

IN THE MATTER OF
SERVICE CORPORATION INTERNATIONAL
CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket 9071. Complaint, Jan. 20, 1976—Decision, Oct. 12, 1976

Consent order requiring a Houston, Texas, funeral home chain, among other things to cease misrepresenting the prices of services obtained from third parties; failing to disclose the availability and price of immediate cremation services; misrepresenting the qualities or properties of caskets; and misrepresenting the legal requirements and characteristics of caskets. Further, respondent is required to locate and make proper refunds to customers overcharged during a prescribed time period; and to maintain appropriate records.

Appearances

For the Commission: *Arthur R. Angel.*

For the respondent: *Jay F. Lapin, Wilmer, Cutler & Pickering,*
Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. §41, *et seq.*, as amended), and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Service Corporation International, a corporation, hereinafter sometimes referred to as “respondent” or “SCI,” acting at various times directly or through certain of its funeral home subsidiaries, has violated the provisions of said 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 Service Corporation International is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office and principal place of business located at 1929 Allen Parkway, Houston, Texas.

PAR. 2. Respondent SCI is now, and for some time last past has been, engaged in the sale and provision of funeral services and merchandise to the public, incident to the care and final disposition of deceased human beings, through various funeral home subsidiaries.

PAR. 3. SCI's funeral service operations in the United States consist, at the time of this complaint, of in excess of 135 funeral homes located in 16 States (California, Colorado, Connecticut, Florida, Georgia, Illinois, Kansas, Louisiana, Maryland, Minnesota, North Carolina, New Jersey,

New York, Tennessee, Texas and Washington) and the District of Columbia. Said funeral homes are operated through more than 80 funeral home subsidiaries, almost all of which are wholly owned by respondent SCI. SCI also owns a casket supply company (Hy-Grade) which furnishes some of the caskets used in various of respondent's funeral homes.

PAR. 4. Respondent SCI has now and for some time past has had knowledge and supervision of and control over the business operations, policies and practices of its wholly-owned funeral home subsidiaries.

PAR. 5. In the course and conduct of its business as aforesaid, respondent SCI, and various of its funeral home subsidiaries and their duly authorized employees and agents, have:

- purchased caskets, burial vaults, and other merchandise and supplies from suppliers located in different States;
- used media of interstate communication including the United States mail and the telephone in connection with the provision and sale of, and the collection of payment for, funeral services and merchandise;
- sold funeral services, and merchandise to customers from different States;
- caused advertisements to be run in newspapers and magazines with interstate circulation and to be featured in radio broadcasts transmitted across State lines to potential customers in different States;
- shipped deceased human bodies by common carrier to funeral directors located in other States for burial and received bodies for burial which were shipped to respondent's funeral homes from funeral directors located in other States;
- transmitted information on policies and practices back and forth between SCI's headquarters in Houston and individual funeral home subsidiaries located in various States.

By and through such activities, the conduct of respondent Service Corporation International's business and its acts and practices have been and continue to be in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. Customers of various of respondent's funeral homes are often grief-stricken members of the deceased person's family who, because of their bereavement, lack of information respecting funeral arrangements, time pressures and related factors, are highly susceptible to unfair and deceptive practices.

I

PAR. 7. One of the services typically provided by a funeral home is to arrange, on behalf of customers, for a variety of items furnished by a third party and not the funeral home itself. Such items include various combinations of the following: obituary notices, flowers, crematory charges, public transportation or shipping charges, limousines or flower cars, nurses, musicians or choirs, pallbearers, clergy honoraria, gratuities and charges of other mortuaries in shipping cases. (These items may hereinafter be referred to as cash advance items). Funeral homes typically advance money, or obligate themselves to pay later, for such items and then seek reimbursement from the customer for these expenses incurred on the customer's behalf. These items are typically listed on the customer's bill under a heading "cash advances," "accommodations" or words of similar import. Typically, compensation for the funeral home's services in making arrangements for cash advance items is included in the funeral home's charge for professional services.

PAR. 8. Respondent's funeral homes have made arrangements and incurred expenses for cash advance items in the manner described in Paragraph 7, above. Certain of respondent's funeral homes have used, for some time last past, a practice of listing on some customers' bills and collecting from such customers in the guise of reimbursement for sums actually advanced, amounts for cash advance items which exceeded the sums actually expended by respondent's funeral home on the customer's behalf. In some instances, respondent's funeral homes have applied a direct mark-up to the amount advanced. In other instances, respondent's funeral homes have received kickbacks, agent's commissions, volume discount or other rebates without disclosing or passing on to the customer the benefits of such price adjustments.

