstances, to grant respondent a new trial (which is what, in effect, he requests in the motion to reopen) simply because he has belatedly decided that he could have made a better defense with the aid of counsel would open the door to widespread abuse of the administrative hearing process. A respondent who, like the present respondent, is perfectly free and able to retain counsel to represent him may not, except in extraordinary circumstances not shown here, insist on two successive trials on the same charges before the Commission—the first without, and the second with, counsel. We think the principle of *Colorado Radio Corp. v. F.C.C.*, 118 F.2d 24, 26 (D.C. Cir. 1941), is applicable here:

[W]e cannot allow the applicant to sit back and assume that a decision will be in its favor and then when it isn't to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.

Second. We do not think respondent was, in the circumstances, prejudiced in the presentation of his defense by his choice to represent

WILMINGTON CHEMICAL CORPORATION ET AL.

Docket 8648. Order, Mar. 18, 1965

Order denying leave to file an interlocutory appeal challenging hearing examiner's ruling.

ORDER DENYING LEAVE TO FILE INTERLOCUTORY APPEAL

On March 17, 1965, the Commission received a letter from counsel for respondents in the above-captioned proceeding, which letter will be treated as an application for leave to file an interlocutory appeal from the hearing examiner's order of March 16, 1965. By this order the examiner denied respondents' motion for a sixty-day postponement of the hearings in this matter now scheduled to commence on March 18, 1965. The examiner's written ruling upon respondents' motion reflects a full and fair evaluation of all the relevant considerations. The Commission's Rules of Practice and Procedure accord the hearing examiner a considerable discretion in regulating the course of hearing, and respondents have entirely failed to suggest any basis for concluding that the examiner's ruling of March 16, 1965, constitutes an abuse of discretion. Accordingly, it appearing that there are no extraordinary circumstances justifying a review of the examiner's decision by means of interlocutory appeal under Section 3.20 of the Commission's Rules of Practice and Procedure,

It is ordered, That respondents' application for leave to file an interlocutory appeal be, and it hereby is, denied.

LAFAYETTE RADIO ELECTRONICS CORPORATION*Docket C-788. Order, Mar. 24, 1965*

Order denying petition to suspend effectiveness of order until similar orders involving three competitors are issued.

ORDER DENYING PETITION TO REOPEN PROCEEDINGS

Respondent, by petition filed March 1, 1965, has requested that this proceeding be reopened for the purpose of setting aside or modifying the final order, issued on July 14, 1964 [66 F.T.C. 142], based on an agreement containing a consent order. In substance, respondent requests that the effectiveness of the order be suspended until substantially similar orders are issued and become final against three named competitors.

present motion, respondent states that he "did not have an opportunity * * * to answer these charges." No explanation is offered as to why respondent did not have such an opportunity. In any event, the point is a peripheral one. The evidence that respondent's employees substituted false labels in this fashion was merely corroborative. (See initial decision, finding no. 14, 66 F.T.C. 1290, 1296.) The Commission's decision and order would be the same even if the evidence were completely discounted.

It is ordered, That, for the reasons set forth above, respondent's motion to reopen the above-captioned proceeding be, and it hereby is, denied.

COLUMBIA BROADCASTING SYSTEM, INC., ET AL.

Docket 8512. Order, Mar. 15, 1965

Order denying respondent's request to file a 200-page answering brief.

ORDER DENYING MOTION

On January 25, 1965, the Commission issued an order granting respondents' motion for an additional 2 months in which to file their answering brief. Considering at the same time respondents' motion for leave to file an answering brief not exceeding 200 pages, the Commission granted leave to file a brief of 150 pages in length, including all appendices. Respondents have now renewed their request that they be granted leave to file an answering brief not exceeding 200 pages in length and they request that the filing date be further extended to May 19, 1965. The sole reason given by respondents for requiring a 200-page answering brief is that it is necessary to answer in detail what they regard as "the appeal brief's distortions of the record." The Commission is of the view that the authorization heretofore granted respondents should enable them to make a clear and complete presentation of the issues of the case and that they have failed to demonstrate the "reasonableness and necessity" of filing a brief so greatly in excess of the limit set forth in Section 3.22(e) of the Commission's Rules of Practice and Procedure. *Shulton, Inc.*, Docket No. 7721, order issued February 14, 1964. Since respondents' accompanying motion for an extension of time until May 19, 1965, has been premised entirely upon the ground that additional time would be needed to prepare a brief of 200 pages in length, denial of the latter motion also requires a denial of the former. Accordingly,

It is ordered, That respondents' motion be, and it hereby is, denied in all respects.

FRUEHAUF TRAILER COMPANY

Docket 6608. Order, Mar. 25, 1965

Order directing that oral reargument be held before Commission on April 22, 1965, with each side allotted 45 minutes to present its views.

ORDER DIRECTING ORAL REARGUMENT

This matter is before the Commission on the appeals of complaint counsel and respondent from the initial decision of the hearing examiner. The Commission has determined that the appeals should be orally reargued. The Commission invites counsel to focus their attention on reargument on two areas: (1) evidence in the record with respect to post-acquisition events; and (2) the significance of that evidence with respect to the application of Section 7 of the Clayton Act, as amended, to the acquisitions involved in the appeals. Accordingly,

It is ordered, That oral reargument of the appeals in the above-captioned matter be held before the members of the Commission on April 22, 1965, at 2 p.m., in Room 532 of the Federal Trade Commission Building, Washington, D.C., with each side allotted 45 minutes to present its views.

TOPPS CHEWING GUM, INC.

Docket 8463. Order, April 5, 1965

Order reopening proceeding to admit into the record additional documentary evidence.

ORDER RULING ON PETITIONS TO REOPEN

Respondent has filed two motions pursuant to Section 3.27 of the Commission's Rules of Practice for a reopening of the record for the reception of additional evidence. The first of these motions, filed February 24, 1965, seeks the reopening "for the purpose of introducing into evidence the attached player agreement and Exhibits A and B attached to its reply brief." Complaint counsel did not oppose this petition, but requested that a document attached to their answer be similarly accepted into the record. On March 17, 1965, respondent filed an answer thereto stating that it did not oppose complaint counsel's petition, but went on to "answer the additional comments" in complaint counsel's papers.

We cannot say, at least at this point, that the three (3) documents offered by respondent and the one (1) document offered by complaint counsel, all of which apparently concern matters that arose after the

As grounds for its request, respondent states that the practices proscribed by the final order are industrywide and, in particular, are engaged in by its principal competitors, and that it agreed to a consent order, in large part, because of its understanding that its principal competitors were under investigation and that that meant comparable orders would be issued against them in due course.

The order in this case, in principal part, prohibits respondent from misrepresenting prices and the savings available to consumers in the sale of radios, phonograph equipment, radio electronic equipment or any other articles of merchandise. Additionally, the order requires respondent to cease misrepresenting the terms of its guarantees as to such merchandise and prohibits certain claims as to the quality of respondent's phonograph needles. In view of the general nature of these practices and the broad range of products sold by respondent, the Commission, in the exercise of its administrative discretion, determined that the public interest did not warrant suspension of formal action against this respondent pending an investigation of its competitors. Respondent has alleged no facts in support of its present motion which would justify the Commission in revoking the earlier determination. Respondent, while requesting the Commission to take "judicial notice" that its business will suffer by compliance with the order, has made no factual showing whatever of present or prospective business injury as a result of compliance. Indeed, respondent assures the Commission that it will continue to comply with the order even if the Commission grants its request to suspend the effectiveness thereof.

Respondent contends that it agreed to accept a consent order in part because it understood that comparable orders would be issued against its competitors. In support of this contention respondent states only that it was advised that the practices of its competitors were under investigation. But respondent is surely aware that formal proceedings could not be instituted against its competitors unless the Commission, after appropriate investigations, found sufficient evidence of unlawful conduct by the firms under investigation to justify the issuance of complaints.

We conclude that respondent has failed to establish that changed conditions of fact or law, or the public interest, require any change in the order. Accordingly,

It is ordered, That respondent's petition filed March 1, 1965, be, and it hereby is, denied.

REPORT OF THE FEDERAL TRADE COMMISSION UPON ITS INVESTIGATION OF ALLEGED VIOLATIONS OF ITS ORDER TO CEASE AND DESIST

APRIL 12, 1965

The Proceedings

On July 22, 1964, the Commission having reason to believe that Jantzen, Inc., may have violated the provisions of the order to cease and desist issued herein on January 16, 1959, and modified on March 26, 1959 [55 F.T.C. 1065, 1068], directed that an investigational hearing be conducted pursuant to § 1.35 and related rules of the Commission's Rules of Practice to ascertain the extent to which such violations may have occurred. A hearing examiner of the Commission was duly designated to preside at hearings to be conducted for that purpose and it was directed that he, in lieu of rendering an initial decision upon completion of the hearing, certify the record to the Commission, together with his report upon the investigation.

Pursuant to and in accordance with the foregoing, a hearing was set by the hearing examiner for November 30, 1964, in Portland, Oregon, for the purpose of taking testimony in evidence concerning the nature and extent of compliance by Jantzen, Inc., with the said order to cease and desist. Prior to said hearing a prehearing conference was ordered herein for Washington, D.C., on November 23, 1964. During the course of this conference a stipulation signed by counsel for the Commission and for respondent, Jantzen, Inc., and a motion, agreed upon by counsel to close the proceedings before the hearing examiner, were submitted to the hearing examiner and incorporated into the record. On November 23, 1964, the hearing examiner issued his order, as requested by counsel for both respondent and the Commission, cancelling the investigational hearing set for Portland, Oregon, quashing the subpoenas directed to the respondent's officials, excusing their appearance, and closing the record in this proceeding. On January 14, 1965, the hearing examiner's "Report and Certification to the Commission of Record of Investigational Hearing" was duly recorded and filed in the office of the Commission. The Commission having duly considered the report filed by the hearing examiner and the record herein and being now fully advised in the premises, and having accepted the said stipulation entered into by counsel for the respondent and the Commission, makes this its report upon the investigation of the alleged violations of the order to cease and desist.

closing of this record, are irrelevant to any of the issues. They will be received.

Respondent's second motion to reopen was filed on March 29, 1965, almost on the eve of the scheduled oral argument of the case before the Commission (April 6, 1965). Merely to give complaint counsel the usual 10 days to answer this petition would thus compel a postponement of the argument. Respondent presents nothing here to warrant such further delay in an already protracted proceeding. It proffers an affidavit of respondent's president, together with a tabulation and several photographs. The substance of this material is that respondent has discovered new "competition" from a variety of sources, particularly from firms selling cards bearing the likenesses of persons other than baseball players. It indicates, for example, that another bubble gum seller has, within the last few weeks, commenced selling a set of picture cards called "The Addams Family" (picturing the persons and objects depicted in the current television program by that name). This material seems to us to be clearly cumulative; the hearing examiner received voluminous evidence of this character during the course of the hearing (initial decision, pp. 754-760 herein) and later denied a motion by respondent to reopen the case and receive more (*id.*, p. 758). This proceeding could be prolonged interminably if it must be halted and the record reopened each time the television networks create a new personality or subject that can be copied on picture cards and offered for sale to children.

