

Interlocutory Order

98 F.T.C.

IN THE MATTER OF

INTERNATIONAL HARVESTER COMPANY

*Docket 9147. Interlocutory Order, Aug. 12, 1981*ORDER GRANTING MOTIONS FOR LEAVE TO SUBMIT ADDITIONAL
EVIDENCE ON THE ISSUE OF PUBLIC INTEREST

By motions dated July 14 and 15, 1981, complaint counsel have asked the Commission to receive and consider new evidence of fuel fires involving respondent International Harvester's (IH) gas-powered tractors. In its opposing memorandum, IH also provides additional evidence of recent fuel fires involving these tractors.

The "Gary Killingbeck" incident and other alleged fuel fires recounted for the first time by complaint counsel and IH possibly raise questions both about the appropriate scope of relief in this case and the adequacy of IH's past disclosure of alleged safety hazards to affected tractor owners. Thus, this evidence may be relevant to the public interest question certified to the Commission by Judge Mathias. IH does not deny that this evidence may be relevant to the public interest question. Instead, it claims the evidence of the Killingbeck fire is tainted by the way in which it was collected by complaint counsel and thus should not be considered by the Commission. In the absence of a trial record, the Commission will not attempt to evaluate IH's allegations, or determine the ultimate weight that should be accorded the new evidence of fuel fires in any findings of fact. However, the existence of such evidence, and the dispute between the parties over its significance, may be relevant to an assessment of the need for further litigation concerning the sufficiency of IH's notification efforts and the appropriateness of prospective relief.

Accordingly, *it is ordered*, That complaint counsel's motion and supplemental motion for leave to submit additional evidence on the issue of public interest are hereby granted.

IN THE MATTER OF
GROLIER, INCORPORATED, ET AL.

Docket 8879. Interlocutory Order, Aug. 13, 1981

ORDER DENYING MOTION TO DISQUALIFY JUDGE VON BRAND

This matter is before us once again on Respondent's Motion for Disqualification and Removal of the Administrative Law Judge ("Renewed Motion"). Grolier was given the opportunity to raise this issue a second time when the United States Court of Appeals for the Ninth Circuit remanded the case because it believed that there was an erroneous "flat refusal" by the Commission to disclose to Grolier anything at all about Administrative Law Judge von Brand's prior participation in the Grolier case while he served as an attorney-advisor to former Commissioner MacIntyre. *Grolier, Inc. v. FTC*, 615 F.2d 1215, 1222 (9th Cir. 1980).

The Commission denied Grolier's discovery request when it held that, as a matter of law, attorney-advisors were not engaged in investigating or prosecuting matters so as to bring them within the proscription of Section 554(d) of the Administrative Procedure Act ("APA"), 5 U.S.C. 554(d). See *Grolier, Inc.*, 87 F.T.C. 179, 181 (1976). The Ninth Circuit held however that Section 554(d) precluded attorney-advisors to the Commissioners "from [subsequently] participating in the adjudication of cases [as administrative law judges] in which they have actually performed * * * ['investigative and prosecuting'] functions, and in 'factually related cases,'" and stated that "[o]nce an attorney-advisor is shown to have been 'engaged in the performance of investigative or prosecuting functions,' through prior acquaintance with *ex parte* information, 554(d) says he 'may not * * * participate or advise in the decision * * *.'" *Id.*, 615 F.2d 1221. The Ninth Circuit therefore held that Judge von Brand's "actual involvement" with "information received outside of the controlled adjudicative setting" (615 F.2d 1220, 1221) was the critical determination to be made on disqualification. The court remanded the case for us to reconsider the denial of discovery and thereafter the disqualification motion.

Since the case was remanded, Grolier has made extensive submissions, mostly consisting of documents from the Commission's files, which it had prior to the Ninth Circuit's decision. Despite directions to Grolier to state the impact these documents might have on the disqualification issue,¹ Grolier has presented only a recast version of

¹ Order Reopening Proceeding and Directing Submission of Further Information, September 12, 1980.