WARD BAKING CO.

Docket 6833. Order and Opinion, June 23, 1958

Order vacating initial decision dismissing complaint in section 2(d) Clayton Act proceeding and remanding matter to hearing examiner for further consideration of effectiveness of discontinuance of challenged practices, etc.

OPINION OF THE COMMISSION

By TAIT, Commissioner:

The complaint in this matter, charging a violation of section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., title 15, sec. 13), was dismissed without prejudice in an initial decision by the hearing examiner on the ground that respondent voluntarily abandoned the alleged practices under exceptional circumstances. Counsel supporting the complaint has appealed from this holding.

The sole question is whether the examiner, under the circumstances, properly ordered the dismissal.

It appears that the allegations of the complaint are specifically directed to a certain sales promotion plan employed by respondent during the past several years in connection with sales of bakery products to retail establishments. Under the plan, agreements were entered into with many of its customers whereby, if a customer's purchases from respondent exceeded $50 a week, the customer, in return for certain in-store advertising, was paid a 5 percent discount from such purchases.

The complaint was issued July 8, 1957. Thereafter, on December 3, 1957, respondent, prior to a hearing on the merits, moved for dismissal. Attached to its motion are the affidavit of Alexander M. Grean, Jr., vice president and general counsel for Ward Baking Co., and other exhibits. One of the exhibits is the form of the announcement distributed to customers participating in the contested plan advising that, in view of the Commission's proceedings, the advertising program was to terminate on December 28, 1957. The affidavit declares that respondent has wholly discontinued the challenged program and that it has no intention of entering into any other contracts having the same provisions or provisions having substantially the same effect.

The discontinuance of a practice found by the Commission to constitute a violation of law does not render the controversy moot. *Federal Trade Commission* v. *Goodyear Tire & Rubber Company*, 304 U.S. 257 (1938). Nevertheless, where the practice has been surely stopped by the act of the party offending and the object of the proceeding has been attained, no order is necessary, nor should one be entered. *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. 2d 321 (1944). The cases most commonly dismissed on such grounds are those in which the practice has been long abandoned and/or in which the conditions which led to the violation have so changed as to render a resumption highly unlikely. *Federal Trade Commission* v. *Civil Service Training Bureau, Inc.*, 79 F. 2d 113 (1935); *National Lead Co., et al.* v. *Federal Trade Commission*, 227 F. 2d 825 (1955), reviewed on other grounds, 352 U.S. 419 (1957); *Stokely Van Camp, Inc., et al.* v. *Federal Trade Commission*, 246 F. 2d 458 (1957); In the Matter of *Bell & Howell Company*, Docket No. 6729 (Decided July 19, 1957).

Dismissal is rarely warranted, however, in cases where a party waits until the Commission has acted and only then discontinues his illegal practice. *Federal Trade Commission* v. *Wallace*, 75 F. 2d 733 (1935); *Perma-Maid Company, Inc.* v. *Federal Trade Commission*, 121 F. 2d 282 (1941); *Eugene Dietzgen Co.* v. *Federal Trade Commission*,

supra; Galter v. *Federal Trade Commission*, 186 F. 2d 810 (1951). In the *Dietzgen* case, the court's view was that "parties who refused to discontinue the practice until proceedings are begun against them and proof of their wrongdoing obtained, occupy no position where they can demand a dismissal." It is apparent that the Commission would have no power at all if it lost jurisdiction every time a practice is halted just as the Commission is about to act or has acted. *Hershey Chocolate Corporation, et al.* v. *Federal Trade Commission*, 121 F. 2d 968 (1941).

In any case of the discontinuance of a practice, the Commission is vested with a broad discretion in the determination of whether the practice has been surely stopped and whether an order to cease and desist is proper. *Deer, et al.* v. *Federal Trade Commission*, 152 F. 2d 65 (1945); *Keasbey & Mattison Co. et al.* v. *Federal Trade Commission*, 159 F. 2d 940 (1947); *Eugene Dietzgen Co.* v. *Federal Trade Commission, supra; Automobile Owners Safety Insurance Company* v. *Federal Trade Commission* (C.A. 8, May 16, 1958). This discretion is limited only to the extent that it may be abused. *National Lead Co., et al.* v. *Federal Trade Commission, supra.*

The Commission, in the exercise of its proper discretion, may dismiss a complaint even after proceedings have been initiated, but we believe that a dismissal in any such circumstance should be limited to the truly unusual situation. One such situation was involved in the matter of *Argus Cameras, Inc.*, Docket No. 6199 (Decided October 20, 1954), the case largely relied upon by the examiner in support of his holding. In that matter, there was a clear showing of unusual circumstances which in the interest of justice required dismissal. Such circumstances included the Commission's finding that the course of dealing over the years between Federal Trade Commission representatives and Argus was such as to justify that respondent in the belief, prior to the issuance of the complaint, that no challenge was being made to its practices. While the discontinuance did not take place until after the Commission had acted, this fact had no great significance in view of the nature of the assurances to respondent by Commission personnel, and, consequently, the matter could be treated the same as if the practices had been abandoned on an entirely voluntary basis. The *Argus* case, however, is not precedent for a dismissal where, in ordinary circumstances, a respondent discontinues practices only in response to Commission action in the apparent hope that it will thereby avoid the issuance of an order to cease and desist. The rule in such a situation is that the abandonment comes too late.

The instant proceeding contains none of the unusual circumstances which existed in the *Argus* case, or any other factors so out of the

ordinary that they would call for dismissal. The plain fact is that here we have simply a showing of a discontinuance following the issuance of the complaint and a promise not to resume in the future. On the other hand, the same competitive conditions which allegedly induced respondent to initiate the challenged advertising program apparently still exist. Clearly, the Commission would not be required to rely on the promise not to further engage in the practices. *Sears Roebuck & Co.* v. *Federal Trade Commission*, 258 Fed. 307 (1919); *Moir, et al.* v. *Federal Trade Commission*, 12 F. 2d 22 (1926).

The hearing examiner based his conclusion for dismissal, it seems, on the several numbered findings in the initial decision. These include findings as to the effectiveness of the discontinuance and the likelihood that the practices have been permanently abandoned. In addition, he found that respondent, when inaugurating its sale-promotion program, openly and publicly announced it to all customers alike in the trading areas affected and that respondent acted in good faith in the belief that the plan did not violate the law. If the latter findings have a bearing on respondent's good faith, they still do not constitute such exceptional circumstances as to be proper grounds for dismissal where the respondent discontinues the practices subsequent to the issuance of the complaint.

We conclude that the hearing examiner was in error in dismissing the complaint. Accordingly, the appeal of counsel supporting the complaint is granted. In the order to accompany this opinion, the initial decision will be vacated and set aside and the matter will be remanded for further proceedings consistent with the views herein expressed.

ORDER VACATING INITIAL DECISION AND REMANDING CASE TO HEARING EXAMINER

This matter having come on to be heard upon the appeal of counsel in support of the complaint from the hearing examiner's initial decision dismissing the complaint, and the briefs and oral argument in support thereof and in opposition thereto; and

The Commission, for the reasons stated in the accompanying opinion, having determined that the hearing examiner was in error in dismissing the complaint:

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

It is further ordered, That this case be remanded to the hearing examiner for further proceedings consistent with the Commission's opinion.