

MISCELLANEOUS MATTERS

IN THE MATTER OF

NEW STANDARD PUBLISHING CO., INC., ET AL.

ORDER DENYING RESPONDENTS' MOTIONS TO SUPPRESS AND STRIKE ALL EVIDENCE, RETURN DOCUMENTARY EVIDENCE, AND TO DISMISS THE COMPLAINT, AND SUPPORTING AND DISSENTING OPINIONS, ETC.

Docket 4697. Order, June 16, 1950

This matter came on to be heard in regular course upon motions filed May 2, 1946, by the individual respondent Julius B. Lewis and the corporate respondent New Standard Publishing Co., Inc., to suppress and strike from the record all evidence and other information introduced in this proceeding against said respondents, to return to the individual and corporate respondents all the documentary evidence introduced, and to dismiss the complaint as to them.

The motions to suppress and strike from the record all evidence and information introduced against said respondents and to return the documentary evidence to them allege that said documents and other evidence were the private papers and property of the individual respondent Julius B. Lewis and were the papers and property of the corporate respondent and were obtained by illegal search and seizure directly or indirectly by the Commission, acting through its duly constituted officers.

The motion to dismiss the complaint alleges that the documentary and other records, unlawfully seized, were used against the individual respondent in violation of the fourth and fifth amendments to the United States Constitution and against the corporate respondent in violation of the fourth amendment to the United States Constitution. As to the individual respondent Julius B. Lewis, these motions further allege (1) that when he was subpoenaed as a witness by the Commission and compelled to testify in its behalf in compliance with said subpoena he was granted immunity from prosecution under the fifth amendment to the United States Constitution and under section 9 of the Federal Trade Commission Act; (2) that having been subpoenaed and having given testimony in behalf of the Commission in compliance with said subpoena he was granted immunity by the provisions of subsection (1) of section 5 of the Federal Trade Commission Act; and (3) that he was not warned by officials of the Federal Trade Com-

mission at any time that his testimony and his books and papers could be used as a basis for prosecuting him to recover fines and penalties set forth in section 5 of the Federal Trade Commission Act.

The Commission has duly considered said motions, the brief in support thereof, oral argument and reargument in support of and in opposition thereto, and the record herein, and is now fully advised in the premises.

It appears from the evidence of record that the documents, records, and other evidence received from respondents Julius B. Lewis and New Standard Publishing Co., Inc., during the course of the investigation of this matter and introduced as evidence in this proceeding were obtained in a lawful manner under and by virtue of the authority granted the Commission by the provisions of the Federal Trade Commission Act. Authorized agents of the Commission called at respondents' established place of business during regular business hours and requested permission to examine certain records and correspondence then in their possession. Said agents, after properly identifying themselves, fully advised respondent Julius B. Lewis, an officer of the corporate respondent, of the objects and purposes of their visit; and then and there advised him of his rights and privileges and explained to him the authority under which they sought permission to examine the records of the corporate respondent. He was advised of the purposes for which the documents, papers, and other evidence might be used and further advised that the Commission had authority to require their production in response to a subpoena. Thereafter, respondent Julius B. Lewis, acting in his individual capacity and as an officer of the corporate respondent, permitted the agents of the Commission to fully examine all files in his possession and temporarily to remove a portion of said files, letters, documents, and other papers for the purpose of making copies.

During the process of hearings on the issues raised by the complaint and answer herein, certain of the documents, papers, and records obtained during the course of the investigation were offered and properly received in evidence, either as originals or photostat copies. The Commission is of the opinion that their use in this manner does not contravene or violate any right or privilege granted the individual or corporate respondent by the provisions of the fourth or fifth amendments to the United States Constitution.

Pursuant to the provisions of section 9 of the Federal Trade Commission Act, respondent Julius B. Lewis was duly subpoenaed by the Commission and was properly required to attend and testify in support of the allegations of the complaint. He did no more than is required by the provisions of the statute and was not thereby granted immunity from proceedings properly initiated by the Commission

under the laws administered by it, either by the fifth amendment to the United States Constitution or by sections 9 or 5 (1) of the Federal Trade Commission Act.

