COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

PENNSYLVANIA HUMAN RELATIONS COMMISSION,	:	
and	:	
ELEANOR E. NEYER, et al. Complainants	:	DOCKET NO. E-4027
vs.	:	
CROWN CORK AND SEAL COMPANY, INC., PLANT NO. 1,	:	
and	:	
SHEET METAL PRODUCTION WORKERS' UNION, LOCAL 266, Respondents	:	

ELIZABETH McNASBY, Complainant	:	DOCKET NO. E-4249
vs.	:	
CROWN CORK AND SEAL COMPANY, INC.,	:	
and	:	
SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO, CAN WORKERS' UNION, LOCAL 266 a/k/a SHEET METAL PRODUCTION WORKERS, UNION, LOCAL 266, Respondents	:	

RECOMMENDATION OF HEARING PANEL
FINDINGS OF FACT, CONCLUSIONS OF LAW,
OPINION, AND FINAL ORDER

FINDINGS OF FACT

1. Respondent Crown Cork and Seal Company, Inc. (hereinafter "Crown") is a corporation doing business within the Commonwealth of Pennsylvania with its international corporate headquarters located at 9300 Ashton Road, Philadelphia, Pennsylvania, along with a facility designated as Plant No. 1.

2. Respondent Sheet Metal Workers' Union, Local No. 266 (hereinafter "Union" or "Local 266"), affiliated with the Sheet Metal Workers' International Association, AFL-CIO, is a labor organization which had and continues to have offices at 6445 Frankford Avenue, Philadelphia, Pennsylvania.

3. The Pennsylvania Human Relations Commission (hereinafter "PHRC" or "Commission"), by its Executive Director, Homer C. Floyd, filed a complaint against Crown and Local 266 at Docket No. E-4027, on December 20, 1970, alleging unlawful patterns and practices of sex discrimination in recruitment and hiring, initial job assignment, promotions, overtime, layoffs and recall from layoffs.

4. Elizabeth McNasby filed a complaint of unlawful sex discrimination against Crown and Local 266 at Docket No. E-4249 on behalf of herself and other similarly situated female employes at Plant No. 1 on or about June 11, 1971.

5. On October 27, 1975, the Commission filed an amended complaint at Docket No. E-4027 setting forth very detailed allegations of unlawful sex discrimination against Respondents Crown

and Local 266.

6. Eleanor Neyer, Joan Murphy, Sarah Cooper, Margaret Felmey, Lorraine Mason, Virginia Knowles, Doris Yocum, Edith McGrody, Marie Pekala, Theresa Cheplick, Henrietta Hunter, Ann Jacyszyn, and Theresa Reed, all incumbent or past employees of Crown, executed affidavits in 1975 and became individual named complainants in the amended complaint.

7. The Commission's original complaint made allegations that were general in nature. It consisted of 2 pages. The amended complaint was 34 pages, included very specific charges, was brought on behalf of several identified groups of female employes, and included allegations relating to the 13 individually named complainants.

8. The Commission initiated complaint at Docket No. E-4027, as amended, and the individual complaint of Elizabeth McNasby at Docket No. E-4249, were joined for purposes of administrative processing, including investigation, finding of probable cause, attempted conciliation, and public hearing.

9. Complainant Ann Jacyszyn was employed by Crown until 1966, when she was laid off and never recalled.

10. Complainants Eleanor Neyer, Joan Murphy, Margaret Felmey, Lorraine Mason, Virginia Knowles, Doris Yocum, Edith McGrody, Marie Pekala, Theresa Cheplick, and Henrietta Hunter were all laid off from employment at Crown for the last time between 1969 and 1971 and were never employed by Crown thereafter.

11. Complainant Sarah Cooper was employed at Crown until February 28, 1974, when she became disabled. From then through the dates of these hearings she has received disability retirement payments.

12. Complainants Theresa Reed and Elizabeth McNasby were continuously employed by Crown at all times from July 9, 1969 to the date of this administrative hearing.

13. During the period July 9, 1969 to December 31, 1975, Crown hired 50 males and no females. In the Philadelphia Standard Metropolitan Statistical Area for this time period, females comprised 30.6% of the available labor market in the non-durable industry category.

14. Between July 9, 1969 and December 31, 1975, 590 males or 62.6% of Crown's production and maintenance employes at Plant No. 1 were male; 352 or 37.4% were female.

15. Between 1971 and 1975 aggregate employment of females at Plant No. 1 in the production and maintenance unit dropped from 26.3% of the work force to 20.5% of the work force.

16. Some time in the early 1950's, Crown adopted a system of sex-segregated job classifications.

17. From that time until April, 1967, each collective bargaining agreement between Local 266 (or its predecessor unions) and Crown set forth a group of higher rated male jobs and a second group of lower rated female jobs.

18. The male jobs were generally heavier, dirtier, more physically demanding jobs. The female jobs were generally less physically demanding in that heavy lifting and dragging were not required.

19. The average pay rate for the female jobs was lower than the average pay rate for the male jobs throughout this period.

20. Even though the collective bargaining agreements before April 1967 provided for sex-segregated job classifications, they did not expressly provide for sex-segregated seniority.

21. Because of sex-segregation in job classifications, two separate seniority lists were created. One seniority list represented the pool of workers available for male jobs, the other seniority list represented the pool of workers available for female jobs.

22. The collective bargaining agreements covering the period 1967-1975 contained language prohibiting discrimination and the expressly sex-segregated job classifications were deleted.

23. Nevertheless, at all times since July 9, 1969, Crown has maintained, and the Union has acquiesced in the maintenance of an effectively sex-segregated system of job classification within the bargaining unit represented by Local 266 at Plant No. 1. One group of jobs has been maintained and generally is known throughout the plant as male jobs. Another group of jobs has been maintained and generally is known throughout the plant as female jobs.

24. At all times from July 9, 1969 to December 31, 1975, new employes at Plant No. 1 have been assigned to their initial shift and department by Crown's Personnel Office, and to their initial job within their department and shift by their department/shift foreman. Men have always been initially assigned to home shifts and departments in which male job openings existed, and to a particular male job within that home department/shift. No new women were hired during this period.

25. At all times from July 9, 1969 to December 31, 1975, Crown, with the Union's acquiescence, has effectively maintained a sex-segregated system of plant, department, and shift seniority for all of its production and maintenance unit employes.

26. At all times material to this litigation a sex-segregated seniority system has been maintained and used for purposes of ascertaining transfer, promotion, layoff, and recall rights of employes.

27. A dual roster of plant seniority embodying the date of original hire at Plant No. 1 or its predecessor plant has been and continues to be maintained in the Personnel Office on a sex-segregated basis.

28. Men's cards are filed chronologically in one section of a set of files known collectively as the "plant seniority board" and women's cards are filed in a separate section of the same "plant seniority board."

29. Similar sex-segregated dual rosters of "home shift" and "home department" seniority are also maintained in the same location and are known as the "department seniority boards."

30. As a result of this system, there are dual ladders of job progression within all gender integrated departments. (Some departments are gender segregated, having only men's jobs or only women's jobs.)

31. At all times since July 9, 1969, the collective bargaining agreements in force between Crown and Local 266 have provided that employes are to be laid off by inverse order of their date of initial hire at Plant No. 1 (or its predecessor plant on Erie Avenue). In fact, however, the sex-segregated plant seniority board has been and is still today the sole system used for purposes of layoff of employes at Plant No. 1.

32. At any time when Crown finds it necessary to reduce the number of personnel working in men's jobs, it uses this roster to locate the men with lowest plant seniority. These men are then ordinarily laid off. Whenever Crown finds it necessary to reduce the number of employes in women's jobs, the sex-segregated seniority board is utilized to select the women with lowest plant seniority who are then laid off.

33. In 97.7% or 1311 of the 1342 instances where females were laid off between July 9, 1969 and December 31, 1975, less senior males with equal or lower job classifications were retained in the employ of Crown within the production and maintenance unit at Plant No. 1.

34. Females were disproportionately subjected to layoffs during the period July 9, 1969 to December 31, 1975. There occurred 2764 layoffs during this time. Although females constituted 37.4% of all persons employed during the period, 48.6% of all layoffs were of female employes.

35. The mean duration of layoffs involving males during the period July 9, 1969 to December 31, 1975 was 33.5 days; the median was 17.4 days. The mean duration of layoffs involving females during the period was 45.9 days; the median was 23.8 days.

36. Although women constituted 37.4% of the production and maintenance unit work force during the period July 9, 1969 to December 31, 1975, they incurred 61.5% of the time spent in layoff status (76,198 days out of 123,977 total employe - days on layoff).

37. At all times since July 9, 1969, Crown has followed a practice of recalling employes from layoff, based upon the same system of sex-segregated plant seniority used for layoffs.

38. When women's jobs must be filled, Crown recalls women from layoff based upon their plant seniority as shown on the sex-segregated seniority board.

39. Between July 9, 1969 and December 31, 1975 there were 975 instances where females remained in layoff status when males, with lower job classifications and with less seniority, were recalled to employment in the production and maintenance unit at Plan No. 1.

40. Between July 9, 1969 and December 31, 1975, when there were an insufficient number of men on layoff to fill vacancies in male jobs, new men were frequently hired in lieu of recalling female employes on layoff status.

41. On some occasions, when additional women's job have had to be filled to meet production schedules but men have been slated for layoff during the same week based on reduced production schedules for those departments with a larger number of men's jobs, Crown has assigned these men (who otherwise would have been laid off) to fill the women's jobs "temporarily." Female employes who would otherwise have been recalled to fill the female vacancies have simply remained on layoff.

42. Crown and Local 266 attempted to justify such departures from ordinary practice on the theory that each case was an emergency -- i.e., Crown could not afford to wait for women on layoff to respond to telegrams ordering them back to work. However, there are apparently no instances of Crown assigning women to do men's jobs in similar "emergency" situations.

43. In some cases, females with many years of plant seniority who never would have been laid off except for the sex-segregated seniority system, were kept out on layoff status so long that their rights to recall, pursuant to the terms and provisions of the applicable collective bargaining agreement, expired.

44. During the period from July 9, 1969 through December 31, 1975, there were 20 such instances when female can workers were

terminated from employment because they were on layoff in excess of 3 years. In no case during this period was a male can worker ever kept on layoff for so long that his recall rights expired.

45. In another twenty-two instances, between July 9, 1969 and December 31, 1975, females with substantial plant seniority felt compelled to accept "early retirement" while on layoff status to avoid expiration of recall rights. No male could be identified who felt similarly compelled to elect early retirement during this period.

46. In the late 1960's and early 1970's, the effects of automation began to substantially impact upon female employment at Plant No. 1. Women's jobs were disproportionately eliminated and the successor jobs, if any, were generally higher rated and classified as men's jobs.

47. This situation resulted in women with substantial seniority being laid off for extended periods, while males with far less seniority continued to work and occasionally while new male employes were being hired.

48. As sex-segregated layoffs became more frequent and severe, female employes at Plant No. 1 began to complain to Crown and to Local 266.

49. After women began to complain about sex discrimination at Plant No. 1, officials at Crown, with the assistance of Local 266, intentionally and systematically attempted to get as many female employes as possible to sign ambiguous forms purporting to

implement equal employment opportunity, but which were in fact an attempt to secure waivers of women employes' rights to equal employment opportunity and to create a "paper record" which might shield Crown from potential liability for unlawful sex discriminatory practices.

50. Crown and Local 266 attempted to show that female can workers had been extended bona fide, good faith offers of men's jobs, but had knowingly and intentionally waived their rights to such jobs by means of written "waivers."

51. The first such allegedly bona fide, good faith offers of men's jobs were made in Spring, 1970 to a group of approximately 12 women at a meeting which took place at the offices of Local 266. Those women present were asked to list or identify on a piece of paper which men's jobs they could do. No clear waiver of rights was included.

52. Despite expressions of interest in various men's jobs by women present at this meeting, the actual job offers made during or after this meeting were limited to a single job in the inspection department, given to Elizabeth McNasby.

53. Several other women were allowed to take an "inspector's test" or to work briefly as inspector trainees, but were then told they had failed the test or were laidoff based upon department seniority or sex-segregated plant seniority. (Prior to this time no man was ever administered a test when seeking an inspector position.)

54. The second occasion when "waivers" were obtained was during the period beginning in or about April, 1971 and continuing on a sporadic basis, until about 1974. These "waivers" were proffered to an indeterminate number of women then on layoff status or about to be placed on layoff status.

55. The "waivers" listed titles of jobs traditionally available only to men. The women were advised to check those in which they were interested and that they would thereby be relinquishing their rights to any others.

