

IN THE MATTER OF
WILSON TOBACCO BOARD OF TRADE, INC., ET AL.

Docket 6262. Order and opinion, Apr. 25, 1956

Denial of leave to intervene in cross-appeals from hearing examiner's initial decision to applicant having a substantial private controversy with respondents.

Before *Mr. Frank Hier*, hearing examiner.

Mr. Rufus E. Wilson for the Commission.

Lucas, Rand & Rose, Gardner, Connor & Lee, Mr. Chas. B. McLean and Carr & Gibbons, of Wilson, N. C., *Battle, Winslow & Merrell*, of Rocky Mount, N. C., *Blackwell, Blackwell & Canady*, of Winston-Salem, N. C., and *Sanders, Gravelle, Whitlock & Markey, Diamond & Brylawski and Howrey & Simon*, of Washington, D. C., for respondents.

ORDER DENYING APPLICATION FOR LEAVE TO INTERVENE

An application having been filed by C. B. Renfro, of Wilson, North Carolina, requesting leave to intervene in this proceeding for the purpose of filing a brief amicus curiae and participating in oral argument before the Commission on the pending cross-appeals from the hearing examiner's initial decision; and

The Commission having determined, for the reasons set forth in the accompanying opinion, that the request should not be allowed:

It is ordered, That the aforesaid application for leave to intervene be, and it hereby is, denied.

Commissioner Kern not participating.

ON APPLICATION FOR LEAVE TO INTERVENE

By *SECRET*, Commissioner:

This matter is before the Commission upon an application, filed by C. B. Renfro, requesting leave to intervene in this proceeding for the purpose of filing a brief amicus curiae and participating in oral argument before the Commission. The application is unopposed by counsel in support of the complaint, at least insofar as filing brief is concerned, but is resisted by respondents.

The complaint charged the respondents, the Wilson Tobacco Board of Trade, Inc., and its member warehousemen, with an unlawful conspiracy to suppress competition in the sale and purchase of leaf tobacco on the Wilson, North Carolina, tobacco market. The con-

spiracy was carried out, it was alleged, through the adoption of rules and regulations having the effect of preventing the erection of new tobacco auction warehouses or the expansion of existing warehouses and excluding would-be traders from the Wilson tobacco market. After the holding of twenty-two hearings over a period of six months, resulting in a record of 3163 pages of transcript and 215 exhibits, the hearing examiner on December 20, 1955, filed his initial decision which satisfied neither side, and both counsel in support of the complaint and the respondents have appealed. The case has been scheduled for oral argument on the merits on May 2, 1956.

In support of his application for permission to intervene the applicant states that he is the operator of the Liberty Warehouse, which was constructed in Wilson, North Carolina, just prior to the adoption of the regulations challenged by the complaint. He states further that since he was not joined as a party respondent nor called as a witness in the hearings, he has had no opportunity to be heard. He alleges, however, that he has been highly prejudiced before the Commission in that the examiner erroneously found that he, as a recently admitted member of the respondent Board of Trade, voted for the performance system of allocating selling time among the warehouses which was adopted by the respondents on April 8, 1952, and states that as the operator of a tobacco warehouse on the Wilson market, he will be bound by any order the Commission may issue. His right to exist in competition with other warehousemen in Wilson, he says, may be, and in all probability will be, conclusively determined in this proceeding.

Under Section 5 of the Federal Trade Commission Act, any person, partnership or corporation may make application, and "upon good cause shown" may be allowed by the Commission to intervene in a proceeding. Under § 3.11 of the Commission's Rules of Practice, opportunity may likewise be afforded of filing an appropriate brief as *amicus curiae*. Under both the statute and the rule, however, intervention and the extent thereof is at the discretion of the Commission, and in the exercise of its discretion the Commission must necessarily examine all the pertinent circumstances.

One of the grounds upon which the applicant bases his application is that he, as a warehouseman on the Wilson market, has had no opportunity to be heard in this proceeding. Just why he was not called as a witness does not appear. In fact, as the examiner pointed out in the initial decision, a showing of the applicant's experience after his entry into the market might have shed consider-

able light on the reasonableness or unreasonableness of the regulation of the Board of Trade concerning which the applicant now complains. But, be that as it may, the record does not support an inference that the applicant's position was wholly disregarded. It strongly indicates, on the other hand, that Mr. Renfro has taken a rather active interest in this case, even to the extent of cooperating with counsel in support of the complaint in obtaining and interviewing prospective witnesses. He obviously had the opportunity of calling to the attention of trial counsel those facts which he believed would assist in the making of a proper record, and the Commission cannot take too seriously the applicant's argument that he has had no opportunity to be heard. Having stood quietly by during the six months the hearings were in progress, it ill behooves him to now complain of results, the possibility of which was apparent from the very beginning of the proceeding.

