

Now, therefore, it is ordered, That the respondent Jordan L. Lichtenstein is entitled to counsel, and is hereby granted leave to proceed *in forma pauperis*.

It is further ordered, That respondent's request for counsel be, and it hereby is, granted and the matter is hereby referred to the Committee on the Federal Trade Commission of the Antitrust Section of the American Bar Association for the designation of counsel to assist respondent Jordan L. Lichtenstein in prosecuting his appeal.

It is further ordered, That said respondent's time for perfecting an appeal to the Commission shall expire on January 31, 1971.

NATIONAL BISCUIT COMPANY

Docket 5013. Order, Dec. 18, 1970

Order denying complaint counsel's appeal from the examiner's ruling denying a motion to quash a subpoena *duces tecum* requiring the production of documents from Commission's files in four other cases.

ORDER DENYING APPEAL FROM RULING OF HEARING EXAMINER

Counsel for the Commission has filed an appeal from the hearing examiner's ruling denying a motion to quash a subpoena *duces tecum* requiring the production of documents from the Commission's files in the matters of National Tea Company, Docket 5648, Manhattan Brewing Company, Docket 4572, United Buyers Corporation, Docket 3211, and National Biscuit Company, Docket 5013.

The proceeding before the examiner is being held under the mandate of the Court of Appeals for the 5th Circuit for the purpose of determining whether the Commission employed an informal consent settlement procedure in entering an order to cease and desist against respondent herein in 1944. In granting the motion for issuance of the subpoena *duces tecum*, the examiner held that inspection of the documents called for by the subpoena would be one of the most reliable means of determining whether it was the practice of the Commission in 1944 to permit informal consent procedures and that to deny respondent reasonable access to such records would be "to deny respondent key corroborating evidence of its alleged version of the practice followed in this matter."

Commission counsel opposes the subpoena on the ground that it requires the production of documents which reflect the private deliberation and thought processes of the Commission and which are therefore privileged. He concedes, however, that there are serious countervailing policy considerations militating toward granting re-

lease of the documents. These considerations are that the documents may be the best evidence now available as to the procedures employed by the Commission in 1944 and that the court has ordered the Commission to determine for the court's purposes the nature of the 1944 order.

In view of the unusual circumstances involved in this case, particularly the fact that the court has directed that a resolution of the consent order issue be made, the Commission is of the opinion that it must deny complaint counsel's appeal and permit release of the documents called for by the subpoena:

It is ordered, That the appeal of counsel for the Commission from the hearing examiner's ruling denying the motion to quash the subpoena *duces tecum* be, and it hereby is, denied.

Commissioner MacIntyre not participating.

KOPPERS COMPANY, INC.

Docket 8755. Order and Opinion, Dec. 18, 1970

Order vacating initial decision and remanding case to hearing examiner for *de novo* trial.

OPINION OF THE COMMISSION

This is an appeal by complaint counsel from a hearing examiner's initial decision dismissing the complaint.

I

COMPLAINT, ANSWER, AND PROCEEDINGS BELOW

The complaint issued on January 12, 1968, and states that Koppers Company, Inc., (hereinafter "Koppers") is engaged in the manufacture and sale of resorcinol, an organic chemical which is important in the manufacture of rubber tires and other products. The complaint charges that respondent has monopolized, attempted to monopolize, and has lessened or hindered competition in the production of this chemical, and that Koppers would now be in substantial competition with others if it were not for certain unfair methods of competition and certain unfair acts and practices of respondent which have been used for the purpose of promoting and maintaining a monopoly. Specifically, respondent is charged with the use of persuasion, intimidation, threats, coercion, price cuts, and long term requirements contracts for the purpose of maintaining a monopoly. It is alleged that the effects of respondent's acts and practices have been to discourage or foreclose the entry of actual or potential rival producers in the

resorcinol market, including U.S. Pipe and Foundry Company, hereinafter "U.S. Pipe"). According to the complaint, the alleged acts and practices constitute unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

Respondent's answer admits certain jurisdictional facts and also admits that it is engaged in the manufacture and sale of resorcinol. The answer denies all of the other allegations of the complaint.

After extensive pretrial hearings on discovery, the formal hearings began on January 12, 1970. The hearings were recessed on two occasions to allow for additional discovery and preparation for cross-examination. Complaint counsel rested on February 5, 1970, and respondent moved to dismiss the complaint. This motion was denied by the hearing examiner, and respondent was ordered to proceed with its defense. Respondent elected not to put on a defense and the record was closed.

