

IN THE MATTER OF

INDIANA FEDERATION OF DENTISTS

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9118. Complaint, Oct. 18, 1978—Final Order, Feb. 17, 1983

This Final Order, among other things, prohibits an Anderson, Ind. dental association ("IFD") from engaging in any action or course of conduct having the effect of requiring or organizing dentists to refuse to submit radiographs or other materials requested by third-party payers for use in benefit determinations or to deal with a third-party payer in a certain way. The order also forbids IFD from engaging in any action that compels a third-party payer to deal with or to operate in a certain way in connection with dental health care benefits programs; or whose purpose is to influence a consumer's choice of dentists based on the degree of non-cooperation between such dentists and a third-party payer. Additionally, the association is required to timely mail to each of its members a copy of the Commission order together with a letter advising that IFD has abandoned all policies and guidelines that fail to conform to the provisions of the order, and that members are free to deal with dental health care programs and payers as they see fit.

Appearances

For the Commission: *L. Barry Costilo, M. Elizabeth Gee, James McCarty and Laurel Brandt.*

For the respondent: *Ronald K. Fowler, Anderson, Ind. and Bruce W. Graham, West Lafayette, Ind., intervenor for State of Indiana.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondent named in the caption hereof has violated the provisions of Section 5 of the Federal Trade Commission Act and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

PARAGRAPH 1. The following definition shall apply in this Complaint. *Third-party payer* or *payer* means any entity that provides a program of reimbursement for dental health care services to employees or members of any business organization, and any person, such as an independent claims adjuster, who provides evaluative services in connection with any such reimbursement program.

PAR. 2. Respondent Indiana Federation of Dentists ("IFD") is an unincorporated association with its principal place of business at 2403 Raible Ave., Anderson, Indiana. The IFD is composed of dentists licensed to practice dentistry in the State of Indiana and has approximately 250 members.

PAR. 3. The Indiana Dental Association ("IDA"), is an Indiana corporation with approximately 2000 members, all of whom are licensed to practice dentistry in Indiana. IDA charters, and is divided into, geographic component societies. Membership in a component society is a condition of membership in IDA.

PAR. 4. Members of respondent and of IDA are engaged in the business of providing dental health care services to patients for a fee and are paid for such services from the patients' personal funds and/or from funds provided under dental health care benefits programs. Except to the extent that competition has been restrained as herein alleged, members of respondent have been and are now in competition among themselves and with other dentists. [2]

PAR. 5. Among respondent's objectives is representation of dentists in socio-economic matters, as a result of which respondent is a corporation organized to carry on business for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 6. In 1976, total expenditures for dental health care services in the United States were approximately \$8.6 billion. The annual rate of expenditure in Indiana is at least \$150 million.

PAR. 7. In the course and conduct of their businesses, members of respondent, among other things,

(A) Receive substantial revenue from private third-party payers and from the Federal Government in payment for rendering dental health care services, which money flows across state lines;

(B) Provide dental health care services to patients who receive reimbursements from private third-party payers and from the Federal Government for payments made for such services, which reimbursements flow across state lines;

(C) Receive and treat patients from states other than Indiana; and

(D) Utilize and prescribe drugs, medicines, and other products which are shipped in interstate commerce;

as a result of which the acts and practices herein below alleged are in or affect commerce within the meaning of the Federal Trade Commission Act, and respondent is subject to the jurisdiction of the Federal Trade Commission.

PAR. 8. A substantial portion of the population of Indiana is covered by dental health care benefits programs administered by third-party

payers. Many of such programs include provisions for determination of benefits in advance of treatment ("predetermination") and limitation of coverage to the least expensive adequate course of treatment, with a requirement that radiographs ("X-rays") be submitted to aid in benefit determination. The purpose of such provisions is to contain the cost of dental care. Their efficient utilization requires cooperation from treating dentists.

