

IN THE MATTER OF
THE KROGER COMPANY

Docket 9102. Interlocutory Order, Feb. 26, 1979

ORDER DENYING MOTION FOR RECONSIDERATION AND DENYING
MOTION TO DISQUALIFY ADMINISTRATIVE LAW JUDGE

Respondent has moved for reconsideration of our recent order affirming the administrative law judge's ("ALJ") denial of respondent's motion for discovery of certain documents in the files of the Commission. Respondent has also moved to disqualify the ALJ, Montgomery K. Hyun, on the ground that because he had access to many of these same documents during his prior employment as attorney-advisor to former Chairman Engman, his continued participation creates an actual or apparent impropriety. Respondent perceives an impropriety because "it appears that [Judge Hyun] may decide the case or have his reaction to evidence preconditioned by ex-record material and discussion on pertinent issues arising from his activities engaged in before becoming an administrative law judge." Affidavit of Stuart J. Land at 6. Judge Hyun declined to disqualify himself and certified respondent's motion to the Commission, pursuant to Section 3.42(g) of our Rules of Practice.

The Issue of Disqualification

This case concerns, *inter alia*, allegations that respondent, which owns a chain of supermarkets, made comparative price claims about the relative costs to consumers of its products, which claims were based upon methodologically unsound price surveys. Judge Hyun accepted an assignment to this matter only on the basis, which he has expressly reaffirmed, that he had no recollection of advising former Chairman Engman on, or otherwise dealing with, any matter pertaining to respondent or to retail food advertising generally during his tenure as an attorney-advisor. Respondent has not suggested that the contrary is true. Thus, the only question with which we are presented here is whether disqualification of an administrative law judge is mandated where in his prior employment he had access to, but does not recall reviewing, materials which, respondent contends, might influence his reaction to record evidence and thus lead him to render a biased decision.

The Nature of the Claim

Judge Hyun resigned from the Commission in September 1973; the

preliminary investigation underlying the instant complaint was not opened until December 1975, and the complaint itself was not issued until July 1977. Accordingly, respondent cannot and does not allege that the documents to which Judge Hyun had access bear specifically on the allegations against it. Instead, respondent avers that the Commission documents concern and would reflect upon the ease or difficulty of designing and implementing a methodologically valid retail food price survey generally. Collectively, respondent claims, such documents would tend to be exculpatory in nature.¹ But, it is apparent, respondent could only benefit from any preconditioning of the mind of Judge Hyun resulting from his exposure to allegedly exculpatory information. To assert this disqualification claim, therefore, respondent avers that at the time of Judge Hyun's resignation from the Commission, the exculpatory nature of the document may not yet have become evident, because the Commission's staff had not yet comprehended or reported the difficulties of devising a sound methodology. Thus, it is alleged, during his seven-month service as an attorney-advisor, Judge Hyun would have had access only to documents which might not prove to be exculpatory after all, and that he therefore may be "preconditioned," if one presumes he actually read or discussed the documents, to react other than positively to respondent's defense asserting the unreasonable difficulty of conducting a methodologically valid survey.

Disposition of the Motion for Disqualification

Because we do not perceive an appearance of impropriety, we decline either to reverse our earlier determination concerning document production² or to order the disqualification of the ALJ. Even if all the allegations contained in the moving affidavit are taken as true, respondent would still fall short. As we have previously stated, an ALJ should be disqualified only upon an adequate showing of bias or prejudice. Mere access to internal Commission documents tangentially relevant to a proceeding cannot be grounds for his dismissal, notwithstanding that such access has served, under our Rules of Practice, as grounds for denial of clearance to a former Commission employee who wished to appear as counsel for respondent in this litigation. See letter of November 16,

¹ On this basis, respondent has sought, unsuccessfully, to have all such documents, including those which the ALJ has ruled are exempt from disclosure by reason of privilege, produced and admitted into evidence in this litigation. Judge Hyun has, of course, ordered production to respondent of all relevant non-privileged factual materials, including exculpatory information, in the possession of the Commission.

² As noted at the outset, we recently affirmed Judge Hyun's denial of respondent's motion for production of otherwise privileged Commission documents. Respondent has asked us, in connection with the motion for disqualification of Judge Hyun, to reconsider this determination, so that it might "lay bare facts which would either confirm or dispel the appearance of impropriety that now exists." Motion for Reconsideration at 2.

1978 to S. Mark Tuller, Esq. As we have noted previously, our clearance rules address issues wholly distinct from those pertinent to disqualification of a law judge.³

The two instances cited by respondent in which disqualification was ordered by a Court of Appeals because an individual acting in an adjudicative capacity had gained knowledge of relevant facts while serving in a prior, non-judicial capacity, differ materially from this case and do not support respondent's contention that Judge Hyun must be disqualified.

In *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966), it was proved that a member of the Commission, in his role as Chief Counsel to the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, had personally investigated the same facts and issues concerning the same parties named as respondents in an administrative proceeding, prior to adjudicating that proceeding in his subsequent role as Chairman of the Commission. The decision plainly is not based on the Commissioner's access to pertinent information in his role as Chief Counsel but rather upon his extensive personal conduct, which the court held to be sufficient to unseat the presumption of impartiality. Indeed, the Court of Appeals specifically stated that the Commissioner's service, standing alone, as counsel to the subcommittee that was undertaking the investigation, would not necessarily require his disqualification. 363 F.2d at 768.