II

THE INITIAL DECISION

In an initial decision filed April 30, 1970, the hearing examiner determined that respondent's motion to dismiss the complaint should be granted because the public interest at this time does not require the issuance of a cease and desist order. The hearing examiner also found that respondent was denied due process in the preparation of its defense.

The hearing examiner said that Koppers' actions in 1964, 1965, and 1966 with respect to prices and contracts as well as actions specifically aimed at U.S. Pipe were inhibiting and not commendable, but unsuccessful; and that the improper acts and practices alleged in the complaint were, to a degree, true.¹ According to the hearing examiner, Koppers' market position was the result of "economic factors" and not any wrongful conduct.² He found that the acts and practices had been stopped and entry into the resorcinol market by U.S. Pipe was an accomplished fact. The initial decision says that the record shows three crucial facts: (1) the total requirements contracts, one of the alleged illegal practices, were abandoned a year after being signed—before U.S. Pipe commenced production and two years before the complaint issued; (2) no effort has been made by Koppers to reinstitute any of the alleged illegal practices; and (3) competition has been solidly entrenched by the entry of U.S. Pipe.³ The examiner concluded, therefore, that the practices alleged in the complaint had been aban-

¹ Findings 44, 46.

² Finding 41.

³ Finding 74.

doned and that the public interest did not require the issuance of a cease and desist order. He also held that the complaint must be dismissed because Koppers was denied due process by reason of the Commission order of January 9, 1970, which, it is claimed, forced Koppers to go to trial without adequate discovery.

In this appeal, complaint counsel has alleged numerous errors, both in the hearing examiner's findings of fact and in his conclusions. In view of our decision on the procedural issue, it will not be necessary to treat complaint counsel's contentions concerning the errors made by the examiner in making certain factual findings which were the basis of the decision on the merits.

III

THE DISCOVERY ISSUE

In preparation for the evidentiary hearings, Koppers applied for and obtained a subpoena from the hearing examiner calling for the production of records and documents pertaining to U.S. Pipe's production of resorcinol, including documents showing prices, sales, production costs, and profit or loss.⁴ U.S. Pipe resisted production of documents covered by this subpoena to the point where the Commission was required, on June 4, 1969, to file a petition in the United States District Court for the District of Columbia for an order requiring U.S. Pipe to produce documentary evidence called for by the Commission's subpoena. While the discovery proceeding was pending in the District Court, the Commission issued an order on June 13 directing that evidentiary hearings were to commence no later than ten days after the hearing examiner had decided, on the basis of the disposition of the District Court petition, that Koppers' discovery needs have been met.

On October 2, 1969 [304 F. Supp. 1254], the District Court entered an order directing compliance with the subpoena subject to certain conditions and with instructions on the issuance of protective orders. On October 14, 1969, the hearing examiner held a prehearing confer-

⁴ The subpoena was issued on November 20, 1968, and as later modified by the examiner on December 3, 1968, called for the production of records and documents covering the period from April 1, 1965, to March 12, 1968 (except for Items 5 and 6 for which the time period is January 1, 1962, to March 12, 1968), and pertaining to U.S. Pipe's production of resorcinol, including documents showing prices, sales, production costs, profit or loss, and documents concerning these estimates and past estimates or forecasts. On November 12, 1969, the hearing examiner issued an "updating" subpoena. As indicated later in the opinion, the scope of discovery is usually left to the discretion of the examiner and we will not overrule his decision in this case to issue a subpoena. However, as a matter of law, we do not interpret the decision in *FTC v. Columbia Broadcasting System Co.*, 5 CCH Trade Reg. Rep., Para. 72,835 (7th Cir. 1969 [414 F.2d 974]), as authority for the proposition that respondent may make initial requests for a subpoena and while that request is pending to seek still another "updating" subpoena. *Columbia Broadcasting* will be confined to its special facts, and only in the most compelling circumstances are respondents or innocent third parties to be subjected to multiple subpoenas.

ence for the purpose of accepting return by U.S. Pipe of documents called for by the subpoena and ordered to be produced by the District Court. Documents were produced by U.S. Pipe, but the examiner failed to rule, as the Commission had ordered on June 13, on the adequacy of this return.

