# INTER-STATE BUILDERS, INC., ET AL.

*Docket 8624. Order, Jan. 13, 1967*

Order granting respondents' motion to file brief with respect to procedural issues of the case.

## ORDER ON RESPONDENTS' MOTION

This matter is before the Commission on a motion by respondents to file a brief in the appeal herein limited to the procedural issues involved in the Commission's Order Directing Remand dated April 22, 1966 [69 F.T.C. 1152]. Complaint counsel submits that the motion should be denied, although contending that the Commission is now in a position to dispose of the matter on its merits.

Respondents in this matter were charged with making false and deceptive statements in advertising in connection with the sale of home improvement materials to the public. After full evidentiary hearings the examiner issued an initial decision on January 21, 1965, sustaining the allegations of the complaint and

[1] See *Modern Methods, Inc., et al.*, 60 F.T.C. 309, 339 (1962); *Foster-Milburn Co., et al.*, 51 F.T.C. 369, 371 (1954).

ordering respondents to discontinue the practices with which they had been charged.

Respondents appealed from this decision both on the substantive issues in dispute relating to the allegedly deceptive practices and on the ground that the examiner had erred in refusing to inspect certain interview reports to determine whether they were required to be provided for purposes of impeaching complaint counsel's consumer witnesses.

The Commission, not reaching the merits of the case, sustained respondents' claim with respect to the examiner's failure to make the requested inspection of interview reports and remanded the matter to the examiner with directions to:

(1) examine the interview reports made with respect to each of the witnesses (other than Milton S. Gottesman) called by counsel supporting the complaint to determine by appropriate procedures, including a hearing if necessary, whether or not such reports contain pre-hearing statements which should be made available to respondents' counsel under the "Jencks rule" as described in the Commission's opinion of this date;

(2) deliver to respondents' counsel any of such reports or portions thereof found by him to be statements within the meaning of the "Jencks rule" and to be relevant for the purposes of cross-examination;

(3) if requested by respondents' counsel reconvene the hearing-in-chief to permit respondents' counsel to utilize such reports or portions thereof for the purpose of cross-examining any of such witnesses whom respondents' counsel requests be recalled for such purpose; and

(4) issue a new initial decision which should include specific findings with respect to the issues presented on this remand.

Pursuant to this order a hearing was held on August 15, 1966, at which complaint counsel produced copies of field reports with respect to each of the eighteen consumer witnesses who had testified in support of the complaint. The examiner inspected each of these reports "in camera" to determine whether any or all of said reports contained "Jencks statements." Complaint counsel and counsel for respondents each advised the examiner that they would waive the refiling of proposed findings of fact, conclusions of law and order, which had originally been submitted prior to the original decision of January 21, 1965.

The examiner thereupon issued an initial decision filed on September 9, 1966 [72 F.T.C. 370, 373], which was identical to his previous decision except that he inserted a brief additional conclusion that the investigator's reports of interviews with the eighteen consumer witnesses were mere summaries and none contained a "Jencks statement." Respondents have appealed.[1]

[1] On October 15, 1966, respondents were granted an extension of time to file their appeal brief until December 22, 1966, the date on which the present motion papers were filed.

In the motion considered herein respondents contend that the examiner "failed to follow the Commission's directions on remand and that this threshold procedural matter should be resolved initially, prior to briefing and arguing the appeal on the additional substantive issues raised in the record in its present state." Respondents have also submitted a brief limited to the simple issue of the propriety of the procedure followed by the examiner in conducting the hearing on remand.

Complaint counsel disputes respondents' contention that the examiner failed to follow the Commission's directions on remand but takes the position that since no new facts have been introduced, no new conclusions have been reached and the order is identical to that originally proposed by the examiner, the Commission should now dispose of the matter on its merits.

In our opinion it would be improper to hear and decide the issues in the case on a piecemeal basis, since such a procedure would serve only to prolong the final determination of the matter and to cause unnecessary duplication of effort in the consideration of the cause. However, since the parties have filed briefs with respect both to the substantive and to the procedural issues in dispute, there would appear to be no valid reason why the case could not be presented to the Commission on the basis of the briefs submitted in connection with this motion as well as the briefs filed on the original appeal herein.

Accordingly, respondents will be permitted to file their brief limited to the procedural issues in the case, but the request that the Commission confine its consideration of the case to this single issue will be denied. With respect to the substantive issues the parties may rely on their briefs previously filed or file supplementary briefs incorporating any additional arguments on the merits which they may wish to make. Although respondents' time for filing their appeal brief has expired, they will be granted an additional period of time to file such supplementary brief. It is therefore

*Ordered,* That

1. Respondents' motion to file a brief with respect to the procedural issues it has raised be and it hereby is granted.

2. Respondents' request that the Commission dispose of these procedural issues prior to consideration of the substantive issues in the case be and it hereby is denied.

3. In presenting the case to the Commission on the appeal herein the parties may rely in whole or in part on the briefs submitted herein as well as the briefs filed in connection with respondents' appeal from the hearing examiner's initial de-

cision dated January 21, 1965. Any additional brief filed by respondents shall be filed within twenty days after service of this decision upon them and any answering brief by complaint counsel shall be filed within ten days after service upon him of respondents' brief. Respondents shall advise the Secretary within seven days after service of this order upon them whether or not they intend to file such supplementary brief.

Commissioner Elman not concurring.