RENAIRE CORPORATION (PENNSYLVANIA) ET AL.

Docket 6555. Order and opinion, May 15, 1957.

Interlocutory order upholding the hearing examiner's adverse ruling on motion to dismiss complaint as to certain respondents before conclusion of trial.

ON INTERLOCUTORY APPEAL
FROM RULING OF HEARING EXAMINER

By the COMMISSION:

An appeal has been filed from the hearing examiner's order of March 21, 1957, denying the respondents' motion to dismiss the complaint as to certain respondents.

The complaint under which this proceeding was instituted charged that the respondents were engaging in unfair and deceptive acts and practices in commerce in connection with the advertising, sale and distribution of freezers and frozen foods under a food purchase plan called the "Renaire Plan." Joined as parties respondent in the complaint were eleven corporations and also eight individuals whom the complaint alleged directed and controlled their corporate policies and served as their officers; and the complaint's additional allegations respecting each of the corporate respondents being a separate corporate entity and soliciting sales in separate trade areas, and being operated as a joint enterprise in such connection, have been admitted in the respondents' answer.

The motion to dismiss which was ruled on adversely by the hearing examiner was filed on behalf of nine of the eleven corporate respondents, and the grounds asserted were that they were not shown to be engaged in interstate commerce. Its denial by the hearing examiner was made without prejudice to renewal thereof at the time of closing of the case for the reception of evidence. In their appeal, the respondents state that immediate decision on jurisdictional questions is required to obviate prejudice to them in defending against a proceeding which has been improperly instituted.

§ 3.20 of the Commission's Rules of Practice provides that interlocutory appeals from rulings of hearing examiners will not be entertained unless showing is made that the ruling being appealed from involves substantial rights and will materially affect final decision, and that a determination of the correctness of such ruling before conclusion of the trial would better serve the interests of justice. The ruling of the hearing examiner does not restrict the appealing respondents in the presentation of their defense, and their rights, as well as those of other respondent co-members of the Renaire family of corporations, to have all questions of law and fact subsequently passed upon by the Commission are fully protected. The hearing

examiner's order is not a decision on the merits or a final decision, and his ruling nowise affects any of the respondents' substantial rights. In order to justify an interlocutory appeal under the rule, a party ordinarily must demonstrate a likelihood of adverse effects from the challenged ruling more substantial than the inconvenience attending his presentation of a defense to the charges against him.

Having determined that the respondents' appeal does not come within the category of those to be granted under § 3.20 of the Commission's Rules of Practice, our order accordingly provides for denial of the appeal.

ORDER RULING ON INTERLOCUTORY APPEAL

The respondents having filed an interlocutory appeal from the hearing examiner's order of March 21, 1957, denying the respondents' motion to dismiss the complaint as to certain of the respondents; and

The Commission, for reasons stated in its accompanying opinion, having concluded that said appeal should not be granted:

It is ordered, That the respondents' appeal be, and the same hereby is, denied.

ERIE SAND AND GRAVEL CO. Docket 6670. Order, May 29, 1957.

Order amending respondent's answer and denying its motions to dismiss complaint and quash subpoena and requesting oral argument.

This matter having come on to be heard upon respondent's interlocutory appeal from the hearing examiner's rulings denying motions (1) to dismiss the complaint; (2) to amend respondent's answer; and (3) to quash a certain subpoena duces tecum, upon respondent's request for oral argument, and upon the answers in opposition to the appeal and request for oral argument filed by counsel supporting the complaint; and

The Commission having duly considered the matter and having determined that the appeal should be granted in part and denied in part, and that the request for oral argument should be denied:

It is ordered, That respondent's answer be, and it hereby is, amended in the manner requested in its motion to amend, but without prejudice to the right of counsel supporting the complaint to make such use of the original answer of the respondent as the law permits.

It is further ordered, That respondent's interlocutory appeal from the hearing examiner's rulings denying its motions to dismiss the complaint and to quash a subpoena duces tecum, and respondent's request for oral argument, be, and they hereby are, denied.

SOUTHERN OXYGEN CO. Docket 6372. Order and opinion, June 13, 1957.

Interlocutory order denying complaint counsel's appeal from hearing examiner's ruling interpreting and applying stipulation between opposing counsel.

ON INTERLOCUTORY APPEAL

By ANDERSON, Commissioner:

In this proceeding respondent is charged with price discrimination in violation of Section 2(a) of the amended Clayton Act. The complaint alleges that respondent's pricing practices have resulted in diversion of substantial business to it from competitors and that competitors' efforts to meet respondent's discriminatory prices have lessened their profits and affected, adversely, their ability to compete. Subsequent to completion of the case-in-chief, and during the course of hearings for receipt of respondent's evidence, counsel supporting the complaint objected to certain testimony sought to be adduced on respondent's behalf. The hearing examiner thereupon indicated on the record that the questioned testimony, and other similar proof, would be received in evidence pursuant to a stipulation theretofore agreed to by counsel for both sides and entered on the record. The hearing examiner's action was based upon his interpretation and application of the stipulation. Counsel supporting the complaint noted and perfected an interlocutory appeal. There is before the Commission, therefore, the question of whether the hearing examiner's interpretation and application of the stipulation is erroneous. No question of the admissibility of any particular evidence is presented to, or determined by, the Commission on this appeal.