Although the examiner had not ruled on the completeness of U.S. Pipe's return, respondent requested that the Commission set the opening date of hearings for January 12, 1970.⁵ Respondent's motion was accompanied by an affidavit by its counsel which raised no question about unresolved discovery issues. On the contrary, the motion and affidavit could be read as a representation that respondent's discovery needs had been met and it would be ready for trial on January 12. Relying upon respondent's arguments and sworn statements, the Commission issued an order on November 19, 1969, granting respondent's request to set the hearing date for January 12, 1970. A subsequent joint motion by complaint counsel and respondent to withdraw from adjudication for the purpose of negotiating a consent settlement was rejected by the Commission and on January 9, 1970, the Commission issued an order confirming the January 12 hearing date previously requested by respondent. Although the issue of the completeness of the discovery return had not been raised by respondent in its motion or affidavit requesting the January 12 hearing date, the Commission nevertheless specifically made allowance for additional discovery. The Commission's January 9 order said:

To the extent that any issues relating to the adequacy of compliance with subpoenas may be outstanding, the hearing examiner will make the necessary disposition with respect thereto at the hearings beginning January 12, 1970.

Respondent's argument that the January 9 order was "in effect, a direction to the examiner to deny any further production of documents"⁶ is contrary to the letter and spirit of our order. The Commission had no such intention. On the contrary, it was the Commission's intention that respondent be given all the discovery to which it is entitled.

While respondent is in error about the Commission's intention respecting the January 9 order, this does not dispose of its contentions about the effects of that order as interpreted by the examiner. Respondent charges that as a result of the January 9 order, it has been denied adequate discovery. Respondent argues: (1) that many documents called for by the subpoena were not produced before the start of the trial on January 12, 1970, and although they were produced at various times during the trial (January 27, February 3, and Febru-

⁵ Koppers' Motion to Reset Opening Date of Hearings to January 12, 1970 (11/12/69).

⁶ Respondent's Brief, p. 22.

ary 5), they were not available for use in the cross-examination of some of complaint counsel's witnesses immediately after direct examination; and (2) other documents called for by the subpoenas have never been produced. Respondent also argues that all documents produced before the start of the trial were of limited usefulness because of unduly restrictive protective orders that were thought to be necessary to protect U.S. Pipe's trade secrets and other confidential information.

V

REASON FOR REMAND

Although we believe that the examiner misinterpreted our order of January 9, 1970, and that he was under no compulsion to begin the taking of testimony before satisfaction of all discovery needs, the facts remain that he began the trial, the witnesses were called, and Koppers was required to begin cross-examination before there was any ruling by the examiner on the adequacy of the subpoena return.⁷ Apparently, complaint counsel would have the Commission dispose of the discovery issue and go to the merits by reviewing all exhibits and testimony to determine the actual extent of discovery and the degree of compliance with outstanding subpoenas. We reject this argument for in order for the Commission to determine the adequacy of discovery as of the start of the trial, or the extent of prejudice resulting from whatever inadequacy may have existed, we would need the answers to the following questions:

1. Which documents called for by subpoenas were actually submitted in response thereto as of January 12, 1970?
2. To what extent did Koppers already possess the information contained in the U.S. Pipe documents when other documents were requested? To what extent had U.S. Pipe physically made available documents which had not been marked or introduced, but were later cited by respondent as not having been produced? In this connection, were the market survey, plant expansion report, sales report, and cost reports not produced as alleged by respondent (Respondent's Brief, p. 32) or were these documents either not in existence or already produced by U.S. Pipe and in the possession of respondent as alleged by complaint counsel (Complaint Counsel's Reply Brief, p. 19)? Was

⁷The hearing examiner's rulings on the completeness of the discovery return are ambivalent at best. The initial decision says that the return ordered by the Commission and the Court has not been completed (Findings 51, 56). But, earlier the examiner had ruled:

* * * respondent received all the necessary documentary and oral evidence necessary to show that U.S. Pipe was not only able to enter the resorcinol market, but was able to sell all of its production as rapidly as it was produced (Hearing Examiner's Memorandum to Commission, March 18, 1970).

the pilot plant study made available to respondent as alleged by complaint counsel (Complaint Counsel's Reply Brief, p. 18) or had it not been produced as charged by respondent (Respondent's Brief, p. 32)? Were the written notes of Dr. Lofton made available to respondent in the hearing room and through lapse of respondent's counsel not examined (Complaint Counsel's Reply Brief, p. 19) or, again, were they not produced as alleged by respondent (Respondent's Brief, p. 32)? Only a hearing examiner present when the production of documents is made could resolve this kind of discrepancy. Obviously it is impossible for the Commission to resolve conflicting claims about what was produced and what was not produced when complaint counsel's own version of the facts is that the documents *were* produced, but were not *used* and, therefore, are not even shown in the record.

