

Interlocutory Order

IN THE MATTER OF

KELLOGG COMPANY, ET AL.

*Docket 8883. Interlocutory Order, July 31, 1980*DENIAL OF MOTION TO DISQUALIFY ADMINISTRATIVE LAW JUDGE
BERMAN

ORDER

The Commission has before it a variety of motions and requests filed by respondents, including: (i) the motion of respondent Kellogg Company ("Kellogg"), dated July 20, 1979, for reconsideration of the Commission's Order dated December 8, 1978, in which the Commission concluded that Administrative Law Judge Harry R. Hinkes became "unavailable" within the meaning of 5 U.S.C. 554(d) (1976) upon his retirement on September 8, 1978; (ii) Kellogg's motion, dated January 31, 1980, to disqualify Administrative Law Judge Alvin L. Berman from presiding in this proceeding and for related discovery, which was certified to the Commission by Judge Berman on February 12, 1980; (iii) the request of respondent General Mills, Inc. ("General Mills"), dated April 3, 1980, for discovery and an evidentiary hearing regarding the "unavailability" of Judge Hinkes; (iv) Kellogg's request, dated April 3, 1980, that the Commission rescind its December 8, 1978, Order and direct a retrial of this proceeding or, in the alternative, that the Commission order an evidentiary hearing and allow depositions of 21 persons, and that an ALJ not currently employed by the Commission be appointed to preside over such proceedings; and (v) the motion of General Foods Corporation ("General Foods") dated April 3, 1980 for dismissal of the complaint, which allegedly is required "as a result of the Commission's actions in connection with the retirement and contractual reemployment of former Administrative Law Judge Harry R. Hinkes."¹

After reviewing the relevant procedural history, we shall first consider Kellogg's motion to disqualify Judge Berman and shall then turn to the various issues raised by Kellogg's July 20, 1979, motion for reconsideration of the Commission's Order of December 8, 1978, and the respondents' April 3, 1980, motions and requests.

¹ In addition, on June 9, 1980, Judge Berman certified to the Commission the question of whether he had authority to establish a briefing schedule in the principal proceeding on the merits while the Commission conducted the inquiry into the circumstances of Judge Hinkes' retirement. We agree with Judge Berman that the Commission's inquiry is collateral to the merits, and we affirm his authority to adopt the briefing schedule he has decided upon. We also grant his request for an extension of the time within which the initial decision may be filed.

I.

The complaint, charging the respondents with engaging in unfair methods of competition in violation of Section 5 of the FTC Act, 15 U.S.C. 45 (1976), was issued on April 26, 1972. The proceeding was assigned to ALJ Harry R. Hinkes, who presided over all pre-trial proceedings and a substantial portion of the trial, including all of complaint counsel's case-in-chief and much of the case-in-defense of Kellogg and General Mills. In all, Judge Hinkes presided over some four years of pretrial proceedings and some 243 hearing days encompassing more than 30,000 pages of transcript.

On August 16, 1978, Chief ALJ Daniel H. Hanscom submitted to Chairman Pertschuk a memorandum stating that Judge Hinkes had advised that he intended to retire as of August 31, 1978. Judge Hanscom recommended that Judge Hinkes be retained under contract to complete the case. His recommendation and surrounding events are the subject of the pending motions, but it is undisputed that Judge Hinkes did retire on September 8, 1978, and that he continued to preside over this case until October 20, 1978, under contract.

On September 22, 1978, Kellogg filed a motion, subsequently joined in by General Mills, for discovery concerning the contract, which Judge Hinkes certified to the Commission. Thereafter, all three respondents moved for disqualification of Judge Hinkes, and on October 20, 1978, the Commission stayed further proceedings before the ALJ. Complaint counsel subsequently petitioned for Judge Hinkes' removal. On December 8, 1978, Chairman Pertschuk, after considering the objections raised by respondents, concluded that the contract was "of questionable validity" and that he would not submit the contract to the Civil Service Commission for approval. On the same date the Commission issued an Order holding that, under the circumstances, Judge Hinkes had become "unavailable" within the meaning of 5 U.S.C. 554(d) (1976) as of the date of his retirement.

The Commission remanded the case for appointment of a new ALJ, and ALJ Alvin L. Berman was appointed. The Commission also instructed the parties to brief within 45 days certain issues relating to the need for a trial *de novo* "as well as any other legal or factual matters that the submitting party may deem relevant to the issue of whether retrial is required and, if so, to what extent." In their memoranda filed in response to this direction, none of the respondents sought reconsideration of the December 8, 1978, Order or challenged the Commission's determination of Judge Hinkes' un-

availability. On May 24, 1979, Judge Berman issued his order holding that a retrial of the merits was not required.

On July 20, 1979, Kellogg moved for (i) reconsideration of the Commission's December 8 Order holding Judge Hinkes had become "unavailable," and (ii) an evidentiary hearing concerning the circumstances of Judge Hinkes' retirement.² By Order of November 13, 1979, the Commission reserved decision on Kellogg's request for reconsideration of the December 8, 1978, Order, and instituted a limited inquiry into the circumstances surrounding Judge Hinkes' retirement. The Commission explained that "both the resolution of Kellogg's motion for reconsideration and the public interest generally would be served by an inquiry into the facts of Judge Hinkes' retirement as they relate to Kellogg's allegations of impropriety", i.e., that "the agency itself [had brought] about the unavailability of the ALJ." Specifically, the Commission directed Chief Judge Hanscom, Deputy Chief Judge Ernest Barnes, and Deputy Executive Director Barry Kefauver to file affidavits setting forth "their knowledge of the circumstances of Judge Hinkes' retirement and the negotiations leading to the execution of the contract with Judge Hinkes and, in particular, their recollections of the time, place, and substance of any conversations with Judge Hinkes regarding either his desire to retire or his desire to continue as an ALJ if he could move to Los Angeles." The Commission noted that Chairman Pertschuk's recollections concerning his role and that of his staff had been memorialized and appended to the December 8, 1978, Order. Finally, the Commission directed the Secretary to send to Judge Hinkes a letter requesting that he file an affidavit setting forth his recollection of the circumstances.