PAR. 9. The practices described in Paragraph 8, above of listing as cash advances or accommodation items sums in excess of the amounts actually paid out by certain of respondent's funeral homes was and is deceptive and in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45) (hereinafter referred to as "Section 5"), and the collection and retention of such excess sums by such deceptive means is an unfair and deceptive practice in violation of Section 5.

II

PAR. 10. In the further course and conduct of business as aforesaid various of respondent's funeral homes have sold to some of their customers certain caskets called "sealed" or "sealer" caskets which are equipped with a rubber gasket and/or other mechanisms which, when activated, are intended to seal the casket. Some funeral directors of

respondent's funeral homes have claimed or suggested to some customers, directly or by implication, that such sealer caskets would when closed be completely airtight and/or watertight when such was not the case. In some instances, funeral directors of some of respondent's funeral homes have also claimed or suggested to customers directly or by implication, that a sealer casket would preserve human remains and prevent their natural decomposition, when such was not the case.

PAR. 11. The claims and representations regarding the airtightness, watertightness, or preservation capability of sealer caskets, described in Paragraph 10 above have had and have the capacity and tendency to mislead and deceive consumer funeral buyers and to induce them to purchase merchandise which they might not purchase but for such deceptive claims. Such claims and representations were and are deceptive and unfair and in violation of Section 5.

III

PAR. 12. In the further course and conduct of business as aforesaid, some of respondent's funeral homes have induced or compelled some consumers who sought to arrange cremation services to purchase caskets, even if a casket was not desired by the consumer. Various of respondent's funeral homes have induced customers arranging cremations to purchase caskets by various means, including: a) claiming or suggesting to consumers, directly or by implication, that purchase of a casket was required by law, when such was not the case; or b) claiming or suggesting, to consumers, directly or by implication, that purchase of a casket was required by crematory rule, regulation or policy, when such was not the case; or c) requiring the purchase of a casket in cremation cases as a policy of the funeral home.

PAR. 13. The practice of claiming or suggesting to customers that purchase of a casket is required by law or by crematory rule, regulation or policy when such is not the case was and is deceptive and in violation of Section 5. Inducing or compelling consumers to purchase merchandise which is not desired and thereby incur additional and unnecessary expense either by such misrepresentations or by imposing a requirement that a casket be purchased constitutes an unfair practice in violation of Section 5.

IV

PAR. 14. In the further course and conduct of business as aforesaid, various of respondent's funeral homes have performed embalming and other services in connection with readying deceased bodies for burial

without first obtaining permission from the next of kin or other authorized person and without ascertaining whether such services were in fact desired by the customer.

PAR. 15. The practices described in Paragraph 14 above, of furnishing embalming or other services without the knowledge and permission of customers constitutes unfair and deceptive practices in violation of Section 5.

V

PAR. 16. In the further course of business as aforesaid, certain of respondent's funeral homes have made payments, as compensation, gifts or rewards, to medical examiners, morgue or hospital employees, or police who have notified respondent's funeral homes when certain deaths have occurred and have assisted respondent's funeral homes in acquiring business from such cases. Those of respondent's funeral homes which have made such payments have not informed the funeral buyers in such cases that such payments have been made.

PAR. 17. The practice of some of respondent's funeral homes of making payments to medical examiners, morgue or hospital attendants and police, as described in Paragraph 16, above, has had the effect of obstructing and restricting the consumer's ability to freely choose a funeral home and is an unfair practice, in violation of Section 5.

PAR. 18. The making of such payments by respondent's funeral homes as described in Paragraph 16, above, has had the effect of obtaining cases and revenues for respondent's funeral homes which might otherwise go to other funeral homes in the same geographic area as respondent's funeral homes, and constitutes an unfair method of competition, in violation of Section 5.