It is ordered, Therefore, that respondent's petition filed on February 24, 1965, and the petition of complaint counsel contained in their answer thereto filed March 8, 1965, be, and they hereby are, granted to the extent herein indicated; that the record be, and it hereby is, reopened for the limited purpose of receiving into evidence the three (3) documents described in respondent's petition and the one (1) document described in complaint counsel's answer thereto; that those documents be, and they hereby are, received in evidence as respondent's and the Commission's exhibits, respectively; and that the record be, and it hereby is, thereafter closed.

It is further ordered, That respondent's petition for reopening filed March 29, 1965, be, and it hereby is, denied.

JANTZEN, INC.

Docket 7247. Order and Report, Apr. 9, 1965

Order denying respondent's request for informal disposition of the case under Section 1.21 of the Rules of Practice.

or through such customers in connection with the offering for sale, sale or distribution of respondent's products, without making such advertising or promotional allowance payments available on proportionally equal terms to all other customers competing in the distribution of respondent's products with the aforementioned and other favored customers, respondent has failed to comply with provisions of the said order to cease and desist.

Conclusion

It is our conclusion, after giving due consideration to the acts and practices of the respondent as evidenced by the admissions in the said stipulation, that the respondent, Jantzen, Inc., has paid advertising or promotional allowances to certain customers as compensation or in consideration for advertising or promotional services furnished by or through such customers in connection with the offering for sale, sale or distribution of respondent's products, without making such advertising or promotional allowance payments available on proportionally equal terms to all other customers competing in the distribution of respondent's products with the favored customers in direct violation of the Commission's order to cease and desist issued January 16, 1959, and amended March 26, 1959 [55 F.T.C. 1065, 1068].

ORDER DENYING RESPONDENT'S REQUEST FOR INFORMAL DISPOSITION

This matter is before the Commission on the hearing examiner's "Report and Certification of Record of Investigational Hearing," filed January 14, 1965. Respondent filed its application on January 28, 1965, requesting informal disposition of this proceeding under § 1.21 of the Rules of Practice, and Commission counsel, on February 5, 1965, filed their answer in opposition thereto.

The Commission, upon consideration of respondent's application and Commission counsel's answer, has determined that this matter is not suitable for disposition under § 1.21 of the Rules of Practice. Further, the Commission has reviewed respondent's contentions, first, that the consent order to cease and desist of January 16, 1959, and modified March 26, 1959 [55 F.T.C. 1065, 1068], is invalid, and, second, that there is no statutory method for enforcement of Clayton Act orders issued prior to July 23, 1959. These contentions are without merit. Accordingly,

It is ordered, That respondent's "Application For Disposition Of Investigation Under Section 1.21" be, and it hereby is, denied.

The Order

The order to cease and desist which issued on January 16, 1959, and which was amended on March 26, 1959 [55 F.T.C. 1065, 1068], is as follows:

It is ordered, That respondent Jantzen, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in, or in connection with, the sale of clothing in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation, or in consideration, for any services or facilities furnished by or through such customer in connection with the offering for sale, sale or distribution of any of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

Report on the Facts

As shown by the stipulation submitted during the prehearing conference of November 23, 1964, respondent acknowledges and admits the following facts:

1. Respondent is a corporation organized and existing under the laws of the State of Nevada with its principal office and place of business located in Portland, Oregon. It is now and has since prior to 1959 engaged in the manufacture and sale in commerce, as "commerce" is defined in the amended Clayton Act, of a wide variety of men's, women's and children's clothing, apparel and accessories.

2. In the course of conduct of the aforesaid business, respondent has failed to comply with provisions of said order to cease and desist in the following respects:

(a) That in or about December 1962, respondent, in violation of the said order to cease and desist, paid an advertising or promotional allowance of \$111.15 to its customer, Loveman's 800 Market Street, Chattanooga, Tennessee.

(b) That in or about August 1960, respondent, in violation of the said order to cease and desist, paid an advertising or promotional allowance of \$235.50 to its customer, Savoy Shops, 4512 13th Avenue, Brooklyn, New York.

(c) That in or about July 1962, respondent, in violation of the said order to cease and desist, paid an advertising or promotional allowance of \$66.66 to its customer, the said Savoy Shops.

3. In paying the said advertising or promotional allowances to the aforementioned and other favored customers of respondent as compensation or in consideration for advertising services furnished by

Respondents have not shown why the Commission should reconsider and rescind its determination that issuance of complaints here is in the public interest and is consistent with the Commission's expressed concern to prevent future unlawful acquisitions in this industry through exercise of its powers of industrywide inquiry and correction. Accordingly,

It is ordered, That the motions of respondents in the above-captioned proceedings to suspend further adjudicative proceedings be, and they hereby are, denied.

HOFFMANN AIRCRAFT COMPANY ET AL.

Docket 8136. Order, Apr. 29, 1965

Order denying respondent's petition that Commission's order of May 13, 1961, 58 F.T.C. 730, be reopened and modified.

ORDER DENYING PETITION TO REOPEN PROCEEDINGS

This matter is before the Commission upon respondents' petition, filed April 5, 1965, requesting that this proceeding be reopened for the purpose of modifying the Commission's order to cease and desist issued on May 13, 1961 [58 F.T.C. 730], based on an agreement containing a consent order.

As grounds for their request, respondents allege that there was a misunderstanding as to the meaning of certain paragraphs of the order to cease and desist as the result of representations made by counsel supporting the complaint during the negotiations leading to the consent order. Respondents have made no showing in verification of the allegations in their petition.

The Acting Director, Bureau of Deceptive Practices, has filed an answer in opposition to respondents' petition. Attached to the answer is the affidavit of counsel supporting the complaint wherein he denies making the alleged representations concerning the phraseology or interpretation of the order to cease and desist. Complaint counsel has attached to his affidavit a copy of a draft of a proposed order which he discussed with respondents' counsel, and handwritten notations thereon tend to refute respondents' allegations.

The Commission, upon consideration of respondents' unverified petition and the answer thereto, has determined that respondents' request must be denied.

Respondents do not contend that there have been any changed conditions of fact since the order to cease and desist became final. The Commission's action in denying the present motion is not intended to pre-

TEXAS INDUSTRIES, INC., Docket 8656
MISSISSIPPI RIVER FUEL CORPORATION, Docket 8657

Order, April 14, 1965

Order denying requests of two respondents to suspend proceedings pending completion of an industrywide investigation.

ORDER DENYING MOTIONS TO SUSPEND COMPLAINTS

On March 31, 1965, the hearing examiner certified to the Commission motions by counsel for respondent in each of the above-captioned proceedings to suspend the proceeding pending completion of an industrywide investigation, inquiry, or other action by the Commission.

On December 7, 1964, the Commission announced the commencement of an investigation designed to aid the Commission in enforcing Section 7 of the Clayton Act, as amended, in the cement industry. Respondents in the motions before us argue that in light of the Commission's announced intention of proceeding on a broad industrywide basis to prevent unlawful mergers in this industry, the Commission should, as a matter of fair enforcement policy, not prosecute adjudicative proceedings against these respondents in regard to past acquisitions by them in this industry.

This argument misconceives the purpose of the Commission's investigation and of any industrywide proceeding that might arise out of it. Such a proceeding would be concerned with preventing future unlawful mergers, by providing business men with guidance as to the probable legality of proposed mergers; it would not adjudicate the legality of specific past mergers. The Commission issued complaints in the present cases because it had reason to believe that the challenged acquisitions endangered competition in the markets affected; and the ill-effects of such specific acquisitions, if found illegal, could not be dissipated merely by a nonadjudicatory, industrywide inquiry of the kind projected by the Commission. That is why, as the Commission stated in *Permanente Cement Co.*, Docket 7939, decided April 24, 1964, p. 9 [65 F.T.C. 410, 494], commencement of a general industrywide inquiry "is not tantamount to declaring a moratorium on all enforcement activities with respect to transactions [previously] consummated." Here, too, the challenged past acquisitions could be found to "have profound and even irreversible adverse effects upon competition in substantial markets" which no industrywide action looking to the prevention of future unlawful actions by cement producers would, in itself, be effective in correcting.

trative action aimed at dealing promptly and effectively with the basic merger problems out of which the cases arise.

I reiterate my view that the Commission, without further delay, should decide these cases, and also that it should not continue to delay in acting immediately on a broad administrative basis to prevent further unlawful mergers in the retail food industry. The initial decision of the hearing examiner in Docket 7453 was rendered more than two years ago—on April 5, 1963 [69 F.T.C. 226]. Oral argument on the appeal from the initial decision was heard by the Commission on November 6, 1963—a year and half ago. The initial decision in Docket 8458 was rendered on October 4, 1963 [67 F.T.C. 999], and oral argument was heard on May 7, 1964—almost a year ago. If “remedies and solutions” for the serious, industrywide problems in the food industry are to be found, as I hope they will, we should delay no longer in deciding these particular cases and moving along into a broad industrywide administrative approach.

One such approach might be for the Commission to extend an opportunity to all of the large retail food chains to cooperate with the Commission in the prevention in this industry of mergers proscribed by Section 7. The companies that have been active in making acquisitions could be directed to file with the Commission periodically such reports as might be necessary to keep the Commission informed, well in advance, as to all prospective mergers and acquisitions involving such companies. See Section 6(b) of the Federal Trade Commission Act, 15 U.S.C. § 46(b); *United States v. Morton Salt Co.*, 338 U.S. 632. On the basis of the information obtained through such reports concerning the terms, conditions, business reasons, etc., of proposed acquisitions, as well as on the basis of the Commission’s extensive accumulated knowledge and experience concerning the competitive conditions and problems of the retail food industry, the Commission could, where practicable, advise companies as to the probable legality of such proposed acquisitions, as well as take such other action as might be required to prevent unlawful mergers. In addition, the Commission could utilize such information to aid in keeping itself abreast of current merger trends in the industry.

The merger movement in the retail food industry warrants the Commission’s closest scrutiny; and unlawful mergers in the industry should be prevented. But we must choose wisely the “remedies and solutions” that are likely to achieve our enforcement goals in an effective and fair manner. To protract the present cases still further while ignoring the larger question of how the Commission is to deal effectively with a merger movement that is continuing and that is industrywide in scope seems to me the least efficient, the least expeditious, the least economical, and the least equitable approach for an administrative agency to take.

clude respondents from filing a new motion if and when supported by a factual showing that would warrant modification of the order to cease and desist.