In issuing its November 13, 1979, Order, the Commission anticipated that Judge Berman would preside over the inquiry into the circumstances surrounding Judge Hinkes' retirement. However, Judge Berman recused himself from presiding over this inquiry, stating that "while I feel that I am able to comply with the Commission's directive in an impartial manner, I am aware that my impartiality may reasonably be questioned." Furthermore, Chief Judge Hanscom advised the Commission that the concerns expressed by Judge Berman applied to all of the other Commission ALJs. Accordingly, on November 30, 1979, the Commission issued an Order providing that the Commission itself would conduct the inquiry into the circumstances surrounding Judge Hinkes' retirement.

² Kellogg's motion also sought interlocutory review of Judge Berman's decision respecting the need for retrial of this proceeding and a stay of the proceeding. Both requests were denied by the Commission in its Order of November 13, 1979.

On January 31, 1980, Kellogg moved to disqualify Judge Berman from presiding over the principal proceeding on the merits, arguing that (i) "because Judge Berman has conceded he was a friend of ALJ Hinkes, his continued participation in any aspect of the case would present an appearance of impropriety"; (ii) that Judge Berman could not properly "partially recuse himself from this case"; and (iii) that Judge Berman should be disqualified because he was selected to replace Judge Hinkes by Judge Hanscom, who "may have selected Judge Berman * * * on the understanding that Judge Berman not allow * * * a retrial [of the case]." Judge Berman denied the requested relief, and certified Kellogg's motion to the Commission; in the certification Judge Berman discussed in detail his relationship to Judge Hinkes, his reasons for recusing himself from the inquiry into the circumstances surrounding Judge Hinkes' retirement, and the circumstances of his assignment to this proceeding.

In the meantime, in December 1979, Judges Hanscom and Barnes and Mr. Kefauver filed their affidavits as directed by the Commission. In lieu of an affidavit, Judge Hinkes submitted a statement taken under oath before Commissioner Clanton. Subsequently, the Commission issued an Order (i) directing that the transcript of Judge Hinkes' statement be placed in the record in this proceeding, and (ii) directing the parties to file within 30 days "their views on whether additional fact-finding is needed as to the circumstances surrounding Judge Hinkes' retirement and subsequent reemployment under contract, and if so, by what procedure such fact-finding should be undertaken."

On April 3, 1980, each of the respondents filed a motion or request with the Commission. (1) General Mills argued for further discovery and an evidentiary hearing—specifically, General Mills sought the depositions of Judges Hanscom, Barnes and Hinkes and Mr. Kefauver; Charles Dullea, former Director of the Office of Administrative Law Judges of the Civil Service Commission; Chairman Pertschuk; and eight other present or former Commission employees. General Mills also requested that, after the depositions were taken, an evidentiary hearing be held before an ALJ from another agency designated by the Civil Service Commission. (2) Kellogg requested that the Commission order a complete retrial of this case. In the alternative, Kellogg requested (i) that Judges Hanscom, Barnes and Hinkes and Mr. Kefauver testify at an evidentiary hearing; (ii) that Kellogg be permitted to depose 21 people (principally present or former Commission employees, including all of the persons General Mills wishes to depose); and (iii) that an ALJ not currently employed by the Commission be appointed to preside over

such proceedings. (3) General Foods moved for dismissal of the complaint, alleging that the Commission's actions in connection with the retirement and reemployment of Judge Hinkes had deprived General Foods of due process of law in three respects: (i) by conducting *ex parte* negotiations with a sitting judge leading to an illegal contractual arrangement; (ii) by impermissibly intermingling its prosecutorial, administrative and judicial functions; and (iii) by inducing Judge Hinkes to retire through the offer of an illegal contract.

II.

In support of its motion to disqualify Judge Berman, Kellogg argues "that the facts concerning Judge Berman's admitted friendship with ALJ Hinkes which created an appearance of impropriety necessitating his withdrawal from the proceedings for the supplementation of record also compel Judge Berman's recusal from the remainder of the * * * case" (Kellogg Memorandum filed Feb. 20, 1980, at 3). Kellogg also argues "that an ALJ may not recuse himself from part of an adjudicative proceeding, so that two triers of fact must then preside concurrently over the reception of evidence in different portions of that proceeding." This argument in turn rests on three separate contentions: (a) that neither the Administrative Procedure Act nor the Commission's Rules of Practice for Adjudicative Proceedings permit two triers of fact to preside simultaneously over different portions of the same case; (b) that such a procedure also violates basic principles of due process; and (c) that analogous cases dealing with judicial disqualification prohibit a judge from recusing himself partially from an ongoing case. Finally, Kellogg argues that Judge Berman's disqualification is compelled by the fact that he was assigned to the case by then-Chief Judge Hanscom, who was himself disqualified by virtue of his role in recommending to Chairman Pertschuk that the Commission offer a contract to Judge Hinkes.

A. Kellogg contends that Judge Berman's friendship with Judge Hinkes disqualifies him from any aspect of the case. Assuming, as does Kellogg, that Judge Berman's future participation in this case is to be determined by a standard that would disqualify Judge Berman upon the existence of an "appearance of impropriety," we do not find Judge Berman disqualified from presiding over the trial of the merits of this case.

The determination of whether events have created an "appearance of impropriety" can be difficult; however, certain benchmarks have

evolved. Our role in passing on Judge Berman's participation is to ask "whether a reasonable person would have had a reasonable basis for doubting the Judge's impartiality. * * * Neither our faith nor the imaginings of one highly suspicious of others are relevant. The inquiry begins and ends with whether a reasonable person would have had a reasonable basis for doubting the Judge's impartiality." *Rice v. McKenzie*, 581 F.2d 1114, 1116-17 (4th Cir. 1978) (footnotes omitted); accord, *United States v. Cowden*, 545 F.2d 257, 265 (1st Cir.), *cert. denied*, 430 U.S. 909 (1977).

In our view, a reasonable person would conclude that Judge Berman's relationship with Judge Hinkes does not call Judge Berman's impartiality into doubt. No rule of law disqualifies a judge from reviewing or reconsidering another judge's order because the two judges are acquaintances and colleagues. With respect to the substantive case, Judge Berman has been, and no doubt will continue to be, called upon to pass upon the prior rulings of Judge Hinkes. In the proceedings concerning Judge Hinkes' retirement, on the other hand, Judge Berman was apparently concerned that he might have had to judge the personal credibility of Judges Hinkes, Hanscom and Barnes:³

I had in mind the possibility of being required to determine whether or not to subpoena the various individuals involved and the necessity to rule on the scope of examination and cross-examination of such individuals, as well as rulings that might be required with regard to particular objections that might be raised as to particular questions. In addition, there was the requirement to make factual findings with respect to possibly conflicting testimony on the part of [former Chief Judge Hanscom, Chief Judge Barnes, and Judge Hinkes]. I did not believe it appropriate for me to preside at such an inquiry. This was my thinking when I recused myself and these considerations are encompassed in the more general statement of reasons for recusement in my notice of November 21, 1979. [Certification and Denial Order at 3.]