Section 5 (1) of the Federal Trade Commission Act provides for a civil penalty for a violation of a cease-and-desist order of the Commission only after it has become final and is in effect. To date, no cease-and-desist order has been issued against the respondents. The documents, papers, and records obtained from respondents during the course of the investigation and received in evidence in the trial of the issues herein have in no manner been used or offered for use as evidence in the collection of civil penalties. The Commission is of the opinion that the question of whether respondent Lewis was advised of the penalty provisions of section 5 (1) of the Federal Trade Commission Act need not be decided.

It is therefore ordered, That the motions to suppress and strike from the record all evidence introduced against the respondents in this proceeding and to return to them all documentary evidence be, and the same are, hereby denied.

It is further ordered, That the motions to dismiss the complaint against the respondent Julius B. Lewis and the corporate respondent New Standard Publishing Co., Inc., be, and the same are, hereby denied.

Commissioner Mason dissenting.

OPINION OF THE COMMISSION

AYRES, *Commissioner*.

This matter is before the Commission on motions by respondents to suppress and strike all evidence and return documentary evidence and to dismiss the complaint; and on motions by counsel supporting the complaint to strike affidavits accompanying respondent's motions and to reopen the proceeding. These motions have been denied and the several orders on them show the reasons for the Commission's action. In view of the scope and gravity of respondents' motions, however, it may be helpful to discuss the situation to which they relate in more detail.

The gravamen of respondents' motions is their contention that documentary and other records were obtained by unlawful search and seizure and were used against them in violation of the fourth and fifth amendments to the Constitution of the United States. It is also contended that when he was subpoenaed and required to testify, the individual respondent was granted certain immunities under the fifth amendment to the Constitution of the United States and under sections 9 and 5 (1) of the Federal Trade Commission Act. The latter contention may be disposed of first.

Subsection (1) of section 5 of the Federal Trade Commission Act provides for civil penalties against persons or corporations who violate an order of the Commission to cease and desist after it has become final. No order to cease and desist has been issued in this matter and accordingly we need not decide here what, if any, immunity respondent may have acquired under section 5 (1) of the Federal Trade Commission Act by reason of having testified under subpoena in this matter. It is also irrelevant for the purposes of this proceeding, to determine what, if any, immunities from prosecution, penalties or forfeitures respondent may have acquired under section 9 of the Federal Trade Commission Act or under the fifth amendment to the Constitution. This is a proceeding against alleged violations of the Federal Trade Commission Act and it has been conducted strictly in conformity therewith. The Commission is empowered by the provisions of that act to require the attendance and testimony of witnesses and the production of documentary evidence and to impose an appropriate remedy based upon such testimony and evidence. Immunity from such remedy could not be acquired as a result of the production of the necessary evidence without substantially nullifying the manifest purposes of the law.

The question of primary importance raised by respondents is whether or not the documentary evidence which was obtained and introduced into the record was secured by illegal search and seizure. This question must be resolved upon the basis of the facts, as they appear in the record, leading up to and surrounding the alleged illegal search and seizure.

Before issuance of the complaint in this matter, duly authorized representatives of the Commission made an extensive preliminary and informal investigation. The information developed in the course of that investigation provided the Commission with reason to believe that the respondents were engaged in certain violations of the Federal Trade Commission Act and, based on that information, the Commission on February 4, 1942, issued its complaint charging such violations. The alleged illegal search and seizure occurred during the preliminary investigation, well before the formal complaint was issued.

The first contact with the moving respondents in the course of the investigation was in May 1939. Thereafter investigation was conducted through other sources, and on February 19, 1941, these respondents were again contacted, and it was during this contact that the alleged illegal search and seizure occurred. The events at that time have been fully explored in the record and extensive testimony has been adduced with respect to them. Such testimony shows surprisingly little conflict.