PAR. 9. Since at least 1961, IDA, its component societies, and their members have engaged in acts, practices, and methods of competition to eliminate, prevent, or hinder competition among dentists with respect to cooperation by dentists with dental health care benefits programs containing predetermination and least expensive adequate course of treatment [3] provisions. In the course thereof, IDA, its component societies, and their members in concert and agreement among themselves, and with IFD and its members, as hereinbelow alleged, *inter alia*:

A. Promulgated and distributed to their members guidelines and principles for dealing with third-party payers, along with forms and information to facilitate adherence to such guidelines and principles;

B. Encouraged and induced their members to discontinue serving and/or to refuse to serve as dental consultants for third-party payers and to refuse to provide payers with other professional services such as, but not limited to, taking X-rays for use in benefits determination;

C. Conducted meetings, workshops, and pledge campaigns among their members to gain the agreement of individual members not to compete with other dentists in dealing with third-party payers;

D. Urged dental organizations in other states to pursue courses of conduct similar to that hereinabove described; and

E. Urged payers, purchasers, and beneficiaries of dental health care benefits plans to eliminate provisions of such plans that they find unacceptable.

PAR. 10. In or about September 1976, respondent was organized and founded by dentists, at least some of whom were or had been members or officers of IDA. In or about September 1976, respondent announced its intention to adopt and pursue the purposes of the agreement and concert of action alleged in Paragraph Nine.

PAR. 11. Since September 1976, respondent and its members, in concert and agreement among themselves, have acted in furtherance of the agreement and concert of action alleged in Paragraph Nine, and have otherwise engaged in acts, practices, and methods of competition to eliminate, prevent, or hinder competition among dentists with respect to cooperation with dental health care benefits programs

containing predetermination and least expensive course of treatment provisions by, *inter alia*:

A. Promulgating, adopting, publishing, and distributing to its members a purported "work rule" that details certain uniform courses of conduct for dentists in their dealings with third-party payers; and [4]

B. Urging payers, purchasers and beneficiaries of dental health care benefits plans to eliminate provisions of such plans that respondent finds unacceptable.

PAR. 12. The acts, practices and methods of competition alleged in Paragraphs Nine through Eleven have had, or have the tendency or capacity to have, among others, the following effects:

A. Competition among dentists in Indiana has been hindered, restrained, foreclosed, and frustrated;

B. The cost of dental health care services in Indiana has been or may be stabilized, fixed, or otherwise tampered with;

C. Consumers have been or may be deprived of the benefits of third-party payers' cost-containing measures, including lower or potentially lower costs for dental health care services and dental health care benefits insurance;

D. Consumers have been or may be denied the benefits of a second dentist's opinion as to the adequacy of proposed dental treatment; and

E. Consumers have been limited in their opportunity to select dentists who cooperate with dental health care benefits programs.

PAR. 13. The aforesaid acts and practices of respondent constitute unfair methods of competition and unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, and are within the scope of Section 5(m)(1)(B) of said Act.

INITIAL DECISION BY

PAUL R. TEETOR, ADMINISTRATIVE LAW JUDGE

MARCH 24, 1980

I. SUMMARY OF PROCEEDINGS

On 10/18/78 the Commission issued its complaint against the Indiana Federation of Dentists (IFD), a small unincorporated association organized in 1976. The complaint was served on Indiana Federation of Dentists at its office at 2403 Raible Ave. in Anderson, Indiana on 11/13/78. The complaint charged the Federation and its members, in substance, with adopting and pursuing a conspiracy started some years earlier by the much larger Indiana Dental Associa-

tion (IDA), which was named here as a co-conspirator but not as a Respondent.¹ The conspiracy charged centers about an organized effort to keep Indiana dentists from turning over patients' dental radiographs (commonly called X-rays) to group dental health care insurers. The principal terms of the alleged conspiracy are described in Paragraph 9 as follows:

A. Promulgated and distributed to their members guidelines and principles for dealing with third-party payers, along with forms and information to facilitate adherence to such guidelines and principles;

B. Encouraged and induced their members to discontinue serving and/or to refuse to serve as dental consultants for third-party payers and to refuse to provide payers with other professional services such as, but not limited to, taking X-rays for use in benefits determination;

C. Conducted meetings, workshops, and pledge campaigns among their members to gain the agreement of individual members not to compete with other dentists in dealing with third-party payers;

D. Urged dental organizations in other states to pursue courses of conduct similar to that hereinabove described; and [2]

E. Urged payers, purchasers, and beneficiaries of dental health care benefits plans to eliminate provisions of such plans that they find unacceptable.