56. Another set of forms purporting to offer promotional opportunities to men's jobs was proffered during May and June of 1973 to certain women then actively employed at Plant No. 1 and neither on layoff status nor about to be placed on layoff status. These forms and the procedure used for making the offers and signing the forms were substantially identical to that utilized for the offers just described in these findings. The forms also included purported waivers of rights to positions in which no affirmative interest was indicated.

57. None of the forms utilized by Crown with the Union's acquiescence can be considered to be good faith offers of equal job or promotional opportunities.

58. The signers of these forms cannot be considered to have knowingly intended to waive their legal rights to be assigned to jobs regardless of sex.

59. Many of the women lacked sufficient formal education to fully appreciate the legal significances of the proffered "waiver" documents.

60. The offerees were materially misled as to the possible legal consequences of the documents by Crown and Local 266 officials.

61. The women involved had historically been excluded from many all male departments and were thus unfamiliar with the actual job duties of many of the listed jobs.

62. At the time of the offers, job descriptions were generally not made available to the women.

63. The women had no meaningful opportunity to discuss their decision with a lawyer, spouse or other disinterested party as they were expected to sign "on the spot" after seeing the documents for the first time.

64. The women were never offered the opportunity to retain copies of the documents which they were to sign.

65. No male employe was ever tendered such a form or otherwise asked to waive his rights to jobs at Plant No. 1.

66. Many women who indicated on their form that they were willing to accept assignment to jobs on the lists were never assigned to any of the jobs in which they indicated an interest.

67. Few of the jobs listed on the forms were actually available.

68. Not all male job titles in the production and maintenance unit were listed on the forms.

69. The forms did not reveal how Crown would make use of them and what would be the duration of their effectiveness.

70. The forms did not reveal what, if any, steps a woman could undertake to revise the preferences she had indicated if she subsequently changed her mind.

71. On those occasions when women indicated an interest in assignment to a particular men's job, they were frequently discouraged by officials of both Crown and Local 266.

72. Crown explained to the women that if a female employe decided to enter into a male job in other than her home department, she would have to relinquish or waive her seniority rights in her current home department and begin to accrue departmental seniority in a new department. (This was the same for any employe at Crown, male or female; i.e. when they moved into a new department they had to start at the bottom in that department.)

73. As a pre-condition to placement, many of the jobs required substantial experience in lower rated department jobs, but women had always been excluded from some of those jobs.

74. Crown officals treated women who refused to sign the forms exactly the same as those who signed and failed to check any of the jobs thereon.

75. Crown frequently relied upon oral representations of third party fellow employes that particular women would refuse assignment to any man's job, and did not inquire further.

76. Despite self-serving claims that all females were systematically contacted to ascertain their willingness to accept assignment to men's jobs, neither Crown nor Local 266 kept any record of which women had been offered a man's job or asked to sign a "waiver" form, or when such contacts were initiated. In fact, many women were never contacted at all, and many others were spoken to only once or twice, rather than before every lay-off.

77. Crown made only the most limited use of the waiver forms in connection with employment decisions after they were signed. Originals of the forms were given to Crown's attorneys sometime before 1975 and no copies were kept in the Personnel Office, nor was the information thereon transferred to any other office record.

78. With respect to those women who indicated on the forms a willingness to work male jobs, Crown rarely, if ever, consulted their forms to determine which particular jobs they had expressed interest in. Rather they were treated as being eligible for any male job to which Crown wished to assign them.

79. The process of offering male jobs to incumbent and laid off females by use of the "waiver" documents and by less formal means resulted in few women actually achieving assignment

to male jobs.

80. Elizabeth McNasby, who was successful in moving into the Inspection Department as a result of the "offer" of men's jobs to women made at the Spring, 1970 meeting, was repeatedly laid off from her inspector job thereafter because she was lowest in department seniority.

81. Upon all but the last of several occasions on which waivers were proffered to McNasby she failed to list any jobs in which she was interested and refused to sign the forms because of her distrust of Crown's motives in seeking execution of the forms.

82. Computer analysis, as set forth in Exhibits C-43 through C-46 introduced at the hearing, revealed that Elizabeth McNasby's anticipated earnings at Crown based upon her seniority and in the absence of sex discrimination, would have exceeded her actual earnings by the following amounts:

1971 - $4463.35
1972 - $6510.80
1973 - $6977.59
1975 - $7887.78

83. Women who were reassigned to male jobs after July 7, 1969, in accordance with the waiver scheme or by any other means, were treated as if they were men for seniority purposes so that to the limited extent that women appeared on the male seniority list, it was effectively an integrated list.

84. Women who were reassigned to male jobs were permitted to opt out of the integrated seniority list and go back to the female list if they so chose.

85. At no time during the period July 9, 1969 to December 31, 1975 were more than 12 women on the integrated seniority list for a particular calendar year.

86. During 1971, while at least 250 females were employed or possessed employment rights at Plant No. 1 in the production and maintenance unit, a total of 5, 2% of all female employes, were on the integrated seniority list. Only 1 of the 5 was on the integrated list for 12 months.

87. During calendar year 1972, while at least 221 females were employed or possessed employment rights at Plant No. 1 in the production and maintenance unit, a total of 6, less than 3% of all female employes, appeared on the integrated seniority list. Only 3 of the 6 were on the integrated list for 12 calendar months.

88. During calendar year 1973, while at least 180 females were employed or possessed employment rights at Plant No. 1 in the production and maintenance unit, a total of 10, slightly more than 5% of all female employes, appeared on the integrated seniority list. Only 6 of the 10 appeared on the integrated list for the entire 12 month period.

89. During calendar year 1975, while at least 118 females were employed or possessed employment rights at Plant No. 1 in

the production and maintenance unit, a total of 12, slightly more than 10% of all female employes, appeared on the integrated seniority list, all for the entire calendar year.

90. Those female employes who attained integrated seniority status for only part of any calendar year were relegated to female seniority status for all periods during which they did not appear on the integrated list.

91. All remaining female employes had only segregated female seniority status.

92. From July 9, 1969 to December 31, 1975, no more than 18 of the 352 female production and maintenance unit employes have ever been assigned by Crown to perform one or more of the men's jobs.

93. Whenever one of these 18 workers were performing a man's job, her plant seniority and department/shift seniority cards were retained on the female sections and the department/shift and plant seniority boards with a red tag affixed.

94. A comparison of job titles worked during 1970 at Crown's Plant No. 1 in the production and maintenance unit with the job titles worked during 1975 discloses little progress toward ending the pattern of segregation. In 1970, of 104 job titles worked, 61 were all male and 33 were all female. Only 10 job titles, or 9.6%, were integrated. By 1975, of 76 job titles worked, 43 were all male, 19 all female, and 14, or 18.4%, integrated.

95. An examination of employe incumbency data, as of December 31, 1975, by Home Department, discloses a pattern of total exclusion of female employes from 4 departments encompassing 112 out of 281 production and maintenance jobs.

96. Department 29, the Drawn and Iron Department ("D&I") due to its advanced technology, has been the fastest growing department at Plant No. 1 since it began operation in the early 1970's. (Because of Crown's use of departmental seniority rapid department growth virtually insures an employe rapid promotion within a department, especially a new department.)

97. Initially, there was no posting to announce the availability of positions in Department 29. Employes were transferred into the new department based upon subjective appraisals of their experience and ability made by Crown's Personnel Department with advice from Local 266.

98. It was not until October 28, 1974 that Crown made any attempt to offer positions in Department 29 to female employes working at Plant No. 1 and not until October 30, 1974 that Crown informed some female employes on layoff status of the availability of openings on the D&I lines.

99. Even on those earlier occasions when Crown offered traditionally male jobs to certain female employes, jobs on the D&I lines were never included in the list of jobs allegedly available.

100. At the time of hearing, 44 male and only 2 female employes were working in Department 29 on the first shift. The two females had been temporarily placed in the department a few days before the public hearing in these cases began. No home department employes in Department 29, first shift were female.

101. As of December 31, 1975, the average plant seniority for all males employed between July 9, 1969 and December 31, 1975 was 20.3 years. The average plant seniority for females was 28.8 years.

102. The employment work force profile at Crown shows that, despite the higher average seniority of female employes, females were disproportionately clustered in the lower rated and lower paid job classifications.

103. Positions in the production and maintenance unit at Crown are compensated in accordance with a system of job codes as set forth in the applicable collective bargaining agreement ranging from the lowest paying Code 4 jobs to the highest paying Code 35 jobs.

104. As of December 31, 1975, the mean job Code for males was 23.8 and the median was 23.0. For females the mean was 13.7 and the median was 11.0.

105. As of December 31, 1975, statistical analysis revealed that the mean job code would be 29.0 for females, 18.9 for males, if attainment were based solely on plant seniority. If based solely on department/shift seniority, mean expected job code

attainment would be 19.5 for females, 21.9 for males.

106. From July 9, 1969 through December 31, 1975, men have been allowed to perform overtime work on both men's job and women's jobs while women have been restricted to a portion of the overtime available on women's jobs.

107. During calendar year 1971, female employes earned on the average $3476.00 per employe less than similarly situated male employes.

108. During calendar year 1972, female employes earned an average of $2954.00 per employe less than similarly situated male employes.

109. During calendar year 1973, female employes earned an average of $3176.00 per employe less than similarly situated male employes.

110. During calendar year 1975, female employes earned an average of $3976.00 per employe less than similarly situated male employes.

111. After July 9, 1969, responsible officials of Crown and Local 266 knew or should have known of the prohibitions against sex discrimination in employment contained in state and federal law.

112. Some Crown managerial and Local 266 officials held stereotypic preconceptions and discriminatory attitudes toward female employes, particularly with respect to female abilities

to perform "strenuous" and "dirty" -type jobs. These preconceptions and attitudes affected employment related decisions during the period July 9, 1969 to December 31, 1975.

113. At all times material to this litigation, production and maintenance employes at Crown's Plant No. 1 were represented for purposes of collective bargaining by respondent Local 266.

114. At all times material to this litigation, Crown and Local 266 were signatories to collective bargaining agreements covering production and maintenance departments in Plant No. 1.

115. At all times material to this litigation, all employes covered by the collective bargaining agreements between Local 266 and Crown were required, after an initial 30 day grace period, to join Local 266, pay initiation fees and dues, and to maintain union membership as a condition of continued employment at Crown.

116. Officials and agents of Local 266 were at all times aware of the sex discriminatory acts and practices of Crown.

117. Union officials had access to and examined the transfer and layoff lists every week in order to determine whether employes were being properly transferred and laid off. They also had access to the recall list for each week.

118. Local 266 has always received notice when the recall rights of employes at Plant No. 1 expired.

119. Representatives of Local 266 have always had knowledge that weekly "manning" schedules were submitted by each department foreman on a sex-segregated basis.

120. Subsequent to July 9, 1969, Local 266 negotiated three new collective bargaining agreements with Crown covering workers at Plant No. 1, effective respectively in April, 1970, April, 1973, and April, 1976. On none of these occasions did Local 266 make any attempt whatsoever to obviate through bargaining or to eliminate or reduce sex discrimination at Crown or to mitigate its effects on female members of Local 266.

121. Local 266 persistently failed to enforce the plant seniority provision of the collective bargaining agreement despite full knowledge that Crown's breach of that provision, particularly with respect to layoffs and recalls, consistently and disproportionately disadvantaged female employes.

122. At no time has Local 266 filed any grievance, urged any of its members to file a grievance, initiate a lawsuit, complained orally or in writing to Crown, or taken any other action of any sort whatsoever related to enforcement of the non-discrimination provision of the collective bargaining agreement despite full knowledge of the pattern and practice of sex discriminatory behavior being engaged in by Crown.

123. At all times since July 9, 1969 Local 266 has effectively refused to investigate or prosecute the numerous grievances of its female members alleging sex discrimination at Crown.

124. The problem of female members of Local 266 being improperly laid off was well known to the Union and discussed at shop steward's meetings. However, nothing was done about it, even though grievances were filed.

125. Approximately 100 female members of Local 266 signed a written grievance on or about November 1, 1969 complaining about continuing sex discrimination in employment at Plant No. 1.

126. After the grievance was signed, it was given to Pasquale Coia, head shopsteward for delivery to Herman Tedeschi, President of Local 266, but Local 266 took no further meaningful action regarding the grievance.

127. At all times since July 9, 1969, the final step in the applicable grievance procedure has been arbitration. From that time to the present, Local 266 has never taken any case involving any woman to arbitration though complaints involving men have been taken to arbitration.

128. Local 266 has been governed by the Constitution and Ritual of the Sheet Metal Workers International Union, AFL-CIO at all times since 1966. The Constitution requires that employes in layoff status be given an opportunity to use withdrawal cards in order to avoid reinstatement fees each time they are recalled to work. Local 266, contrary to this requirement, has never given its members an opportunity to utilize withdrawal cards. Instead, at all times material to this litigation, whenever employes were in layoff at Crown's Plant No. 1, they were required to pay monthly dues or upon recall to pay a "reinstatement" fee of between $15 and $30 to Local 266.

