AMERICAN METAL PRODUCTS COMPANY ET AL.

Docket 7365. Order and Opinion, Jan. 23, 1961

Interlocutory order remanding case to hearing examiner for modification and to provide for simultaneous filing by both parties of proposed findings instead of successive filing.

OPINION OF THE COMMISSION

By the COMMISSION:

In his order of November 15, 1960, closing this proceeding for the reception of evidence, the hearing examiner fixed February 3, 1961, as the date for filing of proposed findings and conclusions by counsel supporting the complaint, and designated March 6, 1961, for filing of such proposals by the respondents. The order additionally granted counsel supporting the complaint leave to file reply to respondents' suggested findings within a time to be subsequently designated. Counsel supporting the complaint seasonably filed interlocutory appeal and contends that the order's provision for successive instead of simultaneous filings of those proposals is inequitable and constitutes an improper departure from established procedure in Commission cases. Since the question thus raised involves an interpretation of a rule of practice having general applicability to all of the Commission's adjudicative proceedings, the Commission feels that an expression of its views on this subject will be of material assistance to both counsel and hearing examiners in future proceedings and, consequently, the appeal is being treated as one to be entertained and decided.

Section 3.19 of the Commission's Rules accords parties the right to file proposed findings and conclusions at the close of the reception of evidence or "within a reasonable time thereafter" as fixed by the hearing examiner. Counsel supporting the complaint does not contend, however, that the time allotted for preparation of the suggested findings which are to be initially filed by him is insufficient, and disposition of the appeal accordingly does not turn on this aspect of the time disparities. Furthermore, although the periods of time accorded under the hearing examiner's ruling exceed those usually granted in Commission proceedings, the appeal's exceptions relate only to the successive filing provision. Thus, no question of whether the order serves to delay the proceeding unduly is presented to us, nor is it being decided.

The above-mentioned rule does not expressly prescribe that the time fixed by hearing examiners provide for simultaneous filing of proposed findings; and a rigid requirement in that respect would foreclose hearing examiners from meeting the exigencies of unusual

situations warranting another course. It is, however, equitable and proper that parties be afforded equal time, running concurrently, for the submission of their suggested findings. This has been the customary practice in Commission proceedings, and as we have previously held in a prior interpretation* of that rule, such course should be departed from only in unusual circumstances. The order appealed from here, however, contains no showing of special circumstances or exigencies impelling a departure from the customary practice and other facets of the case clearly suggest their absence.

The rule as above interpreted is conducive to informed and expeditious decision of cases on their merits. In the Commission's view, simultaneous submissions of proposed findings better engender full discussion of all alternative factual and legal theories available, including arguments in favor of those proposed for adoption and against those anticipated to be advanced by the adversary, and, when thus prepared, proposed findings constitute informative briefs on the evidence. Successive submissions in Commission proceedings, however, envision narrowing of the issues to those advocated by the respective parties, with respondents' counter findings and staff counsel's rebuttal submissions serving primarily as memoranda of points and authorities in support of their exceptions to their opponents' contentions. Hence, simultaneous filing of suggested findings encourages more comprehensive coverage of the facts. Furthermore, such filing practice obviously is attended by less likelihood of delaying proceedings unduly.

In view of the foregoing, the Commission is of the opinion that the hearing examiner erred in failing to accord the parties equal time, running concurrently, for preparation and submission of their proposed findings and conclusions. The appeal is granted and the case is being remanded for further proceedings in regular course, including appropriate modification of the order of November 15, 1960.

Chairman Kintner dissented to the decision herein.

ORDER REMANDING CASE

This matter having come on to be heard upon the interlocutory appeal filed by counsel supporting the complaint from the hearing examiner's order of November 15, 1960, and upon the respondents' answers in opposition to such appeal; and the Commission, for reasons stated in the accompanying opinion, having granted the appeal:

It is ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner for appropriate modification of said order.

Chairman Kintner dissenting.

* *Luria Brothers & Company, Inc.*, Docket 6156 (Decision on interlocutory appeal, July 30, 1958).

SCOTT PAPER COMPANY

Docket 6559. Order, Feb. 21, 1961

Order, with memorandum, denying motion requesting 60-day stay and reconsideration of divestiture order of Dec. 16, 1960, 57 F.T.C. 1415.

The respondent, on January 16, 1961, filed a motion requesting that the order contained in the Commission's decision entered December 16, 1960, be stayed for sixty days; that the respondent be orally heard on the motion; and that the order be reconsidered by the Commission. In support of the motion, respondent contends, among other things, that the requirement in the order for divestiture is unnecessarily harsh; that respondent has had no opportunity to present its views as to the provisions of the order; and that the order is unenforceable because of lack of specificity.

When rendering its decision in this proceeding, the Commission determined that divestiture of the assets of the named corporations acquired and thereafter held by the respondent in violation of Section 7 of the Clayton Act, as amended, was the appropriate remedy for correcting those violations. In directing such divestiture, the order also prescribes guideposts for its conduct in good faith, including restoration of the acquired properties as competitive entities in substantially the same operating form and of substantially equivalent productive capacity as existed at or about the time of acquisition; and the order additionally directs the respondent to submit within sixty days a plan for compliance with the order, with time for compliance to be fixed thereafter. The challenged order accordingly contemplates full opportunity for the respondent to submit in writing its recommendations and suggestions relating to the order's requirements for good faith divestiture of the acquired assets, with opportunity for counsel supporting the complaint to respond in writing. Furthermore, it is implicit in the Commission's prior action that an additional order specifying the manner of divestiture within the purview of Section 11 of the aforesaid Act, as well as the time within which it must be accomplished, will follow.

ORDER

It is ordered, That the respondent's motion be, and it hereby is, denied.

It is further ordered, However, that the time within which the respondent may submit its plan for compliance with the order for divestiture be, and it hereby is, extended to include thirty (30) days from the service upon the respondent of this order.

Commissioner Mills not participating.