Paragraph 11 of the Complaint added the following:

Since September 1976, respondent and its members, in concert and agreement among themselves, have acted in furtherance of the agreement and concert of action alleged in Paragraph Nine, and have otherwise engaged in acts, practices, and methods of competition to eliminate, prevent, or hinder competition among dentists with respect to cooperation with dental health care benefits programs containing predetermination and least expensive course of treatment provisions by, *inter alia*:

A. Promulgating, adopting, publishing, and distributing to its members a purported "work rule" that details certain uniform courses of conduct for dentists in their dealings with third-party payers; and

B. Urging payers, purchasers and beneficiaries of dental health care benefits plans to eliminate provisions of such plans that respondent finds unacceptable.

(The complaint regularly refers to "third-party payers" rather than "insurers" but we use the term "insurer" as following popular usage more closely.)²

The conspiracy is said to have adversely affected competition among Indiana dentists; tended to fix or tamper with the price of dental health care in Indiana; deprived consumers of the benefit of insurers' cost-containment efforts; deprived them, too, of the benefit of a second dentist's opinion on the adequacy of proposed dental treat-

¹ At the same time that the Commission issued this complaint it accepted a consent order from IDA in Docket No. C-2957. See *Federal Register*, Vol. 43, No. 223—Friday, November 7, 1978 [93 F.T.C. 392].

² Technically a cost-plus group insurer is probably not an "insurer" because the Supreme Court views the spreading and underwriting of risk as the "primary elements" of insurance. See *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211 (1979).

ment; and limited their opportunity to select dentists who cooperate with [3] dental health care benefit plans. The relevant text (Par. 12) reads:

The acts, practices and methods of competition alleged in Paragraphs Nine through Eleven have had, or have the tendency or capacity to have, among others, the following effects:

- A. Competition among dentists in Indiana has been hindered, restrained, foreclosed, and frustrated;
- B. The cost of dental health care services in Indiana has been or may be stabilized, fixed, or otherwise tampered with;
- C. Consumers have been or may be deprived of the benefit of third-party payers' cost-containing measures, including lower or potentially lower costs for dental health care services and dental health care benefits insurance;
- D. Consumers have been or may be denied the benefits of a second dentist's opinion as to the adequacy of proposed dental treatment; and
- E. Consumers have been limited in their opportunity to select dentists who cooperate with dental health care benefits programs.

The acts and practices described in the complaint are said to constitute both unfair methods of competition and unfair acts and practices and for both reasons to violate Section 5 of the Federal Trade Commission Act. The contemplated relief is an order for Respondent to cease and desist from the following:

1. to cease and desist from engaging in any activity that has the purpose or effect of causing or inducing dentists not to cooperate with any third-party payer;
2. to cease and desist from engaging in any activity which has the purpose or effect of causing or inducing consumers to [4] choose dentists who do not cooperate with third-party payers;
3. to cease and desist from engaging in any activity that compels or coerces any third-party payer to incorporate, delete, or modify any provision in any existing or proposed dental health care benefits program;
4. to cease and desist from all activities that have the purpose or effect of influencing the selection of dental consultants or the opinions rendered by such consultants; and
5. to notify their members and local chapters of the substantive relief provided by the order, including affirmative statements advising members that they are free to make their own decisions concerning cooperation with third-party payers.

On 10/20/78 the matter was assigned for trial to Paul R. Teetor, Administrative Law Judge, and he has since presided over all proceedings. A motion by Respondent for a more definite statement of the charges of the complaint was denied but Respondent's time to answer was extended to 12/22/78. In its Answer, Respondent admitted a few preliminary allegations of the complaint but denied all important substantive allegations and raised a number of affirmative defenses, including failure to state a claim, state action defense, no effect on

interstate commerce, non-profit association, commercial free speech, business of insurance, and complaint contrary to the public interest.