PAR. 19. The making of such payments by respondent's funeral homes as described in Paragraph 16, above, and the failure to inform the customers who make the funeral arrangements in such cases, constitutes a failure to disclose material facts which if known might affect the consumer's purchase decision. The non-disclosure of such material facts is a deceptive practice, in violation of Section 5.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent having been served with a copy of that complaint; and

The Commission having withdrawn the matter from adjudication for

the purpose of considering settlement by the entry of a consent order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, 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 alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its Rules, now in further conformity with the procedure prescribed in Section 3.25(d) of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent Service Corporation International is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office and place of business located at 1929 Allen Parkway, Houston, Texas.

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

Definitions

The term "alternative container" means, with respect to each of respondent's funeral homes owned on May 26, 1976, any receptacle or enclosure, made of any material, which is of sufficient strength and retentiveness to hold and transport human remains, and which is made available to customers at a price that does not exceed 60 percent of the retail price charged for the lowest line casket regularly offered by that funeral home as of May 26, 1976; *provided*, that commencing July 1, 1977, and thereafter annually, the maximum prices for alternative containers that are initially established pursuant to this order shall be adjusted to reflect changes in the Bureau of Labor Statistics' Consumer Price Index subsequent to April 1976; *provided further*, that with respect to each of respondent's funeral homes that is acquired after May 26, 1976, (1) respondent shall establish a maximum price for alternative containers at a price not exceeding the mean maximum price for alternative containers chargeable in respondent's funeral homes as of

the date of acquisition, and (2) a maximum price established pursuant to (1) shall be adjusted to reflect changes in the Consumer Price Index subsequent to the date of acquisition as provided above.

The term "casket" means a rigid container which is designated for the encasement and burial of human remains and which is usually constructed of wood or metal, ornamented, and lined with fabric.

The term "customer" means the person making arrangements for the care and disposition of the body of a deceased person.

The term "discount" means, with regard to the sale of a particular item, a price adjustment, commission or allowance which is openly and regularly made available by third parties to respondent's funeral homes and to other similarly situated funeral homes and which would not regularly be made available to customers who sought to order that item directly from such third parties; *provided*, that a price adjustment, commission or allowance made available on the basis of prompt payment shall be considered a "discount" even if such an adjustment, commission or allowance would regularly be made available to customers.

The term "effective date of this order" means the date on which this order becomes a final order.

The term "funeral home" means an establishment primarily engaged in preparing the dead for final disposition and conducting funeral services.

The term "funeral services" means funerals in which the funeral home provides the customary services, necessary facilities and equipment, a casket and other selected merchandise.

The term "immediate cremation service" means the removal and disposition by cremation of the remains without embalming, viewing (except for purposes of identification) or visitation and without any pre-cremation service with the body present, which service is arranged by the funeral home.

The term "item" refers to both merchandise and services.

The term "mark-up" means the excess of the amount charged by respondent to a customer of one of respondent's funeral homes for crematory or cemetery services, pallbearers, public transportation, clergy honoraria, musicians or singers, nurses, gratuities, flowers, or obituary notices over the net amount actually advanced, paid or owed by respondent to the third party, when such items were furnished by the third party, and when the charges for such items were listed or described as "cash advances," "accommodations," or words of similar import on the contract, final bill, or other written evidence of agreement or obligation submitted to the customer by the funeral home; *provided*, that it shall not be considered a mark-up when one of respondent's funeral homes charges a customer an amount for an item which exceeds

the total amount of the additional or marginal costs to respondent and its subsidiaries for such item when the amount charged to the customer is a fixed and consistent amount for the entire item not exceeding \$20 and when the item consists of services rendered in whole or in part by employees of respondent or any of its subsidiaries while on duty and thereby earning other compensation from respondent or any of its subsidiaries that is not included in the additional or marginal cost described above; *provided further*, that any excess attributable to a discount shall not be considered a mark-up.

The term "prescribed time period" means the five-year period immediately preceding the effective date of this order or, with respect to any funeral home acquired by respondent or any subsidiary thereof during that five-year period, the period beginning with the date of acquisition of such funeral home and ending on the effective date of this order.

The term "public transportation" means nonlimousine (including as "limousines" hearses, flower cars and other funeral vehicles) transportation by common carriers for hire which is regulated by Federal or State regulatory agencies.

The term "respondent's funeral homes" refers to funeral homes owned or hereafter acquired and owned by respondent or a subsidiary thereof and located in the United States.

