TIMKEN ROLLER BEARING CO.

Docket 6504. Order and Opinion, May 27, 1958

Order vacating and setting aside initial decision dismissing complaint in section 3 Clayton Act proceeding and remanding case to hearing examiner for further action.

OPINION OF THE COMMISSION

By KERN, Commissioner:

This matter comes before us on the appeal of counsel supporting the complaint from the hearing examiner's initial decision wherein he dismissed the complaint. Briefs in support of and in opposition to the appeal have been filed, and oral argument of counsel has been heard.

The complaint, issued February 13, 1956, charged respondent with violation of section 3 of the Clayton Act in the sale of its tapered roller bearings in interstate commerce.[1] At the close of the introduction of evidence in support of the complaint, respondent moved for dismissal on the ground that a prima facie case had not been established. The hearing examiner granted the motion and dismissed the complaint.

The appeal raised two questions:

1. Does the record show prima facie that respondent has sold its tapered roller bearings to distributors or jobbers on the condition, agreement, or understanding that the distributors or the jobbers will not handle tapered roller bearings sold by any competitor with the probable effect of substantially lessening competition or tending to create a monopoly in any line of commerce?

2. Did the hearing examiner err in refusing to admit into evidence some 94 exhibits offered as relevant to the issues raised by the complaint?

Respondent, an Ohio corporation with headquarters in Canton, Ohio, is the largest manufacturer and seller of tapered roller bearings in the United States. It sells its products both for use as original equipment and for replacement and repairs in automobiles, tractors, and other machines. Only sales for ultimate purposes of replacement and repairs are involved in this proceeding.

Respondent's total sales in the replacement market run between $10 million and $20 million a year. Its closest competitor does a yearly business of between $1 million and $2 million a year in the sale

[1] The pertinent text of this section is as follows:

"SEC. 3. That it shall be unlawful for any person engaged in commerce * * * to * * * make a sale or contract for sale of goods * * * for * * * resale within the United States * * * on the condition, agreement, or understanding that the * * * purchaser thereof shall not use or deal in the goods * * * of a competitor or competitors of the * * * seller, where the effect of such * * * sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." [38 Stat. 731; 15 U.S.C. 14.]

of tapered roller bearings, and the next competitor, only between $400,000 and $800,000. Respondent manufactures more than 11,000 different items in its line of tapered roller bearings; its closest competitor, only 780; and the next competitor, a mere 586. Between 65 and 75 percent of all tapered roller bearings manufactured in the United States are produced by respondent. Its pre-eminence in the market would seem beyond dispute.

Timken distributes its bearings through two main classes of customers: Authorized distributors and authorized jobbers. The distributors buy directly from respondent; the jobbers buy through the distributors. Both pay the same price, but respondent allows a specified credit to distributors for sales which they make to jobbers. Generally speaking, the distributors carry a larger and more complete stock of bearings than do the jobbers.

In 1956, respondent had sales contracts with 1,541 authorized distributors, who, along with their branch stores, controlled 3,360 outlets for respondent's bearings, and with 3,406 authorized jobbers. These contracts were subject to cancellation by either party upon 10 days' written notice. Neither type provided that the purchasers must not deal in the bearings of respondent's competitors. Hence, if respondent has indeed made sales or contracts for sale on the understanding that the buyers should not handle competitive bearings, proof of that fact must be found elsewhere than in the written contracts. The complaint alleged that respondent's requirement of exclusive dealing was "a consistent policy" and did not particularize the form in which the alleged policy was manifested.

From the fact that the statute is not limited to express contractual provisions imposing exclusivity but encompasses sales made "on the condition, agreement or understanding that the * * * purchaser * * * shall not use or deal in the goods * * * of a competitor," it is clear that any type of coerced exclusivity is unlawful, whether imposed by written instrument or not. See *Carter Carburetor Corporation* v. *FTC*, 112 F. 2d 722, 732 (8th Cir. 1940).

From our examination of the present record we are satisfied that the evidence received affords the basis for reasonably concluding, in the absence of countervailing proof, that during the period covered by the complaint respondent regularly and consistently required its authorized distributors and authorized jobbers not to deal in the tapered roller bearings manufactured by others. We fully recognize that at the present stage of the proceeding respondent has not had the opportunity to explain or contradict that evidence, but we are convinced that the allegations of the complaint have been prima facie made out.

