INTERLOCUTORY, VACATING, AND MISCELLANEOUS ORDERS

SWIFT & COMPANY

Docket 8304. Order and Opinion, July 11, 1962

Interlocutory order denying motion to disqualify Commissioner MacIntyre from participating in proceeding.

MEMORANDUM OF COMMISSIONER MACINTYRE IN REGARDS TO RESPONDENT'S MOTION THAT HE WITHDRAW FROM THIS PROCEEDING

Respondent, by Motion filed herein July 3, 1962, has requested that I withdraw from this proceeding and that I not participate or advise the Commission regarding its decision herein.

Respondent's Motion refers to the fact that I was Chief of the Commission's Division of Investigation and Litigation during the period from 1951–1954 and that before the end of that period an investigation had been made of respondent's practices, the results of which were transferred to the Department of Agriculture for a proceeding there. Apparently respondent considers that the investigation made of Swift & Company in the period of 1951–1954 served as a basis for and out of which developed the present proceeding in Federal Trade Commission Docket 8304. Moreover, respondent takes the position that it would be improper for me to have been responsible for the conduct of an investigation of Swift & Company at that time and to now participate in a decision by the Commission in a formal case which the respondent believes developed out of that investigation.

There are pertinent facts not publicized heretofore regarding my connection or lack of connection with the present proceeding in Federal Trade Commission Docket 8304. I am informed that an investigation of Swift & Company was undertaken by the Commission under its informal investigational File No. 1–24619 prior to 1952. In 1954 the file number of that particular investigation became File No. 541 0207. Also, I am informed that the Commission's investigation of that matter and the files in connection therewith were discontinued and marked "Closed" November 15, 1955. Considerably in advance of that date, February 15, 1955, I resigned from the staff of the Federal Trade Commission and had no connection with the activi-

ties of the Commission, either at staff level or at the Commission level, until I took the oath of office as a Member of the Federal Trade Commission on September 26, 1961. I am informed that in the meantime, in 1959, the Commission docketed for investigation under File No. 591 0158 a new investigation of Swift & Company, and that out of the ensuing investigation has developed the proceedings involved in Federal Trade Commission Docket No. 8304. With that investigation and the present formal proceedings I have had no connection nor responsibility. I was not a Member of the Commission in 1961 at the time it issued its complaint in this matter. Therefore, I was not informed, as were the other Commissioners, regarding the results of the investigation conducted commencing in 1959 into the activities of Swift & Company. Consequently, I was not in a position to conclude, as were the other Commissioners, that there was reason to believe that Swift & Company was engaging in unfair acts and practices in violation of the laws administered by the Commission. In view of these circumstances, to the extent that I should participate in any decision by the Commission in Docket No. 8304, I would do so without as much information regarding the underlying background of the proceeding as evidently is possessed by each of the other Commissioners who participated in the decision to issue the complaint in Docket No. 8304.

In view of the foregoing and other facts and circumstances known to me, I am aware of no reason why I should withdraw from the proceeding and refrain from participating with the Commission in any decision in this proceeding. One thing is clear: I am determined that whatever I do in this proceeding shall be without bias or prejudice, but on the contrary, be expressive of sound and fair judgment.

ORDER DENYING MOTION TO DISQUALIFY

Respondent, by motion filed July 3, 1962, having requested that Commissioner MacIntyre withdraw from this proceeding, or, in the alternative, that the Commission determine that Commissioner MacIntyre is disqualified with respect to any and all proceedings in this matter; and

The Commission being of the opinion for the reasons set forth in the accompanying memorandum that the grounds stated in respondent's motion are insufficient to support a determination that Commissioner MacIntyre be disqualified:

It is ordered, That the motion directed to the Commission requesting that it disqualify Commissioner MacIntyre from participating in this proceeding be, and it hereby is, denied.

By the Commission, Commissioners Elman and MacIntyre not participating.

FOSTER PUBLISHING COMPANY, INC., ET AL.

Docket 7698. Order and Opinion, July 26, 1962

Interlocutory order vacating initial decision and remanding case to hearing examiner for additional testimony as to products and product lines purchased by respondents and their competitors and as to competition in the resale of such goods—in proceeding charging illegal inducing of discriminatory advertising allowances from suppliers.

OPINION OF THE COMMISSION

By Dixon, *Commissioner:*

Respondents herein are charged with violating Section 5 of the Federal Trade Commission Act by knowingly inducing and receiving payments from suppliers for services and facilities in connection with respondents' offering for sale or sale of goods not available to all of their competitors on proportionally equal terms. In short, the complaint charges in effect that respondents have knowingly induced their suppliers to make payments violative of Section 2(d) of the Robinson-Patman Act. The matter is now before us on the appeal of respondents from the initial decision wherein the hearing examiner sustained the allegations of the complaint.

Of the several issues presented by respondents in their brief, we are here concerned with their argument that the record does not support a finding that respondent Foster Type and Equipment Company, Inc.,[1] and other distributors of printing equipment and supplies, whose representatives testified in this proceeding, did in fact compete in the resale of goods with respect to which the payments in issue were made, as well as with respondents' contention that the evidence herein will not support a finding that such payments for services were not made available on proportionally equal terms to respondent Foster Type's competitors.

A review of the record convinces us that the evidence identifying the products of particular suppliers with respect to which Foster Type and other distributors allegedly competed is so uncertain that any determination based thereon could not rise above the level of conjecture.[2] For this reason alone it is impossible to make any find-

[1] Hereinafter referred to as Foster Type.

[2] The record is replete with the testimony of distributors allegedly competing with Foster Type who stated merely that they purchased "products" from various suppliers also selling to Foster Type. Even in the few instances where a more explicit response was elicited from representatives of such distributors the evidence is too vague for any informed conclusion on the crucial issue of competition in the resale of goods involved in the alleged inducement of payments violative of Section 2(d). For example, one witness testified his concern purchased "platemaking equipment" from The Nuarc Co., whereas the evidence with respect to Foster Type's purchases from that supplier indicates merely that this respondent purchased "photo mechanical equipment" from Nuarc; there is no additional evidence in this record permitting a determination as to whether the designations "platemaking" and "photo mechanical equipment" are in fact synonymous.