I

It is ordered, That Service Corporation International, a corporation, and its officers, representatives, agents and employees, its successors and assigns, directly or through any corporation, subsidiary, or other device in connection with the sale or offering for sale of funeral services and funeral merchandise by and through its funeral homes, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, cease and desist from:

A. When one of respondent's funeral homes arranges with a third party (including one of respondent's subsidiaries) on behalf of a customer for items to be furnished by such third party and not by the funeral home itself:

1. charging of the customer by the funeral home for items listed or described as "cash advances," "accommodation" or words of similar import on the contract, final bill or other written evidence of agreement or obligation submitted to the customer by the funeral home, more than the amount actually advanced, paid or owed by the funeral home to such third party on behalf of the customer for such items;

2. misrepresenting to the customer in any other respect the actual amount advanced, paid, or owed by the funeral home to such third party

on behalf of the customer for items represented by the funeral home as having been furnished to the customer by such third party;

3. listing or describing items to be furnished by the funeral home itself (or any of its employees while on duty) as "cash advances," "accommodations" or words of similar import on the contract, final bill or other written evidence of agreement or obligation submitted to the customer by the funeral home;

4. charging of the customer by the funeral home for the following items, when furnished by such third party and not by the funeral home itself, more than the amount advanced, paid or owed by the funeral home to such third party for such items:

- a. Cemetery or crematory charges
- b. Pallbearers
- c. Public Transportation
- d. Clergy Honoraria
- e. Musicians or singers
- f. Nurses
- g. Gratuities
- h. Flowers
- i. Obituary notices

Provided, that paragraphs A(1)-(4) shall not require any of respondent's funeral homes to pass on to a customer any discount received by the funeral home if the fact that the funeral home does or may receive such discounts is disclosed to the customer in writing before the customer becomes legally obligated to pay for the funeral arrangements.

B. (1) Requiring customers of respondent's funeral homes who express interest in an immediate cremation service to purchase a casket for such a service, and failing to make available to such customers an alternative container; and (2) failing to affirmatively disclose, at the time the arrangements are made and before agreement, the availability and price of an immediate cremation service and of an alternative container to customers who (i) express interest in an immediate cremation service, (ii) inquire as to the least expensive means of disposition available at the funeral home, or (iii) inquire as to the full range of options respecting disposition of the deceased unless such customer affirmatively expresses an interest in any merchandise or service inconsistent with an immediate cremation service or with the use of an alternative container either at the time of making the inquiry or after the alternative of cremation is presented. *Provided*, that where one of respondent's funeral homes complies with the foregoing requirements, any of respondent's funeral homes located within two miles of such complying funeral home need not comply with the foregoing

requirements if it (i) informs each customer who expresses an interest in an immediate cremation service of the availability and price of such a service at the complying funeral home, and (ii) if it has already received the body of the deceased, offers to arrange for the transfer of the remains to the complying funeral home at no extra charge to the customer for the transfer.

C. Suggesting to customers, directly or by implication, that purchase of a casket for cremation is required by State law or by crematory rule, if such is not the case.

D. Misrepresenting, by statements or suggestions, directly or by implication, the extent to which any casket, including a sealer casket, will be airtight or watertight or will prevent natural processes of decomposition or provide long-term preservation of human remains; *provided*, that this paragraph shall not prevent respondent's funeral homes from accurately describing, displaying or otherwise making available to customers the written warranty or claims of the manufacturer or supplier of such casket, to the extent that such may be required for compliance with Federal Trade Commission regulations or other applicable laws.

E. Furnishing embalming, or other services or merchandise in connection with readying deceased bodies for burial without obtaining prior written or oral authorization therefor; *provided*, that furnishing embalming or other services or merchandise to avoid irreparable deterioration of the remains or offensive odor (after having made a good faith effort to obtain permission) or to satisfy the requirements of applicable laws and regulations shall not be regarded as a violation of this order.

II

It is further ordered, A. That respondent shall obtain from its funeral home managers or such other persons as would reasonably be expected to be most knowledgeable of the billing practices of respondent's funeral homes a separate statement for each such funeral home which shall indicate whether during the prescribed time period the funeral home had any policy or practice of charging a mark-up, and if so, the time period during which any such policy was in effect or any such practice was utilized and the type(s) of items which were the subject of such policies or practices. For purposes of Part II of this order, a mark-up that is determined (based upon a consideration of other comparable transactions) to be attributable to an estimation error (including discrepancies attributable solely to a consistent practice of rounding off) shall not be considered to be the result of a policy or practice of charging a mark-up.