On the basis of the foregoing:

It is ordered, That respondents' petition, filed April 5, 1965, be, and it hereby is, denied.

NATIONAL TEA CO., Docket 7453

THE GRAND UNION COMPANY, Docket 8458

Order and Statements, May 3, 1965

Order providing for reargument of two cases before the full Commission involving the merger movement in the retail food industry.

SEPARATE STATEMENT

By ELMAN, *Commissioner*:

I agree that the merger movement in the retail food industry is industrywide in scope; that it raises serious problems; and that all the members of the Commission as now constituted should participate in formulating "remedies and solutions." I do not agree, however, that the way to remedy and solve these problems effectively is by setting these cases down for reargument, as the full Commission has now decided to do.

In both cases there is a quorum for deciding the appeals on the merits. The cases can be decided now, without reargument, and I think they should be. By deciding *not* to decide these cases now and to set them down for reargument, the Commission has delayed the process of seeking and finding "remedies and solutions." In these cases, and in others, the central goal of merger enforcement in this industry should be the same: the preservation of a competitive market structure. In this industry particularly, the Commission should be primarily concerned with arresting further concentration through acquisitions, whether by these respondents or by other major chains, that could result in the industry's becoming substantially less competitive than it is today.

A quorum of the Commission is now available, without reargument, to dispose of the present cases in harmony with what should be the Commission's primary enforcement objectives in this industry. It is true that the members of the Commission who did not hear oral argument in these cases may properly decline to participate in adjudicating the merits of the appeals. But those members, who have now voted to set the cases down for reargument, could with equal propriety refrain from entering into the adjudication of these cases, permitting them to be decided now, and at the same time join in appropriate adminis-

Such a situation can readily arise when there are four Commissioners sitting. And while hearing oral argument is not necessary to participation, those Commissioners not having had the benefit of earlier oral argument feel the need for the enlightenment and clarification which oral argument might provide. Neither Commissioner Jones nor I heard National Tea, nor has Commissioner Jones heard Grand Union. Our judgment that the public interest requires our full participation in these cases must outweigh a call, however insistent, that these matters must now be pressed to conclusion.

This rather uncomplicated state of affairs, which would defer these matters at most a few weeks, should not, it seems to me, give rise to a public debate as to the methods and objectives of Commission merger enforcement policy.

ORDER DIRECTING ORAL REARGUMENT

These matters are before the Commission on appeals of counsel supporting the respective complaints. Oral argument *In the Matter of National Tea Co.*, Docket No. 7453 [69 F.T.C. 226], was heard on November 6, 1963, by the full Commission as then composed, which included three of the present Commissioners. Oral argument *In the Matter of The Grand Union Co.*, Docket No. 8458 [67 F.T.C. 999], was heard on May 7, 1964, by four members of the present Commission. Realizing the seriousness of the industrywide scope of the merger movement in the food retail industry, as shown by the records in these cases, and the problems associated with the remedies and solutions to be applied, and being of the opinion that all of the members of the Commission as now constituted should participate in the consideration of these cases and in the formulation of the remedies and solutions, the Commission has determined that the appeals of counsel supporting the complaints in both of these matters should be orally reargued. Although aware that reargument will lengthen somewhat the span of time between issuance of the complaints and ultimate disposition of the cases, the Commission is of the opinion that the advantages of a single approach to the mutual problems presented by these cases more than outweigh the disadvantages inherent in lengthened proceedings. Accordingly,

It is ordered, That oral reargument on the appeals *In the Matter of National Tea Co.*, Docket No. 7453, and *In the Matter of The Grand Union Co.*, Docket No. 8458, be held before the members of the Commission on dates to be established by the Secretary of the Commission at times agreeable to counsel for respondents and counsel in support of the complaints.

SEPARATE STATEMENT

By MACINTYRE, *Commissioner*:

Since I have always opposed procedures which tend to inject delay into the administrative process, I feel called upon to express my reasons for not opposing the Commission's decision to hear reargument in these cases.

The first and most important consideration is to afford all five Commissioners the opportunity to hear oral argument and to participate in the final decisions. Only three of the present Commissioners heard the first oral argument of the *National Tea* matter and only four Commissioners heard the *Grand Union* argument. I doubt that I would ever vote to deny a colleague who desires to participate in the decision of a case the right to hear oral argument thereon.

Another important reason for hearing reargument is to shed additional light on an important subject which the parties have not as yet adequately explored. It is my view that the briefs and arguments heretofore submitted did not give sufficient coverage to the question of remedy in the event violations are found. After these rearguments the Commission will be better equipped to decide whether to enter orders for outright divestitures, injunctions against future acquisitions, some combination of the two, or other orders with which respondents could comply without disruption to their businesses and would accept as appropriate. The rearguments we have provided for will enable all counsel in these matters to inform us more about the answers we should supply to these questions.

And, finally, the law in this field is developing at a very rapid rate and the interval since the last arguments has seen the issuance of many important court decisions. I am sure that all counsel will be benefited by this opportunity to bring their legal arguments up to date.

SEPARATE CONCURRING STATEMENT

By REILLY, *Commissioner*:

The majority has ordered reargument in these aging cases because it finds itself unable to decide them without the participation of the full Commission. This is dictated in part by the majority's conviction that these cases are important in the Commission's larger concern with competition in the food industry and thus should be considered by the full Commission, and in part by the fact that the number of Commissioners participating in a matter may be large enough for a quorum but not large enough to provide a clear majority for satisfactory Commission action.

8512. Counsel for Columbia Broadcasting System, in a motion requesting that I withdraw from participation in the *Columbia Broadcasting* case, argue that the practices allegedly engaged in by the Columbia Broadcasting System are similar to the practices which Doubleday allegedly had pursued and with respect to which the Commission had dismissed the complaint many years ago.

Respondents request that I withdraw from participation in this case because during my tenure on the staff of the Commission as Assistant Director of the Bureau of Antimonopoly and Chief of the Division of Investigation and Litigation my name appeared on various briefs in *Doubleday*. Respondents claim, as a result, I must have had important administrative responsibilities with respect to the investigation or prosecution or appeal in *Doubleday*. In this connection, respondents contend that in view of my participation in *Doubleday* it must be inferred that I was an advocate of the specific positions advanced by complaint counsel in that case with respect to the alleged injurious effect on dealers of mail order clubs. Respondents contend that *Doubleday*, which was dismissed, is the decision controlling this case and in fact was relied upon by the hearing examiner below in dismissing the complaint.

Respondents, citing Section 5(c) of the Administrative Procedure Act, 5 U.S.C. § 1004(c), argue that *Doubleday* and the instant proceeding are "factually related" and contend that as a result my continued participation herein would entail a commingling of the adjudicative and prosecutorial or investigative functions. I have examined the authorities cited by respondents and certainly none of them support the proposition that under these circumstances the *Doubleday* case and the instant proceeding should be considered "factually related" within the meaning of that term as used in Section 5(c). Respondents straightforwardly admit that they have found no judicial authority construing the words "factually related" in the statute. Further, they are to be commended for candidly directing the Commission's attention to the definition of this phrase in the *Attorney General's Manual on the Administrative Procedure Act* (1947).¹ As I construe that definition, a factually related case within the meaning of the Act refers to two cases involving at least to some degree the same party out of the same or a connected set of facts. The Manual further states: "* * * [agency employees] would not be prevented from assisting the agency in the decision of other cases (in which they had not engaged either as investigators or prosecutors) merely because the facts of these other cases may form a pattern similar to those which they had theretofore investigated or prosecuted." In this case it is

¹ At p. 54, n. 6.

The views of Commissioners Elman and MacIntyre are set forth in separate statements, and the views of Commissioner Reilly are set forth in a separate concurring statement.

RODALE PRESS, INC., ET AL.

Docket 8619. Order, May 11, 1965

Order denying respondent's request that a news release following the initial decision be made part of the record on appeal.

ORDER DENYING MOTION TO ENLARGE RECORD ON APPEAL

Respondent Rodale Press, Inc., having moved to enlarge the record on appeal by making a news release relating to the hearing examiner's initial decision, which release was issued by the Commission subsequent to the date of said initial decision, a part of the record on appeal, and the Commission having determined that any issue respecting the accuracy or completeness of said news release is irrelevant to any issue before the Commission on the appeal of respondent:

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

COLUMBIA BROADCASTING SYSTEM, INC., ET AL.

Docket 8512. Order and Opinion, May 13, 1965

Order denying respondent's motion that Commissioner MacIntyre be disqualified from participating in this proceeding.

COMMISSIONER MACINTYRE'S STATEMENT ON MOTION THAT HE BE
DISQUALIFIED

MAY 12, 1965

During the late 1940's and the early 1950's, when I was serving on the staff of the Federal Trade Commission as Assistant Director of the Bureau of Antimonopoly and Chief of the Division of Investigation and Litigation, I supervised a substantial number of investigations and a substantial amount of litigation. Included was a case entitled *In re Doubleday and Co., Inc.*, F.T.C. Docket No. 5897 [52 F.T.C. 169]. It involved a factual situation confined to the practices allegedly pursued by that firm. The Federal Trade Commission dismissed the complaint in part. Quite recently the Commission instituted proceedings *In re Columbia Broadcasting System, Inc.*, F.T.C. Docket No.

The Commission having considered Commissioner MacIntyre's statement and being in agreement with the reasoning therein and his determination that the *Doubleday* case* and the instant proceeding are not "factually related" within the meaning of that term as used in Section 5(c) of the Administrative Procedure Act; and

The Commission having determined that respondents have failed to justify the action requested:

It is ordered, That respondents' motion requesting that Commissioner MacIntyre be disqualified from participating in this proceeding be, and it hereby is, denied.

Commissioner MacIntyre not participating.

PHILADELPHIA CARPET COMPANY ET AL.

Docket 7635. Order, May 14, 1965

Order extending the closing date for the respondent to file a report of compliance.

SUPERSEDING ORDER AS TO TIME WITHIN WHICH RESPONDENTS SHALL FILE REPORT OF COMPLIANCE

Respondents have filed a petition with the Commission requesting that the period of time within which they are required to comply with the Commission's cease and desist order be extended for a period of time coextensive with that accorded their competitors in companion cases. The Commission, on April 2, 1964, extended the time in which eight of respondents' competitors¹ were required to file reports of compliance to sixty (60) days after the latest date of any final judicial determination on appellate review in *Callaway Mills Co.*, Docket No. 7634, *Cabin Crafts, Inc.*, Docket No. 7639, and the instant case. Appeals from the Commission's decision in *Callaway Mills Co.*, *supra*, and *Cabin Crafts, Inc.*, *supra*, are currently pending before the United States Court of Appeals for the Fifth Circuit. On April 1, 1965, the Commission's order in the instant case was affirmed by the United States Court of Appeals for the Third Circuit. *Philadelphia Carpet Co. v. Federal Trade Commission*, 342 F. 2d 994 (3d Cir. 1965). The final decree of that court ordering compliance with the Commission's order to cease and desist was issued on April 26, 1965.