There is of course a great deal of difference—in perception as well as fact—between reviewing the work of an acquaintance in a professional capacity and judging the personal credibility of fellow judges.⁴ Judge Berman has described his relationship with Judge Hinkes—apparently they were merely colleagues, not even close friends; to require disqualification under such circumstances would be unprecedented, and if applied as a general rule would make

³ We intimate no view as to whether Judge Berman was required to withdraw from the proceedings concerning Judge Hinkes' retirement. Clearly, it was his right to do so whether or not he was disqualified. 5 U.S.C. 556 (1976). "Judges from time to time elect not to try cases, which they are sure that can try fairly and effectively, because of their concern to avoid any substantial doubt which circumstances beyond their control may create in the public mind about the impartiality of their administration of justice in the matters at hand." *Green v. Murphy*, 259 F.2d 591, 595 (3d Cir. 1958) (*en banc*) (Hastie, J. concurring).

⁴ It is reported that "Judge Learned Hand considered it appropriate to review decisions of his cousin Judge Augustus Hand, when the former was a circuit judge and the latter a district judge." J. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 J. Law & Contemp. Prob. 43, 48 n.25 (1970).

administration of the federal courts and administrative agencies difficult, if not impossible. We do not believe that disqualification of Judge Berman is required and we so hold.

B. We turn now to Kellogg's contentions that the hearing procedures employed by the Commission are impermissible under the APA and the Commission's Rules, and deny due process, because of the simultaneous use of two triers of fact; and violate an alleged rule against partial recusals applicable to judicial disqualification. These contentions are addressed to the procedures employed by the Commission, rather than to the participation of Judge Berman, and they would seem to preclude the appointment of *any* ALJ in Judge Berman's stead.⁵ But in any event, assuming *arguendo* that these objections are properly raised in a motion to disqualify the ALJ, we find them to be without merit.

1. Kellogg's arguments based on the APA and the Commission's Rules of Practice stem from its perception of the proceeding concerning Judge Hinkes' retirement as an "integral part" of the case on the merits. We cannot agree. In our view, the inquiry concerning the circumstances of Judge Hinkes' retirement is "distinct and separable" from the proceedings on the merits of the Commission's complaint. *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1930). The proceedings involve different witnesses and testimony, bearing upon different legal and factual issues. Most importantly for purposes of Kellogg's motion, Judge Berman's reasons for recusing himself from the proceedings concerning Judge Hinkes' retirement are entirely unrelated to his ability to judge the merits of the complaint.

Neither the APA, nor the Commission's Rules preclude "bifurcation" of a proceeding under the special circumstances of this case. Both the APA and the Commission's Rules contemplate that, in the ordinary case, all of the evidence bearing upon the merits of the complaint will be taken before an ALJ, who will write the initial decision. Judge Berman has not, however, excused himself from hearing any evidence going to the merits of the complaint, and his ability to write an initial decision is not compromised by his decision not to preside over the collateral inquiry concerning Judge Hinkes' retirement.⁶

⁵ Kellogg argues that the Commission should request an outside ALJ to replace Judge Berman (Kellogg Memorandum dated January 31, 1980 at 23), but "bifurcation" of the proceedings would appear no less objectionable merely because an outside ALJ was presiding over the trial on the merits.

⁶ This case is thus distinguishable from *Channel 16 of Rhode Island, Inc. v. FCC*, 229 F.2d 520 (D.C. Cir. 1956), where the FCC defined six issues to be resolved in passing on the merits of a proceeding before it. The first five were issues of fact; the sixth issue was the appropriate ultimate legal conclusion flowing from resolution of the first five issues. The FCC referred the first five issues to a hearing examiner for an initial decision, but reserved the sixth issue to itself. With little discussion or analysis, the court held that this procedure was inconsistent with the

Within constitutional and statutory limitations, the formulation of procedures is generally within the discretion of the agency. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524-25 (1978). The Supreme Court has recognized "the general principle that '[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party.' " *American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970) (quoting *NLRB v. Monsanto Chem. Co.*, 205 F.2d 763, 764 (8th Cir. 1953)). This rule is applicable to the special circumstances of this case, as respondents have not been prejudiced by the procedures adopted by the Commission. It is clear, for example, that, under both the APA (5 U.S.C. 556(b))⁷ and the Commission's Rules (16 C.F.R. 3.42(g)) the Commission itself may conduct proceedings to resolve a motion to disqualify an ALJ—thus permitting two triers of fact in what is, in form, a single proceeding. See *Attorney General's Manual on the Administrative Procedure Act* 73 (1947). In this case, the inquiry into the circumstances of Judge Hinkes' retirement was prompted, initially by respondents' objections to Judge Hinkes' further participation in the proceeding, which sought, *inter alia*, a hearing under Commission Rule 3.42(g). Since the procedures adopted by the Commission are consistent with the APA and the Commission's Rules, we believe that the Commission has not exceeded its discretion by deciding to conduct itself the inquiry into the circumstances of Judge Hinkes' retirement.⁸

2. Kellogg's constitutional claim is equally without merit. Kellogg relies upon *Gasoline Prods., Inc. v. Champlin Ref. Co.*, *supra*, a

requirements of 47 U.S.C. 409(b), noting that the hearing examiner was not "unavailable" to the FCC for purposes of the sixth issue. Here, in contrast, the issues being addressed by the Commission are collateral to, and independent of, the issues pertaining to the merits of the complaint; Judge Berman was "unavailable" to preside over the proceeding to resolve those issues; and the statutory provision on which the *Channel 16* court relied is inapplicable.

⁷ 5 U.S.C. 556(b) (1976) provides: "On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case."