The Commission likewise does not understand the applicant's assertion that he will be bound by any order the Commission may issue, or that his right to exist in competition with other warehousemen in Wilson will be determined in this proceeding. It is elementary that the Commission's orders, when issued, go no further than to require the respondents in a proceeding and their privies to refrain in the future from engaging in the unlawful acts or practices in which they were found to have been engaged in the past. And, except in a class action, no person is bound, even to that extent, by an order arising out of a proceeding in which he was neither served with process nor given an opportunity to litigate his claims or defenses. Accordingly, the applicant, who was not a party respondent in this proceeding and whose rights have not been determined herein, will not be bound by any order the Commission may issue and could not be subjected to penalties for acts done contrary thereto. The applicant's right to exist in competition with other warehousemen in Wilson will be determined not by any order the Commission may issue, but by conditions and circumstances wholly separate therefrom.

It is apparent to the Commission that this application must be denied for still another and even more persuasive reason. The record discloses that Mr. Renfro at one time filed a private lawsuit in a state court against the respondents in this proceeding. The record further discloses that thereafter he instituted another action in a United States District Court under the Sherman Antitrust Act against the same parties. Thus, while the nature of those proceedings is not shown, it is apparent that there exists between Mr. Renfro and the respondents herein a substantial private controversy.

The Commission acts only in the public interest, any protection afforded private persons being only incidental, and it must be ever vigilant against the possibility of its processes being used to further the private interests of any party. This consideration alone would be sufficient to require a denial of the applicant's request for permission to intervene, especially in the absence of any showing that the case will not be adequately presented by counsel in support of the complaint whose duty it is to call to the Commission's attention any errors or inequities in the initial decision.

The application for leave to intervene will be denied and an appropriate order will be entered.

Commissioner Kern did not participate in the decision of this matter.

Opinion

52 F. T. C.

IN THE MATTER OF

FOOD FAIR STORES, INC., ET AL.,
GIANT FOOD SHOPPING CENTER, INC.*Dockets 6458, 6459. Order and opinion, Apr. 25, 1956*

Order denying respondents' appeal from hearing examiner's denial of their motion for consolidation of hearings in cases involving charges of knowing acceptance of illegal payments from suppliers by food retailers in violation of Sec. 5 of the FTC Act with hearings in cases charging suppliers with granting promotional allowances to said food retailers in violation of Sec. 2 (d) of the Clayton Act.

Before *Mr. Frank Hier*, hearing examiner.

Mr. Andrew C. Goodhope and *Mr. Frederic T. Suss* for the Commission.

Stein, Stein & Engel, of Jersey City, N. J., and *Gravelle, Whitlock & Markey* and *Howrey & Simon*, of Washington, D. C., for Food Fair Stores, Inc.

Danzansky & Dickey, of Washington, D. C., for Giant Food Shopping Center, Inc.

ORDER RULING ON RESPONDENTS' INTERLOCUTORY APPEALS

The respondents having filed appeals from the hearing examiner's order denying their motions for consolidation of certain hearings in this and other pending proceedings designated in the motions; and

The matter having been heard on the appeals and the answer in opposition thereto, and the Commission having determined, for reasons stated in its accompanying opinion, that the appeals should be denied:

It is ordered, That the respondents' appeals be, and they hereby are, denied.

OPINION OF THE COMMISSION

Per Curiam:

The respondents in the above-captioned proceedings have separately filed interlocutory appeals from orders by the hearing examiner denying their respective motions to consolidate the hearings therein with those in other pending proceedings designated in their motions.

According to the pleadings, the respondents, Food Fair Stores, Inc., and Giant Food Shopping Center, Inc., each engage in operating a chain of retail stores reselling all types of grocery products. The complaints in which each is named as the party respondent

charge them with knowing inducement and receipt of allegedly illegal payments from suppliers or manufacturers of grocery products there named, and from other unnamed suppliers as well, in violation of Section 5 of the Federal Trade Commission Act; and the complaints in eleven other proceedings instituted by the Commission charge that the respective manufacturers and suppliers named have granted promotional allowances on their purchases to one or both of the aforesaid food retailers in violation of Section 2 (d) of the Clayton Act. These eleven complaints additionally charge that such allowances were not offered or made available on proportionally equal terms to other customers of the respective suppliers and manufacturers competitively engaged with Food Fair Stores, Inc., or with Giant Food Shopping Center, Inc., in the resale of those products.

In the motion before the hearing examiner, the respondent, Food Fair Stores, Inc., requested that hearings in all thirteen proceedings be consolidated. Under the appeal, however, it alternatively requests that hearings in its case be combined with those in the nine wherein the suppliers are charged with having granted discriminatory payments to it. The appeal of Giant Food Shopping Center, Inc., similarly requests that the hearings in its case be consolidated with those in seven proceedings involving suppliers specifically charged with having granted discriminatory payments to it.