On 12/29/78 the State of Indiana moved to intervene in this proceeding to see that the so-called "state action" defense would be presented adequately. On 1/5/79, however, the Administrative Law Judge, while willing to grant *amicus curiae* status, denied the motion to intervene on the ground that the difficulties of trial would be increased without offsetting value, absent any showing that Respondent would not be able to present the "state action" defense properly.

On 1/9/79 a major prehearing conference was held in Washington at which both sides made opening statements of position, followed by arguments as to important legal questions involved. A substantial part of the conference was devoted to planning discovery, including Complaint Counsel's need for certain subpoenas and Respondent's demand for inspection and copying of Commission files and its applications for interrogatories to Complaint Counsel and [5] for third-party subpoenas. Complaint Counsel were ordered to turn all their evidence over to Respondent by 5/20/79 and Respondent to turn its evidence over to Complaint Counsel by 6/20/79. Trial was anticipated for the coming summer. Thereafter both sides worked actively and productively on discovery problems through the Spring of 1979.

At the prehearing conference of 1/9/79 Complaint Counsel's objection to searching Commission files as far back as 1961 had been overruled because the Complaint's allegations go that far back. On 2/1/79, however, Complaint Counsel gave notice of their willingness to limit their case to activities from 1970 on and Respondent accordingly agreed on 2/6/79 that the Government's file search might omit documents prepared, sent or received by the Commission prior to 1/1/70. This stipulation was approved by the Administrative Law Judge on 2/8/79.

On 2/5/79 the Commission denied a request for an appeal by the State of Indiana from the Administrative Law Judge's refusal to permit intervention as a party but confirmed that the State might have *amicus curiae* status. Unsatisfied, the State of Indiana on 5/23/79 filed a complaint (Civ. IP 79-453-C) in the U.S. District Court for Southern Indiana (Indianapolis Division) seeking an injunction against further prosecution of this matter unless and until the State of Indiana be permitted to intervene as a party or, alternatively, an injunction against further prosecution of this matter under any circumstances (because, the complaint averred, the "state action" doctrine is applicable here and operates to deprive this Commission of jurisdiction).

On 6/15/79 another prehearing conference was held in Washington, primarily to discuss the practical problems that were arising

because of a substitution of counsel for Respondent. A request by Respondent for an additional 90 days to prepare for trial was denied as unnecessary because Respondent's new counsel was its regular lawyer and quite familiar with the facts of the case. Respondent's scheduled turnover of its evidence on 7/20/79 was confirmed and trial was set for 8/6/79. By 7/17/79, however, counsel on both sides felt need for more time and trial was postponed until 9/17/79.

Meanwhile, on 7/19/79 the U.S. District Court for Southern Indiana, Holder, J., conducted a brief trial on affidavits in the State of Indiana's suit against the Commission and on 8/17/79 handed down a decision by mistake granting the State *both* of the alternative judgments it sought. The mistake was corrected almost immediately by the Court by leaving only the judgment of intervention standing but the supporting findings were never altered. [6]

In conformance with Judge Holder's intervention order³ and in view of the need of the Indiana Attorney General's office for some time to prepare for participation in the trial, the holding of evidentiary hearings in this matter was again postponed. On 8/17/79 the Intervenor was given until 9/24/79 to turn its proposed evidence over to the other parties and trial was finally set to begin on 10/2/79 in the Federal Courthouse in Indianapolis, Indiana.