It appears that two investigating attorneys of the Commission appeared at the office of the respondents, New Standard Publishing Co., Inc., and its president, Julius B. Lewis, at about 9 or 9:30 o'clock on the morning of February 19, 1941, at which time they identified themselves, displayed their credentials and advised Mr. Lewis concerning the purposes of the investigation and of their visit. During the course of their interview with Mr. Lewis they requested his permission to examine certain files of the individual and corporate respondents, and after discussion, expanded their request to include permission to make a general file examination. Pursuant to his inquiries concerning their authority to examine the files, the investigating attorneys discussed their authority generally and advised Mr. Lewis that under the provisions of the Federal Trade Commission Act he could be required, by subpoena, to produce his records for examination and for copying. In so advising him they relied primarily upon that part of the act which provides that the Commission or its duly authorized agents "shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation" (sec. 9). Mr. Lewis was advised that if he refused to make the requested files available for examination, he could be taken to court and required to produce them, and that it would be to his advantage to permit the file examination without requiring resort to the courts. After conference with his wife, who is Secretary and Treasurer of respondent, New Standard Publishing Co., Inc., Mr. Lewis agreed to permit the investigating attorneys to examine the files. The file examination covered about 4 days, during which time the investigating attorneys selected a considerable number of documents, including letters and memoranda. Respondent Lewis then granted the request of the investigating attorneys to remove the selected material from his office for copying. Some 2 or 3 months later the original material was returned to respondent Lewis by registered mail.

Mr. Lewis testified that he did not seek legal advice before granting the investigating attorneys access to his files, but that he called a friend in Chicago concerning their authority to make the examination. He further testified that neither of the investigating attorneys used any force or threats of force or any abusive language and that they conducted themselves like "perfect gentlemen." Their only threat, according to his testimony, was that they would take him to court if he did not let them have access to the files they requested.

The investigating attorneys were not operating under authority of any subpoena or other formal process, and made no pretense of doing so. They were simply making a preliminary informal investigation in the course of which, after considerable discussion, they persuaded respondent to grant them access to the requested files in order to avoid the probability of being required to produce them in response to a subpoena. We believe that it is clear from the record that respondent Lewis was fully and properly advised of the informal nature of the investigation and that he voluntarily permitted the investigating attorneys to examine all files in his office and to remove those which were selected, upon condition that they would be returned after certain of them had been copied. In doing so, he acted for and in behalf of himself and the corporate respondent. No threat of physical violence was made or implied and no abusive language was used and the investigating attorneys conducted themselves with propriety throughout.

The investigating attorneys did not advise respondent Lewis in detail concerning all the processes of the Federal Trade Commission, the legal effect of an order to cease and desist, under what circumstances such an order would become final, or concerning the penalties which may be imposed for its violation. And they were under no obligation to do so. They did, however, correctly advise him that the Federal Trade Commission had authority to require by subpoena his testimony and the production of all documentary evidence in his possession relating to the matter under investigation, and that it would be to his advantage voluntarily to grant access to the files for the purpose of examining and copying rather than to be required to produce the files before the Commission or the courts in response to subpoena.

The only representations made by the investigating attorneys to respondent Lewis which could possibly be construed as constituting a threat, were to the effect that he could be required by subpoena to produce the documents in court and that if he refused to make them available voluntarily, he could be taken to court. By such representations the respondent was fairly informed concerning the legal authority of the Commission and the probable results which could be expected from his refusal voluntarily to grant access to the files for the purposes requested. Representatives of this Commission would be remiss in their duties and lacking in a sense of fairness if they failed under such circumstances to disclose their authority and the authority of the Commission. Laymen not well versed in the provisions of the statutes under which this Commission functions would have reason to feel aggrieved if, upon refusal to grant access to their files, they were, without warning, required by subpoena to pro-

duce important and bulky files at an inconvenient time and distant place, resulting probably in endless expense and serious disruption of the normal business operations. It is usually much more to the advantage of persons and corporations under investigation to make their files available for examination at their own places of business during customary office hours at a minimum of interference with their business, than to produce them in response to subpoena.

It is abundantly clear, we believe, that the investigating attorneys entered respondent's place of business during regular business hours, and that their entry was not a trespass in any sense; that they identified themselves and fairly advised respondent concerning their authority to make the investigation and the file examination; that they were granted permission to make a general file examination, and to remove the selected material for the purpose of copying; and that they complied fully with the conditions under which the permission was granted. To characterize such conduct as illegal search and seizure in contravention of the provisions of the Constitution of the United States is to strain their meaning and fundamental purposes to the point of absurdity. The Commission is of the opinion, therefore, that the file examination which resulted in certain documents being removed from respondent's files and copied and subsequently used in evidence, was properly conducted in all respects, and that respondent's contentions that it constituted unlawful search and seizure are wholly without merit.