In *United States v. Amerine*, 411 F.2d 1130 (6th Cir. 1969), a criminal case, the court ordered the disqualification of a district court judge who had tried and sentenced a defendant against whom the original complaint had been issued during the period of the judge's prior service as United States Attorney. There are critical distinctions between *Amerine* and the instant case, even beyond the undeniable asymmetry of the criminal and civil laws. First, the complaint in this case was not issued until four years after Judge Hyun's resignation from the Commission, a salient distinction which eliminates any need for disqualification. See *United States v. Wilson*, 426 F.2d 268 (6th Cir. 1970); *Barry v. United States*, 528 F.2d 1094 (7th Cir.), cert. den., 429 U.S. 826 (1976); *United States v. Kelly*, 556

³ In the clearance context, the Commission's primary concern is with the perception that a former employee may have an advantage in representing a client by reason of having had access to nonpublic information, and as a matter of policy the Commission has decided to base its determinations on an essentially objective standard—likelihood of access and opportunity to be exposed to such information—rather than to rely solely upon the subjective standard of actual exposure. In the present context, however, respondent's claim of disqualification rests largely upon the supposed effects of actual exposure to certain information, and the Commission has concluded in any event that, under its precedents, even actual exposure would not be disqualifying, see *infra*. Alternative Ground for Disposition of Motion to Disqualify, there being no comparable problem of a former Commission employee using for private purposes information acquired while a Commission employee.

F.2d 257 (5th Cir. 1977), *cert. den.*, 434 U.S. 1017 (1978). Second, Mr. Hyun's role as attorney-advisor to a Commissioner is hardly akin to that of a United States Attorney, who exercises supervisory responsibility and at least nominally initiates charges and issues complaints. Finally, *Amerine* is of limited utility in any event, since the opinion rested solely upon a statutory construction of the former version of 28 U.S.C. 455, under which the judge was deemed to have been "of counsel" to the government by dint of his former role as United States Attorney.

Finally, respondent urges upon us the current version of 28 U.S.C. 455(b) (1976), as amended in 1974, which mandates the disqualification of a federal judge who has "personal knowledge of disputed evidentiary facts concerning the proceeding" or who "participated as . . . adviser . . . concerning the proceeding" while "in governmental employment." The proposed application of the statute to the facts at hand cannot be sustained. First, the statute on its face does not apply to administrative law judges,⁴ and respondent's argument that the courts have so extended the statute, Application for Review of ALJ's Order of January 15, 1979 at 12, lacks support. There is considerable authority, apart from the application of maxims of construction, which suggests that Section 455 does not apply to agency adjudicators, whose potential disqualification is to be tested instead against the standard set out in the Administrative Procedure Act ("APA"). See 5 U.S.C. 556(b) (1976); *Securities and Exchange Comm'n v. R. A. Holman & Co.*, 323 F.2d 284, 287 (D.C. Cir.), *cert. den.*, 375 U.S. 943 (1963); *Converse v. Udall*, 262 F.Supp. 583 (D. Ore. 1966), *aff'd*, 399 F.2d 616 (9th Cir. 1968), *cert. den.*, 393 U.S. 1025 (1969). The APA gives appropriate recognition to the varied functions performed by agencies which federal judges would not be expected to perform. Where Congress has not explicitly subjected agencies to the same strictures applicable to federal courts, it would be inappropriate to subject an agency's actions to the same standards. See generally *Vermont Yankee Nuclear Power Corp v. NRDC*, 435 U.S. 519 (1978); *FTC v. Flotill Prods., Inc.*, 389 U.S. 179, 183-85 (1967); *United States v. Morton Salt Co.*, 338 U.S. 632, 641-42 (1950).

Second, assuming *arguendo* that the statute does apply, it does not require Judge Hyun's disqualification. The judge has specifically denied having any "personal knowledge" whatever concerning this proceeding, and he has specifically denied that he "participated as an advisor" concerning this proceeding. The authorities are also clear that under Section 455, a necessary precondition to disqualifi-

⁴ Only justices, judges, magistrates and referees in bankruptcy are expressly covered.

cation is that the proceeding in question have been initiated during the judge's prior tenure in a non-judicial capacity, a hurdle which respondent plainly fails to surmount here. *See United States v. Kelly, supra; Barry v. United States, supra.*

In the absence of some evidence extrinsic to the discovery in this case, which suggests that Judge Hyun's stated recollections are mistaken, we see no basis for disqualification or even for further inquiry. There is nothing to suggest that the judge will decide the case on the basis of anything other than the record evidence. Respondent has failed utterly to demonstrate that Judge Hyun has "a bent of mind that may prevent or impede impartiality of judgment." *Berger v. United States*, 255 U.S. 22, 33-34 (1921).

Alternative Ground for Disposition of Motion to Disqualify

As an alternative and independent ground for affirmance, the Commission is of the view that Commission rule and precedent, as well as the Administrative Procedure Act, dispose of respondent's arguments.

For example, *Grolier, Inc.*, 87 F.T.C. 179, 180 (1976), *aff'd* 91 F.T.C. 486 (1978), contradicts respondent's position. There, the Commission held that even an ALJ's prior participation as an attorney-advisor in "provid[ing] advice during the precomplaint stage of an investigation" would not alone be sufficient to order his disqualification on the grounds of alleged improper commingling of functions, possible bias, or possible exposure to information not later admitted into evidence. In the instant case, of course, Judge Hyun has stated that he has no present recollection of participating in this matter, and we have no reason to question his statements. *Cf. National Nutritional Foods Ass'n v. FDA*, 491 F.2d 1141, 1144-46 (2d Cir.), *cert. den.*, 419 U.S. 874 (1974); *Hercules v. EPA*, No. 77-1248, slip op. at 59-62 (D.C. Cir. Nov. 3, 1978). Judge Hyun's conduct thus falls well within the ambit of activity protected by *Grolier*.

Neither is the relief sought by respondent required by the APA. Section 7, 5 U.S.C. 556, of course, mandates impartiality, but does not aid respondent, because respondent has failed completely to overcome the strong presumption of honesty and fairmindedness attributed to agency adjudicators. *See Withrow v. Larkin*, 421 U.S. 35, 47, 55 (1975). Indeed, under respondent's argument a Commissioner who had access to the same information as Judge Hyun could not then preside at the reception of evidence, a result clearly inconsistent with the APA.