129. Since female members of Local 266 were laid off proportionately with greater frequency than male members, the brunt

of this particular policy fell most heavily on the female members.

130. At all times from July 9, 1969 or earlier up to December 31, 1975 officials of Local 266 have actively and in concert with Crown worked to maintain sex discriminatory practices in effect at Crown, including the sex-segregated system of job classification prevailing at Plant No. 1, and have sought to insure that layoff, transfer, promotion and recall were done strictly by sex-segregated plant and department seniority.

131. Local 266 officials have actively assisted Crown management in its attempts to get female employes at Plant No. 1 to sign documents ostensibly waiving their rights to equal employment opportunity. They personally reviewed and approved forms calculated to obtain uninformed waivers of these rights and they participated in meetings on numerous occasions where these forms were used.

132. Assertions by officials of Local 266 that they had helped to enforce the sex-segregated seniority system and sex-segregated job classification system only because their female members demanded it were self-serving and not credible.

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter "Commission" or "PHRC") has appropriately exercised jurisdiction over the parties to and the subject matter of the complaints upon which these hearings in Docket Nos. E-4027 and E-4249 were convened.

2. Crown Cork and Seal (hereinafter "Crown") at its Plant No. 1 is an employer within the meaning of §4(b) of the Pennsylvania Human Relations Act (hereinafter the "PHRA").

3. Sheet Metal Production Workers' Union, Local 266 (hereinafter "Local 266") is a labor organization within the meaning of §4(d) of the PHRA.

4. All procedural prerequisites to a public hearing as set forth at §9 of the PHRA have been satisfied. Investigation, findings of probable cause and attempted conciliation of these charges were all completed prior to this litigation.

5. The Commission initiated complaint filed on December 22, 1970 at Docket No. E-4027 did not state alleged violations of the PHRA with sufficient particularity as required by law and it was therefore a defective complaint and a nullity.

6. The defective complaint filed at Docket No. E-4027 on December 22, 1970, being null and void, did not toll the running of the PHRA 90 day statute of limitations.

7. The complaint of Elizabeth McNasby filed on June 11, 1971 at Docket No. E-4249 is sufficiently particular to constitute a valid complaint with respect to the allegation related to McNasby individually. It is not sufficiently particular, however, to constitute a valid complaint with respect to the allegations relating to similarly situated females. With respect to these latter allegations the complaint is accordingly null and void. It is thus not valid as a class action complaint and does not toll the running of the statute of limitations with respect to any allegations other than that relating to McNasby individually.

8. The amended complaint filed by the Commission on October 27, 1975 at Docket No. E-4027 is sufficiently particular so as to constitute a valid complaint under the PHRA. Being valid in its own right, it is not rendered invalid by virtue of the mere technicality that it is labelled an "amended" document nor by virtue of the fact that it purports to amend a mere nullity; i.e. the original Commission initiated complaint of December 22, 1970.

9. The amended complaint of October 27, 1975, albeit a valid complaint in its own right cannot relate back to the null and void original complaint of December 22, 1970. The amended complaint is thus limited by the statute of limitations to addressing alleged violations of the PHRA which occurred within the period commencing on July 30, 1975, i.e., 90 days before the October 27, 1975 filing. All alleged illegalities pre-dating July 30, 1975 are not redressable by the amended complaint as they are barred by the statute of limitations.

10. Allegations concerning all of the 13 individual complainants named in the amended complaint at Docket No. E-4027, except for Theresa Reed, relate to occurrences pre-dating July 30, 1975. None of the named complainants other than Theresa Reed (and Elizabeth McNasby at Docket No. E-4249) had any employment relationship with Crown after 1974. Accordingly, all allegations of the individually named complainants other than Reed and McNasby are barred by the statute of limitations.

11. Although violations of the PHRA pre-dating July 30, 1975 (except those relating to McNasby), are not redressable in this action, evidence of historic patterns and practices of sex discrimination committed by Crown and Local 266 is relevant to this case and was properly received by the Commission hearing panel. Furthermore, nothing in law prohibits the Commission from making Findings of Fact and Conclusions of Law concerning pre-July 30, 1975 violations so long as those violations are not made the subject of any ordered remedy.

12. Delays in the processing of this matter from the December 22, 1970 filing of the original complaint to the October 27, 1975 filing of the amended complaint, albeit attributable primarily to PHRC staff, do not give rise to a defense of laches and have not deprived Crown or Local 266 of due process of law. Neither respondent has shown any substantial prejudice to have resulted from the delays and more significantly it has been determined that the statute of limitations proscribes any remedy

under the amended complaint for violations pre-dating July 30, 1975.

13. Notwithstanding the lengthy delay between the filing of her complaint at Docket No. E-4249 on June 11, 1971 and the commencement of a hearing upon these consolidated cases on October 30, 1978, Elizabeth McNasby was faultless with respect to that delay, is not guilty of laches, and thus redress of her claim is not barred by reason of the delay.

14. The delay between the October 27, 1975 filing of the amended compalint and the October 30, 1978 commencement of the public hearing was not exclusively attributable to the PHRC and accordingly the defense of laches raised by both respondents cannot be sustained.

15. Section 9 of the PHRA which authorizes the Commission to initiate complaints of unlawful discriminatory practices implicitly authorizes complaints on behalf of classes of aggrieved persons alleging patterns and practices of unlawful discriminatory conduct. Commission initiated complaints are not restricted to allegations on behalf of individual discriminatees.

16. At all times from July 9, 1969 to December 31, 1975, Crown engaged in a pattern and practice of discrimination based upon the sex, female, of applicants and employes in hiring, job assignment, job transfer, compensation, layoff, and recall from layoff, on a continuing basis.

17. Respondent Crown's failure to recruit and hire females while recruiting and hiring males throughout the period from July 9, 1969 to December 31, 1975 constitutes a continuing pattern or practice of discrimination on the basis of sex in violation of §5(a) of the PHRA, 43 P.S. §955(a).

18. Respondent Crown's actions and continuing pattern and practice of assigning females to jobs based upon their sex, and in establishing and maintaining a system of male jobs and female jobs, constitutes discrimination on the basis of sex in violation of §5(a) of the PHRA, 43 P.S. §955(a).

19. Respondent Crown's failure to award overtime work to female employes on the same basis as it was awarded to male employes constitutes a continuing pattern and practice of discrimination on the basis of sex in violation of §5(a) of the PHRA, 43 P.S. §955(a).

20. By establishing and maintaining sex-segregated seniority rosters, laying off female employes with greater plant seniority than males, recalling laid off males with less seniority while females on layoff status were not recalled, hiring males while females remained in layoff status, Crown has engaged in a continuing pattern and practice of sex-discrimination in violation of §5(a) of the PHRA, 43 P.S. 6955 (a).

21. The seniority system utilized by Crown and Local 266 to the extent it employed and cotinues to employ sex-segregated plant, department, and shift seniority had and continues to have

a disparate pervasive unlawful impact upon female employes at Plant No. 1 in the production and maintenance unit.

22. The seniority system as administered by Crown and Local 266 in the context of layoffs, and recall from layoff status had and continues to have a disparate pervasive unlawful impact upon female employes at Respondent Crown's Plant No. 1 in the production and maintenance unit.

23. During the period July 9, 1969 to December 31, 1975, the sex-segregated job classification and seniority systems employed by Crown and acquiesced to by Local 266 disproportionately disadvantaged females employes with respect to job assignment, job transfer, compensation, layoff, and recall from layoff. The present continuing effects of these past practices would be unlawfully discriminatory even in the absence of renewed acts of discrimination.

24. The sex-segregated job classification and seniority systems historically employed by Crown inhibited the movement of Elizabeth McNasby upward through the production and maintenance ranks at Crown as occurred with other women. This left her with artificially low department seniority in 1971. Thus, continued layoffs she suffered in her inspection position were illegal consequences of a seniority system which disproprotionately disadvantaged women and are therefore remediable.

25. The sex-segregated job classification and seniority systems employed by Crown and acquiesced to by Local 266 were

justified by neither any bona fide occupational qualification nor by any business necessity.

26. The seniority system, to the extent that it utilizes seniority measures other than plant seniority and to the extent that it perpetuates the effects of past discriminatory practices, is unlawful.

27. Respondent Crown's current system of sex-segregated job classification and plant seniority is unlawful per se and must be integrated for all purposes.

28. Respondent Crown's current system of department and shift seniority is unlawful in its effects and may not be used as a basis for job advancement, layoffs, or recall to employment unless plant seniority among competing employes is equal.

29. While Crown and Local 266 allege, in effect, that many female employes knowingly and intentionally waived their rights to equal employment opportunity, such rights cannot be prospectively waived.

30. The alleged "waivers" proffered as a defense by Crown and Local 266, were not informed, knowing waivers nor were they legally binding.

31. Local 266 has a duty to afford equal representation to its female members and to accord them full and equal membership rights.

32. Local 266 repeatedly discriminated against female employe members:

(i) by failing to process the grievance of female members complaining of the sex discriminatory acts and practices of Respondent Crown;

(ii) by improperly encouraging and misleading many female members to sign alleged waivers of their rights to equal employment opportunity;

(iii) by failing and refusing to enforce the non-discrimination provision of its applicable collective bargaining agreements with Crown;

(iv) by failing to protest against or bargain for an end to the illegal practices of Respondent Crown which adversely affected female Local 266 members; and

(v) by aiding and abetting Respondent Crown in its continued pattern of employment discrimination.

These acts and policies constitute sex discrimination in violation of §5(c) and §5(e) of the PHRA, 43 P.S. §955(c) and (e).

33. Respondent Local 266 violated the PHRA by requiring the payment of dues while employes were in layoff status and/or by requiring the payment of reinstatement fees as a condition of obtaining reinstatement to employe status from layoff. These requirements, in the context of Crown's sex-segregated layoffs, disproportionately disadvantaged females in violation of §5(c) of the PHRA, 43 P.S. §955(c).

34. Local 266 has contended that female employes failed to complain or file grievances concerning sex discrimination and generally failed to avail themselves of the union's participatory processes whereby they could have made counter-discrimination suggestions relating to future union collective bargaining efforts. Even to the extent that these contentions are true, female employes have not thereby waived any rights to non-discriminatory treatment and are not thereby estopped from raising a challenge to Local 266's discriminatory conduct.

35. A proper element of the relief to be awarded is back pay for each eligible female discriminatee equal in gross amount to the differences between that which she actually earned from employment at Crown or elsewhere during the period from July 30, 1975 to December 31, 1975 and that which she would have earned at Crown during the same period had she been extended the equal employment opportunities to which she was entitled under the PHRA.

36. A similar award is appropriate for Elizabeth McNasby dating from the filing of her complaint on June 11, 1971 to December 31, 1975.

37. The inability of the hearing panel to determine from the record the precise amount of back pay appropriately awardable to Elizabeth McNasby and members of the class of discriminatees with redressable claims under the amended complaint at Docket No. E-4027 does not preclude the awards of back pay set forth

in the attached Final Order as those awards are based upon reasonable calculations supported by the evidence.

38. Females who, should they now be assigned to jobs previously classified as male jobs, would otherwise be subject to wage reductions because of Crown's departmental or shift seniority system are legally entitled to have their current wage rates "red-circled" or maintained at a rate equivalent to the rate a woman could attain through the use of her plant seniority until such time as she rises within an integrated department to a job code level with the appropriate corresponding or higher wage rates.

39. A proper element of relief is the required institution of a bona fide, good faith and effective training program to enable female employes to enter jobs and departments from which females have previously been excluded. Under the circumstances, a step-by-step procedure of learning the necessary skills for advancement within departments by on-the-job experience at lower level jobs would unfairly delay the discriminatees reaching their rightful place within the hierarchy of jobs at Plant No. 1 unless it is demonstrated that experience in the lower rated job is a business necessity.

OPINION

I. Background

On December 22, 1970 the Pennsylvania Human Relations Commission (hereinafter "PHRC" or "Commission"), by its Executive Director, Homer C. Floyd, initiated a complaint at Docket No. E-4027 against Respondent, Crown, Cork and Seal Company, Inc. (hereinafter "Crown"), and Respondent Sheet Metal Workers Union, Local No. 266 (hereinafter "Local 266") alleging that both respondents had committed acts of unlawful sex discrimination in violation of the Pennsylvania Human Relations Act (hereinafter "PHRA"), Act of October 27, 1955, P.L. 744, as amended, 43 P.S. § 951 et seq. Another complaint of unlawful sex discrimination was lodged against Crown and Local 266 at Docket No. E-4249 by Elizabeth McNasby on June 11, 1971.