3. To what extent was information contained in the documents, which presumably were not produced, material and relevant to issues in the case, or to what extent would such information be helpful in cross-examining complaint counsel's witnesses?

4. Were documents that (a) contained needed information and (b) were submitted after January 12, 1970, and before the close of the trial, obtained by Koppers early enough to avoid any prejudice from precious unavailability?

5. With respect to the protective orders in force in the pre-trial period: (a) were these orders actually necessary to protect legitimate interests of U.S. Pipe? (b) to what extent did they inhibit counsel's preparation for trial, by preventing a full understanding of the documents obtained from U.S. Pipe? (c) to what extent was any possible prejudice from inadequate understanding of the protected documents (and thus inadequate preparation for trial) cured by virtue of the permitted consultation with Koppers personnel during the trial?

6. To what extent was the participation of Koppers' general counsel in the discovery process, and his consultation with "outside" counsel actually necessary to preparation for trial?

These questions indicate that a determination concerning the adequacy of discovery depends upon much more than a numerical count of the number of documents produced. They require a careful assessment of the good faith of the party making the return and the validity of the objections to the return. These are matters peculiarly within the competence of our hearing examiners.

Federal Trade Commission hearing examiners are charged with the responsibility of conducting the proceeding from the time the complaint issues for adjudication until an initial decision on the merits is filed. They are specifically charged with supervising discovery proceedings, issuing discovery orders and subpoenas, and determining the adequacy of the subpoena return. Clearly the hearing examiner

is in the best position to determine if the subpoena return is made in good faith and to evaluate the completeness or adequacy of the return.

Subject to our review for abuse of discretion, it is the function of the hearing examiner to determine when subpoenas have been complied with in good faith, and when objections to a subpoena return are frivolous. He is to determine the degree of protection to be afforded documents produced, in light of the public's interest in disclosure and with due regard for legitimate business interests, particularly those of innocent third parties. He is to determine when requests for subpoenas are meant for no other purpose than to harass third parties and to frustrate the Commission's adjudicative procedure; and he is to draw the line between adequate discovery for the purpose of conducting a defense and perversion of the discovery process for the purpose of delay.⁸ In carrying out these responsibilities, examiners must make detailed findings on the discovery matters in issue. This the examiner has failed to do here. Our policy of examiner control over the discovery process and intrusion by the Commission only when absolutely necessary to ensure fairness and due process would be completely subverted if the Commission undertook to solve the complex discovery issues which are still unresolved in this record.

In view of the policy outlined above, it was error for the examiner to so interpret our order of January 9, 1970, as to render himself disabled from ruling on the adequacy of discovery before witnesses were called. That respondent's counsel must share the blame for this misinterpretation because he asked the Commission for no clarification prior to January 12, and therefore the Commission had every reason to believe that a hearing date specifically requested by respondent would be satisfactory is of no moment. The issue here is fairness and not parceling out blame. Respondent's rights should not be abridged because of the examiner's misinterpretation of the Commission's January 9 order or because counsel for respondent filed motions and affidavits requesting that evidentiary hearings begin before discovery was completed.

The examiner has said in his initial decision that in this case he interprets our orders as saying that discovery should have been completed in this case before the taking of any evidence. This is stretching what the Commission actually said,⁹ but, in any event, we believe the

⁸ See Commission Rules of Practice, 16 C.F.R. Sec. 3.42(c) (1970).

⁹ In our orders of November 1, 1968 [74 F.T.C. 1621], and January 30, 1969 [75 F.T.C. 1050], we said it is our policy to encourage full discovery in advance of hearings and deviations should be permitted only in rare and unusual circumstances (order of November 1, 1968, Denying Interlocutory Appeals and Requests for Permission to File Interlocutory Appeals and order of January 30, 1969, Denying Application for Leave to File Interlocutory Appeals). This does not mean that examiners may not defer ruling on discovery requests when in the prehearing stage the relevance of particular documents have not been demonstrated. If relevancy is later demonstrated, the examiner may then allow recall of witnesses, deferred cross-examination or any other reasonable procedure to assure that the right to complete cross-examination upon the basis of discoverable documents is not abridged.

examiner had full authority to order full discovery before hearings if he believed, as apparently he did, that fairness required full pre-hearing discovery in this case.¹⁰

While we do not accept the proposition that the failure to give complete discovery prior to hearings necessarily raises a due process question, we have no basis for disturbing a denial of due process ruling, based on the timeliness of production where the examiner was presumably familiar with complaint counsel's order of presenting witnesses and could gauge, far better than the Commission, the degree of prejudice which would result if discovery of U.S. Pipe were not completed before the hearings began.