Disposition of the Motion for Reconsideration

Respondent's motion for reconsideration must be denied. Absent some extrinsic evidence of bias or prejudice by the ALJ, respondent is not entitled to discovery of otherwise privileged documents to which it has sought and been denied access already in this proceeding. *Cf. United States v. Litton Industries, Inc.*, 462 F.2d 14 (9th Cir. 1972); *R. A. Holman & Co. v. S.E.C.*, 366 F.2d 446 (2d Cir. 1966), *cert. den.*, 389 U.S. 991 (1967). The naked conclusory allegation of bias, resting upon a hypothetical preconditioning of the mind of the ALJ resulting from his possible exposure to documents which he does not recall, does not state a need sufficient to overcome a proper assertion of privilege. Accordingly,

It is ordered, That respondent's motion for reconsideration of the Order Affirming Order Ruling on Respondent's Motion for Production of Documents be, and it hereby is, denied. And,

It is further ordered, That respondent's motion for disqualification of the administrative law judge be, and it hereby is, denied.

Commissioner Pitofsky did not participate.

IN THE MATTER OF
LOUISIANA-PACIFIC CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS

Docket C-2956. Complaint, Feb. 27, 1979 — Decision, Feb. 27, 1979

This consent order, among other things, requires a Portland, Ore. firm engaged in harvesting and converting timber into various wood products, including medium density fiberboard (MDF) and particleboard, to divest, within two years to a Commission-approved buyer, the Rocklin MDF plant, which firm acquired through its merger with the Fiberboard Corporation; and offer the new buyer the opportunity to purchase from the firm, for five years, a limited amount of the raw materials necessary to manufacture MDF. Additionally, the order prohibits the firm, for ten years, from acquiring, without prior agency approval, any entity engaged in the manufacture of particleboard or MDF.

Appearances

For the Commission: *James Egan.*

For the respondent: *William E. Willis, Sullivan & Cromwell, New York City.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent, subject to the jurisdiction of the Commission, has entered into a merger agreement which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, that said agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 4(b), stating its charges in the following Count I.

The Federal Trade Commission, having further reason to believe that the above-named respondent also has violated and is violating Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, through the acquisition of the stock and/or assets of various corporations, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b), of the Federal

Trade Commission Act, 15 U.S.C. 45(b), stating its charges in the following Count II.

COUNT I

I. Louisiana Pacific Corporation

PARAGRAPH 1. Louisiana Pacific Corporation (L-P) is a corporation organized under the laws of the State of Delaware with its principal place of business located at 1300 S.W. Fifth Ave., Portland, Oregon.

PAR. 2. L-P is a diversified, integrated forest products company. It grows and harvests timber which it then converts to various wood products, including lumber, plywood, particleboard, veneer, pulp and wood chips. In 1977 L-P had total shipments of particleboard in excess of \$56 million and total sales of lumber in excess of \$330 million.

PAR. 3. In 1977 L-P had net sales in excess of \$794 million and net income in excess of \$60 million.

II. Fibreboard Corporation

PAR. 4. Fibreboard Corporation (F-B) is a corporation organized under the laws of the State of Delaware with its principal place of business located at 55 Francisco St., San Francisco, California.

PAR. 5. F-B is a diversified, integrated forest products company. It grows and harvests timber, which it then converts to various wood products, including lumber, plywood, medium density fiberboard (MDF), pulp and wood chips. It is also involved in the manufacture and sale of container products and insulation. F-B's total shipments of MDF in 1977 exceeded \$10 million and its total sales of forest products exceeded \$51 million.

PAR. 6. In 1977 F-B had net sales in excess of \$227 million and net income in excess of \$1.2 million.

III. Jurisdiction

PAR. 7. At all times relevant herein L-P and F-B have been engaged in the manufacture and sale of various products, including those products relevant to this complaint, in interstate commerce and are engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and each is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

IV. The Merger Agreement

PAR. 8. On March 22, 1978 L-P and F-B entered into a merger agreement which provides, inter alia, for the merger of F-B into L-P. The merger agreement further provides that, upon consummation of the merger, F-B will become a wholly-owned subsidiary of L-P. The value of the transaction is in excess of \$56 million.

V. Trade and Commerce

PAR. 9. The relevant markets are:

- a. The manufacture in the United States of particleboard and MDF, and the sale thereof.
- b. The manufacture in the Western Region of the United States of particleboard and MDF, and the sale thereof.
- c. The manufacture in the Pacific Coast Region of the United States of particleboard and MDF, and the sale thereof.

PAR. 10. The Western Region of the United States as used herein includes the States of Arizona, California, Colorado, Idaho, Montana, New Mexico, Oregon, Nevada, Utah, Washington and Wyoming. Of these states particleboard and/or MDF is actually produced only in the States of California, Idaho, Montana, New Mexico, Oregon and Washington. The Pacific Coast Region of the United States as used herein includes the States of California, Oregon and Washington.

PAR. 11. Concentration in each of the relevant markets enumerated in Paragraph 9 of this complaint is already high and increasing.

PAR. 12. Barriers to entry into each of the relevant markets enumerated in Paragraph 9 of this complaint are already high and increasing.

VI. Actual Competition

PAR. 13. L-P and F-B are now and have been since at least 1975 actual competitors of each other in each of the relevant markets enumerated in Paragraph 9 of this complaint, and actual competitors of others engaged in each of the relevant markets enumerated in Paragraph 9 of this complaint.

PAR. 14. L-P is the largest manufacturer, by capacity, of particleboard/MDF in the United States, accounting, in 1978, for approximately 12.4 percent of all capacity in that market. In 1978 F-B had approximately 1.3 percent of the total capacity in that market. In terms of actual production, L-P was the second largest producer in 1977 accounting for approximately 11.1 percent of all particleboard/MDF produced in the United States. In that same year F-B

accounted for approximately 1.3 percent of total production in that market.

PAR. 15. L-P is the largest manufacturer, by capacity, of particleboard/MDF in the Western Region of the United States, accounting, in 1978, for approximately 14.5 percent of all capacity in that market. In 1978 F-B was ranked twelfth in that market in terms of capacity with approximately 2.9 percent of the total. In terms of actual production, L-P was the third largest producer in 1977 accounting for approximately 14.1 percent of all particleboard/MDF produced in the Western Region of the United States. In the same year F-B ranked thirteenth in terms of production accounting for 2.9 percent of the market.