In the circumstances, the Commission has determined that the period of time within which the respondents in this case should be required

*In re *Doubleday and Company, Inc.*, 52 F.T.C. 169 (1955).

¹ Bigelow-Sanford Carpet Company, Inc., Docket No. 7420; Mohasco Industries, Inc., Docket No. 7421; The Magee Carpet Company, Docket No. 7631; C. H. Masland & Sons, Docket No. 7632; The Beattie Manufacturing Company, Docket No. 7633; A. & M. Karagheusian, Inc., Docket No. 7636; Roxbury Carpet Company, Docket No. 7637; The Firth Carpet Company, Docket No. 7638.

obvious that the proceeding brought against CBS can in no way be considered an outgrowth of the *Doubleday* proceeding. Assuming for the moment that both cases involve the same legal theory as to similar facts,² in my view that does not constitute a factual nexus so as to warrant my disqualification in this proceeding under section 5(c) of the Administrative Procedure Act. The mere circumstance that *Doubleday*, which was dismissed, may have rested on the same or a similar legal theory as the instant proceeding is insufficient to bring my participation in this case within the area forbidden by Section 5(c). Needless to say, I intend to judge this matter on the facts in this record and in the context of this industry.

If respondent's construction of the term "factually related case" were to be upheld, obviously no staff member could ever sit on any Commission or administrative board having a quasi-judicial function. There would be too many instances where he would have to disqualify himself. Furthermore, by way of analogy, if the phrase were to be given the broad sweep for which respondents contend, few United States Attorneys could become elevated to a Federal judgeship and probably no Attorney General could ever sit on the Supreme Court. For example, if a United States Attorney had once participated in a murder proceeding involving a particular set of facts, under respondents' interpretation of the doctrine there would be a commingling of the prosecutorial and judicial function in another homicide involving similar circumstances because he had, in the course of prosecution, once taken the position that murder under analogous facts was illegal. This is clearly an absurd result. The doctrine to be applied here obviously is that the prior expression of legal views as to the lawfulness of certain practices does not disqualify the adjudicative officer if it does not involve the particular party being proceeded against. As a noted authority has stated, "Bias in the sense of [a] crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification."³ I might add that my views on this proceeding have, in fact, not yet crystallized.

ORDER DENYING MOTION TO DISQUALIFY

Respondents, by motion filed May 12, 1965, having requested that Commissioner MacIntyre be disqualified from any further participation in this proceeding; and

Commissioner MacIntyre having filed with the Commission a statement that he has determined not to withdraw; and

² At this time I have reached no final conclusion on that point.

³ 2, Davis, *Administrative Law Treatise*, § 12.01 at 131 (1958); Comment, *Prejudice and the Administrative Process*, 59 Nw. U. L. Rev. 216, 218 (1964); see also *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948).

amended, respondent Nash-Finch's answer in opposition thereto, and respondent's motion to terminate the proceeding. In addition, respondent Nash-Finch concurrently filed a motion that I be disqualified from further participation in this proceeding. In support of its motion for my disqualification, respondent cites my participation as staff counsel in the negotiation and settlement leading up to the entry of the cease and desist order against Nash-Finch in 1947 and asserts, further, that I participated in discussions relating to respondent's proposed compliance with that order. Respondent argues that under the circumstances my disqualification is mandatory under the rule announced in *Amos Treat & Co. v. S.E.C.*, 306 F.2d 200 (D.C. Cir. 1962). Finally, respondent contends that I should not participate since this proceeding is adjudicative and the Commission herein purports to act as a master in making findings of fact for the court of appeals.

Every adjudicator is under a positive duty to fulfill his adjudicative functions unless actually disqualified, and it is almost as great a fault to employ self-disqualification too readily as too sparingly.¹ The same considerations are, of course, equally applicable to agency members' participation in the administrative functions entrusted to them when faced with a request for withdrawal. Careful consideration of the issues raised by respondent's motion is therefore required in the context of this proceeding and the manner in which it developed.

The cease and desist order under consideration here issued in 1947 and the provisions of the so-called Finality Act, enacted July 23, 1959, do not apply. Accordingly, it is the purpose of this proceeding to determine whether the facts warrant a petition to one of the courts of appeals for affirmance and enforcement of the order to make it final. The determination as to whether an order of enforcement should issue rests with the courts and not with the Commission. Respondent nonetheless claims that in proceeding the Commission is acting as a master for the court of appeals and therefore it is entitled to all of the procedures applicable to an adjudicative trial. In short, respondent asserts that if I continue to sit in this proceeding there will result a commingling of the adjudicative and prosecutorial and investigative functions prohibited by the Administrative Procedure Act. The crux of the situation, therefore, is whether this is an investigative, an adjudicative or a hybrid proceeding. That question can best be resolved after an examination of how this proceeding was instituted and how it has developed over the last two years.

On February 1, 1963, the Commission issued its order directing an investigation as to whether respondents had complied with the order

¹ Comment, *Prejudice and the Administrative Process*, 59 Nw. U. L. Rev. 216, 233-34 (1964).

to file a report of compliance should be extended for a period coextensive with that of their aforementioned eight competitors. Accordingly,

It is ordered, That the paragraph in the Commission's order to cease and desist, issued February 10, 1964 [64 F.T.C. 762], referring to the time within which respondents are required to file a report of compliance with said order be, and it hereby is, stricken.

It is further ordered, That the respondents shall, within sixty (60) days after the date of the final judicial determination in *Callaway Mills Co.*, Docket No. 7634, or *Cabin Crafts, Inc.*, Docket No. 7639 [362 F.2d 435 (1966)], whichever is later, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the Commission's order to cease and desist.

C. H. ROBINSON COMPANY AND NASH-FINCH
COMPANY

Docket 4589. Memorandum, May 17, 1965

To avoid further delay Commissioner MacIntyre withdraws from the case in which respondents allege that his participation would result in a commingling of adjudicative, prosecutorial, and investigative functions prohibited by the Administrative Procedure Act.

MEMORANDUM OF COMMISSIONER MACINTYRE WITH RESPECT TO
RESPONDENT'S MOTION THAT HE BE DISQUALIFIED

Approximately nineteen years ago, while serving as a member of the staff of the Federal Trade Commission, in my capacity as Chief of the Division of Investigation and Litigation, I participated in conferences with Federal Trade Commission counsel and counsel for the C. H. Robinson Company and the Nash-Finch Company, held for the purpose of negotiating a consent settlement of alleged violations of law taking place approximately twenty years ago or more. Such conferences did result in the negotiation of a consent settlement and a cease and desist order was issued in F.T.C. Docket No. 4589 [43 F.T.C. 297]. The current investigation, initiated on February 1, 1963, is for the purpose of collecting information regarding the present practices of the C. H. Robinson Company and the Nash-Finch Company. If it should appear that the present practices of the respondents violate the terms of the aforesaid cease and desist order, then the Commission may refer the information to the appropriate court for a determination of whether violation of the cease and desist order has occurred and whether the order should be enforced.

This matter is now before the Commission on Commission counsel's request that the order directing the investigational hearings be

torney in seeking enforcement of a court order. Respondent's motion for clarification made it clear, to me at any rate, that it would have been desirable for the Commission to differentiate sharply between the adjudicative and investigative functions in this matter and I did not concur in the order of November 4. While this procedure may have been approved by the courts,² it seems clear that the interaction of the adjudicatory form given to this investigation and the procedural questions continually raised by respondents throughout this proceeding has created a procedural bog, out of which the Commission has yet to find its way. When respondent objected to the so-called undefined nature of this proceeding, the Commission should have amended its order directing the investigation, making it plain that this proceeding is solely investigative, to which only the Rules of Practice applicable to investigations will be applied. This the Commission has not chosen to do and the result has evidently been confusion compounded.

Respondent, not satisfied with the "clarification" contained in the order of November 4, 1963, petitioned the United States District Court for the District of Minnesota, Fourth Division, for a declaratory judgment and injunction. Nash-Finch requested that the Commission and its staff be enjoined from further proceeding in this matter until respondent had been informed as to whether the hearings are adjudicative or investigative, the purpose of the hearings clarified, the duties and functions of the presiding official defined, and the rules applicable to the proceeding affirmatively promulgated.

The district court, denying respondent's petition, adopted essentially the position set forth in the Commission brief filed with the court, to the effect that in an enforcement proceeding the Commission may, to expedite the proceedings, hold investigative hearings in advance of going to the court of appeals and to such hearings apply its adjudicative rules.³ The court further held that under this procedure the Commission proceeds as if it had been appointed as a master and that this was the procedure adopted in this instance.⁴

As heretofore stated, it is my view that this proceeding is essentially an investigative proceeding and, although the courts have judicially approved what the Commission has done here in prior cases, it is obvious that the engrafting of adjudicatory procedures on the Commission's essentially investigative function in this instance led only to confusion and delay. This case and similar cases, I believe, could be

² See *F.T.C. v. Standard Brands* [1950-1951 TRADE CASES ¶ 62,797], 189 F. 2d 510 (2d Cir. 1951); and *F.T.C. v. Washington Fish & Oyster Co.* [1959 TRADE CASES ¶ 69,487], 271 F. 2d 39 (9th Cir. 1959).

³ In this case the procedure utilized has, if anything, slowed down the proceeding.

⁴ *F.T.C. v. Nash-Finch Co.*, 1964 Trade Cas. ¶ 71,204 [7 S.&D. 973].

to cease and desist in Docket No. 4589. The order specified that a public investigational hearing should be conducted for that purpose pursuant to § 1.34 and the related rules of the Commission's Rules of Practice which were then in effect. It was further ordered that the chief hearing examiner should appoint and designate a hearing examiner to preside at the hearing with all the powers and duties as provided by § 4.13 of the Commission's Rules of Practice then in effect. The order provided that respondents were to have the right of notice, cross-examination, production of evidence in rebuttal, and that the hearings should be conducted in accordance with the Commission's Rules of Practice for adjudicative proceedings insofar as such rules were applicable.