B. That respondent shall cause a firm of independent certified public accountants to perform a statistical evaluation of the accuracy of the information compiled pursuant to paragraph II(A), which evaluation shall be based on sufficient sampling(s) of respondent's documentation (including but not limited to customer contracts and funeral bills, invoices of cash advance vendors, regular and special checks paid to such vendors, "add-on and delete" forms, computer summaries of income from or expenses for individual cash advance items, if available, and computer summaries of amounts paid to specific vendors of cash advance items, if available) for funerals contracted for during the prescribed time period to permit said accountants to conclude, with a 98 percent confidence factor, that the information compiled pursuant to paragraph II(A) and the information obtained as a result of the sampling(s) made by said accountants in performing the statistical evaluation have identified not less than 98 percent of all funerals contracted for during the prescribed time period which involved the purchase of an item which was in fact the subject of a policy or practice of charging a mark-up.

C. That respondent shall thereafter examine its files and thereby identify each customer of its funeral homes who contracted for a funeral during the prescribed time period and purchased an item which was the subject of a policy or practice of charging a mark-up; *provided*, that respondent shall not be required to examine its files for any funeral home for which the information compiled pursuant to paragraphs II(A) and II(B) does not disclose a policy or practice of charging any mark-ups; *provided further*, that with respect to each of respondent's funeral homes for which the information compiled pursuant to paragraphs II(A) and II(B) discloses a policy or practice of charging a mark-up, respondent shall be required to examine only the documentation relating to the type(s) of items disclosed in said information as having been the subject of such a policy or practice, and, for each such type(s) of item, shall be required to examine such documentation only for the time period during which said information discloses that such type of item was the subject of such a policy or practice.

D. That respondent shall cause a letter to be sent within four (4) months of the effective date of this order, by first class mail, to each customer identified pursuant to paragraph II(C), which customer as of that date has paid or caused to be paid a bill or bills in which total mark-ups in excess of \$10 were included; said letter shall advise the customer of his right to a refund as set forth below, the approximate date when such a refund will be made, and the need to inform respondent of any future change of residence or address where such refund can be delivered; *provided*, that with respect to customers entitled to a refund

under this part of this order whose letters are returned to respondent undelivered, respondent's obligation to make refunds to such customers shall terminate six (6) months after the effective date of this order.

E. That respondent cause a revised bill to be sent within four (4) months of the effective date of this order, by first class mail, to each customer identified in paragraph II(C), which customer as of that date has not yet paid or caused to be paid the bill or bills in which a mark-up was included, deducting the amount of the mark-up from the amount owed respondent by the customer.

F. That six (6) months after the effective date of this order, respondent prepare a list of all the customers to whom letters were sent pursuant to paragraph II(D) who have paid or caused to be paid a bill or bills in which total mark-ups in excess of \$10 were included and whose letters have not at that time been returned to respondent undelivered. The amount of refund due each such customer shall be the total of:

(1) The amount of the mark-ups paid or caused to be paid by the customer; plus

(2) A fractional share of the total amount of mark-ups paid or caused to be paid by customers whose letters sent pursuant to paragraph II(D) were returned to respondent undelivered, and a fractional share of the total amount of mark-ups of \$10 or less paid or caused to be paid by the customers identified pursuant to paragraph II(C); the numerator of each such fractional share to equal the mark-ups paid or caused to be paid by the customer, and the denominator to equal the total amount of mark-ups paid by the customers whose letters were not returned to respondent undelivered.

G. That within ten (10) days following the completion of the list described in paragraph II(F), respondent shall cause to be mailed to each customer on that list a check in an amount computed in accordance with paragraph II(F). Such payments shall complete respondent's obligations with respect to restitution under this order.

III

It is further ordered, That respondent transmit copies of this order to all of respondent's funeral homes and notify, orally and in writing, all affected employees of the requirements of this order.

IV

It is further ordered, That respondent shall, within 60 days after the service upon it of this order, file with the Commission a report in writing setting forth in detail the manner in which respondent is complying and intends to comply with this order.

V

It is further ordered, That for a period of not less than three (3) years after the effective date of this order, respondent maintain records which are adequate to disclose respondent's compliance with this order, such records to be furnished by respondent to the Federal Trade Commission upon request after reasonable notice.