PAR. 16. L-P is the third largest manufacturer, by capacity, of particleboard in the Pacific Coast Region of the United States accounting in 1978, for approximately 11.4 percent of all capacity in that market. In 1978 F-B was ranked eleventh in that market in terms of capacity with approximately 3.3 percent of the total. In terms of actual production, L-P was the fourth largest producer in 1977 accounting for approximately 10.0 percent of all particleboard/MDF produced in the Pacific Coast Region of the United States. In the same year F-B ranked twelfth in terms of production accounting for approximately 3.5 percent of the market.

VII. Effects; Violations Charged

PAR. 17. The effects of the proposed acquisition may be to substantially lessen competition or tend to create a monopoly in the relevant markets enumerated in Paragraph 9 of this complaint in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

- (a) actual competition between L-P, F-B and others in the manufacture and sale of particleboard/MDF will be eliminated; and
- (b) concentration in the manufacture and sale of particleboard/MDF will be increased and the possibilities for eventual deconcentration may be diminished.

COUNT II

VIII. Louisiana-Pacific Corporation

PAR. 18. The allegations as set forth in Paragraphs 1 through 3,

inclusive of Count I are hereby incorporated by reference and made a part of Count II as if rewritten herein.

IX. Evans Products Company

PAR. 19. Evans Products Company is a corporation organized under the State of Delaware with its principal place of business located at 1121 S.W. Salmon St., Portland, Oregon.

PAR. 20. Evans Products Company is engaged in the manufacturing, marketing and retailing of building materials including lumber, plywood, plywood specialities, and precut homes, and the manufacturing, marketing and leasing of transportation and industrial equipment. In 1975, its last full year of particleboard production, Evans Products Company had particleboard shipments in excess of \$9 million.

X. Georgia-Pacific Corporation

PAR. 21. Georgia-Pacific Corporation ("G-P") is a corporation organized under the laws of the State of Delaware with its principal place of business located at 900 S.W. Fifth Ave., Portland, Oregon.

PAR. 22. G-P is a diversified integrated forest products company. It grows and harvests timber which it then converts to various wood products, including lumber, plywood, particleboard and wood chips. In 1975 G-P had particleboard shipments in excess of \$31 million.

XI. Jurisdiction

PAR. 23. The allegations as set forth in Paragraph 7 of Count I which relate to L-P are hereby incorporated by reference and made part of Count II as if fully rewritten herein.

PAR. 24. At all times relevant herein Evans Products and G-P have been engaged in the manufacture and sale of various products, including those products relevant to this complaint, in interstate commerce and are engaged in commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

XII. The Acquisitions

PAR. 25. On April 2, 1976, L-P purchased from Evans Products Company a particleboard plant in Missoula, Montana for \$11,798,000 (including plant and related assets).

PAR. 26. On August 30, 1976, L-P leased a particleboard plant from G-P at Ukiah, California ("Ukiah") for a period of five years at an

average annual payment of \$480,000. L-P has the option to purchase the plant at the end of 3 years.

XIII. Trade and Commerce

PAR. 27. The relevant markets are:

- a. The manufacture in the United States of particleboard and MDF, and the sale thereof.
- b. The manufacture in the Western United States of particleboard and MDF, and the sale thereof.
- c. The manufacture in the Pacific Coast Region of the United States of particleboard and MDF, and the sale thereof.

PAR. 28. The allegations as set forth in Paragraph 10 of Count I are hereby incorporated by reference and made a part of Count II as if rewritten herein.

PAR. 29. At the time of the acquisitions by L-P of the Missoula particleboard plant and the Ukiah particleboard plant, the manufacture of particleboard/MDF and the sale thereof in the relevant markets as enumerated in Paragraph 27 of this complaint was highly concentrated and increasing.

PAR. 30. Barriers to entry into the manufacture and sale of particleboard/MDF are substantial and are increasing.

XIV. Actual Competition

PAR. 31. At the time of the acquisitions, L-P and Evans Products Company were and had been since at least 1975, actual competitors of each other in the relevant markets as enumerated in Paragraph 27, subparts a. and b. of this complaint and actual competitors of others engaged in the relevant markets as enumerated in Paragraph 27, subparts a and b, of this complaint.

PAR. 32. At the time of the acquisitions, L-P and G-P were and had been since 1975, actual competitors of each other in the relevant markets as enumerated in Paragraph 27 of this complaint, and actual competitors of others engaged in the relevant markets as enumerated in Paragraph 27 of this complaint.

PAR. 33. In 1975, the year preceeding the acquisitions L-P accounted for approximately 5.3 percent of all particleboard/MDF production in the United States; 3.9 percent of all particleboard/MDF production in the Western Region of the United States and 4.6 percent of all particleboard/MDF production in the Pacific Coast Region of the United States. In that same year, G-P's Ukiah plant accounted for 1.6 percent of all particleboard production in the

United States; 3.3 percent of all particleboard/MDF production in the Western Region of the United States and 3.9 percent of all particleboard/MDF production in the Pacific Coast Region of the United States. In that same year, Evans Products Company accounted for 2.9 percent of all particleboard/MDF production in the United States and 6.1 percent of all particleboard/MDF production in the Western Region of the United States.

XV. Effects, Violations Charged

PAR. 34. The effects of the acquisitions may be to substantially lessen competition or tend to create a monopoly in the relevant markets enumerated in Paragraph 27 of this complaint in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

- (a) actual competition between L-P, G-P, Evans Products Company and others in the manufacture and sale of particleboard/MDF has been eliminated; and
- (b) concentration in the manufacture and sale of particleboard/MDF has been increased and the possibilities for eventual deconcentration have been diminished.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with a violation of the Federal Trade Commission Act and the Clayton Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent 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 matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in

that respect, and having thereupon accepted the executed agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following findings and enters the following order:

1. Respondent Louisiana-Pacific Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at 1300 S.W. Fifth Ave., Portland, Oregon.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent and the proceeding is in the public interest.