The evidence includes documentary exhibits consisting of correspondence between Timken officials and members of the Timken sales force and memoranda authorizing cancellation of respondent's agreements with distributors and jobbers in consequence of failure to adhere to the company's exclusive-dealing policy. This evidence consists of more than mere isolated, disconnected fragments of information indicating possibly sporadic or unauthorized activity by minor employees. On the contrary, it implicates respondent's branch managers in Atlanta, Cincinnati, Dallas, Detroit, Los Angeles, Minneapolis, New York, Philadelphia, Pittsburgh, San Francisco, and Seattle, and it shows that General Manager Austin not only received reports of deviations from the 100 percent-loyalty-requirement policy but authorized cancellation of the recalcitrants' agreements.

Throughout these letters and memoranda runs a constant pattern. New accounts were given to understand that they were to liquidate their stocks of competitive bearings and "go Timken 100 percent" or to show "100 percent loyalty." Established accounts detected in handling competitive lines of bearings were canceled by top management on the recommendation of branch managers. All this conduces to the inference that exclusive dealing has been an important and regular feature of respondent's relations with its Authorized Distributors and Authorized Jobbers.

In the present posture of the case we, of course, draw no conclusions on the merits. Our sole task at the present time is to ascertain whether a prima facie case has been established in support of the complaint. In our decision of November 29, 1955, in *Vulcanized Rubber & Plastics Company*, Docket No. 6222, we said:

> The ruling of a hearing examiner denying a motion to dismiss a complaint for failure of proof, made at the conclusion of the case in chief, obviously is not a decision on the merits of the case. Such a ruling is merely a determination that there is in the record reliable evidence which, when considered in connection with reasonable inferences which may be drawn therefrom, and if not overcome by the respondent's evidence, would support an order to cease and desist. The ultimate decision of whether an order to cease and desist will be issued, even in the absence of further evidence, is not reached; and it could well be that a hearing officer, upon full consideration of a proceeding submitted for final decision, after making appropriate determinations concerning the credibility of witnesses, the weight to be given conflicting evidence, and other pertinent questions involved, would dismiss the complaint even though he had theretofore denied a motion to dismiss for failure of the record to establish a prima facie case.
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> A hearing examiner in ruling on a motion to dismiss for failure of proof, made at the close of the case in chief, like a Federal district court in ruling on a similar motion in a nonjury trial, views the evidence and inferences reasonably to be drawn therefrom in the light most favorable to the complaint. Thus, an appeal from a ruling denying such a motion should be granted only when it is apparent that there is in the record no substantial evidence in support of the complaint

and the ruling was obviously erroneous. The instant appeal does not present this situation. The record in this case contains considerable respectable evidence which, if not overcome by rebutting evidence, would support an order to cease and desist. * * *

In the light of the holding just quoted, the hearing examiner applied a wholly erroneous test when he held that a prima facie case is not established unless "the record under consideration (including, of course, inferences reasonably to be drawn therefrom) warrant[s] a finding and conclusion of violation of law on the part of the respondent and the issuance of an order to cease and desist." Furthermore, despite his recognition that certain exhibits "indicate that in some instances respondent has entered into agreements with customers that they would not handle competing lines," he proceeded to discount their probative value for what he called their "remoteness in point of time" and "their extremely small number in relation to the number of respondent's dealers." The alleged "remoteness in point of time" goes "as far back as 1949." On the other hand, many of the exhibits bear dates of 1952 and 1953, and one is as late as 1954. Taking into account the fact that the complaint recited that respondent "is now *and for many years* has been engaged in the manufacture" of tapered roller bearings, documents relating to transactions within the 5-year period of 1949–54 can hardly be thought inapposite to a proceeding instituted early in 1956 by issuance of a complaint charging that respondent "has made and is now making sales and contracts for sale of its tapered roller bearings * * * on the * * * understanding that the purchasers thereof shall not use or deal in like or similar tapered roller bearings sold or supplied by a competitor or competitors of respondent."