The ensuing months were consumed by procedural maneuvering until on October 14, 1963, respondent Nash-Finch filed a motion requesting the Commission to clarify the order of February 1, 1963, directing an investigation of the respondent. It was the burden of respondent's motion that the order of February 1, 1963, was defective because it did not specify whether the proceeding initiated was adjudicatory or investigatory and that it failed to make clear whether the examiner was appointed to act as an impartial adjudicative officer subject to the provisions of Section 5(c) of the Administrative Procedure Act. Respondent, at that time, argued strenuously that it should be advised as to whether these hearings were supposed to be an "actual trial" and that it should not be left to speculate as to whether these hearings were the proper time to make its defense. In short, respondent claimed that it could not be sure of the procedural rights to which it was entitled under this proceeding. On November 4, 1963, the Commission issued its memorandum and order disposing of the petition for clarification of the prior order. The Commission did not change the format of the proceeding, merely holding, essentially, that the same procedure had been previously approved by the Ninth Circuit in *F.T.C. v. Washington Fish & Oyster Co.* [1959 TRADE CASES ¶ 69,487], 271 F. 2d 39 (1959) [6 S. & D. 666], where the court stated that any reasonable and fair method or procedure not forbidden by statute would be appropriate as a foundation for an enforcement proceeding.

I have always been of the opinion, and am of the opinion now, that investigational proceedings leading up to enforcement under Section 11 of the Clayton Act prior to its amendment by the so-called Finality Act are inherently investigational procedures, irrespective of whether the indicia of adjudicative proceedings are engrafted thereon. The Commission's function here is strictly an administrative one; it is in the same position as the Justice Department or a United States at-

proceedings to such an extent that as a result many persons might be misled as to its true character. I do not wish my participation herein to be the occasion of another delay in a case which has been plagued by too many procedural pitfalls since its inception.

TEXAS INDUSTRIES, INC.

Docket 8656. Order, May 18, 1965

Order denying respondent's request that the Commission furnish respondent with special reports obtained in the Commission's industrywide investigation of the cement industry.

ORDER DENYING MOTION FOR PRODUCTION OF DOCUMENTS

On April 22, 1965, counsel for respondent in the above-captioned proceeding filed with the hearing examiner a motion for production of documents pursuant to Section 3.11 of the Commission's Rules of Practice (effective August 1, 1963). Respondent, by this motion, sought to have produced for its inspection and copying certain Special Reports submitted to the Commission in response to orders issued under Section 6(b) of the Federal Trade Commission Act, 15 U.S.C. § 46(b), pursuant to a resolution of the Commission dated December 1, 1964, directing an investigation of corporations engaged in the production and distribution of portland cement. On April 28, 1965, complaint counsel filed an answer in opposition to respondent's motion. The hearing examiner determined that he did not have the authority to rule upon respondent's motion. Accordingly, pursuant to Section 3.6(a) of the Rules of Practice the examiner on May 5, 1965, certified respondent's motion to the Commission, recommending that the motion be denied.

The examiner acted correctly in certifying for the Commission's determination a motion seeking the production of material obtained by the Commission through the exercise of its investigatory powers under Section 6(b) of the Federal Trade Commission Act and placed in the Commission's confidential files. See *L. G. Balfour Co.*, F.T.C. Docket 8435 (Interlocutory Opinion, May 10, 1963) [62 F.T.C. 1541]. In the *Balfour* opinion the Commission explained in detail the considerations bearing on whether to release material from the Commission's confidential files for use by a respondent in preparing his defense in a Commission adjudicative proceeding. The Commission emphasized (p. 1546) that the question of whether to release such materials in a particular case "should be met with flexibility and discretion, not rigid formula," and that a determination of the question would depend

disposed of more expeditiously if the Commission proceeding were kept purely investigative in form as well as substance prior to assumption of jurisdiction by the courts in enforcement proceedings. The Commission could request enforcement simply by affidavit or other appropriate pleading and at that point the courts are in the best position to specify the nature of and ground rules for the hearing, on the basis of which they must exercise their judicial function in determining whether the order should be enforced.⁵

This history of this proceeding makes it abundantly clear that the distinction between adjudicative and investigative hearings should be kept well-defined. As far as can be determined after two years of procedural maneuvering, the investigation is very little, if any, closer to resolution than at its inception. The Commission should take heed of the Supreme Court's warning that the investigative process can be completely disrupted if investigative hearings are transformed into trial-like proceedings and that burdening of investigative proceedings with trial-like procedures may render them sterile.⁶ Here it is evident that the procedures governing this investigation have become ossified to the point where the Commission, the examiner, and counsel alike are in danger of losing sight of the fact that flexibility is at once the goal and justification of the administrative process.

The significance of what has happened here lies not so much in the sphere of enforcement of Commission orders under the Clayton Act; with the passage of the Finality Act in 1959, in all likelihood there will be a diminution of such proceedings. The implications of this case, however, should be carefully examined by the Commission in the context of all its investigative proceedings, for the record makes it plain that where an inherently investigative proceeding is given an adjudicative form, the result may well be an exercise in contrived futility.

In any event, I intend to refrain from participating further in this proceeding, either in ruling on the scope of this investigation or ultimately on the question of whether the Commission should apply to a court of appeals for affirmance and enforcement. Recent developments have made it clear to me that putting a hearing examiner in charge of investigative hearings tends to compromise both his position and the nature of the proceeding. As I have noted above, this essentially administrative matter has now taken on the appearance of adjudicatory

⁵ It has apparently been hitherto the "usual practice" if the assertion of violation is disputed for the court to remand the matter to the Commission for formal proceedings *F.T.C. v. Washington Fish & Oyster Co.*, *supra* n. 2, at 42 [6 S.&D. 666, 669].

⁶ *Hannah v. Larche*, 373 U.S. 420, 443, 448 (1960); see also *F.C.C. v. Schreiber*, 329 F.2d 517, 526 (9th Cir. 1964), *cert. granted*, 379 U.S. 927 (1964). As I noted in my dissent in *Mead Corporation*, File No. 571 0656, issued January 3, 1963 with respect to a similar situation, "I shall not join in this game of hare and hounds, where the facts are to be cornered only after the long and perhaps never-ending chase * * *".

reason to believe, their expectation and understanding that these Reports would not be released for the use sought in the present motion for production.

While we have determined that there is a very substantial public interest in not releasing the Special Reports in question to respondent in this case, we would do so if the needs of basic fairness so dictated. They do not. As noted above, no part of these Reports has been or will be turned over to complaint counsel to be introduced as evidence in this proceeding. Since no part of these Reports will become evidence in this proceeding, denial of access to them on the part of respondent is not a case of the Commission's denying a respondent "access to evidence which it controlled." *Union Bag-Camp Paper Corp. v. F.T.C.*, 233 F. Supp. 660, 666 (S.D. N.Y. 1964) [7 S.&D. 991, 998]. As the hearing examiner noted in his certification of May 5, 1965, recommending that the Commission deny respondent's motion for production, "the nature, outline and substance of the evidence upon which [complaint counsel] * * * intend to rely will be fully disclosed to respondent before the hearings begin." All evidence in the possession of complaint counsel will be subject to full discovery, which, under the Commission's Rules of Practice, is available to respondent as well as to complaint counsel. Therefore, we do not see how denying respondent production of the Special Reports obtained in the Commission's industrywide inquiry can materially prejudice respondent in preparing and conducting its defense to the complaint.

The court in the *Union Bag-Camp* case, cited above, held that the Section 6(b) procedure for obtaining information and data is an extraordinary power vested in the Federal Trade Commission as an agency charged with protecting the public interest, and was not intended by Congress to be available as a matter of right to private parties in preparing their defense in proceedings before the Commission. Just as a respondent cannot compel the Commission to conduct a Section 6(b) survey on his behalf, so he may not compel the Commission to turn over to him the fruits of such a survey where it has not been conducted by the Commission for the purpose of aiding in the prosecution of the case against respondent, and where release of the material obtained in the 6(b) inquiry would interfere with the Commission's effective performance of its statutory functions and duties. Here the only basis for respondent's motion for production is that the Special Reports may contain material that would be relevant or helpful in the preparation of its defense, and for the reasons stated, such a ground is, in the circumstances, insufficient. Accordingly,

It is ordered, That respondent's motion for production of documents dated April 22, 1965, be, and it hereby is, denied.

Commissioner MacIntyre not participating.

on all of the relevant facts. The Commission also stated: "In general, however, it may be said that an applicant must satisfy the Commission not only that the material sought is relevant and useful for defensive purposes, but also that its release would not impair any overriding public interest in preserving its confidentiality. In making its judgment the Commission will also necessarily take into account such considerations as basic fairness to the parties * * *." *Ibid.* Applying the criteria of the *Balfour* opinion to the present facts, the Commission has determined that respondent's motion for production of documents must be denied.

There is an overriding public interest in preventing the release of the Special Reports obtained through Section 6(b) orders in the Commission's industrywide investigation of cement producers from confidential status for use in this adjudicative proceeding. These Special Reports, submitted by fifty portland cement manufacturers, are an integral and important part of a broad administrative inquiry into certain serious and prevalent competitive problems of the cement industry (see the Commission's press release of December 7, 1964, announcing commencement of the inquiry)—an inquiry that is still continuing. The Reports have not been and will not be made available to complaint counsel for use as evidence in the present case. The concern of the inquiry, as the Commission explained in its order of April 14, 1965 [p. 1363 herein], in the above-captioned proceeding, denying respondent's motion to suspend the complaint, is "with preventing future unlawful mergers, by providing businessmen with guidance as to the probable legality of proposed mergers," and not with gathering evidence to be used in adjudicating the legality of already consummated mergers, such as the one challenged in this case.

The Commission's ability to conduct a sound and comprehensive industrywide inquiry in the cement industry and complete it with reasonable expedition is likely to be seriously impaired by releasing the Special Reports obtained in the inquiry for use in adjudicative proceedings such as the present one. Such release would be likely to engender resistance on the part of the companies filing the reports to further requests or demands by the Commission for information, and to seriously retard voluntary and constructive collaboration between the Commission and the industry in obtaining facts and data necessary to the industrywide inquiry. For much of the information contained in these Reports is highly confidential, and the parties filing the Reports would be extremely reluctant to see such information find its way into the hands of competitors, or into the public record of this adjudicative proceeding. The substantial cooperation the Commission has received from the reporting companies reflects in part, we have

York membership corporation, and that said International Paper Company Foundation has sold or contracted to sell said 5,000 shares to a purchaser or purchasers to whom International Paper Company would have been entitled to sell the same under the terms of the Commission's order of June 25, 1957.

MODERN MARKETING SERVICE, INC., ET AL., Docket 3783
C. H. ROBINSON COMPANY AND NASH-FINCH COMPANY,
Docket 4589

Orders, June 2, 1965

Order broadening an earlier order authorizing an investigation, denying a motion to terminate and for oral argument, and dismissing motion to disqualify Commissioner MacIntyre as moot.