The PHRC initiated complaint and the McNasby complaint were consolidated for purposes of administrative processing and some investigation took place through early 1973. Thereafter it appears that there was virtually no activity upon the consolidated cases until mid-1975 when PHRC staff sought and received affidavits from 12 former and 1 incumbent female Crown employes relating to the sex discrimination allegations.

In part based upon these affidavits the Commission, again by its Executive Director, initiated an amended complaint at Docket No. E-4027 on October 27, 1975. Investigation then

proceeded until a finding of probable cause was made by PHRC staff on April 19, 1976. (Technically this was an amended finding, several findings of probable cause having already been made prior to amendment of the complaint.)

Conciliation efforts, as required by § 9 of the PHRA, were undertaken but failed and accordingly a public hearing was ordered. Protracted pre-hearing maneuvering and collateral litigation delayed commencement of the hearing until October 30, 1978. Thereafter 37 days of hearings were held ending on June 17, 1980 and resulting in a hearing record of over 6000 pages.

The hearings were conducted before a panel of Commissioners consisting of Alvin E. Echols, Junior, Esquire, presiding, and Commissioners Doris M. Leader, Benjamin S. Lowenstein, Esquire, and Robert Johnson Smith. The case on behalf of the complainants was presented by PHRC Assistant General Counsel, James J. Keeney, Esquire and PHRC General Counsel, Robert S. Mirin, Esquire. Respondent Crown was represented by Stephen P. Gallagher, Esquire and Respondent Local 266 was represented by Mark P. Muller, Esquire. Serving as legal advisors to the hearing panel were PHRC Assistant General Counsels James D. Pagliaro, Esquire, and Benjamin G. Lipman, Esquire.

Extensive Findings of Fact and Conclusions of Law having been submitted in these consolidated cases, this Opinion will not attempt to reiterate their essence in narrative form but will undertake only to clarify the underlying rationale for aspects of the Commission's decision and Final Order which may

not be self-evident.

Additionally, the Commissioners wish to make known their view that although procedural deficiencies in the processing of this matter have precluded a full remedy for all the wrongs found to have been committed, these cases nevertheless present one of the most blatant patterns of sex discriminatory employment practices that has ever been brought to this Commission's attention. Practices concerning hiring, transfer, promotion, compensation, layoff, and recall from layoff were all tainted by extremely antiquated and stereotyped perceptions of female workers manifest by Crown and Local 266 all operating to the detriment of women employes.

II. Limitations on Action

A. Insufficiency of the original complaint

The December 22, 1970 complaint initiated by the PHRC against Respondents Crown and Local 266 was 2 pages long. The entirety of its substantive allegations was as follows:

> On or about to wit, December 22, 1970 the complainant alleges that the respondent company engages in unlawful employment practices which are discriminatory with respect to female employees, because of their sex, in hiring, assignment, seniority, transfer, salary, overtime, promotion, denial of training, and layoff. It is further alleged that the respondent Union concurs in and aids and abets the discriminatory practices of the respondent Company.

In the case of PHRC vs. U.S. Steel Corp., 325 A.2d 910 (1974), the Pennsylvania Supreme Court reviewed a similarly brief, generalized allegation of classwide discrimination and concluded that by any reasonable standard the complaint was so

deficient in particularity that its averments failed to provide the respondent with adequate notice as to the wrongs with which it was charged.

Unfortunatley, the same is the case here. The original Commission initiated complaint at Docket No. E-4027 is so similar to the complaint found to be defective in U.S. Steel that there is no reasonable basis upon which we can distinguish it. Accordingly, the complaint must be held to be null and void.

B. Sufficiency of the Amended Complaint

On October 27, 1975 the PHRC, by its Executive Director, filed a 34 page amended complaint alleging in very specific detail a pattern and practice of discrimination by Respondents Crown and Local 266. The allegations related to several specified classes of females, including a group of 13 named individuals, 1 incumbent and 12 former Crown employees.

The amended complaint certainly satisfies the particularity requirements for complaints set forth in U.S. Steel and would seem to be sufficient in its own right to constitute a complaint under §9 of the PHRA, 43 P.S. §959. The mere fact that the label on the document includes the word "amended" we do not find a basis for discrediting it. Furthermore, the fact that the amended complaint purports to amend an original complaint which we have already held to be a nullity does not convince us that the amended complaint is any less viable as a complaint in its own right. Thus, we have, in effect determined to treat the amended complaint as an original complaint.

C. Statute of Limitations

The PHRA, at §9, 43 P.S. § 959, requires that "Any complaint filed pursuant to this section must be so filed within ninety days after the alleged act of discrimination." The amended complaint filed at Docket No. E-4027 purports to apply to

discriminatory acts during the period July 9, 1969 (when the PHRA was amended to prohibit sex discrimination) through and continuing beyond the date the amended complaint was filed, October 27, 1975.

We believe that §9's statute of limitations confines the amended complaint to redressing grievances within a much more narrowly circumscribed time frame; particularly, to allegations of discriminatory acts which occured no more than 90 days prior to the filing of a complaint. The question thus arises:

> Is the amended complaint restricted to acts occuring within 90 days of its filing or does it relate back to the filing of the original complaint thus allowing it to redress allegations of discriminatory acts which occured within 90 days of the December 22, 1970 filing of the original complaint?

As previously, indicated, the amended complaint virtually ignores the statute of limitations and purports to apply to conduct dating back to July 9, 1969. We find, however, that this is impermissible and that the amended complaint, filed October 27, 1975, cannot redress discriminatory conduct occuring more than 90 days prior to its filing.

We have made this determination because of the well-established doctrine, adhered to in Pennsylvania and elsewhere, that an amendment to a complaint cannot revive a time barred claim and cannot introduce a new cause of action after a statute of limitations has expired. Thus, here, where the original complaint is a nullity, fails to state a viable cause of action, and fails to toll the running of the statute of limitations, the amended complaint, in effect stating a new cause of

action, cannot relate back to the original date of filing. Instead, it is restricted to redressing allegations of discriminatory acts occuring on or after July 30, 1975 (90 days before the October 27, 1975 filing of the amended complaint).

(The amended complaint characterizes most of Respondents' discriminatory acts as being of a continuing nature. And while the evidence suggested the correctness of this contention, little in the record affords us a sufficient basis upon which to formulate specific monetary relief beyond the date of December 31, 1975. Thus, notewithstanding an evidentiary picture manifesting blatant sex discrimination dating back to the July 9, 1969 enactment of the sex discrimination prohibitions in the PHRA and continuing up through the dates of these hearings in 1978-1980, the statute of limitations and the state of the record restrict much of the remedy we have ordered to the period July 30, 1975 to December 31, 1975.)

D. The 13 individually named complainants

During the recommencing of investigation of this matter by PHRC staff in mid-1975, affidavits of 13 women were sought and received. The 13 included 1 incumbent and 12 former Crown employes. Their affidavits were attached to the October 27, 1975 amended complaint and they were thereafter treated as individually named complainants.

Unfortunately, all but one of the women, Theresa Reed, had no employment relationship with Crown nor any membership relationship with Local 266 after 1974. As none except Reed can allege victimization by discriminatory practices on or after July 30, 1975 the statute of limitations thus bars their claims.

E. The complaint of Elizabeth McNasby

On June 11, 1971 Elizabeth McNasby filed an individual complaint against Crown and Local 266 alleging in relevant part "that the respondents consorted in the lay-off of the complainant because of her sex, female, and have prevented her, as well as all other females, from enjoying equal job opportunities at Crown Cork and Seal Company."

Notwithstanding its brevity, we have no doubt but that the specific references in the complaint to a particular act of layoff is sufficient to withstand the particularity requirement for complaints set forth in the U.S. Steel case. Accordingly, we hold that the McNasby complaint is viable for purposes of redressing her individual grievance against the respondents. With respect to her allegation on behalf of all other females, however, we are of a different view.

In the case of PHRC vs. Freeport Area School District, 359 A. 2d 727 (1976), the Pennsylvania Supreme Court reviewed a sex discrimination complaint brought by an individual female on behalf of herself and all similarly situated females. The court held that:

> .....PHRC may order affirmative relief for persons other than the named complaint (sic) when (1) the complainant alleges that such other persons have been affected by the alleged discriminatory practices and (2) such other persons entitled to relief may be described with specificity. 359 A. 2d at 728.

We do not find McNasby's allegations on behalf of "all other females" sufficient to constitute a redressable complaint as measured by the standards of either U.S. Steel or Freeport. Nothing in her allegations facilitates specific identification of "such other persons entitled to relief" as required by Freeport. Furthermore, the allegation that ".....all other females (have been prevented) from enjoying equal job opportunities at Crown Cork and Seal Company" is totally lacking in the degree of particularity required by U.S. Steel to give respondents notice of the charges against them.

Accordingly we find the McNasby complaint sufficient to toll the running of the statute of limitations with respect to her individual allegations of discrimination; but failing to state a cause of action on behalf of the class of other female employes at Crown it does not toll the running of the statute as to the classwide allegation.

F. Initiation of a pattern and practice complaint by the PHRC

In its post-hearing brief Crown challenges the authority of the Commission to initiate a complaint based upon an alleged pattern and practice of discrimination. Nothing in logic or law supports this view.

The PHRA at §9, 43 P.S. §959 states in relevant part:

> Any individual claiming to be aggrieved by an alleged unlawful discriminatory pratice may make, sign and file with the Commission a verified complaint, in writing, which shall state the name and address of the person, employer, labor organization or employment agency to have committed the unlawful discriminatory practice complained of, and which shall set forth the particulars thereof and contain such other information as may be required by the Commission. The Commission upon its own initiative or the Attorney General may, in like manner, make sign and file such complaint.

No reasonable inference can be drawn from this language that there exists a limitation on the type of Commission initiated complaint permitted under §9 of PHRA.

The apparent intention of this legislative invention, i.e. the Commission initiated complaint, is to attack the type of broad based discriminatory conduct that is not manifest by single isolated incidents (which are more likely to result in individual complaints). The Commonwealth's interest in eradicating unlawful discrimination, above and beyond the interest of individual victims, is vindicated through Commission initiated charges. This interest, of necessity will at times

be directed at patterns and practices of discriminatory conduct.

Finally, although the issue raised by Crown has apparently never before been addressed by the state's appellate courts, the continued approval of PHRC Final Orders arising out of Commission initiated pattern and practice complaints suggests that the courts do not agree with Crown's view. See, for example, PHRC vs. Chester School District, 233 A. 2d 290 (Pa. Sup. 1967) and PHRC vs. Chester Housing Authority, 327 A. 2d 335 (Pa. Sup. 1974).

G. The laches defense

Both respondents assert the doctrine of laches as a defense to their conduct in these cases. The doctrine prohibits a party guilty of inexcusable delay from maintaining an action against an opponent who has been substantially prejudiced by the delay. We find the doctrine inapplicable here.

It is certainly correct that PHRC staff had sole control of the pace at which this matter moved toward resolution from the time the original complaint was filed in 1970 until pre-hearing preparation began in earnest in 1976. It is equally true that the Commission had the statutory obligation to proceed expeditiously with the case and did not. Nonetheless, neither respondent has been significantly prejudiced by the Commission's slowness.

Most important in this regard is the fact that all charges against respondents pre-dating July 30, 1975 (except those relating to Elizabeth McNasby individually) have been dismissed due to statute of limitations problems. And while the Commission has relied in large part in reaching its holding upon evidence of discriminatory acts which pre-dated July 30, 1975, neither respondent was prejudiced by reliance upon such evidence.

From the initiation of the original complaint to the time of the hearing neither respondents' conduct was in any way affected by the pendency of this litigation. In fact, their discriminatory practices, based upon antiquated and blatant stereotypes, were maintained in preciselythe same manner as they always had been.

Respondents encountered no meaningful difficulty in producing their evidence because of the delay. Certain Crown payroll records from 1974 were lost and unavailable but this was obviously due to Crown's own neglect as records concerning 1971-1973 were readily available.

The principal element in the defense offered by both respondents concerned securing and use of "waivers" from female employes. Although Crown was unable to produce all the waivers it claimed to have secured over the years this could not affect our decision, as, for reasons set forth later in this Opinion, we have rejected the legitimacy of the entire waiver process.

Local 266 officials and other witnesses frequently claimed lapse of memory when testifying and understandably so. Nevertheless, the crucial elements of these cases and the primary bases for our decision, namely statistics and the waiver process, were well presented by all parties. We can think of no place in the record where there is an indication of lapse of memory, unavailability of witnesses, or loss of documents which could have meaningfullyaltered our view with respect to these two subjects.