In holding that "the number of instances reflected by the documents appears negligible—insufficient to warrant an inference of a general policy of exclusive dealing" the examiner has failed to follow the applicable precedents. To ascertain the prevalence of a particular type of business dealing, and the degree to which it may constitute a general policy, the Commission is not bound to undertake an exhaustive enumeration. Thus, the United States Court of Appeals for the Second Circuit held in *Standard Distributors, Inc.* v. *FTC*, 211 F. 2d 7, 12 (1954):

* * * There were 31 witnesses called by the Commission who testified to about that number of instances, and the petitioners called 13 witnesses in an effort to refute such testimony. While the instances of misrepresentation so proved ranged through a period roughly of 9 years and were comparatively small, both in numbers per year and in total numbers of sales of sets of encyclopedias which ran to over 160,000 and were made by over 2,000 salesmen, they were enough to show a pattern of conduct sufficiently extensive to support the findings made by the Commission. * * *

To like effect are *Steelco Stainless Steel, Inc.* v. *FTC*, 187 F. 2d 693, 696 (7th Cir. 1951); *Consumer Sales Corp.* v. *FTC*, 198 F. 2d 404, 407 (2d Cir. 1952); *Tractor Training Service* v. *FTC*, 227 F. 2d 420, 425 (9th Cir. 1955).

Because the exhibits cover a range of about 5 years and relate to the acts of widely scattered branch offices of respondent and reports made by those branch offices to respondent's general sales manager, we believe that there is raised the presumption that they evince a standard policy of the Timken Co. to oblige its authorized distributors and authorized jobbers to handle Timken tapered roller bearings to the exclusion of all other brands.

There remains the necessity of deciding whether there has been a primafacie showing that respondent's exclusive-dealing requirement "may be to substantially lessen competition or tend to create monopoly in any line of commerce." We think that respondent's overwhelming ascendancy in the manufacture and sale of its bearings, as shown by its dollar sales figures compared with those of its two closest rivals, and its superlatively more varied product line, together with the fact that there is some evidence in the record, so far uncontradicted, showing specific and substantial loss of sales by respondent's competitors in the replacement market, clearly suffice to constitute a primafacie showing of a likelihood of the lessening of competition or tendency toward the creation of monopoly.

Viewing the evidence in the record and inferences to be drawn therefrom in the light most favorable to the complaint, we conclude that a prima facie case has been established and that the hearing examiner accordingly erred by dismissing the complaint. Respondent will have ample opportunity to rebut, explain, or contradict the proof adduced in support of the complaint in the next stage of the proceeding.

Finally, for determination is the appeal of counsel supporting the complaint from rulings of the hearing examiner refusing to admit into evidence some 90-odd documents which were offered as being relevant and germane to the issue of whether respondent Timken has an established policy of requiring its distributors and jobbers to handle its products exclusively. These documents consisted of salesmen's reports of calls and intercorporate correspondence regarding the respondent's relations with distributors and jobbers who carry a competitive line of bearings. Appendix A to the appeal brief of counsel supporting the complaint consists of a summary of excerpts from the documents excluded. Counsel for the respondent in his brief in opposition to the appeal brief appears to characterize the excerpts contained in the summary appendix as being meaningless, the significance of which can be understood only by examining the entire exhibit from which each is taken. This the Commission has done,

and it is of the opinion that certain of the documents in question should have been admitted as being relevant to the principal issue presented in this matter, namely, whether respondent does follow a consistent general policy of exclusive dealing.

Typical of the rejected documents is Commission's exhibit 38 for identification. This is a salesman's report of a call upon one of respondent's customers, Pat Murphy, president, Quality Parts and Equipment Co., Laurinburg, N.C. The hearing examiner rejected this exhibit, apparently because he viewed it merely as a report of the "ordinary day-to-day effort of a salesman's endeavor to sell his employer's goods * * * to establish a new account or to improve an account which was already in existence * * *." It was the hearing examiner's view that the proffered exhibit had no "probative value on the question as to whether Timken had a policy to the effect charged in the complaint." The pertinent statements in the exhibit are in the first two paragraphs as follows:

> Called he. ° for further talks with these people about their going Timken 100 percent.
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> During this talk Pat Murphy told me that they were perfectly willing to go Timken 100 percent. * * *

From our examination of this rejected exhibit we deem it relevant to the issue of exclusivity. It bears directly on the question of whether there was an understanding, or agreement, between respondent's salesman and a customer that the latter was going to handle Timken 100 percent.