Early in the hearings (10/5/79) Complaint Counsel moved, on instructions from the Administrative Law Judge, to amend the complaint to conform to their proposed proof by including certain theories of interstate commerce not specifically referred to in the complaint, although literally covered by the words "among other things" in Paragraph 7 of the complaint. It appearing that Respondent and Intervenor had been on notice for several weeks before trial that Complaint Counsel proposed to add the evidence in question to their proof of interstate commerce, the Judge, while doubting need for the amendment, proceeded to grant it purely as a precautionary matter in open court on 10/9/79.⁴

Complaint Counsel's case-in-chief was presented by 17 witnesses, largely insurance company dentists and administrators, between 10/2/79 and 10/17/79. Respondent's defense was presented by 4 witnesses, largely Respondent's organizers and officials, on 10/30/79. Intervenor's case was presented by four witnesses, including two academic experts in dentistry, on 10/29/79 and 11/1/79. Complaint Counsel's sole rebuttal witness, an official of the Indiana Department of Insurance, was heard on 11/1/79. It was understood by all parties that if for any reason the State's status as an Intervenor were eventually disapproved, nonetheless the testimony adduced by it would re-

³ The Commission's formal reversal of its 2/5/79 order did not occur until 10/16/79.

⁴ Tr 1058.

main in the record and would be treated as if adduced by Respondent.
A List of Witnesses follows. [7]

List of Witnesses

Witness	Address	Sponsor	Dates/Testimony	Page References
Anderson, Carlton	28 Park Avenue Cadwell, N.J. 07006	Complaint Counsel	October 16, 1979	1976-1991
Arvanitis, Ernest A.	25-11, 147 Flushing St. Flushing, N.Y.	Complaint Counsel	October 16, 1979	1930-1949
Chichester, David I.	14 Ridge Road Enfield, Conn.	Complaint Counsel	October 3-4, 1979	387-626
Christianson, Steven	1984 Stoneyhill Drive Hudson, Ohio	Complaint Counsel	October 12, 1979	1609-1648
Clegg, Robert L., III	Indiana State Insurance Department	Complaint Counsel	November 1, 1979	2762-2784
Dixie, Gene F	1235 Mission Street San Francisco, Cal.	Complaint Counsel	October 2, 1979	250-349
Downes, William G., DDS	Newington, Conn.	Complaint Counsel	October 10, 1979	1212-1394[8]
Hurwitz, Jacob	21760 Kenosha Oak Park, Michigan	Complaint Counsel	October 15, 1979	1757-1806
Janzarik, Richard V.	716 North Wood Anderson, Indiana	Respondent	October 30, 1979	2525-2554

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List of Witnesses

Witness	Address	Sponsor	Dates/Testimony	Page References
Kasle, Myron J.	Indiana University School of Dentistry	Intervenor	November 1, 1979	2712-2742
Kos, John	The Equitable Life Assurance Society of the United States	Intervenor	October 29, 1979	2338-2375
Mackillop, Donald K.	63 Fox Den Road Glastonbury, Conn.	Complaint Counsel	October 15, 1979	1835-1858
Miele, Frank, Dr.	16 High Gate Court St. Charles, Ill.	Complaint Counsel	October 11, 1979	1414-1536
Mishler, Ernest	933 Briar Patch Lane Greenwood, Indiana	Complaint Counsel	October 5, 1979	908-954
Nelsen, Robert	271 East Bury Hill Rd.	Complaint Counsel	October 16, 1979	1950-1975[9]
Notling, Charles	Indiana State Board of Dental Examiners	Intervenor	October 29, 1979	2197-2338
Oliver, Richard T.	Lafayette West Lafayette, Ind.	Respondent	October 31, 1979	2631-2656
Pierce, James G.	Anderson, Indiana	Respondent	October 31, 1979	2563-2619
Roberts, Fred	2910 Bodine Drive Wilmington, Delaware	Complaint Counsel	October 4-5, 1979	629-810

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List of Witnesses

Witness	Address	Sponsor	Dates/Testimony	Page References
Rohn, Ralph Daniel	Alexandria, Indiana	Respondent	October 30, 1979	2381-2524
Schade, Gerhard Rudolph, Jr.	887 Goodale Hill Road Glastonbury, Conn.	Complaint Counsel	October 9, 1979	968-1171
Shafer, William	Indiana University School of Dentistry	Intervenor	November 1, 1979	2681-2708
Siegel, Henry	67 Park Terrace East New York City	Complaint Counsel	October 15, 1979	1826-1835[10]
Speziale, John E.	4457 Angie Way Lilburn, Georgia	Complaint Counsel	October 5, 1979	811-907
Trego, Sam	4321 Cardinal Drive Indianapolis, Ind.	Complaint Counsel	October 12, 1979	1656-1682
Winkworth, Roy	109 Chippewa Drive Alexandria, Va.	Complaint Counsel	October 11, 1979	1536-1604[11]