⁸ The case law supports the proposition that an inquiry such as the inquiry into the circumstances of Judge Hinkes' retirement is collateral to, and independent of, the inquiry on the merits, and may be conducted by a different decisionmaker. For example, in *United Air Lines, Inc. v. CAB*, 281 F.2d 53 (D.C. Cir. 1960), a claim of improper *ex parte* communications was raised on review of CAB orders. The court, after considering and rejecting all of the substantive objections to the orders raised by the petitioners, nevertheless remanded for the CAB to conduct an inquiry into the *ex parte* allegations in order "to preserve the integrity of its own administrative process" *Id.* at 58. After the remand, the court sustained the procedures adopted by the CAB, specifically noting (with apparent approval) that the inquiry had been conducted "before a new examiner" appointed by the CAB, who issued an initial decision (later affirmed by the CAB) limited to the *ex parte* issues. *United Air Lines, Inc. v. CAB*, 309 F.2d 238, 239 (D.C. Cir. 1962). The court's actions in resolving the substantive objections and ordering a remand on the limited question of *ex parte* communications, and its affirmation of the "bifurcated" procedures adopted by the CAB, implicitly support our view that the procedures adopted in this case are proper, and implicitly reject Kellogg's contention that bifurcation is unlawful.

Seventh Amendment case involving the right to trial by jury in civil cases. The Court held that a partial retrial, to be permissible, must be on an issue "so distinct and separable from the others that a trial of it alone may be held without injustice." 283 U.S. at 500. There is, of course, no Seventh Amendment right to a jury trial in a Commission proceeding. But in any event, as noted above, we believe that the issues in the proceeding relating to Judge Hinkes' retirement meet this test.

Kellogg hypothesizes that the Commission may have entered into the contract with Judge Hinkes to avoid a retrial at a time when economic thought allegedly has shifted away from the theory of the complaint. It argues that it is entitled to present evidence of the Commission's conduct to the trier of fact in the merits proceeding as a type of admission by conduct supporting negative inferences. There is not a scintilla of evidence in the record to support the premise of Kellogg's argument, which is contrary to the presumption of administrative regularity. We believe Kellogg's rights are fully preserved by the procedures adopted by the Commission.

3. Kellogg additionally claims that statutes and case law concerning disqualification of judges do not permit partial recusal. The statutes are not directly applicable and the case law does not support Kellogg's broad contention. Judge Berman has not partially withdrawn from the case, but rather has wholly withdrawn from presiding over a separate inquiry involving distinct factual and legal issues. Although partial recusal may be improper if it is inconsistent with the reasons offered for recusal,⁹ or may be precluded by statute,¹⁰ the cases recognize the propriety of partial recusal where the basis of recusal is inapplicable to a segregable portion of a case. See, e.g., *Warner v. Rossignol*, 538 F.2d 910, 913 n.6 (1st Cir. 1976); *Middletown Nat. Bank v. Toledo A.A. & N.M.R. Co.*, 105 F. 547 (S.D.N.Y. 1900); *Coastal Petroleum Co. v. Mobil Oil Corp.*, 378 So.2d 336, 337 (Fla. App. 1980); *State v. Wilson*, 362 So.2d 536 (La. 1978); *Flannery v. Flannery*, 452 P.2d 846, 849 (Kan. 1969). In this case, Judge Berman's reasons for recusal from the inquiry into Judge

⁹ See *Stringer v. United States*, 233 F.2d 947 (9th Cir. 1956), where the court, holding that on the facts before it the district judge, having disqualified himself on his own motion, could not resume control and try the case, nevertheless recognized:

There may be some other instances where a judge could resume direction or even decide the issues. For instance, he might be mistaken as to the identity of a party. But the reason for resuming control should be more than a second reflection on the same facts which the trial judge considered originally disqualified him. [*Id.* at 948 n.2.]

¹⁰ Thus, although the court in *State ex rel. Stefonick v. District Court*, 117 Mont. 86, 157 P.2d 96, 99 (1945), suggested, in *dictum*, a broad rule against partial disqualification, it found it "unnecessary to consider [the] question, since the statute does not make it possible to disqualify judges in particular portions of a cause or proceeding * * *." 157 P.2d at 99. No such statute applies in this case.

Hinkes' retirement would not deny respondents a fair hearing on the merits of the complaint. Accordingly, we find no reason to alter our conclusions, expressed above, that the procedures adopted by the Commission do not exceed applicable constitutional or statutory limitations, and are within the Commission's discretion.

C. Kellogg further argues that Judge Berman should be disqualified because he was assigned to the case by then-Chief Judge Hanscom. Kellogg contends that Judge Hanscom was disqualified from exercising that authority by virtue of his earlier involvement in the efforts to retain the services of Judge Hinkes. Kellogg asserts that this set of circumstances creates an appearance of impropriety requiring disqualification of Judge Berman, arguing that "one who knowingly sanctions the finalization of an unlawful contract * * * i[s] also likely to have selected an ALJ to complete [the] case whom he believed to be inherently predisposed to deny the respondents' request for a hearing *de novo*" (Kellogg Memorandum of Feb. 20, 1980, at 15). We reject this contention.

There is not the slightest record suggestion of any irregularity in Judge Berman's appointment. In the absence of any record evidence to the contrary, the Commission assumes, as it must, that the appointment was regular in every respect and conformed to legal requirements. This presumption is confirmed by the limited record evidence—Judge Hanscom advised Judge Berman that "he was 'up' for the next assignment under the rotation system maintained by the Office of the Administrative Law Judges." Certification and Denial Order at 4. Accordingly, in light of the speculative and unsupported nature of Kellogg's claims, its request for discovery into the circumstances of Judge Berman's appointment is denied.

Even assuming *arguendo* that Judge Hanscom would be disqualified from presiding over the adjudicative proceedings, it is clear under judicial and Commission precedent that he could appoint a successor to Judge Hinkes. In *Stringer v. United States*, 233 F.2d 947, 948 (9th Cir. 1956), a trial judge recused himself from a proceeding, which he then assigned to a judge of another division. Later, the case was transferred back to the original judge who resumed control of the case with the parties' consent and decided the merits. Although the Court of Appeals held that it was improper for the original judge to resume control of the case, it concluded that it was not improper for him to perform "the mechanical duties of transferring the case to another judge or other essential ministerial duties short of adjudication." Accord, *In re Application of Scott*, 397 F. Supp. 622, 624 (S.D. Tex. 1974) (citing cases). Analogous Commission precedent holds that a non-participating adjudicative decisionmaker may engage in the

administrative decision of whether to seek to retain an ALJ as a retired annuitant. *The Hearst Corp.*, 81 F.T.C. 1028, 1029 (1972). Thus, even assuming that Judge Hanscom would have been disqualified from the adjudicative proceeding, his appointment of Judge Berman was regular and proper.