As to delays attending the processing of these matters after filing of the amended complaint in 1975 we view those as due at least as much to respondents' conduct, including Crown's initiation of collateral litigation, as to PHRC staff's. And with respect to Elizabeth McNasby, she, of course, can in no sense be deemed guilty of laches as she had no control whatsoever over the pace at which this litigation unfolded.

III. Evidence of Discriminatory Practices

A. Theories of discrimination

Employment discrimination litigation, particularly that arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (hereinafter "Title VII"), has resulted in judicial formulation of 2 basic discrimination models. The first, disparate treatment, is the more self-evident form of discriminatory conduct. It is the simple situation where an individual is less favorably treated than others due, at least in part, to consideration of some prohibited characteristic such as race, age, religion, national origin, etc. It is plainly unlawful under anti-discrimination laws. McDonnell Douglas Corp. vs. Green, 411 U.S. 792 (1973).

The second discrimination model, and the somewhat more complicated one, is that of disparate impact. This involves practices which are fair in form but discriminatory in their operation, i.e., which appear to be neutral but which adversely affect one protected group more than another. Disparate impact discrimination has been expressly declared to be unlawful under both Title VII, Griggs vs. Duke Power Co., 401 U.S. 424 (1971), and under the PHRA, General Electric Corp. vs. PHRC, 365 A. 2d 649 (Pa. Sup. 1976).

In these cases we find both forms of discrimination to have occured. The detailed Findings of Act and Conclusions of Law which accompany this Opinion make unnecessary a lengthy discussion of our reasoning. However, it is clear that Crown's failure to hire women during the period 1969-1975 and its sex-segregated system of job classification constitute different, disadvantageous treatment on the basis of sex, i.e., unlawful disparate treatment. And statistical and other evidence demonstrate that the sex-segregated seniority system at Crown had

an unlawfully disparate impact upon females with respect to earnings, layoff, and recall from layoff.

B. Statistics

The courts of this Commonwealth and those of the nation have consistently relied upon statistical proof as a means of assessing compliance with anti-discrimination laws. International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977), Hazlewood School District vs. U.S., 433 U.S. 299 (1977), PHRC vs. Chester Housing Authority, 327 A. 2d 335 (Pa. Sup. 1974), PHRC vs. Chester School District, 233 A. 2d 290 (Pa. Sup. 1967). This approach is predicated upon a recognition that discrimination is frequently a systemic condition related to wide spread practices rather than a series of isolated events.

Substantial statistical disparities between existing population distributions and the distribution that might be expected in the absence of discrimination (e.g., percentage of women in a work force compared to percentage of qualified women in available labor pool) will generally be regarded as prima facie evidence of discrimination. Castaneda vs. Partida, 430 U.S. 482 (1977), Hazlewood, supra, Chester Housing Authority, supra. Unrebutted statistical evidence demonstrating an unusually skewed distribution will cause a court to conclude that chance alone cannot account for the disparities and that discrimination has occured.

Much statistical evidence was introduced in support of the complainants' cases at hearing. The disparities reflected by these statistics were substantial and indicated a profound disadvantage experienced by females at Crown with respect to hiring, compensation, promotion, layoff, and recall from layoff. We find this statistical evidence alone to be sufficient to establish a prima facie case of discrimination.

B. Evidence of historic practices

Much of the evidence introduced at hearing and relied upon by the Commission in formulating this decision concerned historic discriminatory practices which had their origins prior to July 30, 1975. Crown's sex-segregated systems of job classification and seniority were the subject of much of the evidence introduced and the statistical reflections of the consequences of these systems, in terms of layoff, earnings, etc., related often to the entire period July 9, 1969 to December 31, 1975. The evidence thus failed to distinguish acts and consequences that were within and that were not within the statute of limitations. A question arises as to the appropriateness of the Commission's consideration of, reliance upon, and making findings concerning events outside the statute of limitations.

In the case of General Electric Corp vs. PHRC, 365 A. 2d 649 (1976), the Pennsylvania Supreme Court reviewed the admissibility of evidence of discrimination concerning conduct not merely outside the statute of limitations, but even predating the enactment of the PHRA's prohibition against sex discrimination. The court ruled that such historic evidence, although it cannot give rise to a finding of redressable illegalities, may still be admissible under some circumstances. And those circumstances are clearly present in this case.

The General Electric court observed that employment practices which are apparently neutral can sometimes operate to "freeze" the effects of past discriminatory conduct, thus perpetuating into the present the impact of the past discrimination. Even if the prior discriminatory practice has been abandoned, the court found that this perpetuation of discriminatory effects can cause the present neutral practices to be deemed discriminatory in their own right. Accordingly evidence of the past practice might be admissible.

In the cases at bar, Crown's sex-segregated job classification and seniority systems remained in place even at the time of the hearing. (They were gradually being removed by virtue of non-applicability to new female employes and the "option" of integrated seniority offered to more senior female employes, discussed infra. But for the overwhelming majority of women, sex-segregation at Crown was the rule.)

Nevertheless, Crown's sex segregation policies can be analogized to the abandoned discriminatory practices discussed in General Electric, because even to the extent that sex segregation was breaking down, its historic place in employment decision making at Crown continued to have effects.

Thus, for example, women who had long been limited in advancement due to sex-segregated departments could not afford to give up department seniority and transfer to integrated departments when that option became available. By virtue of the dual seniority system, segregation, and employer-fostered psychological barriers, women were "locked" into their low-paying, layoff-prone positions even when Crown began the slow process of dismantling overt segregation.

As the court said in General Electric, 365 A. 2d 659-660:

> In sum, we hold that if an employer has in fact engaged in past discriminatory actions, and if the impact of these actions is perpetuated by the employer's otherwise neutral present employment policy, then that employer's present policy may be held to be in violation of Section 5(a) of the PHRA.

The same is applicable here.

IV. Defenses

As indicated in the preceding section of this Opinion, complainants have clearly succeeded in establishing in this matter a prima facie case of employment discrimination. With statistical evidence they have demonstrated disparate treatment of females in hiring. (Respondents have effectively offered no defense to this charge.) They have shown by testimonial and other evidence that disparate treatment occured with respect to job assignment in that women were inevitably initially assigned to lower paying "women's job." And by testimonial, documentary, and statistical evidence they have demonstrated the disparate impact that women suffered in terms of promotions, earnings, layoffs and recall from layoffs resulting from application of the sex-segregated seniority system.

A. The business necessity doctrine

There is a defense, of course, to a prima facie case of employment discrimination. It is what is known as the "business necessity doctrine." It holds that "(T)he unintended discriminatory impact of an employment policy may be justified.... if that policy is necessary for the safe and efficient operation of the enterprise." General Electric Corp. vs. PHRC, 365 A. 2d 649, 655 (Pa. Sup. 1976). Thus, once a complainant establishes a prima facie case of employment discrimination, "(T)he burden then shifts to the employer to justify his employee selections on the basis of job-related criteria which are necessary for the safety and efficiency of the enterprise (citation omitted)". General Electric, 365 A. 2d at 656. Respodnents have failed to do that in these cases.

In defense to the charges the respondents have raised several interrelated contentions. They assert that when changes in the law began to prohibit sex discrimination they undertook efforts to remove any vestiges of such discrimination from their employment practices but at the same time wished to preserve the option

of "loyal" female employes to remain in female jobs if they so chose. This was accomplished, according to respondents, primarily through the tendering of certain documents to female employes during the early 1970s which ostensibly facilitated their choosing male jobs in accordance with their seniority if they wished or waiving their rights to these jobs if they preferred.

As a result of this process respondents argue that the previously sex-segregated seniority lists evolved into a female list for those incumbent women who only wished to be considered for female jobs and an integrated list for all other employes.

In light of the obvious simplicity of using integrated plant seniority for all purposes and permitting women to opt out of promotions to men's jobs if they wished (thus protecting the desires of the "loyal" employes) we are hard pressed to accept any assertion that the employment practices here in question are justified by business necessity.

B. Ostensible employe desires

We reject based upon the evidence and common sense the respondents' position that female employes generally did not wish to be promoted to male jobs. Such a view was characterized in General Electric, 365 A. 2d at 661, as "an assumption based upon an undifferentiated stereotypic appraisal of the women as a class; as such it was plainly discriminatory." Similarly in Ostapowicz vs. Johnson Bronze Co., 369 F. Supp. 522 (W.D. Pa. 1973) the court observed at 537 that:

> It is true that certain females testified they did not want the responsibility which went with the job of machine operator first class even though this meant more money, and the same, of course, might be true of many men. In the view of the court, however, this appears to be a type of warrantless assumption based on generalizations or

stereotyped characterizations of the sexes. It is the opinion of the court that to justify failure to advance women because they did not want to be advanced is a type of stereotyped characterization which will not stand.

Respondents' view that most female employes were not interested in promotion to male jobs was one of many sexist stereotypes that seems to have guided employment practices at Crown. It is also noteworthy, that even to the extent that these ostensible desires of female employes were accurately perceived by respondents those desires must be attributed in part to psychological conditioning by virtue of the historic imposition of sex-segregated job classification at Crown.

C. The Waivers

From approximately 1970 to 1974, primarily through a series of meetings and by use of an assortment of documents (hereinafter referred to as "waivers"), Crown and Local 266 purported to be making good faith offers of non-discriminatory job placement to females while actually seeking to build a "paper record" which they believed would exculpate them from any future charge of sex discrimination. We view these waivers as unlawful per se, unlawful as used, and void as waivers of rights to equal employment opportunity.

Nothing about the waivers suggests that they were truly intended as good faith job offers. They required women to state affirmatively, in advance, how they wished to exercise their seniority to secure rights guaranteed by equal employment opportunity laws including the PHRA. But, of course, these rights being guaranteed by statute, should not require any affirmative exercise. More significantly, no male was ever shown, offered, or asked to sign one of these forms. Males' seniority rights were exercised automatically not as an option available only upon an affirmative effort.

Although there was some variance in the different waiver forms utilized over the years and although the scenarious in which respondents sought the waivers similarly varied, bascially what most often occured was that women were offered forms and were told to list or check off those males jobs on the forms for which they wished to be considered. The forms generally stated a waiver of rights to jobs not affirmatively indicated. Such a practice appears to be illegal per se because of the view in the courts that prospective waivers of equal employment opportunity rights are prohibited. Alexander vs. Gardner-Denver Co., 415 U.S. 36, 51 (1974).

Furthermore, waivers of statutory rights, such as those guaranteed by the PHRA, are frowned upon generally by the law and will be looked at with askance. Particularly, before giving credit to a waiver of this character, a court would have to be well-satisfied that it was a knowing and voluntary waiver. That cannot be said in this case.

The attached Findings of Fact detail the problems surrounding execution of the forms and the defects in the forms themselves. All of these attendant circumstances, reviewed in light of a strong public policy against giving credit to waivers such as these, compel our finding that female employes at Crown, when signing these waivers, did not intend to waive their rights to equal job opportunities.

Finally, the use to which respondents put the forms belies any assertion that the forms had anything whatsoever to do with implementation of equal employment opportunity rights. Crown never demonstrated any significant business use of the forms. There appears to be little if any connection between what a female employe might have placed on the forms and her actual movement to a male job.

The forms obviously had only the most limited affect in dismantling the sex-segregated seniority system as, in all, only 18 females appeared on the integrated seniority list over the years 1971-1975, and no more than 12 ever appeared on that list in a given year.

The general rule against prospective waivers of equal employment rights, the public policy discouraging waivers of statutory rights, the discriminatory, coercive circumstances surrounding execution of the forms, and the lack of any meaningful business use of the forms all operate to require rejection of respondents' defenses based upon the waivers.

D. Challenges to statistical evidence

Crown offered a rather obtuse challenge to the statistical case presented by complainants. In effect Crown's evidence appeared to acknowledge the accuracy of most of complainants' statistical presentation, but Crown concluded that any disparate impact suffered by any identifiable group was due, not to sex, but to whether the group was on the female or the integrated seniority list.

This may well be a nice and technically correct statistical distinction. However, for purposes of enforcing an anti-discrimination law such as the PHRA, we refuse, contrary to the suggestion implicit in Crown's evidence, to ignore the basic facts that the integrated seniority list was virtually all male and that with some limited exceptions the seniority systems at Crown remained effectively segregated at all times material to this litigation. Furthermore, segregation of the seniority systems was attributable totally to the respondents, not to the discriminatees, and was patently illegal. (Ironically, Crown's expert admitted that in 2 of the 4 analyzed years even women on the integrated list had earnings that were

less, by statistically significant amounts, than similarly situated men.)