ORDER

For the purpose of this order, the following definitions shall apply:

(a) "Particleboard" is a flat panel product consisting of particles of wood bonded together with a synthetic resin or other suitable bonding system by a process in which the interparticle bond is created by the bonding systems, as further described in Commercial Standard CS236-66, published by the United States Department of Commerce, National Bureau of Standards, and as reported under the Standard Industrial Classification Manual No. 24921.

(b) "Medium density fiberboard" is a dry-formed panel product manufactured from lignocellulosic fibers, combined with a synthetic resin or other suitable binder, by the application of heat and pressure in which the interfiber bond is substantially created by the added binder, as further described in the standard published by the National Particleboard Association, N.P.A. 4-73, and as reported under the Standard Industrial Classification Manual No. 24997.

(c) The "Rocklin MDF plant" consists of land, plant, property, equipment and machinery presently owned and operated by Fibreboard Corporation for the manufacture of medium density fiberboard at Rocklin, California, to be acquired by respondent as a result of its merger with Fibreboard Corporation, including all additions, replacements and improvements thereto hereafter made by respondent.

I

It is ordered. That respondent, its officers, directors, agents, representatives and employees shall, absolutely and in good faith

divest, within two (2) years from the date this order becomes final, subject to the prior approval of the Federal Trade Commission, all rights, title and interest in and to the Rocklin MDF plant acquired by respondent as a result of its merger with Fibreboard Corporation.

II

It is further ordered, That in connection with any divestiture of the said Rocklin MDF plant, respondent will offer to any prospective acquirer the right to enter into a contract to buy from respondent (or its subsidiary Fibreboard Corporation) for use in said plant at Rocklin, California wood residue raw materials of the type currently being supplied by Fibreboard Corporation's internal operations to said plant, which contract will include provisions substantially as follows:

- (a) the contract will continue for a minimum of five (5) years;
- (b) prices will be market prices existing in the the area during the contract term for similar wood residue raw materials; and
- (c) quantities to be sold in each year will equal at least the total quantity of said wood residue raw materials heretofore supplied to said plant from Fibreboard Corporation's own internal operations in the year 1977, or which will be supplied in the year 1978, or double the total quantity of said materials so supplied in the first six months of 1978, whichever is greatest.

III

It is further ordered, That none of the assets and properties required to be divested by respondent pursuant to Paragraph I above, shall be divested directly or indirectly to anyone who is, at the time of divestiture, an officer, director, employee, or agent of, or under the control, direction or influence of respondent, or who owns or controls more than one percent of the capital stock of respondent.

IV

It is further ordered, That respondent shall cease and desist for a period of ten (10) years from the date this order becomes final from acquiring, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Commission, (1) the whole or any part of the stock or share capital or any concern, corporate or noncorporate, engaged at the time of acquisition in any State of the United States in the manufacture of (a) particleboard, or (b) medium density fiberboard, or (2) a manufacturing plant or facility engaged

at the time of acquisition in any State of the United States in the manufacture of (a) particleboard, or (b) medium density fiberboard. Any exercise hereafter by respondent of its option to purchase the Ukiah, California particleboard plant presently operated by respondent pursuant to a lease shall not be prohibited by this paragraph.

V

It is further ordered, That respondent shall within one (1) year from the date this order becomes final, and every sixty (60) days after one (1) year until respondent has fully complied with the provisions of Paragraphs I and II of this order, submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which respondent intends to comply or has complied with this order. All compliance reports shall include a summary of contacts or negotiations with anyone for the specified assets, the identity of all such persons, and copies of all written communications to and from such persons.

VI

It is further ordered, That respondent notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporate respondent which may affect compliance obligations arising out of the order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation or the creation or dissolution of subsidiaries.

Complaint

93 F.T.C.

IN THE MATTER OF
LANCASTER COLONY CORPORATION, ET AL.

DISMISSAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS

Docket 9119. Complaint, Oct. 25, 1978 — Dismissal Order, March 6, 1979

This order dismisses the complaint against two manufacturers of machine-made glassware alleging violations of Section 7 of the Clayton Act, and Section 5 of the Federal Trade Commission Act. The Commission, in dismissing the complaint, held that under the unique circumstances presented in this case, further proceedings in the matter are not in the public interest.

Appearances

For the Commission: *Edward T. Colbert* and *William D. Mitchell*.
For the respondents: *Richard Murphy* and *Fred A. Summer*,
Dunbar, Kiezel & Murphy, Columbus, Ohio, *Edward Wolf*, *J.B.*
Rather and *R. W. Davis*, *White & Case*, New York City and *John W.*
Barnum, *White & Case*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents, each subject to the jurisdiction of the Commission, have entered into an acquisition agreement which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, that said agreement already constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I

Definition

PARAGRAPH 1. For the purpose of this complaint, the following definition shall apply: "Machine-made glassware" means all moderately-priced soda-lime glass beverageware, tableware, food preparation glassware, and novelty and ornamental glassware items produced by machine.

II

Federal Paper Board Company, Inc.

PAR. 2. Federal Paper Board Company, Inc. (Federal Paper) is a corporation organized and existing under the laws of the State of New York, with a principal place of business at 75 Chestnut Ridge Road, Montvale, New Jersey.

PAR. 3. Federal Paper through its unincorporated Federal Glass Company division (Federal Glass) produces machine-made glassware and sells said machine-made glassware throughout the United States.

PAR. 4. In its fiscal year ended December 31, 1977, Federal Paper had net sales of approximately \$397,000,000, and net income of approximately \$13,800,000; Federal Glass had net sales of approximately \$48,000,000 and income before allocation for taxes and corporate overhead of approximately \$910,000.

PAR. 5. Federal Glass is the third largest manufacturer of machine-made glassware in the United States.

PAR. 6. Federal Glass, until 1978, was for many years a member of the American Glassware Association, which is a trade association made up of the major domestic manufacturers of machine-made glassware.