Appellants state that common questions of law and fact are presented in these proceedings and contend that consolidation of hearings will save expense, promote the convenience of the parties, and expedite the hearings and thereby better serve the interests of justice. The proceedings naming the sellers were instituted under the Clayton Act and those involving the buyer-retailers under the Federal Trade Commission Act. Thus, actual identity of legal and evidentiary principles controlling to all the cases does not prevail, even though some common questions of law and fact may be presented therein. In any event, consolidation would be warranted only upon due showing that the interests of justice would be better served thereby.

In support of the arguments on lessening parties' litigation burdens, it is urged that if each case proceeds separately to hearings, full participation by each of the respondent suppliers will be required not only in his own case, but also in those of the respondent retailers to whom his allegedly unlawful payments were furnished. This asserted result of multiple participation does not follow, however. Although representatives of the respondent sup-

pliers may be called upon to testify or furnish documentary evidence in one or both of the two buyer proceedings, each would remain a party litigant in but one proceeding. On the other hand, consolidation would in effect make every supplier a party in interest in all combined hearings applicable to his case under the order of consolidation. If this course were adopted, each might feel impelled to be represented in interest at all combined hearings, applicable under such order to his case, even though only a part of the evidence submitted might be relevant and material to the issues in his case. In these circumstances, we must conclude that no showing has been made in support of the appeals that parties' convenience would be promoted by the requested consolidation or that a lessening of trial burden or expense would result.

Nor can it be concluded that the course of hearings would be expedited. The scheduling of hearings under procedures for combined hearings would entail reconciling of or other due regard for the convenience of a large number of parties and their counsel when designating times and places therefor, which circumstance would tend to retard rather than expedite the general course of hearings. It also appears from the answers filed by counsel supporting the complaint in opposition to the appeals that hearings for the reception of evidence already have been held in two of the thirteen proceedings and hearings are scheduled for the near future in certain others. The probabilities of delay which would attend the rescheduling of matters heretofore set for hearing are obvious.

In the circumstances here, it is apparent that more expeditious and orderly disposition of the proceedings will be afforded if these cases separately proceed to hearings and the Commission is of the further view that granting of the respondents' requests for consolidation would less serve the interests of justice.

We, accordingly, have determined that the motions to consolidate the hearings were not well taken and the appeals are being denied. Inasmuch as adoption of the requested program for consolidated hearings in these cases would be unwarranted, we note no error in the hearing officer's failure to grant the additional request of respondent, Food Fair Stores, Inc., that he direct a pre-hearing conference of the parties for identifying common issues and simplifying the issues in the interests of conducting such consolidated hearings. Because the questions presented under the appeals are procedural in nature and informed determinations in respect thereto can be made from the moving papers, answers and orders below, the respondents' requests for the privilege of oral argument on their appeals likewise are denied.

Decision

IN THE MATTER OF
P. & D. MANUFACTURING CO., INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 2 (a) OF THE CLAYTON ACT

Docket 5913. Complaint, Aug. 9, 1951—Decision, Apr. 26, 1956

Order requiring a manufacturer of automotive products in Long Island City, N. Y., to cease discriminating in price through allowing certain purchasers rebates or discounts off its jobber price lists (1) of 5% to 15% based on total monthly purchases, in lieu of the usual 2% cash discount granted all its customers; (2) of 20% and 2% on all purchases without regard to size of monthly purchases; or (3) of 20% and 2% on the aggregate group purchases to jobber manufacturers of two group buying organizations regardless of the value of purchases made by each individual; which practice resulted in eight different buying prices on sales of its ignition line and four different buying prices on sales of its fuel pump line.

Mr. Eldon P. Schrup and Mr. Francis C. Mayer for the Commission.

Halfpenny & Hahn, of Chicago, Ill., for respondent.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding is before the undersigned Hearing Examiner for final consideration upon the complaint, answer thereto, testimony and other evidence, and proposed findings as to the facts and conclusions presented by counsel.

The complaint in this proceeding was issued August 9, 1951, charging the respondent, P. & D. Manufacturing Co., Inc., a corporation, with having violated the provisions of subsection (a) of the Clayton Act as amended.

Testimony and other evidence in support of the allegations of the complaint were introduced before Webster Ballinger, a duly designated hearing examiner of the Commission. At the close of the testimony in support of the complaint the respondent made a motion to dismiss the complaint for failure to establish a prima facie case, which motion was denied by the Hearing Examiner, Webster Ballinger, on the record on April 5, 1954. It then appearing that said Hearing Examiner Webster Ballinger would become unavailable to the Commission by reason of his retirement from Government service on May 31, 1954, counsel for the respondent advised that he would not be in a position to complete the respondent's defense within that time and agreed to the appointment of a substitute hearing examiner to go forward with the case and