III.

We shall next consider the issues raised in respondents' April 3, 1980, submissions and in Kellogg's July 23, 1979, motion for reconsideration.¹¹

A. Kellogg advances five theories under which it seeks reconsideration by the Commission of its determination of Judge Hinkes' unavailability; by way of relief, Kellogg asks for a retrial, or, alternatively, for discovery and an evidentiary hearing. General Mills asks for discovery and an evidentiary hearing under a theory that closely resembles Kellogg's third theory, discussed *infra*.

1. Kellogg's first and second theories (in the order which Kellogg advances them in its April 3 memorandum) center on the time after the Commission entered into the contract with Judge Hinkes. The first theory hypothesizes that the contract was valid, Kellogg arguing that therefore the Commission had no right *not* to proceed with it. The second theory hypothesizes that the only missing element was the approval of the Civil Service Commission, and that the Commission had a duty to present the contract to the Civil Service Commission for its approval.

In advancing these arguments, Kellogg ignores the procedural posture in which the determination not to go forward with the contract was made, and misconstrues the basic applicable legal principles. As a matter of Commission organization, determinations on whether to retain an ALJ after retirement are within the administrative authority of the Chairman. *The Hearst Corp.*, 81 F.T.C. 1028, 1029 (1972). Accordingly, it was the Chairman who decided to proceed with a contractual arrangement with Judge Hinkes. Separate Statement of Chairman Pertschuk, Dec. 8, 1978, at 1. Having been advised that the contract was legal and that it had been cleared by the Civil Service Commission, the Chairman authorized the contract to further "the potential benefit to all concerned" (*id.* at 1-2).

¹¹ By a supplemental motion filed July 21, 1980, Kellogg argues that Chairman Pertschuk's Memorandum dated July 18, 1980, by which he recused himself from participating in the pending motions and requests regarding the contract with Judge Hinkes and the alleged need for further factfinding, affords an additional reason for reconsideration of the Commission's order of December 8, 1978. We have reconsidered that order, but for the reasons set forth herein as well as in that order, we reaffirm the order of December 8, 1978.

Subsequently, all three respondents and complaint counsel sought Judge Hinkes' removal from the case. "After reviewing the briefs of the parties," the Chairman concluded that there existed "substantial legal questions" about the validity of the contract. *Id.* at 3. "In light of * * * the fact that none of the parties desire[d] to have Judge Hinkes continue to preside and * * * all [were] willing to forego the benefits of having him continue," the Chairman determined not to seek Civil Service Commission approval. *Id.* Kellogg argues that the Commission at that time had no option but to continue with the contract. In essence, Kellogg contends that the Commission was bound to deny the motions filed by respondents and complaint counsel and proceed with the allegedly unlawful contract. Nothing in Section 5(c) of the APA, 5 U.S.C. 554(d) (1976), its legislative history, the relevant case law, or common sense requires such a bizarre result. Section 554(d) of the APA requires that the ALJ who heard the evidence make the initial decision, unless he or she becomes "unavailable". It imposes no duty on the agency to preserve an ALJ's availability. Here, the parties attacked as unlawful the Commission's attempt to retain Judge Hinkes under contract after his retirement, and demanded his removal. The statute does not require an agency to court error by doggedly pursuing an arrangement which the parties insist is improper and unlawful.¹²

Gamble-Skogmo, Inc. v. FTC, 211 F.2d 106 (8th Cir. 1954), is instructive. In that case, the Commission refused to attempt to have a statutorily retired ALJ's eligibility restored, over the objections of the respondent. The Court held that the Commission had not violated Section 554(d). *A fortiori*, the Commission's action here, where all respondents argued strenuously that the Commission was under a duty *not* to proceed with the contract, cannot be said to have been improper.

Finally, such a result seems dictated by pragmatic considerations. After the contract had been negotiated, the parties raised serious questions about its validity. Docket 8883 has been a long, complicated case involving a massive record, including the testimony of scores of witnesses and many exhibits. Because the parties raised serious questions about the validity of Judge Hinkes' service under the contract, the Chairman decided not to run the risk of proceeding with the contract. Since all parties appeared to favor Judge Hinkes'

¹² The Attorney General's Committee on Administrative Procedure, whose recommendations largely formed the basis of the APA, discussed the problem of substitution of ALJ's. It is clear from the Committee's report that the Committee thought that substitution could take place on consent of the parties. See Final Report of the Attorney General's Committee on Administrative Procedure at 50. See *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952).

removal, the Chairman's action in declining to submit the contract was entirely appropriate.

2. Kellogg's fourth theory also focuses on the time after negotiation of the contract with Judge Hinkes. Kellogg argues that the Commission could and should have cancelled the contract and tried to negotiate another, more acceptable arrangement with Judge Hinkes. This contention was not suggested by Kellogg when it demanded that Judge Hinkes be removed from the case, and, even if it had been, it is clear from *Gamble-Skogmo, supra*, that the Commission was under no duty to pursue such a course, particularly in light of the parties' expressed desire that Judge Hinkes be removed. Moreover, such a course might well have created additional problems of its own. Had the Commission cancelled the Hinkes contract and negotiated an alternative arrangement, it would, in effect, have placed respondents, who had protested the terms of the contract, in the position of having denied Judge Hinkes the perceived benefits of the contract.

3. Kellogg's third and fifth theories are related, and center on the events leading up to the negotiation of the contract. In its third theory, Kellogg argues that the Commission illegally entered into the contract and thus deprived it of an ALJ in circumstances where other arrangements might have been possible. This theory, as we understand it, presupposes a duty on the part of the Commission to employ any legal means to retain the services of an ALJ who threatens to resign or requests special consideration as a condition of his continued service. General Mills' request for discovery and an evidentiary hearing is premised on a similar argument.¹³

In its fifth theory, Kellogg argues that, even if no such absolute duty exists, an ALJ is not unavailable where (1) he is willing and able to be rehired; (2) the agency determines that it is in the best interests of the agency to rehire the ALJ; and (3) the agency fails to use due diligence in finding a lawful means to reemploy the ALJ, all three of which conditions Kellogg claims were present here. According to Kellogg, the "duty of due diligence would consist both of