The stipulation, entered into of record February 15, 1956, reads as follows:

> * * * it is stipulated by Counsel on both sides that either party to this proceeding may offer in evidence without objection, without possible objection under the hearsay rule, sworn testimony as to what was told the witness by a customer or prospective customer concerning the price that customer was paying a competitor or was offered by a competitor for oxygen or acetylene business, and such testimony shall be given such weight as the Examiner believes it is entitled to.

Throughout more than two thousand pages of testimony, counsel supporting the complaint has utilized the stipulation fully, even to the extent of broadening it in usage to present hearsay evidence of all competitive circumstances surrounding the change of customers from one supplier to another. He also has been permitted to adduce hearsay evidence with considerable latitude as to the point of time when certain occurrences or conversations took place. He now, in effect, seeks, however, to limit the availability of the stipulation to

respondent by restricting the testimony of respondent's witnesses under it to reports of conversations which, according to the hearing examiner, occurred "at the time of the instance which is in issue, that is to say, the changing of a customer or the alleged receiving by the customer of a lower price from some competitor" (Tr. 2358).

In the interest of fairness and justice, the Commission is of the opinion that counsel for respondent should be afforded equal opportunity under the stipulation. The interpretation placed upon the stipulation by the hearing examiner is in accordance with the general rule as to such agreements between counsel, namely, that "they should receive a fair and liberal construction, in harmony with the apparent intention of the parties and the spirit of justice, and in furtherance of fair trials upon the merits, rather than a narrow and technical one, calculated to defeat the purpose of their execution * * *." 25 R.C.L. 1095. We find no error in the hearing examiner's ruling in question here.

Further, recognizing the evidentiary questions involved, but without ruling thereon, the Commission notes that the hearing examiner has stated on the record that he would rule on a witness-by-witness basis and would restrict as far as possible the testimony to "conversations which took place at or about the time of the happening of the thing which is at issue * * *." (Tr. 2359). It must be assumed, therefore, that the record will be protected.

In view of the foregoing consideration, the appeal of counsel supporting the complaint will be denied.

ORDER DENYING INTERLOCUTORY APPEAL

This matter having come on to be heard by the Commission upon the appeal of counsel supporting the complaint from a ruling made by the hearing examiner on the record on March 26, 1957, interpreting and applying a stipulation entered of record February 15, 1956, by and between counsel supporting the complaint and counsel for respondent, and upon briefs of counsel in support of, and in opposition to, said appeal; and

The Commission having determined, for the reasons appearing in the accompanying opinion, that the ruling appealed from was correct:

It is ordered, That the appeal of counsel supporting the complaint be, and it hereby is, denied.

MAURICE J. FEIL ET AL. TRADING AS THE ENURTONE CO. Docket 6564. Order and opinion, June 21, 1957.

Order denying respondents' interlocutory appeal from hearing examiner's granting of complaint counsel's motion to amend original complaint, striking exhibits and section of transcript, and directing trial de novo.

ON INTERLOCUTORY APPEAL
FROM RULINGS OF THE HEARING EXAMINER

By ANDERSON, Commissioner:

At a hearing held on May 6, 1957, the hearing examiner granted a motion of counsel in support of the complaint for an amendment of the complaint. At the same time he ordered stricken from the record Commission's Exhibits 1 to 13, inclusive, and pages 1 through 69 of the transcript of testimony. From these rulings the respondents have appealed.

The complaint as originally issued alleges that the respondents have represented that the use of their device will stop bed-wetting and correct the bed-wetting habit in all cases. In controverting the truth of these representations, paragraph 5 alleges, among other things, that said device in fact will not be effective in stopping bed-wetting or correcting the bed-wetting habit, "except in cases of functional bed-wetting not involving organic defects or diseases." Thus, while attacking the representations concerning the efficacy of the respondents' device, the complaint expressly excepts from attack cases of functional enuresis not involving organic defects or diseases.

After the present counsel in support of the complaint was assigned to the case, he learned that the expert witnesses to be called in support of the complaint were prepared to testify not only that an instrument such as the respondents' device is ineffective in cases of bed-wetting caused by organic defects or diseases, but also that it is ineffective in cases of functional bed-wetting involving emotional disturbances. In order to conform the allegations of the complaint with this anticipated testimony, a statement of which had been furnished to counsel for the respondents, counsel in support of the complaint moved for an amendment, which the hearing examiner, over the objection of counsel for the respondents, allowed.

According to the transcript, counsel in support of the complaint requested the amendment in these words:

> Delete the period at the end of paragraph 5 and add the following: "or in cases of functional bed-wetting involving emotional tensions."