Respondent argues that the failure to complete discovery before the evidentiary hearings began resulted in the development of testimony on direct examination which is tainted because impeaching evidence was unavailable during cross-examination. According to respondent, "witnesses were able to respond to questions with the confidence that their testimony was not then subject to impeachment."¹¹ Respondent argues, and the examiner agrees, that additional cross-examination, which was allowed after certain documents were produced, did not cure these defects.

As we indicated earlier, arguments about the timeliness of discovery are peculiarly within the competence of the examiner, and his decision that a record is completely tainted by procedural defects is entitled to great weight. Where it appears that the record may be so tainted, we have no alternative other than to remand for the purpose of curing these procedural defects.

The record as presently constituted consists of evidence adduced by complaint counsel with the exception of those facts which were developed on cross-examination. Respondent will not be unduly prejudiced by our remanding the case since it has not put on any defense, and, in fact, it even refused to produce witnesses subpoenaed during the case-in-chief.¹²

Accordingly, in the interest of protecting the respondent's rights to a fair hearing, the evidentiary hearings will be *de novo*. We will not rely on any of the prior hearings for the purpose of resolving substantive issues, but these hearings may be considered by the examiner for the purpose of deciding the adequacy of the U.S. Pipe subpoena return and the scope of protective orders. Obviously, it would be wasteful to start the discovery process all over, and the prior hearings may be considered in the nature of prehearing conferences on discovery. The right of the hearing examiner to call such additional prehearing con-

¹⁰ Tr. 742-43.

¹¹ Respondent's Brief, p. 31.

¹² Tr. 1909.

ferences is specifically reserved to the discretion of the hearing examiner. The examiner is specifically directed to reconsider, consistent with the decision in *Federal Trade Commission v. United States Pipe and Foundry Co.*, 304 F. Supp. 1254 (D.D.C. 1969), the scope and need for protective orders.

VI

THE EXAMINER'S ALTERNATIVE GROUNDS FOR DISMISSAL

We do not agree with the hearing examiner that even if there were no due process issue, on the present state of the record, the complaint should be dismissed. The hearing examiner's own factual findings argue against such a result. As we have indicated earlier, on the one hand, he found that Koppers' market condition was the result of "economic factors" and not improper actions. On the other hand, he found that respondent's practices with respect to prices and certain requirements contracts were "inhibiting"¹³ in terms of potential entry and that the improper acts and practices alleged in the complaint "to a degree * * * are true" (Finding 46).

Such ambiguous (and contradictory) statements are of no assistance in the resolution of the substantive issues raised in this case. Moreover, the examiner did not give adequate consideration to the legal implications of other facts which he specifically found. For example, he found that from 1951 to 1967, Koppers was the sole domestic producer of resorcinol;¹⁴ that there was no known chemical competitive with resorcinol *per se*;¹⁵ and that in mid-1965, about the time when U.S. Pipe made a public announcement that it was going into the resorcinol business, Koppers began the use of total requirements contracts in an effort (in the examiner's words) "to retain all the business they [sic] had."¹⁶ In addition, the initial decision does not contain a thorough enough analysis of the significance of Koppers' price reduction which occurred in 1965 when U.S. Pipe appeared on the scene and after an extensive period of relatively inflexible pricing from 1951 through at least 1961.¹⁷

The examiner is specifically directed to reconsider all the facts developed in the new record in the light of the Supreme Court's definition of the offense of monopolization as including two elements: (1) the possession of monopoly power, and (2) the "willful acquisition or maintenance" of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident. *United States v. Grinnell Corp.*, 384. U.S. 563 (1966).

¹³ Finding 44.

¹⁴ Finding 14.

¹⁵ Finding 31.

¹⁶ Finding 42.

¹⁷ Finding 17.