VI

It is further ordered, That respondent notify the Federal Trade Commission at least thirty days prior to any proposed change in Service Corporation International such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other change in corporate organization which may affect compliance obligations arising out of this order.

VII

It is further ordered, That respondent notify the Federal Trade Commission by the 10th day of each month as to the acquisition or sale of any funeral homes, occurring in the immediately preceding month.

VIII

It is further ordered, That in the event the Federal Trade Commission promulgates a trade regulation rule regarding funeral industry practices:

A. Each provision of Paragraphs A(4), B and E of Part I of this order that deals with a practice with respect to which there is no requirement or prohibition in the rule shall be automatically deleted from this order on the date the rule is promulgated, and after the rule is promulgated, each court order or Commission amendment that deletes from the rule a requirement or prohibition with respect to a practice dealt with in Paragraphs A(4), B and E of Part I of this order shall, on the date such order or amendment becomes effective, cause to be automatically deleted from this order the provision dealing with the practice with respect to which there is no requirement or prohibition in the rule;

B. Each provision of Part I of this order that deals with a practice for which there are differing requirements or prohibitions in the rule shall be automatically superseded and replaced by such differing requirements or prohibitions on the date the rule becomes effective, and after the rule becomes effective, each amendment to a requirement or prohibition of the rule dealing with a practice dealt with in Part I of this

order shall, on the date the amendment becomes effective, cause an identical amendment to be made to Part I of this order;

Provided, that if the trade regulation rule proceeding regarding funeral industry practices that was commenced on August 28, 1975 is concluded by the Federal Trade Commission without the adoption of the rule in any form, or if said proceeding is not concluded but the rule is not promulgated in any form within five (5) years after the effective date of this order, or if the rule is promulgated in some form but for any reason does not become effective within seven (7) years after the effective date of this order, the provisions of Paragraphs A(4), B and E of Part I shall, on the date the rule proceeding is concluded or at the close of the applicable time period, be automatically deleted from this order; *provided further*, that no exception or limitation to respondent's obligation to comply with any trade regulation rule hereafter made effective shall be implied from this order.

Commissioner Dole did not participate by reason of absence.

Order

88 F.T.C.

IN THE MATTER OF

TRW, INC., ET AL.

Docket 9084. Interlocutory Order, Oct. 13, 1976

Order denying respondents' request that the Commission reconsider its decision to issue the complaint in this matter.

Appearances

For the Commission: *John M. Mendenhall.*

For the respondents: *Richard W. Pogue, Robert H. Rawson, Jr., Jones, Day, Reavis & Pogue, Cleveland, Ohio, and Joseph D. McGrath, Shaker Heights, Ohio.*

ORDER

This matter is before us upon the administrative law judge's limited certification of various motions filed by respondents requesting that the Commission reconsider its decision to issue a complaint. According to the certification, the Commission's staff failed to honor a commitment that respondents' counsel would be notified if the staff decided to recommend to the Commission that a complaint issue so that counsel could immediately seek to make a presentation to the Commission as to why a complaint should not issue. According to the ALJ,

Although it is clear that respondents have no right to such an opportunity, the fact that the staff made such a commitment places the matter in a different light. At the least, * * * the various motions, memoranda, affidavits, and related papers [which respondents assert they would have submitted to the Commission had the alleged commitment been honored] should now be certified to the Commission so that it may give consideration to them for the limited purpose of deciding whether they would have affected the decision to issue a complaint* * *.¹

The Commission has repeatedly held that once a complaint issues, only in the most extraordinary circumstances will it review its determinations that it has reason to believe a person has violated the law and that a proceeding would be in the public interest. *E.g., General Motors Corp., Dkt. 9074 (July 7, 1976); Pepsico, Inc., 83 F.T.C. 1716 (1974).* We do not believe that such extraordinary circumstances are present here since there has been no showing of prejudice to any of respondents' rights resulting from the staff's alleged failure to notify respondents. Neither the Commission's Rules nor its practice provide for precomplaint presentations to the Commission, except for consent orders. The staff cannot create such a right by agreement with a

¹ Certification to the Commission for a Limited Purpose of Respondents' Motion of August 19, 1976, to Renew Motion for Reconsideration and Related Relief and Various Other Motions and Related Papers at 3.