As so charged, paragraph 5 of the complaint would read as follows:

> The said representations were and are false, misleading and deceptive. In truth and in fact, the use of said device will not be effective in stopping bed-wetting or correcting the bed-wetting habit, except in cases of functional bed-wetting not involving organic defects or diseases or in cases of functional bed-wetting involving emotional tension.

This, obviously, is not the result that was intended. It is clear from the record that the purpose of counsel in support of the complaint was to amend the complaint so that it would allege that the

respondents' device will not be effective in cases of functional bed-wetting due to emotional disturbances as well as in cases due to organic defects or diseases. It is equally clear that it was the intention of the hearing examiner to allow such an amendment; and the fact that counsel for the respondents likewise so understood the amendment is shown by his vigorous objection stated on the record and the answer he has now filed to the complaint as amended. The Commission, therefore, interprets the hearing examiner's ruling concerning the amendment to have been that paragraph 5 of the complaint is amended to read as follows:

Paragraph Five: The said representations were and are false, misleading and deceptive. In truth and in fact, the use of said device will not be effective in stopping bed-wetting or correcting the bed-wetting habit in cases involving organic defects or diseases or in cases of functional bed-wetting involving emotional tensions.

Under the complaint as thus amended, the efficacy of the respondents' device in cases of functional enuresis due to emotional disturbances is clearly questioned. It appears, however, that certain of the exhibits theretofore received in evidence had been offered and received pursuant to a stipulation between counsel in which it was expressly recognized that the value of the device in cases of functional enuresis was not in issue. In view of the fact that this was no longer true, the examiner, after allowing the amendment, ruled that these exhibits and all of the testimony with respect to them be stricken from the record. The effect of this ruling was to direct a trial de novo.

The respondents do not in their appeal question the authority of the hearing examiner to allow an amendment to a complaint or to strike from the record exhibits and testimony. Their position is, rather, that the examiner, in allowing the amendment and striking the exhibits and testimony here abused his discretion. This is true, the respondents argue, because the case has been long pending in a status in which the sole issue framed has been whether or not respondents' device is effective in cases of enuresis involving organic defects or diseases. Respondents contend that the scope of the issues was so narrowed as not to bring into issue cases of functional enuresis and that this was with the full understanding and agreement of counsel for both sides and the hearing examiner. Respondents in this appeal, in effect, argue that allowing amendment of the complaint operates to their prejudice.

Counsel supporting the complaint, as previously indicated, has furnished respondents' counsel with a statement of anticipated testimony, including testimony to the effect that respondents' device will not be effective in functional cases of enuresis involving emotional

tensions. Counsel supporting the complaint was not informed of the nature of this testimony, or that it would be available, until the statement in question was being prepared.

Counsel for respondents is thus upon full notice as to what is involved in this proceeding under the complaint as amended and, in fact, is apprised now as to what to cross examine upon when witnesses are presented.

The hearing examiner is expressly authorized by § 3.9 of the Commission's Rules of Practice to permit amendment of pleadings if and whenever determination of a controversy on the merits will be facilitated thereby. He is especially enjoined when so acting to proceed upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties and provided the amendment allowed is reasonably within the scope of the proceeding initiated by the original complaint.

The Commission is of the opinion that the hearing examiner, in permitting the amendment of the complaint here involved, acted strictly in accordance with the terms of, and pursuant to the procedures prescribed by the rules of practice. His ruling does not prejudice any substantial rights of the respondents and clearly subserves expeditious presentation of the case on the merits. The gist of the action, or subject of controversy, remains essentially the same. The amendment of the complaint allowed clearly is reasonably within the scope of the proceeding initiated by the original complaint.

As to the hearing examiner's action in striking pages 1 through 69 of the testimony and Commission Exhibits 1 through 13, we likewise find no abuse of discretion there; although the Commission feels that Exhibit 13 and testimony relevant to it possibly could have been retained in the record. Exhibit 13 is the device involved in this proceeding and the testimony relevant to it is in explanation of its methods of operation. Neither was involved in the stipulations which appear to have been the basis for the hearing examiner's action in striking the aforesaid testimony and exhibits. The hearing examiner indicated on the record, however, that the amendment of the complaint was of such a nature that, in order fully to preserve respondents' rights, it would be better to place the proceeding on the basis of trial de novo rather than retain in the record any of the exhibits or evidence theretofore adduced. In the circumstances, the Commission is of the opinion that his action was in every sense correct and equitable and directed to a just result.

In view of the foregoing considerations, the Commission is of the opinion that respondents' appeal is without merit and should be denied.

ORDER DENYING INTERLOCUTORY APPEAL

The respondents having filed an interlocutory appeal from the hearing examiner's rulings of May 6, 1957, made in open hearing, granting the motion of counsel supporting the complaint to amend the original complaint and, on his own motion, striking Exhibits 1–13, inclusive, and pages 1 through 69 of the transcript and ordering that the matter proceed de novo; and

The Commission, for reasons stated in its accompanying opinion, having concluded that said appeal should not be granted:

It is ordered, That respondents' appeal be, and the same hereby is, denied.