MINORITY FINDINGS AND DISSENTING OPINION OF COMMISSIONER
LOWELL B. MASON

This is a controversy over the taking by Government agents of a large mass of documents and papers belonging to the respondents without warrant, and without the Government giving a receipt for the same.

All of this was done to further the Government's presentation of a complaint against a man who sells books for a living.

There is a corporation involved, but it is one of those family affairs owned by a man and his wife, so that for the time being we may put aside consideration of that phase of the matter.

In the original complaint the man was charged with fooling the public in the way he peddled his books.

However, the issue before us at this time is not concerned with his guilt or innocence on that charge.

We are here faced with a protest by the defendant that the agents of the Commission violated constitutional guarantees against the illegal search of his premises and the wrongful seizure of his papers.

Defendant's motion concerning his constitutional rights was countered by the Commission attorney with opposing motions.

These motions are all interrelated, and for the purpose of deciding the issues presented, it may be said their respective merits all depend on one factual finding; namely, were Lewis' rights under the fourth and fifth amendments to the Constitution of the United States violated by the alleged unlawful actions of certain agents of the Commission searching his private office and effects, and was the seizure of his papers without due process of law.

This the defendant charges, and this the agents of the Government deny.

In considering the merits of this controversy, one must bear in mind that administrative fact-finders such as we, engage in a dual capacity. First, as Commissioners, we control and direct investigational operations. To all intents and purposes we are, in the world of commerce, traffic police upon the public highways of commerce. Secondly, as Commissioners, we sit as judges when we act in our quasi-judicial capacity trying the charges against those whom we (in our administrative capacity) bring before us.

If we countenance, while sitting as judges, the unbridled and unrestrained violation of a citizen's right of privacy by accepting the fruits of an illegal search and seizure, we in effect serve notice on our investigators that we as administrative officers approve a continuance of such act in future cases.

Thus it would seem to me we are under a double command to protect the established guarantees of American citizenship.

It is not enough for us to consider the technical admissibility of evidence allegedly obtained in violation of constitutional guarantees. That is all well and good insofar as our judicial capacities are concerned, but the actions of our employees are also the administrative responsibility of Commissioners, and this responsibility cannot be taken lightly, nor should any departure from accepted standards be condoned by a quasi-judicial toleration of the same.

Attorney-examiners of the Federal Trade Commission are not catch polls. They are highly trained business specialists—lawyers with legal degrees. In most cases they have had considerable general practice before entering into this highly specialized work. Experts in their fields, and noted for thoroughness and enthusiasm in carrying out what they believe to be their appointed tasks, they must not let enthusiasms carry them beyond the bounds of constitutional procedure. If it does, we Commissioners, whose oath of office requires us to support the Constitution, must not condone acts that violate it.

Conditioned as we are by reports of despotic controls over the every-day affairs of mankind in Eastern Europe, it is necessary that

citizens of this country be constantly reassured that their liberty and freedom from unwarranted violation of personal privacy are just as sacred to our administrative agencies as they are to our courts.

Thus it can be seen our particular task at this stage of the proceeding is not to determine whether respondents are guilty of unfair acts in commerce, but to determine if certain evidence was obtained by our agents through means violative of constitutional guarantees.

I make the following findings of fact:

The respondent Lewis is president of the respondent New Standard, a Virginia corporation. The stock of this corporation is owned by Lewis and his wife.

The office is housed in a small room only sufficiently large to accommodate the desks of the employees. Lewis occupies a small office partitioned off from the room occupied by the employees, and in addition, there is a small storeroom in the rear.

The office contains file cabinets. These cabinets hold the books, records, documents, customer correspondence pertaining to the business, and also private papers, writings, and memoranda of respondent Lewis, as well as other personal papers and memoranda belonging to the employees. There are approximately eight file cabinets in the room. Amongst them were the active files used to operate the business.