In this connection we note the close similarity between the character of this salesman's report and others which were received in evidence and can see no persuasive reason for treating them any differently. If some were admissible, the others likewise should have been received as being relevant and material.

Commission's exhibit 45A and B for identification evidences even more clearly the constant pattern running through the letters and memoranda, some of which are already in evidence. This rejected document is a report to respondent's general manager, Service Sales Division, from respondent's Pittsburgh, Pa., branch manager in regard to the Forbes Motor Co., Monroeville, Pa. The letter recommends that Forbes be considered for a Timken distributorship and reads in pertinent part as follows:

> We are recommending this company be considered for a direct appointment on a distributorship for Timken roller bearings. * * *
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> * * * * * * *
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> Currently, they are one of the better Bower roller bearing accounts in our territory and have been selling, according to Mr. Magan, approximately, $4,500 to $6,000 worth of Bower bearings per year.

* * * * * * *

It is my understanding with Mr. Magan that he has return privileges with the Federal-Mogul Co. so that it will be possible for him to return the better part of his present stock of Bower roller bearings and he will be in a position, thereby, to replace same, with a stock order for Timken bearings.

We are quite anxious to make this appointment for many reasons. The first reason being that we can use an authorized distributor at this particular location and also one specializing in heavy-duty fleet contacts. The second good reason is, that we have the opportunity of taking one of the better Bower accounts from the Federal-Mogul Co.

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An examination of this exhibit in its entirety clearly shows the possibility that purchases by Forbes from Timken were to be on the condition, agreement, or understanding that Forbes was to handle Timken products exclusively and eliminate from his stock any competitive products. It fits exactly into what may be reasonably argued to be the matrix of respondent's consistent general policy of exclusive dealing, and the exhibit clearly is relevant evidence on this phase of the case.

Another typical rejected exhibit is marked for identification 90A and is a letter from respondent's general manager, Austin, to respondent's Atlanta, Ga., branch manager. It has reference to a salesman's report of a call on a customer who had on his shelves "a quantity of A.B.C., Bower and unboxed bearings." The document reads as follows:

Judging from their sales volume and Jones' report of March 17, the subject company are not entitled to contract jobber arrangements with us.

Since they apparently are not loyal to us as a source of supply, I think we should do one of two things—either get their support or eliminate this account.

This may indicate that respondent's salesmen "policed" their customers, reporting the presence of competitive bearings in the customer's place of business. The general manager's comment that the customer "is not loyal to us as a source of supply" and his conclusion that the customer's support should be secured or the account eliminated speaks for itself. This exhibit likewise is relevant to the main issue in this case and should have been admitted.

Other relevant evidence of policing of accounts appears in rejected Commission's exhibit for identification 97A, a salesman's report of a call on Modern Automotive Parts Co., Dorchester, Mass., in which the following appears:

Leo Abrahamson would like to be recognized as an Authorized Distributor but at the same time he did not hesitate to purchase a quantity of L & S bearings the early part of this year. We pointed out to Leo that consideration for an A.D. depends very much on volume and, by diverting some of his business to L & S, he

certainly does not strengthen his position with Timken. We told him that we have ample distribution in this area.

* * * Leo assured us that he has not purchased from L & S in the last six months and that it was not his intention to do so in the future.

We will keep close check on this stock and, if additional L & S bearings are purchased, we will take necessary action."

The foregoing are but a few typical examples of the rejected documents. As indicated, we have examined each of them and have concluded that those listed in the margin below [2] are all relevant to the issue of exclusivity presented by the pleadings in this case.[3] Respondent's contentions in opposition to receipt of these documents in evidence essentially are directed to the weight they should be accorded rather than to the question of their admissibility or relevance. Listed also [4] are the other documents rejected by the examiner, the relevancy of which is not so apparent and the exclusion of which is not found to be erroneous.