ORDER BROADENING INVESTIGATION, DENYING MOTION TO TERMINATE
AND FOR ORAL ARGUMENT, AND DISMISSING MOTION TO DISQUALIFY
COMMISSIONER MACINTYRE AS MOOT

The hearing examiner appointed to preside over the investigational hearings in Docket No. 4589 has certified to the Commission a motion by Commission counsel for an amendment of the order directing the investigation. Respondents have submitted an answer opposing that amendment, a motion of their own "to terminate this proceeding," a motion for oral argument on both Commission counsel's request for amendment and their own motion to terminate, and a motion requesting that Commissioner A. Everette MacIntyre be disqualified from further participation in the proceeding.

The order in question, issued by the Commission on February 1, 1963 [62 F.T.C. 1486], directed an investigation to determine whether respondents have violated the provisions of a cease and desist order entered by the Commission under Section 2(c) of the amended Clayton Act, 15 U.S.C. 13(c), in a proceeding entitled *In the Matter of C. H. Robinson Company and Nash-Finch Company*, Dkt. 4589, 43 F.T.C. 297, 301-303 (1947). The substance of that order is that Robinson, a wholly owned subsidiary of Nash-Finch, is prohibited from accepting brokerage payments on its own or its parent's behalf, and Nash-Finch, a wholesale dealer in various fruit and vegetable products, is prohibited from receiving such brokerage payments through or from that subsidiary.

Commission counsel requests that the investigation be broadened to include, in addition to the question of whether respondents have violated that 1947 order, the further question of whether respondent Nash-Finch has also violated an earlier order issued by the Commission, *In re Modern Marketing Service, Inc., et al.*, Dkt. 3783, 37 F.T.C.

INTERNATIONAL PAPER COMPANY

Docket 6676. Order, June 1, 1965

Order granting consent to respondent corporation to transfer 5,000 shares of Longview Fibre Company stock held in the voting trust.

ORDER CONSENTING TO THE TRANSFER OF 5,000 SHARES OF LONGVIEW
FIBRE COMPANY STOCK HELD IN THE VOTING TRUST

Whereas, the Commission by order issued June 25, 1957 [53 F.T.C. 1192], in the above entitled matter ordered International Paper Company to divest itself absolutely, in good faith, within ten years, of all stock in Longview Fibre Company which was acquired through the merger of The Long-Bell Lumber Corporation and The Long-Bell Lumber Company with respondent; and

Whereas, pursuant to said order as an initial step in such divestiture International Paper Company with the Commission's approval transferred said stock, *viz.*, 160,000 shares to The Hanover Bank, as voting trustee under a Voting Trust Agreement dated August 29, 1957, between the International Paper Company and said Bank, in a form approved by the Commission; and

Whereas, said voting trust agreement provides for transfer of any or all of said shares to International Paper Company on the Commission consenting thereto or on certification by International Paper Company to said Bank that it has sold or contracted to sell the same in accordance with the terms of the order; and

Whereas, International Paper Company has petitioned the Commission to consent to the transfer to it (under appropriate safeguards for carrying out the requirements of the Commission's Order) of 5,000 shares of the 14,000 shares of capital stock of Longview Fibre Company now in the hands of the Voting Trustee, in connection with the donation of such shares to the International Paper Company Foundation, a nonprofit corporation incorporated in 1952 under the Membership Corporations Law of New York to receive funds exclusively for religious, charitable, scientific, literary and educational purposes;

Now therefore, upon consideration thereof,

It is ordered, That consent is hereby given to the transfer pursuant to the said Voting Trust Agreement, by The Hanover Bank to the International Paper Company, of 5,000 shares of capital stock of Longview Fibre Company held by said Bank as Voting Trustee under said Voting Trust Agreement upon the certification of International Paper Company to said Bank by an instrument signed by its president or vice president that it has assigned all its right, title and interest in said 5,000 shares to International Paper Company Foundation, a New

52, 55 (4th Cir. 1950). It can be avoided here; the hearings, having been delayed by litigation in the courts,² have not yet begun. Respondents will have ample opportunity to rebut any evidence Commission counsel might offer.

Respondents' position on these motions having been argued at great length in the voluminous papers already before us, nothing but further delay could be accomplished by an oral argument on them.

Commissioner A. Everette MacIntyre has withdrawn from any further participation in this proceeding. Respondents' motion that he be disqualified is therefore moot.

It is ordered, That the Commission's order of February 1, 1963, directing an investigation as to whether C. H. Robinson Company and Nash-Finch Company have complied with the order to cease and desist in Docket No. 4589 be, and it hereby is, amended to include an investigation as to whether Nash-Finch Company has complied with the order to cease and desist in Docket No. 3783.

It is further ordered, That respondents' motion to terminate the investigation in Docket No. 4589, for oral argument on Commission counsel's motion for amendment of the order directing that investigation, and on respondents' motion to terminate, be, and they hereby are, denied.

It is further ordered, That respondents' motion requesting that Commissioner A. Everette MacIntyre be disqualified from participation in this proceeding be, and it hereby is, dismissed as moot.

It is further ordered, That this matter be, and it hereby is, returned to the hearing examiner for expeditious hearings in accordance with the accompanying amended order directing an investigation as to whether C. H. Robinson Company and Nash-Finch Company have complied with the order to cease and desist in Docket No. 4589, and whether Nash-Finch Company has complied with the order to cease and desist in Docket No. 3783.

Commissioner MacIntyre not participating.

ORDER AMENDING PRIOR ORDER AND DIRECTING AN INVESTIGATION AS
TO WHETHER NASH-FINCH COMPANY AND C. H. ROBINSON COM-
PANY HAVE COMPLIED WITH ORDERS TO CEASE AND DESIST

The Commission on February 1, 1963 [62 F.T.C. 1486], having issued an order directing an investigation as to whether C. H. Robinson Company and Nash-Finch Company have complied with an order to cease and desist issued by the Commission in Docket No. 4589 on January 6, 1947; and

² *Nash-Finch Co. v. Federal Trade Commission et al.*, 233 F. Supp. 910 (D.C. Minn. 1964) [7 S.&D. 973].

386, 407-409 (1943), *aff'd Modern Marketing Service, Inc. v. Federal Trade Commission*, 149 F. 2d 970 (7th Cir. 1945). This order was also issued under Section 2(c) of the amended Clayton Act, and prohibits, *inter alia*, Nash-Finch and other named buyers of fruit and vegetable products from receiving or accepting from suppliers, directly or indirectly, brokerage payments or discounts in lieu of such brokerage payments.

Commission counsel argue, in effect, that respondents are attempting to prevent the introduction of evidence showing respondents are continuing to violate Section 2(c) of the amended Clayton Act, and the earlier 1943 order, by urging upon the hearing examiner and unduly narrow construction of the 1947 order. Commission counsel, therefore, seek to have respondents' compliance or noncompliance with the 1943 order added as a subject of the investigation "before actual hearings commenced to avoid possible endless arguments and bickering as to the proper questioning of witnesses and the propriety of introducing certain relevant evidence."

The Commission need not review the elaborate arguments advanced by respondents as to why it should not inquire into the question of whether they are complying with the 1943 order, but should, instead, terminate this inquiry as to their compliance with the 1947 order. The substance of those contentions is that (1) "no violation of law can be proven in regard to these matters,"¹ and (2) the Commission, having once started an investigation of respondents' compliance with one of the two cease and desist orders, is barred or "estopped" from investigating their compliance with the order. Both of these arguments are plainly without merit. The question of whether respondents have in fact violated one or more orders of this Commission is to be determined after an investigation, not before it. Moreover, that is a question to be decided by the courts, not the Commission.

Respondents' "estoppel" argument is equally ill-conceived. There can be no doubt that the Commission, had it so desired at the time this investigation was ordered in 1963, could have directed it to respondents' compliance with either or both of the cease and desist orders in question. *United States v. Morton Salt Co.*, 338 U.S. 632 (1950). And even if it be assumed that the Commission made a "mistake" of some sort in not anticipating that the investigation of the one order might disclose violations of the other, "it is unthinkable that the public interest should be allowed to suffer as a result of inadvertence or mistake on the part of the Commission or its counsel where this can be avoided." *P. Lorillard Co. v. Federal Trade Commission*, 186 F. 2d

¹ Respondents' Answer to Commission Counsel's Request for Amendment of Order, etc., April 26, 1965, p. 14, n. 1.

acting under the control of and in fact for and on behalf of said respondent Nash-Finch Company.

2. Receiving or accepting from any seller, directly or indirectly, anything of value as a commission or brokerage, or any compensation, allowance, or discount in lieu thereof, on or in connection with purchases made for respondent's own account or while acting for or in behalf of a purchaser as an intermediary or agent or subject to the direct or indirect control of such purchaser.

3. Paying, transmitting, or delivering to or for the benefit of any purchaser, either directly or in the form of money or credits or indirectly in the form of dividends, or otherwise, any commission or brokerage, or any compensation, allowance, or discount in lieu thereof, received from any seller while acting as an intermediary or agent for such purchaser or while subject to the direct or indirect control of such purchaser; and

Whereas by the said order to cease and desist in said Docket No. 4589 the respondent Nash-Finch Company and its officers, agents, representatives and employees, directly or through any corporate or other device in connection with the purchase of fruits, vegetables, and other commodities in commerce, as "commerce" is defined in the aforesaid Clayton Act, were ordered to forthwith cease and desist from—

1. Receiving or accepting from any seller, directly or indirectly, anything of value as a commission or brokerage, or any compensation, allowance, or discount in lieu thereof, on or in connection with purchases made for respondent's own account, either directly or by or through respondent C. H. Robinson Company.