It appears that on February 19, 1941, at about 9 o'clock in the morning, before the respondent Lewis had arrived at work, two attorney-examiners of the Commission came to the office and demanded of one Lawrence Hanson, an employee, that they be given the right to examine Lewis' books and records. Hanson was the office manager and in charge of the clerical work. Hanson says the agents threatened to obtain a warrant from the Federal marshal and take him to court if he did not allow them to go through the records.

Shortly afterwards respondent Lewis appeared on the scene. Thereupon the Government agents renewed their demand to go through and examine his books and papers. They stated they would take Lewis to court if he refused access to the same. The agents showed him their credentials as examining officials of the Federal Trade Commission, an agency of the Federal Government, and informed him the Government had a case against him and repeated their demand that they be given access to all his files and papers. According to the agents, the defendant willingly turned over his whole office to them for 4 days and assisted them in bundling up the vast quantity of material that they took away with them.

On the other hand, defendant Lewis declares that he protested vigorously against the search, saying that if they were going to use the files against him, he didn't want to give them up. The agent replied that he would be better off if he did. Lewis claims that he was

frightened, coerced and "put at bay"; that turning over his office and personal files was the act of an automaton, motivated by the spring of fear. Lewis says that his business was at a standstill for the 4 days the agents had possession of the rooms and files, and that during the period, he and his employees were under strict surveillance. He and his staff were required to obey the agents' orders that nothing was to be touched which the agents were engaged in examining. On this latter point there is no conflict, for during cross-examination, one of the agents readily admitted giving such instruction.

From the mass of conflicting statements it is difficult to determine just how long the controversy over the agents' right to examine and seize the defendant's papers went on. I think it reasonable to infer that once the two Government agents had taken over the office, there was scant show of further protest by the defendant. The average citizen does not resist the actions of Federal agents, for it is well ingrained in the American mores that resistance to an officer may of itself constitute a serious Federal offense.

Because of this aura of unassailable authority that the average public associates with a Federal agent, it is difficult to estimate just how many incidents similar to the one at hand may occur in the future if this line of conduct is not scrutinized in strict accordance with constitutional requirements.

The question for the Commission to decide is whether or not this acquiescence and submission to the commands of the Federal agents were a waiver of the defendant's constitutional guarantee as set out in the fourth and fifth amendments. It is urged that the facts surrounding the acquiescence and submission to the commands of the Government agents were such a waiver. I do not so believe.

In support of the Commission counsel's view, it is pointed out that no violence or abusive language was used by the Government agents. To this I can only reply in the words of Mr. Justice Bradley in the *Boyd* case:

It is not the breaking of his doors and the rummaging of his drawers that constitute the essence of the offense; but it is in the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense.¹

It was further urged by Commission counsel that once the agents were in possession, the defendant cooperated by obeying the agents' command not to touch anything at night nor to touch anything that the agents were in the process of examining.

I don't believe lack of resistance denotes waiver—surrender, yes, but waiver, no. In fact, I believe the orders the agents gave were strange

¹ Development of the Fourth Amendment, by Lasson, p. 109.

instructions to a free citizen regarding his own property. They smack of the cell house. A drumhead injunction that a man must not touch his own property has no place in Federal Trade Commission investigations.

The fact that the agents gave no receipt for the large mass of documents they removed to Washington is used by the prosecution to support its contention that the defendant voluntarily relinquished his constitutional rights. The prosecution contends the failure of the defendant to demand a receipt is also evidence of his good will and cooperative attitude.

To use a farm phrase, this does not scour with me.

After 4 days of harassment, the defendant was undoubtedly so relieved to see the agents leave that they probably could have also moved out the furniture. Certainly they could have done it with as much legality as the removal of his private papers.

The procedure for the compulsory production of documentary evidence "before the Commission" through subpoena duces tecum is well established and has constitutional sanction. The purpose of a subpoena is to take the decision as to what may or may not be done out of the hands of the officer who executes the subpoena, and to place it in the more responsible, trustworthy, and sober judgment of a judicial official. There was no subpoena duces tecum issued in this matter.

But with or without a warrant, specified or unspecified, there is certain property which *may not be searched for and seized at all*. It was early laid down in the *Boyd* case that only that class of property to which the Government is otherwise entitled or to which its possessor is not entitled, as stolen goods, counterfeit money, implements used to commit a crime, etc., is seizable under a search warrant, whereas a person's private books and papers cannot be so taken, in order merely to get information from them to be used in evidence against him. [Italics supplied.]²

Nowhere in the entire Federal Trade Commission Act is there one word giving the Commission the right to search a man's premises. On this point the contention of respondent is well-founded.