¹³ A close reading of Kellogg's memorandum of April 3, 1980, suggests that Kellogg's third theory effectively partakes of two notions. On one hand, Kellogg argues that "unavailability" under Section 554(d) "does not refer to every situation where an ALJ becomes unable to serve, but only to those situations where the inability occurs for reasons beyond the agency control" (Kellogg Memorandum of April 3, 1980, at 16). This theory appears also to underlie the request of General Mills for discovery and an evidentiary hearing. General Mills Request at 3. If an ALJ were "available" so long as his continued service was under the Commission's control, it would follow that the Commission would be under a duty to employ any lawful means possible to retain the ALJ. Alternatively Kellogg argues that "the concept of unavailability does not encompass situations where an ALJ's inability to continue presiding . . . is unlawfully caused by the agency which employs him." Kellogg Memorandum of April 3, 1980, at 15. This assertion seems to rely on a different theory—that the agency must refrain from engaging in unlawful conduct in removing an ALJ from a case. Again, General Mills would also appear to rely on this premise. General Mills Request at 3.

identifying and pursuing a lawful arrangement and of ensuring that the individual terms of the contract formalizing that arrangement were all proper and legal" (Kellogg Memorandum of April 3, 1980, at 43). Kellogg contends that the basis of the duty is to be inferred from a variety of sources, see *id.* at 33 n.7, but cites no specific authority that articulates the duty.

It is in connection with these third and fifth theories that analysis of the factual record is appropriate.

The Commission has carefully reviewed the affidavits of Judges Hanscom and Barnes and Mr. Kefauver, and Judge Hinkes' statement, as well as the statements of Chairman Pertschuk. While, not surprisingly, the recollections of the witnesses differ in some respects, they are in accord with respect to the material facts. According to Judge Hinkes, he approached Judge Barnes in August 1978 and advised Judge Barnes that he had decided to retire, because, for personal reasons, he wanted to move to California; he was also motivated by an upcoming cost of living increase for federal retirees. Hinkes Statement at 11, 13, 29. According to Judge Hinkes, Judge Barnes then inquired how Judge Hinkes might be persuaded to remain on the case, and proposed a contract arrangement. *Id.* at 14, 29. Judge Hinkes recalled that he would not have been willing to remain in Washington to finish the case as either a regular ALJ or a reemployed annuitant. *Id.* at 12-13, 19. Judge Hinkes also suggests that he would have been willing to complete the case without a contract if the Commission had been willing (and able) to pay his moving expenses to California. *Id.* at 23, 30-35. Judge Hinkes states that this alternative was communicated to Judge Hanscom and Mr. Kefauver, but that Mr. Kefauver told him it could not be done. *Id.* at 30, 32. This testimony is generally consistent with the affidavits of Judges Hanscom and Barnes and Mr. Kefauver, except that Judge Barnes reports that Judge Hinkes stated somewhat different personal reasons for retiring; neither Judge Hanscom nor Judge Barnes report Judge Hinkes' expression of a willingness to continue as a regular ALJ if he were moved to California.

Thus, there is no dispute that in August 1978 Judge Hinkes approached Judge Barnes and stated that he intended to retire by the end of August. Similarly, there is no dispute that Judge Hinkes would not have remained on the case unless, at a minimum, the Commission transferred him, at Commission expense, to California—special treatment not accorded other Commission ALJ's. Even if the Commission could have granted such treatment to Judge Hinkes,¹⁴ we conclude that, as a matter of law, the Commission was

¹⁴ Under the circumstances, we think it highly unlikely that the Commission could have paid Judge Hinkes'

(Continued)

under no obligation to do so, and that no such obligation arose by reason of the Commission's efforts to retain Judge Hinkes under contract.¹⁵

Kellogg and General Mills point to an appendix to a statement of the Attorney General which says that "only the officer who presided at the hearing (unless he is unavailable *for reasons beyond the agency's control*) is eligible to make the initial or recommended decision * * * ." Appendix to Attorney General's Statement of October 5, 1945, on the APA, appendix to S. Rep. No. 752, 79th Cong., 1st Sess. (1946) (emphasis added). Assuming this appendix provides the proper test, the Commission has not violated its requirements. Judge Hinkes made the initial determination that he would retire and not complete the case absent extraordinary treatment; and to that extent became unavailable for reasons beyond the Commission's control.

If, however, this brief phrase is deemed to suggest that an agency is bound to afford any lawful, extraordinary treatment demanded by an ALJ, it is inconsistent with the removal procedures under federal law, and basic public policy, and we believe it cannot be credited. See also *Gamble-Skogmo, Inc. v. FTC*, *supra*. Indeed, respondents have elsewhere argued that the Commission is under a duty *not* to afford an ALJ special treatment or to negotiate with an ALJ regarding the

moving expenses. The pertinent statute authorizes reimbursement of expenses where an employee is "transferred in the interest of the Government from one official station to another for permanent duty." 5 U.S.C. 5724(a)(1) (1976). The statute further provides: "When a transfer is made primarily for the convenience or benefit of an employee, including an employee in the Foreign Service of the United States, or at his request, his expenses of travel and transportation and the expenses of transporting, packing, crating, temporarily storing, draying, and unpacking of household goods and personal effects may not be allowed or paid from Government funds." 5 U.S.C. 5724(h). Finally, the statute permits payment of moving expenses only upon the employee's written agreement to continue in government employment for 12 months after his transfer. 5 U.S.C. 5724(i).

¹⁵ Kellogg has objected to Commissioner Clanton's presiding at the taking of Judge Hinkes' statement. Kellogg's first objection—that the APA and the Commission's rules do not permit "bifurcation" of the proceeding—has been adequately answered in Part II B, *supra*. Kellogg's second objection—that the entire Commission should have presided over the proceeding to take Judge Hinkes' statement—is equally without merit. There is to be no "initial decision" as to the proceeding regarding the circumstances of Judge Hinkes' retirement, and therefore 5 U.S.C. 554(d) & 557(b) and Section 3.51(c) of the Commission's Rules are inapplicable.