III

Lancaster Colony Corporation

PAR. 7. Lancaster Colony Corporation (Lancaster Colony) is a corporation organized and existing under the laws of the State of Delaware, with a principal place of business at 37 West Broad St., Columbus, Ohio.

PAR. 8. Lancaster Colony, through its subsidiary Indiana Glass Company, an Indiana corporation, produces machine-made glassware, and sells said machine-made glassware throughout the United States. Lancaster Colony also produces machine-made glassware through its subsidiary Lancaster Glass Corporation, an Ohio corporation, and sells said machine-made glassware throughout the United States.

PAR. 9. In its fiscal year ended June 30, 1978, Lancaster Colony had sales of approximately \$237,000,000, and net income of approximately \$23,300,000. Lancaster Colony had sales of machine-made glassware of approximately \$35,500,000.

PAR. 10. Indiana Glass Company is the fourth largest manufacturer of machine-made glassware in the United States.

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PAR. 11. Indiana Glass Company, until 1978, was for many years a member of the American Glassware Association, which is a trade association made up of the major domestic manufacturers of machine-made glassware.

IV

Jurisdiction

PAR. 12. At all times relevant herein Federal Paper and Lancaster Colony have been engaged in the manufacture and sale of machine-made glassware in interstate commerce and are engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and each is a corporation whose business is in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

V

The Acquisition Agreement

PAR. 13. On or about April 1978 Federal Paper and Lancaster Colony agreed in principle to the acquisition by Lancaster Colony of all Federal Glass assets of Federal Paper. The proposed purchase agreement provides, *inter alia*, for the sale of the Federal Glass assets of Federal Paper in exchange for approximately \$42,000,000. A letter of intent was executed by Lancaster Colony on August 29, 1978.

VI

Trade and Commerce

PAR. 14. Relevant lines of commerce are the manufacture and sale of machine-made glassware and submarkets thereof.

PAR. 15. A relevant section of the country or geographic market is the entire United States.

PAR. 16. The United States machine-made glassware market is highly concentrated with the combined market share of the four largest manufacturers estimated to be approximately 74 percent.

PAR. 17. Barriers to entry into the manufacture of machine-made glassware and submarket thereof are substantial.

VII

Actual Competition

PAR. 18. Federal Paper and Lancaster Colony are and have been for many years actual competitors in the manufacture and sale of machine-made glassware and submarkets thereof, and actual competitors of others engaged in the manufacture and sale of machine-made glassware and submarkets thereof throughout the United States.

VIII

Effects

PAR. 19. The effect of the proposed acquisition may be to substantially lessen competition or to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, or Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) actual competition between Federal Paper and Lancaster Colony in the manufacture and sale of machine-made glassware and submarkets thereof will be eliminated;

(b) actual competition between competitors generally in the manufacture and sale of machine-made glassware and submarkets thereof may be lessened;

(c) Federal Paper will be eliminated as an actual substantial independent competitor in the manufacture and sale of machine-made glassware and submarkets thereof;

(d) concentration in the manufacture and sale of machine-made glassware and submarkets thereof will be increased and possibilities for eventual deconcentration may be diminished;

(e) mergers or acquisitions between other machine-made glassware manufacturers may be encouraged, thus causing a further substantial lessening of competition and tendency toward monopoly in the relevant markets.

IX

Violations Charged

PAR. 20. The proposed acquisition by Lancaster Colony of the Federal Glass assets of Federal Paper (if consummated), the proposed Purchase Agreement between Lancaster Colony and Federal Paper (if executed), and the agreement in principle between

Lancaster Colony and Federal Paper, constitute violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and are or would be unfair acts, practices or methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

ORDER GRANTING COMPLAINT COUNSEL'S MOTION TO
WITHDRAW FROM ADJUDICATION AND TO DISMISS THE
COMPLAINT

The administrative law judge (ALJ) has certified to the Commission the motion of respondent Federal Paper Board Company, Inc. (Federal) to terminate this proceeding by an order prohibiting the sale of any of the assets of its Federal Glass Division (Division) to respondent Lancaster Colony Corporation (Lancaster). Also certified to the Commission is complaint counsel's motion to withdraw the case from adjudication and to dismiss the complaint. The ALJ recommends that the Commission accept Federal's motion and deny that of complaint counsel.

The Division has been closed since January 31, 1979, when Federal announced the shutdown of its plant, alleging continuing operating losses. However, Federal has refused to provide complaint counsel with financial and other relevant information in support of its "failing company" defense. In their papers, complaint counsel note that the withdrawal of the Wheaton Glass Co. and the Eastcliff Corporation from negotiations to purchase the Division have exhausted all feasible alternatives to liquidation of the Division or sale to Lancaster. Complaint counsel recognize the possibility that some other purchaser might exist but suggest that the slight chance of identifying another party which will expeditiously return the plant to normal operation is not worth the gamble of approximately 1500 jobs at stake. Counsel further point out that liquidation of the Division could result in the loss of its customers to the two largest firms in this industry, Anchor Hocking Corporation and the Libbey Division of Owens-Illinois.

Under these rather unique circumstances, and in the exercise of our discretion, we conclude that further proceedings in this matter are not in the public interest. Accordingly,

It is ordered, That the complaint in this matter is hereby dismissed.

Interlocutory Order

IN THE MATTER OF
CHILDREN'S ADVERTISING*TRR No. 215-60. Interlocutory Order, March 7, 1979*

ORDER MODIFYING SCHEDULE

Effective March 9, 1979, the Commission will be temporarily reduced to four members, of whom two are not presently participating in the instant proceeding. Whether or not two Commissioners might properly exercise certain decisionmaking authority under these circumstances, the Commission believes that, if at all reasonably possible, it is in the public interest that Commission decisions of significance with respect to this proceeding be taken with the participation of no fewer than three Commissioners. At the same time, certain phases of most Magnuson-Moss rulemaking proceedings, including this one, typically involve little or no intervention by the Commission because of the wide latitude to conduct hearings vested in the presiding officer. It would be productive of considerable delay, and manifestly not in the public interest, were such phases of a matter to be suspended merely because of the desire of the Commission that decisions to be made at some unspecified time in the future be made with the participation of no fewer than three members.