Going now to another point urged by respondent, in my opinion the respondent's contention that the complaint itself was wrongfully issued and should be dismissed, is without merit. When the Commission issues a complaint, it is acting in a capacity similar to a prosecuting officer who files a charge on information and belief. The responsibility for this administrative act rests solely on the Commissioners and no one may successfully challenge their judgment, for to do so would stifle before birth processes aimed at the correction of law violations.

But when the actual trial of the issues is commenced, then the respondents are no longer subject to ex parte procedures. Like any

² Development of the Fourth Amendment, by Lasson, p. 133.

other defendant brought before a commission or court, they stand on equal footing with the prosecuting officer, protected by the same rules of evidence and subject to the same course of orderly procedure.

Then it is that the trial agency must preserve all the rules and functions of a fair and impartial arbiter of justice. One duty is to accept all competent and reject all incompetent evidence.

For an agency that operates in a dual capacity, ordering the filing of a complaint and then sitting as a magistrate on the trial of such a complaint, it is imperative that the issues be determined in full accord with all the respondents' constitutional privileges.

Here the respondents charge that the evidence adduced against them was obtained in violation of their constitutional rights.

Such a charge would be serious enough if presented before a court which had no control over those who assembled the evidence. Here the preliminary assembly of such evidence devolves upon the same agency which later must sit in public judgment on the case. It seems to me we are therefore doubly constrained to apply most strictly the rules of judicial conduct. In considering the validity of such evidence, the attorney for the Commission who presents the challenged evidence stands in no more favored position than does the respondents' attorney who seeks to strike such evidence. The criteria applies equally.

An officer gaining access and possession of private files must have authority in law for the intrusion. Any other rules would violate the fourth amendment to the Constitution which guarantees the right of citizens to be secure in their persons and papers against unreasonable search.

Respondents New Standard and Julius B. Lewis filed motions before the trial examiner and these being denied by the trial examiner, they now renew the same before the Commission.

1. Respondent Lewis moves that all the alleged evidence and information introduced in this proceeding against respondent be suppressed and that all documentary evidence introduced in this proceeding be returned to him.

This is a large order. Granting the validity of respondent Lewis' claim that officers of the Federal Trade Commission violated his constitutional guarantees of freedom from unlawful search, it would only apply to those documents illegally obtained from him and such evidence as was founded on such illegal search and seizure.

I find that all papers and documents searched and seized by the officers and agents of the Government from the premises of respondent Lewis on February 19 to 24 were taken in violation of the fourth

amendment of the Constitution, and said documentary evidence should be returned to respondents, and such evidence as was based on said seized documents be stricken from the record.

2. The second motion covers the same ground as the first but applies to the corporate respondent New Standard and, in my opinion, an order consistent with the above should issue.

3. As to respondent Lewis' motion to dismiss, it cannot be determined at this time whether there is sufficient proper lawful evidence to warrant the issuance of a cease-and-desist order. If my view were to prevail upon reopening of the case, it would be the province of the Trial Examiner to weigh all relevant and material evidence properly adduced and make his recommended decision. Prior to his finding, any motion such as proposed by respondent here is untimely and should be denied, with leave to renew the same in accordance with the Commission's rules.

4. It seems to me the order of the Commission should be to reopen the trial before the trial examiner for the purpose of ruling on the admissibility of evidence in accord with this opinion, and for the taking of such testimony as the attorneys in support of the complaint may wish to offer, as well as to afford respondents the opportunity of meeting the charges set forth in the complaint.

Counsel in support of the complaint has considered the striking of such evidence as inimical to the full and proper presentation of his case, and he has applied to the Commission for leave to reopen the proceedings for the taking of further testimony.

I would be in favor of granting this motion. But if such were done, counsel in support of the complaint would then have to rely for the presentation of his case on evidence untainted by unlawful seizure.

As for those portions of the several orders approved by the majority of the Commission, and which the Commission has entered herein in conflict with these views, I must dissent.