Moreover, Kellogg's argument misconceives the limited nature of the proceeding to obtain Judge Hinkes' statement. The proceeding was not an "evidentiary hearing," but an alternative to the affidavits submitted by Judges Hanscom and Barnes and Mr. Kefauver, and Commissioner Clanton's role was merely to preside over the reception of Judge Hinkes' statement. Commissioner Clanton's active participation was limited to a few, minor questions seeking clarification of points made by Judge Hinkes. The procedure adopted by the Commission in this case—calling for affidavits or statements from knowledgeable witnesses addressing the material circumstances before determining whether to afford discovery and an evidentiary hearing—is fully supported by the case law. See, e.g., *Grolier, Inc. v. FTC*, 615 F.2d 1215 (9th Cir. 1980); *Au Yi Lau v. INS*, 555 F.2d 1036, 1043 (D.C. Cir. 1977); *Adolph Coors Co. v. FTC*, 497 F.2d 1178, 1189 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975); *R. A. Holman & Co. v. SEC*, 366 F.2d 446, 453-54 (2d Cir. 1966), *cert. denied*, 389 U.S. 991 (1967). Although respondents have pointed to a variety of alleged inadequacies or inconsistencies in the statements and affidavits, they point to no inconsistency with respect to what we have found to be the material facts bearing upon the unavailability issue. *Cf.* Fed. R. Civ. P. 56. Accordingly, we find it unnecessary to permit further discovery or to hold an evidentiary hearing on the question of Judge Hinkes' unavailability. And, because we have determined that further factual inquiry related to the unavailability issue is unnecessary, we find no need to consider under what circumstances appointment of an ALJ from outside the Commission to supervise discovery and an evidentiary hearing would be warranted.

terms of his continued service. Kellogg Memorandum of October 10, 1978, at 20-21; General Mills Memorandum of November 29, 1978 at 7.

There is no present need to define the outer limits of the Commission's discretion to accommodate special requests of an ALJ—it is enough for the present that the Commission is under no *duty* to make such an accommodation.¹⁶ In this case, had the Commission chosen to let Judge Hinkes retire, the parties would have no cause to complain. Instead, the Commission entered into the contract. Had the respondents consented to the arrangement, there can be no question that any objection would be waived. *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33 (1952). Similarly, when the parties objected to the contractual arrangement, petitioned for Judge Hinkes' removal, and raised substantial arguments against the validity of the arrangement, Chairman Pertschuk properly decided not to proceed with the arrangement. By acting in a manner that the parties themselves perceived to be in their own best interests, the Commission left the parties in the same position that they would have been in had the Commission taken no action at all to keep Judge Hinkes in the case. Therefore, we conclude that the Chairman's attempt to retain Judge Hinkes did not impose on the Commission any obligation to retain Judge Hinkes that would not have been imposed in the absence of such an attempt.¹⁷

Accordingly, Kellogg's motion for reconsideration is denied, the December 8, 1978, order is reaffirmed, and General Mills' request for discovery is denied.

B. We turn now to the motion by General Foods to dismiss the complaint, in which the other respondents have joined. General

¹⁶ Counsel for Kellogg apparently has acknowledged the absence of such a duty in another case:

MR. FURTH: Well, Your Honor, I guess whether or not [the ALJ] was or wasn't rehired is a matter totally within the discretion of the FTC anyway. I think the law is probably such that the FTC cannot [sic] rehire anybody they don't want to rehire in the middle of a case.

Grolier, Inc., Dkt. 8879, Tr. 8467 (Feb. 10, 1975), attached as Exhibit A to Affidavit of Michael P. Lehmann in Support of Motion of Respondent Kellogg Company to Admit Certain Documents in Evidence in the Proceedings to Supplement the Record Concerning the Hinkes Matter, filed May 20, 1980. The Commission has reviewed the materials attached to the Lehmann Affidavit, and having concluded that they are immaterial to the issues herein, denies Kellogg's request that they be admitted into evidence. For the same reason, Kellogg's request, filed July 2, 1980, to admit into evidence a copy of a statement of Marvin H. Morse, Director of the Office of Administrative Law Judges, is denied. Mr. Morse's statement has no evidentiary value for purposes of this proceeding; and although it might be cited as a secondary authority on the legality of the contract with Judge Hinkes, the Commission has found it unnecessary to resolve that question.

¹⁷ This case is readily distinguishable on its facts from *Chicago Automobile Trade Ass'n v. Madden*, 219 F. Supp. 828, 831 (N.D. Ill. 1963), *rev'd*, 328 F.2d 76 (7th Cir.), *cert. denied*, 377 U.S. 979 (1964), where the district court found that the examiner, who had withdrawn from the particular proceeding for health reasons, had subsequently participated in other proceedings and therefore was still available to the Board. The court also concluded that the Board was motivated, in part, "by its fear of his unfavorable decision were he permitted to resume the case." *Id.* No similar concern motivated the Commission in this case, and none is charged.

Foods contends that the Commission has deprived it of due process of law in the following respects:

A. By circumventing the procedures established by Congress for the protection of respondents' rights and deciding instead to conduct *ex parte* negotiations with a sitting judge which led to a contract arrangement which was and should have been known to be illegal;

B. By impermissibly intermingling its prosecutorial, administrative and judicial functions to the point where the prosecution formulated the course which the Commission then followed; and

C. By inducing Judge Hinkes to retire by the offer of an illegal contract, so that through its own improper actions the Commission rendered Judge Hinkes disqualified from continuing to preside in this matter.

Except for the relief requested—dismissal—General Foods' first argument does not differ substantially from the contentions of Kellogg and General Mills discussed above. The Commission rejects General Foods' contention that the efforts to retain Judge Hinkes create an appearance of impropriety which requires dismissal. As discussed above, Chairman Pertschuk has explained that his decision to seek to retain Judge Hinkes was based upon his conclusion that retention of the judge who had heard so much of the case would benefit all parties. This administrative decision was reasonable at the time, but when respondents (and complaint counsel) raised serious objections to the plan, the Chairman properly decided not to pursue it. Under these circumstances, we perceive no appearance of impropriety which requires dismissal of the proceeding—particularly in view of the important public interest in resolving the charges set forth in the complaint.

General Foods' third objection—charging that the Commission "induced" Judge Hinkes to retire—is simply unsupported by the record evidence. Judge Hinkes' statement makes it clear that he unilaterally decided to retire for personal reasons, and that only extraordinary treatment would have persuaded him to complete the case. (See pp. 17-18, *supra*.)

However, General Foods' second objection raises an issue not heretofore presented: whether the action of Judge Hanscom, a former official of the Bureau of Competition who recommended issuance of the complaint, in recommending the contract, and the participation by officials of the Bureau of Competition in meetings with Barry Kefauver, the Contracting Officer, amounted to impermissible commingling of functions under Section 554(d) and under Commission's Rule 4.7, or were otherwise unlawful under the several

theories outlined in pages 41-46 of General Foods' supporting memorandum.