VI. Remedy

The remedial authority of the Commission is set forth as part of §9 of the PHRA, 43 P.S. § 959:

> If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in this act, the Commission shall state its findings of fact, and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action including but not limited to hiring, reinstatement or upgrading of employes, with or without back pay, admission or restoration to membership in any respondent labor organization..... as, in the judgment of the Commission, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance.

Reviewing this remedial authority in PHRC vs. Alto-Reste Park Cemetary Association, 306 A. 2d 881 (1973), the Pennsylvania Supreme Court observed that "the Legislature vested in the Commission, quite properly, maximum flexibility to remedy and hopefully eradicate the 'evils' of discrimination." 306 A. 2d at 887. We believe that the attached Final Order, read in light of our Findings of Fact and Conclusions of Law, is a responsible exercise of that judicially sanctioned flexibility.

Our primary concern in formulating a remedy is manifest in the injunctive type relief we have ordered. This is intended to dismantle and root out as expeditiously as possible the sex-segregated seniority system which has continuously disadvantaged female workers. (Although most of the evidence in this case concerned the period from July 9, 1969 to December 31, 1975, discriminatory practices having been clearly demonstrated for that period and there being no evidence suggesting their cessation, we may and do reasonably conclude that the

practices remain prevalent, PHRC vs. St. Joe Minerals Corp., 382 A 2d 731, 735 (Pa. Sup. 1978), and we issue a remedy accordingly.)

An additional purpose in the exercise of our remedial authority is, of course, to restore discriminatees to their "rightful place," i.e. to vitiate the effects of any discrimination they have endured over time. Albermarle Paper Co. vs. Moody, 422 U.S. 405 (1975). Unfortunately, statute of limitations problems have restricted the class of discriminatees to whom a remedy can be extended and the absence of sufficient evidence relating to the period following December 31, 1975, the burden of production of which belonged to complainants, precludes any monetary relief for the period after that date.

In calculating monetary relief for the class of entitled discriminatees we have been guided by the principles of flexibility enunciated in English vs. Seaboard Coastline R.R. Co., 12 EPD Para. 11,237 (S.D. Ga. 1975) at 5729:

(i) Difficulty of ascertainment of amounts due will not be confused with right of recovery.

(ii) Unreasonable exactitude, in light of available information, will not be required.

(iii) Uncertainties will be resolved in favor of the victims of unlawful discrimination and against the wrongdoers.

We have also considered in calculating monetary relief the court's declaration United States vs. United States Steel Corp., 520 F. 2d 1043, (5th Cir. 1975); cert. denied, 429 U.S. 817, (1976) at 1050:

> Once a court has determined that a defendant's conduct caused some damages to the class, or to a representative sample of its members, then the burden falls upon the wrongdoers to explain away or disprove the damages which each claimant's evidence arguably supports.

With respect to those females who had employment rights with Crown between July 30 and December 31, 1975, no evidentiary showing was made which would disqualify any of them.

The specific amounts awarded to eligible discriminatees were arrived at by considering Complainant's Exhibit 46 introduced at the hearing. The exhibit represents a statistical study by complainants' expert purporting to demonstrate how much additional earnings each female would have enjoyed during 1975 in the absence of discrimination. Respondent's expert had no significant dispute with the figures on the exhibit. We then awarded to each discriminatee 42% of the amount on the exhibit representing a pro-rata share of the amount covering the period July 30 to December 31, 1975.

We awarded Elizabeth McNasby a pro-rata portion of the amount on Exhibit C-43 for 1971 from the date of her complaint. She was awarded the amounts reflected on C-44 for 1972, C-45 for 1973, and C-46 for 1975. Because there was no data available from respondents for 1974 we awarded McNasby an amount for that year representing her average amount for the other years.

Finally, because we regard Crown principally responsible for the diminished earnings of the discriminatees we have not made Local 266 jointly liable for back pay.

FINAL ORDER

AND NOW, this 30th day of September , 1981, the Pennsylvania Human Relations Commission (hereinafter "PHRC" or "Commission") orders:

1. That Respondent Crown, Cork and Seal (hereinafter "Crown") shall conduct all of its hiring and employment practices in a non-discriminatory manner and in accordance with the Pennsylvania Human Relations Act (hereinafter "PHRA"), Act of October 27, 1955, P.L. 744, as amended, 43 P.S. Section 951, et seq..

2. That Respondent Sheet Metal Workers Union, Local No. 266 (hereinafter "Local 266") shall conduct all of its activities, including but not limited to, initiation and reinstatement of members, setting and collection of dues and fees, processing of grievances filed by employes, representation of employes, and advocacy of the interests of employes in a non-discriminatory manner and in accordance with the PHRA.

3. That Respondent Crown shall:

(a) recruit female employes on the same basis as male employes;

(b) hire female employes on the same basis as male employees;

(c) make initial assignments to shift, department, and/or job regardless of the sex of the employe;

(d) promote and transfer employes to any department and/or job regardless of sex;

(e) assign overtime work to employes regardless of their sex;

(f) layoff employes without regard to sex and based solely upon plant seniority, in the absence of a bona fide, necessitous business reason for using a measure or consideration other than plant seniority; and,

(g) recall employe from layoff without regard to sex and based solely upon their seniority in the absence of a bona fide, necessitous business reason for using a measure or consideration other than plant seniority.

4. That Respondent Crown shall pay back wages to members of the class of females who were employed or who possessed employment rights at Crown's Plant No. 1, production and maintenance unit, during the period July 30, 1975 to December 31, 1975. The amount of back pay shall be equal to 42% of the amount listed by the name of each female on the document introduced in evidence at the hearing as Complainant's Exhibit 46. Added to this total shall be 6% interest, compounded on a quarterly basis from the end of calender year 1975. The total may be reduced by such appropriate deductions

as are allowable under federal, state, and local income tax laws or any other appropriate and normal deductions provided that Crown shall file within 60 days after the effective date of this Order an appropriate affidavit itemizing any such tax or other deductions and indicating, with respect to each, the precise reason therefore (e.g. federal income tax, state income tax, local wage tax, social security and/or any period of unavailability for employment). Such filing (and all filings and reports required pursuant to this Order) shall be directed to the Director, Systemic Enforcement Division (hereinafter "SED") at the PHRC's Headquarters office. Commission staff shall have 30 days to object to any of the proposed deductions. In the event of any objections by Commission staff, the net amount minus deductions proposed by Crown shall immediately be paid and Crown shall have an opportunity to demonstrate by clear and convincing evidence presented to the Hearing Panel that each of the contested deductions is proper. The Hearing Panel's recommendations upon the objections shall be ruled upon by the Commission. Post-judgment interest shall be payable at the rate of 6% per annum compounded quarterly.

5. That the preceding paragraph of this Order shall apply in full to the back wage award of Elizabeth McNasby except that in lieu of 42% of the amount listed by her name on Complainant's Exhibit 46, her award shall be based upon the following yearly amounts plus 6% interest compounded on

a quarterly basis from the end of calender year 1971:

1971 - $2499.28
1972 - $6510.80
1973 - $6977.59
1974 - $6306.62
1975 - $7887.78

6. That to the extent that openings are or subsequently become available. Crown shall make good faith offers of reinstatement to each female employe who is presently laid off if she was laid off while a less plant senior male continued to be employed. Such offers shall be made based upon employment availability and relative plant seniority within the production and maintenance unit.

7. That within 180 days after the effective date of this Order, Crown shall integrate its shift, department, and plant seniority systems in the following manner:

a) All employes, regardless of sex, shall be given an opportunity to bid on the shift of their choice, based solely upon their plant seniority. Such bids shall be honored by management strictly on the basis of plant seniority.

b) All employes shall be informed of the results of the shift bidding and, thereafter, each female employe shall have the opportunity to bid on the department of her choice. The bid shall be honored by management strictly

on the basis of plant seniority, and if upon that basis any female's bid cannot be accommodated she shall be given successive opportunities to bid into the department of her choice until such time as her plant seniority results in her bid being honored.

c) Within any department to which she is assigned, regardless of whether by bidding or otherwise, each female shall be allowed to bid on the particular job of her choice, provided that she has greater plant seniority than the existing incumbent thereof at the time of the bid.

d) In each case where a female employe takes advantage of these bidding opportunities, she shall be granted not less than 30 days of bona fide, good faith training on the selected job, in recognition of the cumulative effect of historical denial of equal employment opportunities at Crown.

e) In the event that any voluntary or involuntary transfer directly or indirectly resulting from the bidding procedures set forth in this paragraph causes reassignment of any employe to a lower-paying position

than that which s/he regularly holds, his/her wages shall be "red-circled" and maintained for the duration of employment with Crown at not less than the "red-circled" amount, plus any raises generally granted to other employes of the same job class.

f) Variances from the requirements of this paragraph shall be available to accommodate individual employe hardships or for other good cause shown with the consent of the SED Director.

8. That in order to facilitate the intelligent exercise of bidding rights set forth in subparagraphs 6(a) - 6(c) of this Order, Crown and Local 266 shall take all necessary steps to advise and inform female employes as to the nature and duties of all production and maintenance jobs within Plant No. 1.

9. That within 30 days of the effective date of this Order, all management and supervisory personnel within Plant No. 1, and all officials and shopstewards of Local 266 shall be provided by Crown and Local 266 with complete copies of the Order, and the Findings of Fact, Conclusions of Law, and Opinion upon which it is based. Copies shall also be posted on all bulletin boards throughout Plant No. 1 and shall remain clearly and prominently displayed for a period of 3 years.

10. That Crown shall institute a bona fide affirmative action program directed towards recruiting, hiring, promoting, transferring, and recalling females and toward remedying the continuing effects of its past discriminatory practices. The affirmative action program shall include an appropriate training program for females and an educational program to acquaint all supervisory and non-supervisory employes at Plant No. 1 with the requirements of the PHRA and the particular remedies being ordered in these cases. The affirmative action program shall be in writing and a copy shall be sent to the SED Director within 180 days of the effective date of this Order.

11. That Respondent Crown and Respondent Local 266 shall take all reasonable steps necessary to insure that none of the named complainants, females who testified at the hearing of this matter, or other female or male employes of Crown or members of Local 266 who assisted with the investigation of this case or, who at any time prior or subsequent to the effective date of this Order, advocated the rights of the female employes within Plant No. 1 under the Pennsylvania Human Relations Act, or who opposed unlawful employment practices are subjected to any harassment or discrimination.

12. That a copy of this adjudication shall be forwarded to the Pennsylvania Labor Relations Board, the National Labor Relations Board, Pennsylvania Department of Labor, Federal Department of Labor and Local 266's parent International Union,

recommending that appropriate action be taken with respect to Local 266, its officials and agents.

13. That Local 266 shall cease requiring the payment of dues while an employe is on layoff status.

14. That Local 266 shall cease requiring the payment of any reinstatement fees associated, or in any way connected with any employe's return from an involuntary layoff.

15. That within 60 days of the effective date of this Order, Local 266 shall reimburse all females for any dues paid while on layoff and for any fees paid upon reinstatement from layoff between July 30, 1975 and the effective date of this Order. Local 266 shall submit a complete report to the SED Director indicating with respect to each female who receives a reimbursement pursuant to this paragraph the name of the female and the amount reimbursed. With respect to any female who does not receive a full reimbursement pursuant to this paragraph, Local 266 shall report to the SED Director the name of the female and why she received less than full reimbursement.

16. That for 3 years from the effective date of this Order, the Commission expressly retains jurisdiction over this matter to insure implementation of the provisions of this Order, or to modify or amend the Order to effectuate the purposes of the PHRA.

17. That the SED Director shall oversee the implementation of the provisions of this Order for a period of 3 years after its effective date and upon notice, shall have access to the confidential personnel records of Crown employes and to other records of Crown and Local 266 to the extent necessary to fulfill PHRC duties under the Order, provided that appropriate confidentiality shall be maintained for such records.

18. That for 3 years from the effective date of this Order, any party may petition the Chairperson of the Commission to reopen the record for or in connection with implementation, modification, or amendment of the Order.

19. That for 3 years from the effective date of this Order where Commission staff believes that any of Crown or Local 266's actions reflect a continuation of the practices found unlawful by the PHRC, or constitute an effort to avoid the effect of this adjudication, Commission staff may either petition to reopen this record for the purpose of adducing evidence and proposing an appropriate course of action or may recommend that an appropriate Commission charge be filed.

20. That for 3 years from the effective date of this Order, Respondent Crown shall, on a quarterly basis, report to the SED Director:

a) all hiring within the production and maintenance unit at Plant No. 1.

b) all reassignment, promotions transfers, layoffs, recall from layoffs, and expiration of recall rights, involving the production and maintenance unit at Plant No. 1

These reports shall indicate the name, address, sex, plant seniority date, initial job class and title, subsequent job class and title, layoff date, job class and title occupied as of layoff date, recall job class and title, and the duration of the layoff.