In light of the foregoing, the Commission can perceive no reason why the presently ongoing "legislative" hearings in this matter, which are subject to the direction of the presiding officer, ought not proceed as scheduled. Nor does any reason appear why interested parties may not thereafter propose issues for designation, or why the presiding officer may not subsequently recommend designation of such issues.¹ However, it is the present intention of the Commission that it will not designate such issues as contemplated by the Initial Notice of Rulemaking, 43 F.R. 17967, 17971 (April 27, 1978) until it may do so pursuant to a vote in which at least three members of the Commission participate. To achieve these results the following order is issued:

It is ordered, That following completion of the Washington, D.C. "legislative" hearing in this matter, persons wishing to do so must submit to the presiding officer on or before April 30, 1979, or by such other time as the presiding officer may in his sole discretion establish (1) proposed disputed issues of fact that are material and

¹ The Initial Notice of Proposed Rulemaking, 43 F.R. 17967, *et seq.* (April 27, 1978), makes no express reference to the role of the presiding officer in the designation process. It was the Commission's intention that the presiding officer should make a recommendation to the Commission as to what issues, if any, should be designated.

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necessary to resolve at a disputed issues hearing, (2) requests to cross-examine at a disputed issues hearing witnesses who appeared at the "legislative" hearings, and (3) requests to present oral rebuttal at a disputed issues hearing.

It is further ordered, That following receipt of the submissions ordered above, the presiding officer shall make a recommendation to the Commission identifying disputed issues of fact, if any, that are material and necessary to resolve at a disputed issues hearing.

It is further ordered, That subsequent proceedings in this matter shall be had at such time as the Commission shall hereafter order.

Chairman Pertschuk and Commissioner Pitofsky did not participate.

IN THE MATTER OF
TRW, INC., ET AL.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED
VIOLATION OF THE FEDERAL TRADE COMMISSION AND CLAYTON
ACTS

Docket 9084. Complaint, June 17, 1976 — Final Order, March 8, 1979

This order, among other things, requires a Cleveland, Ohio manufacturer and seller of electronic point-of-sale credit authorization equipment to cease having on its board of directors any individual who is simultaneously serving as a director of Addressograph-Multigraph Corp., or any other competitive business entity. The order also prohibits Horace A. Shepard from simultaneously serving as a director of TRW, Inc. and any other competing company.

Appearances

For the Commission: *John M. Mendenhall* and *Paul P. Eyre*.

For the respondents: *Richard W. Pogue*, *Robert H. Rawson* and *Brent L. Henry*, *Jones, Day, Reavis & Pogue*, Cleveland, Ohio and *Joseph D. McGarth*, Baker Heights, Ohio.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have been and are in violation of the provisions of Section 8 of the Clayton Act, as amended, and Section 5(a)(1) of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the public interest, issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent TRW, Inc., (hereinafter TRW), is an Ohio corporation and maintains its principal office at 23555 Euclid Ave., Cleveland, Ohio. TRW has capital, surplus, and undivided profits aggregating more than One Million Dollars (\$1,000,000). TRW is engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, and is engaged in or its business affects commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 2. Respondent Addressograph-Multigraph Corporation (hereinafter Addressograph) is a Delaware corporation and maintains its principal office at 20600 Chagrin Boulevard, Shaker Heights, Ohio. Addressograph has capital, surplus, and undivided profits aggregating more than One Million Dollars (\$1,000,000). Addressograph is engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, and is engaged in or its business affects commerce, as

“commerce” is defined in Section 4 of the Federal Trade Commission Act.

PAR. 3. Respondent Horace A. Shepard is an individual. His business address is the same as that of TRW.

PAR. 4. On or about April 29, 1969, respondent Horace A. Shepard was elected director and chief executive officer of TRW and has served in such capacities with TRW from on or about April 29, 1969, until the present. On or about November 4, 1971, respondent Horace A. Shepard was elected director of Addressograph and has served in such capacity with Addressograph from on or about November 4, 1971, until on or about November 6, 1975.

PAR. 5. During all or part of the period January 1, 1973 through and including November 6, 1975, the business of TRW and Addressograph included, but was not limited to, the manufacture, sale and distribution in commerce of point-of-sale credit authorization equipment and teller-operated bank transaction equipment, and other such equipment used for credit validation, check cashing validation, recording of deposits and withdrawals from financial institutions, and inventory record keeping.

PAR. 6. By the nature of their business as hereinabove described and location of operations with respect thereto, Addressograph and TRW were competitors, concurrent with respondent Horace A. Shepard's membership on the Boards of Directors of TRW and Addressograph, during part or all of the period January 1, 1973 through and including November 6, 1975, so that the elimination of competition by agreement between them would constitute a violation of the antitrust laws.

PAR. 7. The simultaneous membership of respondent Horace A. Shepard on the Boards of Directors of respondents TRW and Addressograph constitutes a violation of Section 8 of the Clayton Act, 15 U.S.C. 19, and Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45.

INITIAL DECISION BY JOSEPH P. DUFRESNE, ADMINISTRATIVE
LAW JUDGE

DECEMBER 22, 1977

PRELIMINARY STATEMENT

In a complaint dated June 17, 1976, the Commission charged that respondents TRW, Inc., Addressograph-Multigraph Corporation (A-M) and Horace A. Shepard, had violated Section 8 of the Clayton Act,

as amended, (15 U.S.C. 19) and Section 5(a)(1) of the Federal Trade Commission Act, as amended, (15 U.S.C. 45(a)(1)). [2]

Section 8, in pertinent part, reads as follows:

. . . no person at the same time shall be a director in any two or more corporations, any one of which has capital surplus, and undivided profits aggregating more than \$1,000,000, engaged in whole or in part in commerce, . . . if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. . . .