The element of "willful maintenance" may properly be inferred from the use of requirements contracts. Although requirements contracts are not *per se* illegal, they are subject to careful scrutiny because of their potential market foreclosure effect, *Standard Stations v. United States*, 337 U.S. 293 (1949), and we believe that they are particularly suspect when used by a monopolist. Thus, a monopolist should bear the burden of proving a very strong justification for use of such contracts; especially so where acceptance by customers is induced by a special incentive, such as the substantially lower prices which apparently occurred in this case.¹⁸

This is not to say that monopolists may never use requirements contracts, and we certainly do not mean that monopolists may never reduce prices. But the combination of these factors may be sufficient to raise a presumption of monopolization. Koppers, of course, may attempt to rebut any facts showing monopolization by proof that the requirements contracts and price reduction (a) were motivated by business necessity or by other factors which are inconsistent with the view that they are evidence of the willful maintenance of monopoly power; or (b) had no significant causal relationship to Koppers' market position or the exclusion of potential entrants. Moreover, any facts which may not have been disputed on this appeal may be disputed (and fully discredited) in a new trial.

Still another ground for the hearing examiner's dismissal was his conclusion that there is no public interest in pursuing this complaint because (1) U.S. Pipe has become "firmly entrenched" in the market; and (2) respondent abandoned its improper conduct four years ago, when it modified its full requirements contracts after the Commission's investigation was initiated. On the basis of the record now before us, we cannot agree: U.S. Pipe has been consistently losing money, which is hard to reconcile with a finding of its being "firmly entrenched;" respondent continues to use partial requirements contracts, which facts may or may not be consistent with the finding of abandonment of improper conduct, depending on what a new record (unblemished by procedural defects) reveals concerning the effect, necessity, and legitimacy of these continuing practices. But even if the examiner were completely correct in these findings, he is in error in his conclusion that these facts demonstrate a lack of public interest in pursuing this complaint. The fact that past unlawful practices have ceased or been suspended is no assurance that they will not be resumed at some time in the future, absent the deterrent effect of a Commission order with the possibility of heavy civil penalties for violation; and the fact that such practices may have been unsucces-

¹⁸ Cf. *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966) (special services used as inducement to full supply contracts).

ful in the past (*e.g.*, because in the hearing examiner's view U.S. Pipe has become "firmly entrenched") is no assurance that they will not be successful in the future. Moreover, even if U.S. Pipe has been able to enter the market, this does not prove that but for respondent's alleged practices there may have been even more competition. The complaint is not confined to the foreclosure of U.S. Pipe.¹⁹

In short, neither discontinuance nor lack of success of unlawful practices bars a determination that the public interest requires Commission action.²⁰ Furthermore, as matter of law, if the record showed the offense of *attempting* to monopolize, the fact that the attempt was unsuccessful would be no defense. *Lorain Journal Co. v. United States*, 342 U.S. 143, 153 (1951). And, finally, if the record supports a conclusion of monopolization, or attempt to monopolize, or a finding of practices which tend to lessen competition, it may not be enough that the *precise* practices found to be illegal may have been stopped. An order restoring the competition which has been eliminated is required and such an order may properly go beyond merely enjoining past illegality. In this connection, we believe the examiner has been unnecessarily restrictive in disallowing evidence of the existence and use of Koppers' patents and know-how, since these may play an important factor as to any question of relief.²¹

We will not, however, determine whether the allegation of attempt to monopolize or any of the other charges in the complaint have been proven or whether the case is moot or no longer in the public interest on the basis of documents and testimony which respondent has not had a fair opportunity to meet. The case must be remanded for new hearings.

¹⁹ Complaint, Paragraph 8, charges foreclosure of the resorcinol market to "actual or potential competitors."

²⁰ See *Libbey-Owens-Ford Glass Co. v. FTC*, 352 F.2d 415 (6th Cir. 1965); *Giant Food, Inc. v. FTC*, 322 F.2d 977 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 967 (1964); *Standard Distributors, Inc. v. FTC*, 211 F.2d 7 (2d Cir. 1954).

²¹ See *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954), where compulsory licensing of patents as proper remedy for monopolization was ordered although no prior patent abuse was found. In a subsequent Supreme Court review of the *United Shoe Machinery* order, even the more drastic relief of divestiture was considered:

It is of course established that, in a Sec. 2 case, upon appropriate findings of violation, it is the duty of the court to prescribe relief which will terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future. See, *e.g.*, *United States v. Grinnell Corp.*, 384 U.S. 563, 577 (1966); *Schine Theatres v. United States*, 334 U.S. 110, 128-29 (1948). * * *

* * * If the decree has not, after 10 years, achieved its "principal objects," namely, "to extirpate practices that have caused or may hereafter cause monopolization, and to restore workable competition in the market"—the time has come to prescribe other, and if necessary more definitive, means to achieve the result.

United States v. United Shoe Machinery Corp., 391 U.S. 244, 250, 251, 252 (1968) (emphasis added).