The demeanor and apparent credibility of all witnesses for both sides was generally quite impressive, with the sole exception of one of Respondent's witnesses, Dr. James Pierce, an organizer of Respondent, who consistently professed inability to remember important facts he might be expected to recall. It might further be noted that, surprisingly, Respondent's first President, Dr. David McClure, who has shared with Dr. Daniel Rohn the top leadership of virtually every Indiana effort to keep X-rays out of insurers' hands during the past decade, was never called to testify.

Approximately 440 exhibits were offered (90% by Complaint Counsel) and very generally received in evidence. This being in the nature of a conspiracy case, many of Complaint Counsel's exhibits were offered in evidence as acts and/or declarations of Respondent's co-conspirators but were challenged by Respondent and/or Intervenor as hearsay evidence and urged to be inadmissible unless and until a *prima facie* case of conspiracy be established. Such exhibits were typically admitted by the Judge only for non-hearsay use (*i.e.*, to prove the fact that a statement was made and any reasonable implication therefrom) but *not* for hearsay use (*i.e.*, to prove the truth of the statement) unless and until Complaint Counsel should establish a *prima facie* case of conspiracy which would make Respondent responsible for declarations by other members of the conspiracy made during and in furtherance of it.

In accordance with the usual practice in conspiracy cases, the Administrative Law Judge did not attempt to decide at the time of each evidentiary ruling whether or not a *prima facie* case of conspiracy had yet been made out but postponed that determination until after trial. When closing the record on 11/16/79 the Judge directed Complaint Counsel to "set out clearly in a special section of their proposed findings and conclusions the chief evidence on which they rely to establish the existence of the conspiracy alleged in the complaint." "Complaint Counsel's Brief Supporting Conclusions Of Law" contains a section entitled "Bases For Admission Of Third Party Dental Society Documents Against Respondent." (pp. 28-31 incl.)⁵ Complaint Counsel rely principally on three kinds of evidence to make their *prima facie* case:
[12]

(1) The testimony of Connecticut General's National Accounts Director Chichester⁶ and former Indianapolis Regional Manager Roberts⁷ to their personal experiences in dealing with IDA and its leaders when trying to set up and administer the General Motors/UAW dental health plan and likewise the testimony of Aetna's Group

⁵ The problem arose mostly, although not entirely, with reference to documents of IDA, which was named as a co-conspirator but not a Respondent.

⁶ See transcript references cited in CPF 112-13, 115-16, 120-22, 175.

⁷ See transcript references cited in CPF 87, 112-13, 115-19, 121, 125-27.

Claims Director Downes⁸ and Claims Program Director Schade⁹ to their personal experiences in dealing with IDA and its leaders when trying to set up and administer the International Harvester/UAW dental health plan. Their stories establish clearly the IDA-organized concert of action with regard to submission of X-rays to insurers and the important roles therein played by the future leaders of IFD.

(2) Detail about the IFD phase of the conspiracy, such as pressure put on insurers not to request X-rays and to abide by "gentlemen's agreements" developed during the IDA phase of the conspiracy, is found in the testimony of Connecticut General's former Indianapolis Regional Manager Speziale,¹⁰ who also told of his dealings in regard to submission of X-rays with such continuing IDA/IFD leaders as Drs. McClure and Rohn.¹¹ Evidence that IFD was dedicated to fighting submission of dental X-rays to insurers is found in the testimony of Brockaway Glass' Personnel Manager Christianson¹² and ITT-Hoffman's Personnel Manager Trego.¹³