2. Receiving or accepting from respondent C. H. Robinson Company, either directly in the form of money or credits or indirectly in the form of dividends, or otherwise, any commission or brokerage, or any compensation, allowance, or discount in lieu thereof, received by said C. H. Robinson Company from any seller while acting for or in behalf of said respondent Nash-Finch Company as an intermediary or agent for said respondent or while subject to the direct or indirect control of said respondent; and

Whereas the said orders to cease and desist have not at any time been modified or set aside and are now, and have for many years last past been in full force and effect; and

Whereas the Commission has reason to believe that respondent Nash-Finch Company and its officers, agents, representatives and employees, while engaged in commerce in the purchase of certain fruit and other products, may have violated the provisions of the said order

The Commission on June 2, 1965 [p. 1382 herein], having issued an order granting Commission counsel's motion that said order of February 1, 1963, be amended to direct, in addition to an investigation as to whether C. H. Robinson Company and Nash-Finch Company have complied with the order to cease and desist issued by the Commission in Docket No. 4589, an investigation as to whether Nash-Finch Company has complied with an order to cease and desist issued by the Commission in Docket No. 3783 on September 8, 1943:

It is ordered, That the said order of February 1, 1963, be, and it hereby is, amended to read as follows:

Whereas, pursuant to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," 38 Stat. 730 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. Sec. 13, the Federal Trade Commission on September 8, 1943, after due process and proceedings of record in Docket No. 3783 and in accordance therewith, issued and served upon respondent Nash-Finch Company an order to cease and desist under subsection (c) of Section 2, thereof, and on January 6, 1947, after due process and proceedings of record in Docket No. 4589 and in accordance therewith, issued and served upon respondents C. H. Robinson Company and Nash-Finch Company an order to cease and desist under the said subsection (c) of Section 2, thereof; and

Whereas by the said order to cease and desist in Docket No. 3783 the respondent Nash-Finch Company and its officers, agents, representatives, and employees, in connection with the purchase by such respondent of commodities in commerce, as "commerce" is defined in said Act, were ordered to forthwith cease and desist from—

"receiving or accepting from the sellers of such commodities, directly or indirectly, any brokerage fee, commission, or other compensation, or any allowance or discount in lieu thereof; * * *" and

Whereas by the said order to cease and desist in Docket No. 4589 the respondent C. H. Robinson Company and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the purchase of fruits, vegetables, and other commodities in commerce, as "commerce" is defined in the aforesaid Clayton Act, were ordered to forthwith cease and desist from—

1. Receiving or accepting from any seller, directly or indirectly, anything of value as a commission or brokerage, or any compensation, allowance, or discount in lieu thereof, on or in connection with purchases made by respondent Nash-Finch Company while

ORDER DENYING RESPONDENT'S MOTION FOR ISSUANCE OF ORDERS UNDER
SECTION 6(b) OF THE FEDERAL TRADE COMMISSION ACT

The hearing examiner has certified to the Commission a motion by respondent that the Commission issue a large number of orders to file special reports under Section 6(b) of the Federal Trade Commission Act for the purpose of acquiring information respondent alleges to be relevant and necessary to its defense. The examiner included with his certification a recommendation that the motion be denied. The Commission granted respondent leave to file a supplementary statement in support of its motion, and has also considered an answer in opposition filed by complaint counsel and respondent's reply thereto.

The complaint in this proceeding alleges that respondent violated Section 7 of the Clayton Act by the acquisition of a competitor, S. K. Wellman Company. Paragraph 9 of the complaint alleges that "the relevant product markets for the purposes of this complaint are the production, distribution, and sale of friction materials in general, and sintered metal friction material in particular, exclusive of friction materials used by the railroad industry." During the course of the pre-hearing conference and in the present motion, respondent has indicated an intention to challenge this definition of the relevant market. Respondent takes the position that the probable competitive effects of the acquisition must be viewed within the framework of all "systems, devices, and/or components for the transmission, conversion, and/or retardation of motion."

The survey that respondent seeks to have the Commission conduct by means of Section 6(b) orders is largely premised upon respondent's view of the relevant market. As the first part of the survey, respondent would have the Commission issue Section 6(b) orders upon some 309 companies which respondent believes to be engaged in manufacturing and selling "systems, devices and/or components for the transmission, conversion and/or retardation of motion." Principally each company would be required to specify the nature of the products of this type that it produces and the dollar value of sales of each such product. Additional and more detailed information would be sought from the relatively few firms within the relevant market defined by the complaint. As the second part of its survey, respondent would have the Commission issue Section 6(b) orders upon some 259 companies which are believed to be purchasers of systems, devices or components within the relevant market asserted by respondent. Purchasers would be required to indicate the specific type of such components purchased and the dollar value of the purchases of each such type. Finally, respondent wishes to survey all those companies (the number of which

to cease and desist in Docket No. 3783, and that respondents C. H. Robinson Company and Nash-Finch Company and their officers, agents, representatives and employees, while engaged in the purchase of such fruit and other products, may have violated the provisions of the said order to cease and desist in Docket No. 4589, as heretofore set forth; and

Whereas it is deemed by the Commission to be in the public interest to ascertain the extent to which such violations may have occurred;

Now, therefore, it is ordered, That a public investigational hearing be conducted for this purpose pursuant to Rule No. 1.35 and related rules of the Commission's Rules of Practice.

It is further ordered, That the Chief Hearing Examiner shall appoint and designate a hearing examiner to preside at such hearing with all the powers and duties as provided by Section 3.15 of the Commission's Rules of Practice, except that of making and filing an initial decision; that upon completion of the hearing, the hearing examiner shall certify the record to the Commission with his report on the investigation; that respondents C. H. Robinson Company and Nash-Finch Company shall have the right of due notice, of cross-examination, of production of evidence in rebuttal; and that the hearing shall be conducted in accordance with the Commission's Rules of Practice for adjudicative proceedings insofar as such rules are applicable.

It is further ordered, That the hearings shall be held at such time and at such places as may be necessary, the initial hearing to be held at a place to be fixed by the said hearing examiner on a day occurring at least thirty (30) days after the service of notice thereof upon respondents C. H. Robinson Company and Nash-Finch Company.

It is further ordered, That the proceedings heretofore conducted pursuant to the Commission's order of February 1, 1963, have the same force and effect as though conducted under that order as amended herein.

It is further ordered, That the Secretary shall cause service of this order to be made on said respondents C. H. Robinson Company and Nash-Finch Company.

Commissioner MacIntyre not participating.

AMERICAN BRAKE SHOE COMPANY

Docket 8622. Order, June 2, 1965

Order denying respondent's motion for orders requiring special reports authorized by Sec. 6(b) of the Federal Trade Commission Act.

under a duty to conduct those proceedings in accordance with Section 7(c) of the Administrative Procedure Act which provides that "every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, and unduly repetitious evidence * * *." Without intruding upon the province of the examiner to determine the admissibility of specific evidence offered at the hearings, we can appropriately indicate the following: Nothing that respondent has revealed to date about the intended nature and scope of its defense provides any reason to suppose that respondent would find it necessary to offer, or that the examiner would find it necessary to admit, so vast a volume of testimony as respondent now suggests as the alternative to a Section 6(b) survey.

It is apparent from the proposed survey itself and from respondent's present arguments that respondent has misconceived the scope of the product-market issue in this case. The complaint alleges that the relevant product market is the production, distribution, and sale of friction materials in general and sintered metal friction materials in particular. If complaint counsel is able to establish that the line of commerce specified in the complaint is a valid one under the standards established by the Supreme Court, *e.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294, 325; *United States v. Philadelphia National Bank*, 374 U.S. 321, 356-57; and *United States v. Aluminum Co. of America*, 377 U.S. 271, it is entirely irrelevant that there might also be some broader market, encompassing additional products and additional sellers, which would also constitute a proper framework in which to consider the acquisition. See *United States v. Continental Can Co.*, 378 U.S. 441. In other words, it makes no difference whether the product market specified in the complaint constitutes a primary market or merely a well-defined submarket.¹ Section 7 prohibits any acquisition which may substantially lessen competition or tend to create a monopoly "in any line of Commerce."

Although the proposed survey (or the subpoenaed testimony of hundreds of sellers and purchasers, which respondent poses as the alternative) might incidentally yield a certain amount of information bearing on the only relevant-market issue in the case, this issue

¹ Complaint counsel during the prehearing conference acknowledged the limitations imposed by the complaint:

"Hearing Examiner SCHRUP. Do I understand you to say that if the proposed market or the line of commerce was expanded to the extent asked for by the respondent, that then the case in chief would fall on the basis of the material you have?"

"Mr. GRUNDMAN. We have alleged a line of commerce which we must establish. Unless we establish this, the complaint must be dismissed, or in the unlikely event that evidence is adduced which might call for us to amend the complaint, it would have to be within the scope of the original complaint. I think that we must make our case on the basis that we have alleged in the complaint."

"Hearing Examiner SCHRUP. In other words, you have the burden of proof, of proving the product market."

"Mr. GRUNDMAN. Yes, sir."

is unspecified) that are engaged as resellers of friction materials (within the definition of the complaint) in the Boston, Chicago, and Los Angeles areas.

In this case, as distinguished from several others in which respondents have sought to have the Commission conduct surveys pursuant to Section 6(b), the Commission has not heretofore issued any Section 6(b) orders in connection with its investigation of the acquisition and thus none of the evidence that complaint counsel will offer in evidence has been obtained from special reports. Respondent thus makes no contention that the Commission should conduct the proposed survey in order to afford equal access to the Commission's discovery and investigational procedures.

Indeed, respondent does not assert that it has a legal right to have the Commission conduct a survey on its behalf pursuant to Section 6(b) (it states, however, that it does not waive such a contention). It contends only that such a survey would be a speedier and more efficient method of acquiring the information needed in its defense than would the issuance of subpoenas upon a responsible official of each of the several hundred companies from which it desires to obtain information. Moreover, respondent urges that the market-share information which it supplied to the Commission staff prior to issuance of the complaint, and which complaint counsel now intends to introduce in evidence, is inadequate and inaccurate and that without some further survey of companies within the relevant market as defined in the complaint, complaint counsel could not possibly establish a *prima facie* case.

As respondent recognizes, the Commission has on a number of recent occasions denied similar motions by respondents in merger cases on the ground that the discovery procedures and compulsory process provided by the Commission's Rules of Practice for Adjudicative Proceedings had not been shown to be inadequate or unavailable. *Union Bag-Camp Paper Corp.*, Docket No. 7940, orders issued July 30, 1962, and April 5, 1963; *Frito-Lay, Inc.*, Docket No. 8606, order issued July 30, 1964 [66 F.T.C. 1533]. See also *Union Bag-Camp Paper Corp. v. Federal Trade Commission*, 233 F. Supp. 660 (S.D.N.Y. 1964) [7 S.&D. 991].

Despite American Brake Shoe's vigorous efforts to distinguish these cases, we are unable to conclude that it has made a more convincing showing of the necessity for the Commission's undertaking a vast, expensive and time-consuming survey by means of Section 6(b) orders. We are not persuaded by respondent's argument that it will be more economical to have several hundred companies fill out a form than to have a representative of each appear at a hearing or deposition in response to subpoenas. Examiners in Commission proceedings are

tion or recurrence of the practices charged against Federated in the complaint.

SCHENLEY INDUSTRIES, INC., ET AL.

Docket 6048. Statement, June 11, 1965

Statement of Commissioner MacIntyre withdrawing from consideration of this case on the grounds that as a staff member in 1954 he had supervised its prosecution.