21. That for 3 years from the effective date of this Order, Respondent Crown shall promptly inform the SED Director, in writing, when any female is laid off if any other employee with less plant seniority remains employed or if any employe with less plant seniority is recalled prior to a female employe with greater plant seniority. Crown shall supply the following information for each employe involved in any such employment action (i.e., the female employe and each less senior employe working or being recalled): Name, address, plant seniority date, job class and title before and after layoff or recall, and a narrative statement explaining the reason for the retention or recall of the less senior employe.

22. That for 3 years from the effective date of this Order, Crown and Local 266 shall, within 10 days of receipt inform the SED Director, in writing, of any grievance or complaint (written or oral) involving:

(a) plant seniority

RECOMMENDATION OF HEARING PANEL

AND NOW, this 28th day of August , 1981, in consideration of the entire record in this matter the Hearing Panel hereby adopts the attached as their proposed Findings of Fact, Conclusions of Law, Opinion and Final Order, and recommends that the same be finally adopted and issued by the Pennsylvania Human Relations Commission.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: _____
ALVIN E. ECHOLS, JR., ESQUIRE
Chairperson of the Hearing Panel

_____
DORIS M. LEADER
Hearing Commissioner

_____
Benjamin S. Lowenstein, Esquire
Hearing Commissioner

_____
Robert Johnson Smith
Hearing Commissioner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

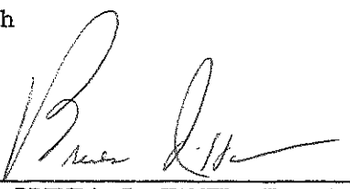
PENNSYLVANIA HUMAN RELATIONS COMMISSION, et al., Complainants	:	
v.	:	Docket Nos. E-4027 and E-4249
CROWN CORK AND SEAL COMPANY, INC., et al., Respondents	:	

CERTIFICATE OF SERVICE

I, BRENDA J. HAMER, Esquire, do hereby certify that a true and correct copy of Recommendation of Hearing Panel Findings of Fact, Conclusions of Law, Opinion, and Final Order was duly served upon upon attorney for Respondents, Crown Cork and Seal Company, Inc., on this 30th day of September, 1981, addressed as follows:

Steven P. Gallagher, Esquire
STACK & GALLAGHER
1314 Chestnut Street - 13th Floor
Philadelphia, Pennsylvania 19107

Mark P. Muller, Esquire
FREEDMAN & LORRY
Lafayette Building - Suite 1001
8th Floor - Chestnut Street at 5th
Philadelphia, Pennsylvania 19106



BRENDA J. HAMER, Esquire
Director
Systemic Enforcement Division - PHRC

DATED: September 30, 1981

(b) layoffs

(c) recall from layoffs

(d) expiration of recall rights

(e) assignment of overtime

(f) sex discrimination

(g) job classifications

(h) promotions

(i) vesting of pension rights

at Plant No. 1, and involving the production and maintenance unit. This report shall include all relevant employment data and the position of each respondent concerning the merits of the grievance/complaint. Final disposition of the grievance/complaint shall also be promptly reported to the SED Director.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: _____
JOSEPH X. YAFFE, CHAIRPERSON

ATTEST:

_____
ELIZABETH M. SCOTT, SECRETARY

OA-501 12-67

COMMONWEALTH OF PENNSYLVANIA

January 8, 1979

SUBJECT: Federal District Court Decision in Crown Cork and Seal Company, Inc. v. Pa. Human Relations Commission (Declaratory Judgment Action by Crown)

TO: All Commissioners

FROM: James D. Keeney
AEP Counsel

Attached is a copy of Judge Cahn's Memorandum and Order issued JANUARY 3, 1979, dismissing Crown's Declaratory Judgment Action against the Commission on the ground that the federal court lacks jurisdiction over the action.

This is the action which Crown filed in federal court after the Commission overruled Crown's objection to producing its payroll records in connection with the pattern and practice sex discrimination case pending before the Commission.

In light of Judge Cahn's decision to dispose of the matter on jurisdictional grounds rather than deciding whether Crown's alleged federal defense to our subpoena has any merit, it appears likely that it will be necessary now to enforce the subpoena in state court, where Crown will again probably raise the federal defense. Therefore, this decision represents rather a pyrrhic victory for the Commission.

One aspect of this matter, however, may yet prove important to the Commission. We are researching whether in addition to costs of the action, to which we are entitled as prevailing party, we may also be entitled to attorneys fees under the Civil Rights Attorneys Fees Act or otherwise. In light of the substantial time put in both by myself and Joan Feldman, the amount of these fees would be in the range of several thousand dollars.

cc: All Attorneys
Homer Floyd
Atch.
Dr. Inocencio
Robert Mirin
Harriet Ehrlich

JDK:dcj

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CROWN CORK & SEAL COMPANY, INC.	:	
v.	:	CIVIL ACTION NO. 77-4170
PENNSYLVANIA HUMAN RELATIONS COMMISSION	:	

MEMORANDUM AND ORDER

CAHN, J. January 3, 1979

Crown Cork & Seal (Crown Cork) has asked this court to declare that I.R.C. §6103 does not allow it to disclose its payroll records to the Pennsylvania Human Relations Commission (Commission) and justifies its refusal to comply with the Commission's orders and subpoenas. This court lacks jurisdiction over such an action. Public Service Commission of Utah v. Wycoff, 344 U.S. 237, 248 (1952); Thiokol Chemical Corp. v. Burlington Industries, Inc., 448 F.2d 1328, 1930-31 (3d Cir. 1971), cert. denied, 404 U.S. 1019 (1972). See LaChemise Lacoste v. Alligator Co., Inc., 506 F.2d 339, 343 (3d Cir. 1974), cert. denied, 421 U.S. 937 (1975) Allegheny Airlines, Inc. v. Pennsylvania Public Utility Commission, 465 F.2d 237, 241 (3d Cir. 1972), cert. denied, 410 U.S. 943 (1973).

Plaintiff, Crown Cork, is a corporation which is currently involved in proceedings before the defendant Commission. In 1970 and 1971 the Commission and several individuals filed complaints against Crown Cork charging it with discrimination against females in violation of the Pennsylvania Human Relations Act, PA. STAT. ANN. tit. 43 §§951-963 (Purdon) (hereinafter the Act). As provided by the Act, the Commission then began to gather information for presentation at a public hearing. Following a pre-hearing

conference on February 10, 1977, a Commissioner issued an order requiring plaintiff to produce the payroll records of all persons employed by it from July 9, 1969, to the present. The following month the Commissioner subpoenaed those records.

Crown Cork failed to comply with both the order and the subpoena. On August 1, 1977, the Commission moved for the production of computer record layout data pertaining to persons employed by Crown Cork during the period in question. On August 9, 1977, Crown Cork filed an answer to the Commission's motion. Crown Cork objected to disclosing any payroll records and argued that I.R.C. §6103 prohibited the disclosure of such information. The Commissioner overruled Crown Cork's objection and ordered it to produce the documents requested. Crown Cork petitioned the Commission for reconsideration of that order but on October 20, 1977, the Commissioner denied the petition. Although the Commission has not tried to enforce its orders, Crown Cork filed this action in December, 1977.[1]

Crown Cork asks this court to declare that I.R.C. §6103 prohibits it from disclosing the documents which the

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[1]The Commission has not alleged, and the court does not find, that there is a ripeness problem in this case. Compare Public Service Commission of Utah v. Wycoff, 344 U.S. 237 (1952) (case held not ripe for decision because defendant had not threatened any action). The Commission's failure to initiate enforcement proceedings seems to reflect its wish to allow Crown Cork to exhaust its judicial remedies before demanding compliance. This is sensible since the issues now being litigated are the same as those that would have to be decided in an enforcement proceeding. Given that the Commission has issued subpoenas and ordered the production of documents, its conflict with Crown Cork is imminent and therefore ripe for decision in a declaratory judgment action such as this one.

Commissioner seeks.[2] Section 6103 is the Internal Revenue Code's confidentiality provision. It carries out two basic

---

[2]Section 6103 provides that:

> (a) GENERAL RULE.--Returns and return information shall be confidential, and except as authorized by this title--
>
> (1) no officer or employee of the United States,
>
> (2) no officer or employee of any State or of any local child support enforcement agency who has or had access to returns or return information under this section, and
>
> (3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii) or subsection (n),
>
> shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.
>
> (b) DEFINITIONS.--For purposes of this section--
>
> ....
>
> (2) RETURN INFORMATION.--The term "return information" means--
>
> (A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions,...
>
> ....
>
> (e) DISCLOSURE TO PERSONS HAVING MATERIAL INTEREST.--
>
> (1) IN GENERAL.--The return of a person shall, upon written request, be open to inspection by or disclosure to--
>
> ....
>
> (D) in the case of the return of a corporation or a subsidiary thereof--
>
> ....
>
> (iii) any bona fide shareholder of record owning 1 percent or more of the outstanding stock of such corporation,

policy objectives. First, it assures taxpayers that the returns and information which they supply to the government in connection with the assessment and payment of taxes will not become public knowledge. I.R.C. §6103(a). Second, it provides for access to the information by persons who are deemed to have a material interest therein.[3] I.R.C. §6103(e). Under §6103(e)(1)(D)(iii) holders of more than one percent of the stock of a corporation are deemed to have a material interest in the corporation's returns and are therefore given access to them. However, anyone who has had access to the information pursuant to that provision may not disclose it to anyone else. §6103(a)(3).

Crown Cork owns more than one percent of its own stock. Notwithstanding that Crown Cork did not obtain the information in question either from the government or as a result of its position as a one percent stockholder, it has taken the position that the precise language of §6103(a) applies to it and prohibits it from disclosing the information which the Commission seeks. Due to the jurisdictional problems presented by the procedural posture of this case this court need not decide the merits of Crown Cork's claim.

Crown Cork avers that 28 U.S.C. §1331 gives this court jurisdiction to hear its claim. It maintains that since it is asking the court to construe I.R.C. §6103, a federal statute, the case "arises under the ... laws ... of

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[3]The word "person" used herein shall have the meaning given to it by I.R.C. §7701(a)(1).

the United States." 28 U.S.C. §1331. This oversimplification ignores the impact of the Supreme Court's decisions on the scope of federal question jurisdiction. In particular, the Court has refused to find federal question jurisdiction where the federal question arises only as a defense to a state law claim. Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 152 (1908). That is precisely the situation in this case; plaintiff's §6103 claim arises only as a defense to the defendant's state law action to compel the production of documents.

Although Mottley did not involve a declaratory judgment action, the Supreme Court's opinion in that case provides the starting point for an analysis of the issues presented in this case. The plaintiffs in Mottley brought an action in federal court seeking specific performance of their contract with the defendant railroad. They claimed that the defendant had agreed to provide them with free passes for the rest of their lives and that a subsequent act of Congress which forbade the giving of free passes did not excuse the railroad's noncompliance with the terms of the contract. If it did, the plaintiff's argued, it was unconstitutional. Since any determination by the court required it to construe the federal statute, the plaintiffs averred that the court had federal question jurisdiction. The Supreme Court thought otherwise; it dismissed the action for lack of subject matter jurisdiction.

In Mottley the Court announced what has become known as the well pleaded complaint rule. The Court reasoned that although the plaintiffs had referred to the federal

statute in their complaint, they would not have done so if they had pleaded correctly. The statute was relevant to the case only as a defense to the plaintiff's future breach of contract (state law) claim; it gave the plaintiffs no affirmative rights which they could ask a federal court to enforce. Therefore, it did not belong in the complaint. As the Court explained,

> [A] suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution.

211 U.S. at 152. The Court therefore held that it did not have jurisdiction over the subject matter of the complaint. 211 U.S. at 152.

Crown Cork argues that its case does not contravene the teachings of Mottley because it seeks an affirmative declaration of its rights under I.R.C. §6103, an act of Congress. Plaintiff is correct only if the Declaratory Judgment Act substantially expands the jurisdiction of the federal courts. It does not. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-72 (1950).

The Declaratory Judgment Act allows one who would otherwise be a defendant to obtain a determination of his rights before anyone has instituted an action against him. Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 240 (1937).

The Declaratory Judgment Act is only a procedural device and does not expand the jurisdiction of the federal courts. Skelly Oil Co. v. Phillips Petroleum Co., supra, at 671-72. To determine the existence of federal question jurisdiction in a declaratory judgment action the court must proceed with the knowledge that "in many actions for declaratory judgment, the realistic positions of the parties is reversed." Public Service Commission of Utah v. Wycoff, 344 U.S. 237, 248 (1952). In this case that means that the court must proceed as if the Commission were the plaintiff. The court must determine whether a federal question would appear on the face of the Commission's well pleaded complaint. Gully v. First National Bank, 299 U.S. 109, 113 (1936); Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 152 (1908). It is clear that it would not.