(3) Hearsay found in Respondent's own minutes or other declarations (whose admissibility thus does not depend on prior establishment of a *prima facie* case of conspiracy) can be used to prove IDA's prior conduct opposing X-ray [13] submission;¹⁴ the founding of IFD as a purported "union" to evade the antitrust laws against boycotts;¹⁵ the deferral of IDA action against submission of X-rays to give newly-founded IFD a chance to work out an arrangement with insurers;¹⁶ exchanges of reports on IFD and IDA actions regarding the X-ray question;¹⁷ IFD members' conduct conforming to its "Work Rule" and refusal to submit X-rays;¹⁸ and statements in newsletters of IFD's position on the "Work Rule" and the submission of X-rays.¹⁹

We agree with Complaint Counsel that the evidence cited makes out a rich *prima facie* case of conspiracy. Accordingly, we now rule that all hearsay evidence received conditionally (*i.e.*, dependent on proof of a *prima facie* case of conspiracy) is hereby relieved of such condition and is now received in evidence unconditionally.

Many times during the trial of this matter Respondent and Intervenor objected to "double" or "multiple" hearsay, usually in documentary evidence. Rule 805 of the Federal Rules of Evidence provides:

⁸ See transcript references cited in CPF 94-99, 105, 108-110.

⁹ See transcript references cited in CPF 107-110.

¹⁰ See transcript references cited in CPF 180-82.

¹¹ See transcript references cited in CPF 134-35.

¹² See transcript references cited in CPF 151, 176-179.

¹³ See transcript references cited in CPF 151, 183-187.

¹⁴ CX 505A; CX 575A-C; CX 584A-E.

¹⁵ See transcript references cited in CPF 140, 193.

¹⁶ See transcript references cited in CPF 145, 157; see also CX 194K and CX 492A.

¹⁷ See transcript references cited in CPF 145.

¹⁸ See transcript references cited in CPF 147-164.

¹⁹ See transcript references cited in CPF 150, 153, 162.

Hearsay within hearsay. Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

In each case when a multiple hearsay objection was raised the Administrative Law Judge assured counsel that he did not propose to rule on the admissibility of each of the many instances of multiple hearsay often found in lengthy proposed exhibits but that even if the overall document was admitted, no weight would be attached to any part violative of Rule 805. We now make it clear that we have not intentionally relied on any multiple hearsay in any exhibit, if such part violates Rule 805. Any finding based [14] in part on multiple hearsay implies that the Judge thought that particular multiple hearsay fell within an exception to the hearsay rule as contemplated by Rule 805.

It proved necessary to admit certain exhibits after the last hearing day (11/1/79) but before the closing of the record. For the record, these exhibits are as follows.

IX 500-500C: a statement of one major insurer's policy regarding "Review of X-rays", offered by Intervenor and received *in camera* by written order on 11/2/79.

CX 852, CX 853, CX 854: certified copies of certain papers filed by the Federal Trade Commission in the suit against it by the State of Indiana in the U.S. District Court for the Southern District of Indiana (Civ. No. IP 79-462-C), offered by Complaint Counsel to supplement other papers from the same file offered by Intervenor and received on 11/1/79 as IX 1000-1000 GGG. The supplementary papers were received by written order dated 11/14/79.

[It should be noted that the progress of the State's injunction suit after Judge Holder's judgment of intervention on 8/17/79 is dealt with hereafter in connection with the State's contention that certain findings by the District Judge are now binding on the Administrative Law Judge here by operation of collateral estoppel.]²⁰

On 11/16/79 the record of this case was closed, subject to reopening for good cause shown any time before submission of the Initial Decision. On 12/21/79 Complaint Counsel submitted "Proposed Findings And Conclusions Of Counsel Supporting The Complaint" and "Complaint Counsel's Brief Supporting Conclusion Of Law." On the same date Intervenor served "Findings Of Fact And Conclusions Of Law." Some days later, pursuant to agreement of the parties and approval by the Administrative Law Judge, Respondent served "Respondent's

²⁰ See Pars. 187 to 209, below.