Section 5(a)(1) provides:

Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

The gravamen of the charges was that the simultaneous membership of Mr. Shepard on the boards of directors of TRW and A-M from January 1, 1973, through November 6, 1975 (hereinafter referred to as the "critical period"), constituted a violation of the Clayton and FTC Acts (Complaint, ¶¶ 4 and 7). This, because during the critical period the business of TRW and A-M ". . . included, but was not limited to, the manufacture, sale and distribution in commerce of point-of-sale credit authorization equipment and teller-operated bank transaction equipment, and other such equipment used for credit validation, check cashing validation, recording of deposits and withdrawals from financial institutions and inventory record keeping" (Complaint, ¶ 5).

The result alleged was that, since TRW and A-M were competitors due to the nature of their business and location of operations, coupled with Mr. Shepard's simultaneous membership on the boards of each, elimination by agreement between them of competition between TRW and A-M would constitute a violation of the antitrust laws (Complaint, ¶ 6). [3]

In their answers, in pertinent part, TRW and Mr. Shepard:

1. Denied having violated Section 8 of the Clayton Act, Section 5 of the FTC Act and denied a proceeding, as alleged in the introductory paragraph of the complaint, was in the public interest. They also denied, for want of knowledge sufficient to form a belief, the allegations regarding A-M. (Answers, ¶¶ 1 and 3);

2. Admitted (1) TRW's capital, surplus and individual profits aggregate more than \$1,000,000, (2) that it is engaged in commerce or that its business affects commerce as "commerce" is defined in the FTC Act, and (3) that Mr. Shepard is an individual whose address is the same as that of TRW. (Answers, ¶¶ 2 and 3);

3. Averred that Mr. Shepard became a director of TRW on March

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26, 1957, chief executive officer of TRW on December 22, 1969, continued in these positions and that on or about March 20, 1971, became and continued to serve as a director of A-M until November 6, 1975. (Answers, ¶ 4);

4. Admitted that between January 1, 1973, and December 6, 1975, TRW's business included the manufacture, and distribution in commerce, of products falling in the generic categories of equipment described above. They denied knowledge as to A-M's products and denied that TRW and A-M were competitors, so that the elimination of competition by agreement between them would constitute a violation of the antitrust laws, during the critical period. They also denied that Section 8 and Section 5 had been violated. [4]

The following affirmative defenses were asserted:

1. The complaint did not state a claim upon which relief could be granted (Answers, ¶ 7);

2. Mr. Shepard had decided prior to August 8, 1975 (when he first learned of the Commission's investigation - RX 54A; Solganik, Tr. 1961-62), to leave the Board of Directors of A-M, did so on November 6, 1975, and the issues raised by the complaint were moot (Answers, ¶ 8);

3. The relevant period was between October 1973, when A-M first sold an AMCAT and November 7, 1974, the date of Mr. Shepard's last election to the Board of A-M (Answers, ¶ 9) during which period A-M and TRW were not competitors (Answers, ¶ 10) and that any alleged competition between them was *de minimis* (Answers, ¶ 11);

4. TRW and Mr. Shepard were denied their rights of due process, denied equal protection of the laws and subjected to abuse of process (Answers, ¶¶ 12 and 13);

5. Section 5 of the FTC Act should not be applied to an interlocking directorate which is not violative of Section 8 of the Clayton Act (Answers, ¶ 14);

6. Section 8 of the Clayton Act does not apply to corporations (Answer of TRW, ¶ 15);

7. The proceedings were not in the public interest (Answers, ¶¶ 16 and 15, respectively); and

8. There is neither a reasonable expectation the alleged wrong would be repeated nor a need for issuance of an order (Answers, ¶¶ 7 and 16, respectively). [5]

Prehearing conferences were held on November 4, 1976 by ALJ aniel Hanscom, to whom the case was assigned initially, and by me on May 9 and 25, 1977, and on June 27, 1977. Motions for summary decision were made both by complaint counsel and TRW. These motions have been denied or are denied by this decision.

In a negotiated order described in a "Decision and Order" dated August 11, 1977, [90 F.T.C. 144] the charges as to A-M were resolved. In the order, A-M admitted all the jurisdictional facts alleged in the complaint and stipulated that consent to the order did not constitute an admission that the law had been violated.

The Consent Order: (1) prohibits A-M from having interlocking directorates with competitors if the elimination of competition by agreement between them would constitute a violation of the antitrust laws; (2) requires preparation of a list by each A-M director of the products, names and addresses of other corporations on whose board the director sits or to which he/she has been nominated; (3) requires A-M to review prior to each election of directors and to retain for each member of its board of directors and nominees, a descriptive list of all products and services of other corporations on whose board the director serves or to which he or she is a nominee; (4) requires A-M to notify the Commission of any proposed assignment, sale, or the like which may affect compliance with the order; and (5) requires filing of a report within 90 days as to the manner and form in which A-M has complied with the order.

The adjudicative hearings in the case-in-chief involving the remaining respondents, TRW and Mr. Shepard, were held in Cleveland, Ohio, and Los Angeles, California, from July 18 - 27 and July 29 - August 1, 1977, respectively. Hearings in the case-in-defense were held in Cleveland from August 22 - 29, 1977. Complaint counsel presented the case-in-rebuttal in Cleveland on September 2, 1977. The official record consists of 2477 pages of transcript. There are 111 numbered exhibits. Of these, 35 were rejected; however, in accord with Commission Rule 3.43(g), they remain a part of the official record. [6]

Bases for the Findings of Fact; Abbreviations Used

The findings of fact following are based on a review of the allegations made in the complaint, respondents' answers, the documentary evidence, and consideration of the demeanor of the witnesses. In addition, the proposed findings of fact, conclusions and proposed orders, together with reasons and briefs in support thereof filed by each side have been given careful consideration. To the extent not adopted by this decision in the form proposed or in substance, they are rejected.

For convenience, the findings of fact include references to supporting evidentiary items in the record. Such references are intended to serve as guides to the testimony, evidence and exhibits supporting the findings of fact. They do not necessarily represent complete