Although the decision to attempt to retain Judge Hinkes was a managerial decision outside the scope of the Commission's adjudicative rules, the Commission has determined to continue the limited inquiry described below to shed additional light on the negotiating process and the role of Bureau of Competition officials in it. Accordingly, the Commission will defer, for now, ruling on the second ground of General Foods' motion.¹⁸ The Commission has determined that the most orderly manner of proceeding is first to obtain affidavits or their equivalents from those who, from the current record, appear best able to provide the relevant facts.¹⁹

CONCLUSION

With the exception of the issues raised by General Foods as to which the Commission is undertaking further inquiry, this order is intended to dispose of all matters raised by respondents in connection with the retirement of Judge Hinkes; the parties are, of course, free to raise these issues again on appeal, if any, of Judge Berman's initial decision.

It is therefore ordered, That:

A. Kellogg's motion to disqualify Judge Berman is denied;

B. (1) The Secretary shall note for the record that the Commissioners participating in the Commission decision on this order have reconsidered the Commission's order of December 8, 1978,²⁰

(2) the Commission's December 8, 1978, order is reaffirmed;

(3) Kellogg's motions of July 23, 1979 (as supplemented by its memorandum of April 3, 1980), and July 21, 1980, insofar as Kellogg seeks a trial *de novo*, an evidentiary hearing, or discovery, are denied.

C. General Mills' motion for discovery or for an evidentiary hearing is denied;

¹⁸ The Commission intimates no view as to the legal sufficiency of the several theories in support of dismissal advanced by General Foods in this portion of its motion.

¹⁹ Judge Hanscom has already filed an affidavit discussing his role in the events leading to the contract with Judge Hinkes. He was not present at any meeting with Bureau of Competition officials. The Commission therefore believes that there is no present need for additional inquiry of him. General Foods' contentions concerning his role will be addressed upon the Commission's disposition of the reserved portion of its motion after the record is augmented in the manner specified.

²⁰ Complaint counsel's request for an extension of time, filed July 24, 1980, is denied insofar as it seeks an extension of time to address Kellogg's July 21, 1980, motion to have the Commission reconsider its order of December 8, 1978; and is granted insofar as it seeks an extension to address Kellogg's motion to disqualify Chairman Pertschuk.

D. General Foods motion to dismiss the complaint is denied except as outlined in paragraph E, *infra*;

E. (1) Barry R. Rubin and John F. Dugan shall file with the Commission, within 20 days, affidavits which set forth in detail their recollection as to the matters specified in paragraph F, *infra*; (2) Barry Kefauver shall file with the Commission, within 20 days, an affidavit which sets forth in detail his recollection as to the matters specified in paragraph F, to the extent that he has not addressed these matters in his affidavit of December 13, 1979; (3) the Secretary shall send to Daniel C. Schwartz and Peter Brickfield the attached letters, requesting them to file with the Commission, within 20 days, affidavits which set forth in detail their recollection as to the matters specified in paragraph F; and (4) the Secretary shall simultaneously place on the docket of this proceeding, and serve upon the parties, these affidavits at such time as all of them have been received. The Commission shall, upon review of the affidavits, determine what further inquiry, if any, is necessary; and

F. The affidavits required by paragraph E shall address the following:

(1) the circumstances under which each affiant first learned that Judge Hinkes was contemplating retirement;

(2) the time, place, and substance of any conversation prior to September 8, 1978, with persons outside the Bureau or office in which the affiant was employed concerning Judge Hinkes' retirement, retention under contract, or other status;

(3) the identity of all persons with whom such conversations took place;

(4) the time, place, and substance of any conversation concerning arrangements for a meeting held on August 14, 1978 at which Messrs. Schwartz, Dugan, Kefauver, Brickfield and Rubin attended, according to the Kefauver affidavit of December 13, 1979;

(5) the substance of discussion at that meeting, and in particular, whether any participant at the meeting discussed rulings that Judge Hinkes had made or might make in Docket No. 8883;

(6) the time, place, and substance of any conversation concerning arrangements for a meeting held on August 16, 1978, at which Messrs. Schwartz, Dugan, and Kefauver attended, according to the Kefauver affidavit of December 13, 1979; and

(7) the substance of discussion at that meeting, and in particular, whether any participant at the meeting discussed rulings that Judge Hinkes had made or might make in Dkt. 8883.

G. The authority of the ALJ to issue his order of May 14, 1980, is

affirmed, and the ALJ's request for an extension of time for filing the initial decision is granted.

H. Kellogg's requests to admit certain documents in evidence, filed May 20, 1980, and July 2, 1980, are denied.

I. Kellogg's objections to having Commissioner Clanton preside at the taking of Judge Hinkes' statement are overruled.

Chairman Pertschuk and Commissioner Pitofsky did not participate.

Complaint

IN THE MATTER OF

BILL CROUCH FOREIGN, INC., d/b/a BILL CROUCH
IMPORTS, INC. (formerly MAZDA OF BOULDER, INC.)

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

Docket C-3030. Complaint, July 31, 1980—Decision, July 31, 1980

This consent order requires, among other things, a Boulder, Colo. retail dealer for new Honda automobiles to cease from charging customers more than its actual cost for transporting vehicles to its showroom; misrepresenting that optional equipment is installed by the manufacturer or required by law; and failing to disclose to customers any additional charges that would be included in the purchase price of the automobile. The order further requires the firm to make refunds, in a prescribed manner, to eligible Honda Accord customers who had paid more than \$30.00 above the actual cost for freight; and retain specified records for a period of two years.

Appearances

For the Commission: *John H. Evans* and *Allen R. Franck*

For the respondent: *Miles C. Cortez, Jr.* and *Debra R. Lappin*,
Welborn, Dufford, Cook & Brown, Denver, Colo.

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 Bill Crouch Foreign, Inc., dba Bill Crouch Imports, Inc. (formerly Mazda of Boulder, Inc.), a corporation, hereinafter sometimes referred to as "respondent," 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 is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Colorado with its principal office and principal place of business located at 2555 Thirtieth St., Boulder, Colorado.

PAR. 2. Respondent is now, and for some time has been, engaged in the advertising, offering for sale, and sale of new automobiles, and the parts and equipment thereof, to retail customers. Respondent is an authorized dealer for the Honda Automobile Company.