In view of the foregoing considerations the appeal of counsel supporting the complaint will be granted, with the result that the initial decision will be vacated and the matter remanded to the hearing examiner for further proceedings in due course. An appropriate order will be entered.

Commissioner Gwynne dissented to the decision in this matter.

ORDER REMANDING CASE TO HEARING EXAMINER

Counsel supporting the complaint having filed an appeal from the initial decision of the hearing examiner, dated October 14, 1957, dismissing the complaint in this proceeding; and the matter having been heard by the Commission upon the whole record, including briefs and oral argument; and the Commission having rendered its decision granting said appeal:

It is ordered, That the aforesaid initial decision be, and it hereby is, vacated and set aside.

It is further ordered, That this case be, and it hereby is, remanded to the hearing examiner for further proceedings.

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[2] Commission Exhibits for identification 38, 45A and B, 69, 70, 71, 79, 90A, 90B, 91A, 91B, 92, 94, 95, 96, 97A, 97B, 98, 99A, 99B, 100, 101, 103A, 103B, 103C, 104, 105, 106A, 106B, 106C, 107, 108A, 108B, 108C, 108D, 111, 112, 114A, 114B, 114C, 117, 118A and B, 119A and B, 120, 121, 125A and B, 126, 127, 128, 129A, 129B, 130A and B, 131, 132, 133,134, 135, 136A, 136B, 137, 138A, 138B, 139A and B, 140, 141, 143, 144, 145, 146A, 146B, 148A, 148B, 149, 151, 153A, 153B, 157A and B, 158, 160, 161, 162, 163, 164.

[3] Illustrative of the important part such evidence may play in the disposition of a case such as this is the consideration given similar documentary matter, including salesmen's reports of calls on customers, in the matter of *Harley-Davidson Motor Co.*, Docket No. 5698, where it was found that the respondent was selling its motorcycles on the condition, agreement or understanding that the purchaser would deal in Harley-Davidson products exclusively.

[4] Commission Exhibits for identification 76, 89A, 89B and C, 93, 102A, 102B, 110A and B, 147, 152, 154, 159.

HAFNER COFFEE CO.

Docket 6961. Order and Opinion, June 4, 1958

Order remanding motion for amendment of complaint to hearing examiner for his determination.

OPINION OF THE COMMISSION

By the COMMISSION:

This matter is before the Commission on a motion filed by counsel in support of the complaint requesting the hearing examiner, in effect, (1) to permit the substitution of Simon Hafner, an individual, as the party respondent in lieu of Hafner Coffee Company, a corporation, and (2) to issue and direct service on Mr. Hafner of an amended complaint. The hearing examiner, being of the opinion that he had no authority to entertain the motion, certified it to the Commission for consideration.

In stating that he has no authority to issue and direct the service of an amended complaint the hearing examiner was correct. However, to the extent that he stated or implied that he has no authority to allow an amendent of an outstanding complaint he was in error. The difference lies in the distinction between the issuance of a complaint, which the Commission reserves to itself and in the performance of which it exercises the administrative function of determining when there is reason to believe the law has been violated and, in the case of proceedings under the Federal Trade Commission Act, when the public interest requires action, as well as that of framing the charges, and the amendment of a complaint already issued, the authority to accomplish which the Commission has expressly delegated to its hearing examiners under the conditions and subject to the limitations prescribed in § 3.9 of its Rules of Practice. Thus, a hearing examiner, when presented with a motion for amendment of a complaint, should consider it, and if it meets the requirements of § 3.9(a)(1) he may, in the exercise of his discretion, allow it, being careful, however, that the action he takes is but an exercise of his quasi-judicial power to permit the amendment of an outstanding complaint and not an impingement on the Commission's administrative responsibility to issue a new or substitute complaint.

Under section 3.9(a)(1) of the Rules, the only limitation on a hearing examiner's authority to allow an amendment of a complaint is that the amendment must be one which is reasonably within the scope of the proceeding initiated by the original complaint. Whether or not this is so must of necessity depend on the circumstances of each case. In this case, the pertinent facts are that the Commission, on November 26, 1957, issued the complaint, alleging violation by