The Commission's complaint against Crown Cork would allege only sex discrimination in violation of state law.[4] Like the holders of the rail passes in Mottley, the Commission could not obtain federal jurisdiction by anticipating a defense to its request for the production of documents. As in Mottley, the federal courts would not have jurisdiction over the claim. Crown Cork cannot change this result by bringing a declaratory judgment action. To hold otherwise would be to allow the Declaratory Judgment Act to expand federal jurisdiction. That I cannot do. Aetna Life Insurance Co. v. Haworth, supra, at 240.

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[4]Even if the Commission could bring an action solely to enforce its subpoena and order, that action would have to be based on PA. STAT. ANN. tit. 43 §957 (Purdon), the statute that gives it the right to subpoena documents in connection with an investigation. The plaintiff could only raise the §6103 issue as a defense to that action.

Case law in both the Supreme Court and the Third Circuit supports this conclusion. In Public Service Commission v. Wycoff, 344 U.S. 237 (1952), the Supreme Court stated that:

> Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action.

344 U.S. at 248. The plaintiff in Wycoff asked the court to declare that its carriage of motion picture films between points within a single state constituted interstate commerce. It also asked the court to enjoin the Public Service Commission from interfering with such carriage over routes authorized by the Interstate Commerce Commission. The district court dismissed the complaint after trial but the court of appeals reversed. The Supreme Court reinstated the order of the district court and held that since the plaintiff had failed to show that the defendant threatened any interference with its routes, its claim was therefore not ripe for adjudication. 344 U.S. at 245.

The Court did not rest solely on its disposition of the ripeness issue, however. As shown by the above excerpt the Court also expressed considerable doubt over whether the district court had subject matter jurisdiction

of the claim. 344 U.S. at 248. Its analysis of the issue, though dicta, is significant for two reasons. First, it follows precisely the same analysis and reaches precisely the same conclusion that an independent review of the authorities suggests; it is logically correct. Second, it is the law of this circuit. LaChemise Lacoste v. Alligator Co., Inc., 506 F.2d 339, 343 (3d Cir. 1974), cert. denied, 421 U.S. 937 (1975); Allegheny Airlines, Inc. v. Pennsylvania Public Utility Commission, 465 F.2d 237, 241 (3d Cir. 1972), cert. denied, 410 U.S. 943 (1973); Thiokol Chemical Corp. v. Burlington Industries, Inc., 448 F.2d 1328 (3d Cir. 1971), cert. denied, 404 U.S. 1019 (1972).

The Court of Appeals for the Third Circuit first had this issue before it in Thiokol Chemical Corp. v. Burlington Industries, Inc., 448 F.2d 1328 (3d Cir. 1971), cert. denied, 404 U.S. 1019 (1972). The plaintiffs in that case were manufacturers of carpet backing who sought a declaratory judgment on the invalidity of certain patents. They averred that the action "arose under" the patent laws and that 28 U.S.C. §1338(a) therefore conferred subject matter jurisdiction on the district court.[5] The district court nevertheless dismissed the action for lack of jurisdiction. A panel of the court of appeals unanimously affirmed. Relying entirely upon what it called "the rationalization" of the Court in Wycoff, the court of appeals held that:

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[5] 28 U.S.C. §1338(a) provides that:

> The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.

> [T]he question of the validity of the patents would arise only as a defense asserted by the present plaintiff [in an action by the defendant for breach of its royalty contract]. Hence, the controversy does not "arise under" the patent laws. (Citations omitted).

448 F.2d at 1330-31.

Dismissal of the plaintiff's action in the instant case follows a fortiori from Thiokol. Thiokol presented a much stronger case for finding federal question jurisdiction than this case does. If jurisdiction did not exist there, it cannot exist here. Unlike the defendants in this case, the defendants in Thiokol could have brought a federal action against the plaintiffs--the defendants could have sued for infringement directly under the patent laws. Although the court recognized this, it found that the defendants had not threatened to follow such a course. Since the defendants had only threatened to bring an action pursuant to state contract law, the court decided the jurisdictional issue on that basis. Thiokol Chemical Corp. v. Burlington Industries, Inc., supra, at 1330, n.2.

In Thiokol the court might have easily concluded that since the defendant could have properly brought a federal action, the case arose under federal law notwithstanding that the plaintiffs' claim for declaratory relief presented a defense to such an action--the court could have treated the defense as mere surplusage. If the court of appeals declined to find jurisdiction under those circumstances, it follows that it would not find jurisdiction in the case at bar. In Thiokol the plaintiff was threatened with a claim that could have been brought under either federal (patent) or state (contract) law. In this case there is not even the

possibility that the defendant, the Pennsylvania Human Relations Commission, could bring a federal action against the plaintiff. If there was no federal question jurisdiction in Thiokol, there can be no federal question jurisdiction in this case.

In Allegheny Airlines, Inc. v. Pennsylvania Public Utility Commission, 465 F.2d 237 (3d Cir. 1972), cert. denied, 410 U.S. 943 (1973), the court of appeals again examined this issue. The facts of Allegheny closely parallel those of the instant case. The plaintiff in Allegheny had discontinued service along a particular route without first obtaining the defendant's permission. The defendant fined the plaintiff for this failure and the plaintiff brought a declaratory judgment action in federal court; it asked the court to declare that the defendant's regulations were invalid because they sought to regulate an area pre-empted by federal law. The district court found that the case did not present a federal question. Since the parties were citizens of different states, however, the court found that 28 U.S.C. §1332 gave it jurisdiction over the subject matter of the action.

The court of appeals decided that it should review the district court's decision on the issue of federal question jurisdiction even though neither party had appealed from it. The court then affirmed that decision. 465 F.2d at 241. Relying on Wycoff, it held that the district court had correctly decided that the case did not present a federal question. Judge Rosenn, writing for the court, agreed with the district court's conclusion that:

> In suits in the federal courts arising out of proceedings pending or threatened in state tribunals, the federal court's jurisdiction may not be predicated upon

> federal question defenses to the state proceedings. It is only if the state complaint raises federal questions that the federal court's jurisdiction may be based on federal question grounds. (Citations and footnotes omitted. Emphasis in original.)

Allegheny Airlines, Inc. v. Pennsylvania PUC, 319 F.Supp. 407, 411 (E.D. Pa. 1970). The court of appeals found that Wycoff "strongly support[ed]" this conclusion. 465 F.2d at 241.

This case is indistinguishable from Allegheny. In both cases a state regulatory agency had begun proceedings against the federal plaintiff. In both cases the plaintiff sought a federal determination of its rights under federal law. In both cases the federal claim was meaningful only as a defense to the state law claims. If Allegheny did not present a federal question neither does this case.

In LaChemise Lacoste v. Alligator Co., Inc., 506 F.2d 339 (3d Cir. 1974), cert. denied, 421 U.S. 937 (1975), the court again relied on Wycoff. That case differed from this one because it involved removal of a declaratory judgment action brought in state court. Although the court concluded that Wycoff did not address the issue of federal question jurisdiction over a declaratory judgment action removed from a state court, the court nevertheless approved the Wycoff dicta as well as the reasoning behind it.[6] 506 F.2d at 343, n. 3-4.

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[6]The court would not rest its decision on Wycoff because it felt that the fact that the case involved a state declaratory judgment action removed to federal court made Wycoff distinguishable because "in the instant case we are constrained both by principles for determining federal question jurisdiction and by those governing removal procedure." (emphasis added). 506 F.2d at 343.

LaChemise Lacoste also reaffirmed the continued vitality of the court's decision in Thiokol. The plaintiffs in LaChemise Lacoste sought a declaration of their right to use a certain trademark and an injunction against interference with that right. However, the court reasoned that even if Wycoff applied to the peculiar circumstances of the case before it, a federal court would not have jurisdiction of the case. As in Thiokol the court concluded that "[t]he 'character of the threatened action' was not necessarily federal in nature." 506 F.2d at 346 (footnote omitted). Since "federal relief was only one of three available avenues of litigation," the court found no basis for the exercise of federal quesion jurisdiction. 506 F.2d at 346. In this case, where federal relief is not an available avenue of litigation at all, the absence of jurisdiction follows inexorably.

In conclusion, Mottley, Wycoff, Thiokol, Allegheny, and LaChemise Lacoste all command dismissal of this action. Wycoff follows logically from Mottley and the procedural nature of the Declaratory Judgment Act. This circuit has expressly adopted its reasoning; this court must follow its dictates. Crown Cork's action must be dismissed.

Crown Cork's belated reliance on 28 U.S.C. §1340 does not alter this conclusion. Although in its complaint Crown Cork alleged jurisdiction under §1331 only, in supplemental memoranda filed at the court's request Crown Cork argued that 28 U.S.C. §1340 also gave this court jurisdiction over its claim. Section 1340 provides that:

> The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from

> imports or tonnage except matters within the jurisdiction of the Customs Court. (Emphasis supplied).

Section 1340 has no requirement of jurisdictional amount. It therefore allows Crown Cork to defeat the Commission's argument that this court lacks jurisdiction because Crown Cork failed to allege that the amount in controversy exceeded $10,000, as required by §1331. However, §1340 does not remove the need for determining whether the case "arises under" an Act of Congress--here, the Internal Revenue Code. The issue is precisely the same as the issue involved in determining the existence of general federal question jurisdiction under §1331: the court must determine whether the action, not the defense, "arises under" the Internal Revenue Code. Clearly, the defense does; unfortunately for Crown Cork, the action does not.

Thiokol supports this conclusion. In that case the plaintiff alleged that 28 U.S.C. §1338(a), the provision which gives the district courts jurisdiction over all actions "arising under" the patent laws, gave the court jurisdiction over its claim.[7] The court of appeals disagreed, applying the Wycoff analysis. 448 F.2d at 1330. By relying on Wycoff and thus applying the same analysis to both §1331 and §1338(a) actions, the court demonstrated that the words "arising under" required a consistent interpretation when construed in the context of a jurisdictional statute.

This conclusion is sound. The various specific jurisdictional statutes do little more than provide exceptions

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[7] See note 5 and accompanying text supra.

to the jurisdictional amount requirement of §1331.[8] The requirement that the case "arise under" some Act of Congress remains unchanged. Therefore while §1340 solves the jurisdictional amount problem, it does not solve the more difficult jurisdictional problem. It does not say whether the case "arises under" the Internal Revenue Code or is merely a defense to a state law claim. As Mottley, Wycoff, and the Third Circuit cases show, this case does not arise under federal law. Crown Cork's claim is merely a defense to a state law action and must be dismissed.

Since I am holding that the case does not arise under the laws of the United States and that the federal courts lack jurisdiction over the subject matter of this complaint, I do not reach the other issues raised by the parties.[9]

The court will enter an order dismissing this case pursuant to Fed. R. Civ. P. 12(h)(3).

Edward N. Cahn, J.

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[8]Given the limitations which Article III of the Constitution places on the jurisdiction of the federal courts, it is doubtful that the various jurisdictional statutes could do more than waive the congressionally imposed jurisdictional amount requirement. Like the Constitution itself, these statutes limit federal jurisdiction to cases "arising under" federal law. Aside from waiving jurisdictional amount they add little to §1331, although a few, such as §1338(a) also make the jurisdiction of the district court exclusive, as the Constitution requires.

[9]If this court had jurisdiction I would have to decide whether I should abstain from deciding the case on the ground that the question had been submitted for determination to the state administrative agency. Burford v. Sun Oil Co., 319 U.S. 315 (1943). Cf. Younger v. Harris, 401 U.S. 37 (1971) (federal courts will abstain from deciding an issue which is pending in a criminal case before a state tribunal). But cf., Johnson v. Kelly, 47 U.S.L.W. 2234 (3d Cir. Sept. 29, 1978) (Younger will not be extended beyond quasi-criminal proceedings, Juidice v. Vail, 430 U.S. 327 (1977)). If I decided not to abstain I would have to decide whether the plaintiff is really asking the court to enjoin a state proceeding. If so, I would have to decide whether such an injunction would be appropriate in light of 28 U.S.C. §2283. Only if I decided that a federal court could grant such relief would I have to decide the merits.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CROWN CORK & SEAL COMPANY, INC.	:	
v.	:	CIVIL ACTION NO. 77-4170
PENNSYLVANIA HUMAN RELATIONS COMMISSION	:	

ORDER

AND NOW, this 3 day of January, 1979, IT IS ORDERED that the within case is DISMISSED for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(h)(3).

BY THE COURT:

Edward N. Cahn

Edward N. Cahn, J.