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.

ing as to whether or not the requisite competition existed between Foster Type and other competitors in the resale of products involved in the alleged inducement of payments violative of Section 2(d). Furthermore, it would be mere speculation to infer that Foster Type and other distributors competed in the resale of products of the same supplier in the case of those distributor witnesses testifying merely in general terms that competition existed between them and Foster Type but whose testimony contains no reference to the supplier whose product was involved in such competition.

Another defect on the face of this record is the fact that representatives of certain distributors allegedly competing with Foster Type apparently did not have the knowledge to qualify them to testify with certainty as to whether Foster Type's suppliers involved in the alleged inducement of payments violative of Section 2(d) had made available to them payments for advertising or other promotional services.

Since we find that the evidence adduced thus far is inadequate for an informed determination as to whether competition existed between Foster Type and other distributors in the resale of the goods involved in the alleged inducement of payments violative of Section 2(d) and in view of our further finding that the testimony of certain distributors as to the nonavailability of payments for advertising or other promotional services is deficient because of inadequate knowledge on the part of certain of such witnesses, the initial decision is vacated and remanded to the hearing examiner for the purpose of receiving additional evidence on these points. Specifically, the examiner is directed to receive additional evidence identifying the products and lines of products purchased by Foster Type and its competitors from suppliers allegedly induced by respondents to make payments violative of Section 2(d), as well as evidence bearing on the issue of competition between Foster Type and other distributors in the resale of goods involved in the alleged violation of law. The examiner is further directed to receive additional testimony on the availability or nonavailability of payments for advertising or promotional services to distributors competing with Foster Type in the resale of such products.

Inasmuch as this case is being remanded for the purposes outlined above, no decision will be made at this time on the other issues presented in the appeal.

ORDER VACATING INITIAL DECISION AND REMANDING CASE TO HEARING EXAMINER

This matter having come on to be heard upon the appeal of respondents from the hearing examiner's initial decision, filed July 17, 1961; and

The Commission, for the reasons stated in the accompanying opinion, having determined that said initial decision should be vacated and the case remanded to the hearing examiner:

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

It is further ordered, That this case be remanded to the hearing examiner for further proceedings in conformity with the views expressed in the aforesaid opinion.

It is further ordered, That after such proceedings have been terminated the hearing examiner shall forthwith make and file, in accordance with the provisions of § 4.19 of the Commission's Rules of Practice, a new initial decision based on the record as then constituted.

By the Commission.