STATEMENT OF COMMISSIONER MACINTYRE RE RESPONDENTS' PETITION
TO REOPEN PROCEEDINGS

On June 10, 1965, respondents in this matter filed a Petition to Reopen Proceedings for Purpose of Modifying Order to Cease and Desist. The order to cease and desist was issued on March 2, 1954 [50 F.T.C. 747], pursuant to a consent settlement.

Disposition of the pending Petition will call for the Commission to exercise its judgment on matters of public policy, fact, and law as provided for in 15 U.S.C. § 45(b). It appears that in doing this the Commission will be passing judgment on some of the public policy and other questions which were before the Commission when it decided to issue the complaint in Docket No. 6048 and again when it issued its order to cease and desist in this case on March 2, 1954. Under these circumstances, the task of the Commission here is to resolve issues under § 3.28(b)(2) of the Commission's "Rules of Practice for Adjudicative Proceedings."

When the Commission issued its complaint in Docket No. 6048 and subsequently until after the Commission had issued its order to cease and desist in this case on March 2, 1954, I served as Assistant Director of the Commission's Bureau of Antimonopoly and Chief of its Division of Investigation and Litigation. In that capacity I not only supervised the prosecuting staff which handled this matter, but also actively participated in the formulation of the order to cease and desist, the modification of which is sought by the pending petition.

In view of the foregoing, I have decided to refrain from participating in the Commission's consideration and action on respondents' Petition to Reopen Proceedings for the purpose of modifying the order to cease and desist.

plainly lends itself to more direct methods of proof, such as the expert-opinion testimony of persons familiar with the structure and functioning of the industry. While the parties to Commission proceedings have a considerable freedom to put on their cases in the manner they deem most effective, there is no absolute right to employ indirect, diffuse, repetitious, or protracted methods of proof when simpler and more expeditious ones are readily available. See *Great Lakes Airlines, Inc. v. Civil Aeronautics Board*, 291 F. 2d. 354, 362-63 (9th Cir.), *certiorari denied*, 368 U.S. 890.

We conclude that the regular processes of the Commission's Rules of Practice will be adequate to permit effective and expeditious litigation of all the relevant issues of this case and that it would not be in the public interest for the Commission to conduct a survey such as that proposed by respondent. Accordingly,

It is ordered, That respondent's motion for orders requiring the filing of special reports pursuant to Section 6(b) of the Federal Trade Commission Act be, and it hereby is, denied.

ASSOCIATED MERCHANDISING CORPORATION ET AL.

Docket 8651. Order, June 10, 1965

Order rejecting respondent's offer to negotiate a consent settlement and remanding the case to hearing examiner.

ORDER REJECTING OFFER OF CONSENT SETTLEMENT

This matter is before the Commission on the certification of the hearing examiner on May 18, 1965, of the motion of respondent Federated Department Stores, Inc., filed April 22, 1965, requesting that the Commission waive the provisions of § 2.4(d) of the Rules of Practice and proposing a consent order for the consideration of the Commission. The Commission waived § 2.4(d) of the Rules of Practice and carefully reviewed the offer of settlement and the statement of respondent in support thereof. The Commission has determined that the proposal of respondent Federated Department Stores, Inc., for a consent settlement should be rejected as inadequate. Accordingly,

It is ordered, That the proposed consent settlement of respondent Federated Department Stores, Inc., be, and it hereby is, rejected.

It is further ordered, That this matter be, and it hereby is, remanded to the hearing examiner for further proceedings in accordance with the Commission's Rules of Practice.

Commissioners Elman and Jones dissent. In their view, Federated's offer provides a reasonable basis for working out a settlement without protracted litigation on terms that would effectively prevent continua-

ORDER PROVIDING FOR REARGUMENT OF APPEALS ON REMAND

On June 7, 1965, the Supreme Court vacated the judgment of the Court of Appeals for the District of Columbia Circuit which had set aside the Commission's order to cease and desist entered in the above-captioned proceeding, and remanded the case to that court "with instructions to remand it immediately to the Federal Trade Commission for further proceedings, without the participation of Chairman Dixon, in light of *Atlantic Refining Co. v. Federal Trade Comm'n*, 381 U.S. 357 (1965)." Pursuant to the mandate of the Supreme Court, the Court of Appeals on June 16, 1965, remanded the case to the Commission.

In accordance with the directions of the Supreme Court and the Court of Appeals,

It is ordered, That:

(1) The Commission's decision and order of April 15, 1963 [62 F.T.C. 1172], in which Chairman Dixon participated, be, and it hereby is, vacated.

(2) The appeals from the hearing examiner's initial decision of September 24, 1962, are set down for oral argument on July 8, 1965, at 2:00 p.m., in Room 532 of the Federal Trade Commission Building, Washington, D.C., with 45 minutes allowed for each side. All questions of law and fact presented by the appeals will be considered by the Commission on the basis of the entire record. The Commission suggests that the oral argument will be most useful if counsel focus on the question whether the facts of record in the present case bring it within the Supreme Court's decision in the *Atlantic Refining Co.* case.

(3) Both sides may submit supplemental briefs with respect to the issues involved in the appeals, provided that such briefs are filed no later than August 9, 1965.

Commissioners Dixon and MacIntyre not participating.

THE B. F. GOODRICH COMPANY AND THE TEXAS
COMPANY

Docket 6485. Order, June 21, 1965

Order denying respondent's motion to postpone oral reargument and the filing of briefs.

ORDER DENYING MOTION TO POSTPONE ORAL REARGUMENT AND FILING
OF BRIEFS AND DISMISSING MOTION FOR LEAVE TO FILE BRIEF

By order of June 18, 1965, the Commission scheduled oral reargument in this matter for July 8, 1965, and directed that supplemental briefs may be filed by August 9, 1965. On June 18, 1965, counsel for

AMERICAN BRAKE SHOE COMPANY

Docket 8622. Order, June 17, 1965

Order denying respondent's request for reconsideration of Commission's earlier denial of motion for issuance of subpoenas.

ORDER DENYING MOTION FOR RECONSIDERATION

On June 7, 1965, respondent, purporting to act pursuant to Section 3.6 of the Commission's Rules of Practice for Adjudicative Proceedings, filed a "Motion for Reconsideration" of the Commission's order of June 2, 1965 [p. 1387 herein], denying respondent's motion for issuance of orders under Section 6(b) of the Federal Trade Commission Act. Although the Rules do not provide for the filing of such a request for reconsideration of an interlocutory matter certified by the examiner, the Commission has nonetheless given it full consideration.

Respondent contends that the June 2 order "cannot stand as written because either (1) it is premised on a mistaken view of respondent's contention as to the relevant product line and therefore does not fairly meet the issue posed by the motion; or (2) the order improperly holds that respondent is not entitled to prove affirmatively that the proper relevant market includes products other than those listed in the complaint."

The Commission has reviewed its June 2 order in light of respondent's present contentions, and concludes that it reflected an entirely correct understanding of respondent's position regarding the definition of a relevant market, as set forth in its answer to the complaint and in its statements during the prehearing conference. Furthermore, nothing contained in the June 2 order is fairly susceptible to the interpretation that respondent is to be prevented from trying to prove that the relevant market defined in the complaint is invalid and that the much broader product market it suggests "is the *only* market in which the impact of the merger can validly be tested."¹

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

THE B. F. GOODRICH COMPANY AND THE TEXAS COMPANY*Docket 6485. Order, June 18, 1965*

Order vacating an earlier order and setting time for reargument of the case.

¹ Respondent's motion of June 7, 1965, p. 3. (Emphasis in the original.)

one of the respondents filed a motion requesting that oral reargument be deferred pending the Supreme Court's disposition of petitions for rehearing in *Atlantic Refining Co. v. F.T.C.* [7 S. & D. 1238], and further requesting leave to file a brief. And in a telegram dated June 17, 1965, counsel "renew[ed] our motion to defer argument until after disposition of Atlantic-Goodyear petition for rehearing and until parties have reasonable time to brief matter prior to any argument that may take place."

The motion for leave to file brief is moot, in view of the Commission's order of June 18, 1965, providing for the filing of briefs. The requests for a postponement of oral reargument and filing of briefs must, we think, be denied. The complaint in this matter was issued on January 11, 1956 [62 F.T.C. 1172], more than nine years ago, and respondents continually urged that the case be completed expeditiously, and without unnecessary delay.¹ The Supreme Court directed that this case be remanded to the Commission "immediately" and that its own judgment "shall issue forthwith." In the circumstances, the public interest would not be served by further postponements. Should the Supreme Court grant the petitions for rehearing filed in the *Atlantic Refining Co.* case, there will be time enough for such further proceedings in the present case as may be appropriate in light of the Supreme Court's action. Finally, consideration of the merits of the appeals will be furthered by permitting briefs to be filed after oral reargument. Accordingly,

It is ordered, That the motion for postponement of oral reargument and filing of briefs be, and it hereby is, denied and that the motion for leave to file briefs be, and it hereby is, dismissed as moot.

Commissioners Dixon and MacIntyre not participating.

¹ At one point the respondents sought in federal district court to enjoin further Commission proceedings on the ground of undue delay.

DECISIONS AND ORDERS

	Page
Counter tops, plastic.....	1156
Crackers	263
Dairy products.....	282
Frozen	473
Diesel training, correspondence course.....	860
Drug and medicinal preparations.....	1158
"Anacin"	430
"Bayer Aspirin".....	430
"Bufferin"	430
"Excedrin"	430
"St. Joseph Aspirin".....	430
Drugstore merchandise.....	1158
Electrical products:	
Appliances	975
Household	20
Shavers	20
Tools	20
Electronic parts.....	195, 223
"Excedrin" drug preparation.....	430
Fingerprinting science, correspondence course.....	860
Floor coverings.....	1156
Food plans, freezer.....	1059, 1318
Freezer-food plan.....	1059, 1318
Freezers	1059, 1318
Frozen dairy products.....	473
Fruits, fresh.....	237
Fur products	77, 267, 290, 367, 455, 461, 981, 988, 1049, 1137, 1308
Gasoline	341, 941
Golf bags.....	84
Grocery products	999
Hosiery	1338
Incandescent light bulbs.....	735
"Irregular" hosiery.....	1338
Jewelry	974
Costume	468
Lamps, photographic.....	235
"Lifetime Charge" battery additive.....	470
Light bulbs, electric.....	735
Luggage	84
Mail order merchandise.....	299
Miscellaneous merchandise.....	974
National Labor Record, publication.....	1055
Paperback books.....	1073
Paper products.....	138, 157
Patio covers, aluminum.....	1
Petroleum products.....	941
Phonographs, high fidelity.....	978
Photographic lighting products.....	235
Plastic products: Floor and wall coverings, vinyl.....	1156
Portland cement.....	67