Docket 7780. Order and Opinion, Oct. 10, 1962

Denial of respondent's motion to disqualify the Chairman because of his association with the Senate Subcommittee on Antitrust and Monopoly.

MEMORANDUM OF CHAIRMAN DIXON IN RESPONSE TO RESPONDENT'S MOTION THAT HE WITHDRAW FROM THIS PROCEEDING

By motion filed September 14, 1962, this respondent has moved that I withdraw from this proceeding or, in the event that I should refuse to withdraw, that the Commission enter an order disqualifying me

from further participation. The motion is founded upon Sections 5(c) and 7(a) of the Administrative Procedure Act (5 U.S.C. §§ 1004(c) and 1006(a)), and "principles of law applicable to the disqualification of judicial officers generally; and the right of a respondent to a fair and impartial hearing guaranteed by the due process clause of the Constitution. . . ." The motion is supported by the affidavit of John E. F. Wood, of the law firm Dewey, Ballantine, Bushby, Palmer & Wood, of New York City, attorneys for respondent.

In substance, the affiant deposes that I am disqualified in this proceeding because, prior to becoming a member of the Commission, I served in an investigative capacity in a proceeding involving the facts now before the Commission. The affidavit correctly states that, shortly after the Commission entered its formal complaint herein, the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary of the United States Senate held public hearings at which it received evidence relevant to the charges made in this complaint. It is also true that I participated in said hearings as Counsel and Staff Director of the Subcommittee. However, as indicated by the public record, my participation consisted solely of rendering some slight assistance to the Chairman of the Subcommittee in the numbering of exhibits. The record does not show, and I do not recall, taking any more of an active role in the presentation of this matter to the Subcommittee.

It seems to me that this motion is founded upon a misconception of the role played by a Congressional investigating committee. Proceedings before such a committee are not in any sense adversary in nature. As everyone knows, the hearings are conducted for the sole purpose of supplying Congress with information so that it may determine the need for and the form of legislation. To that end it is the clear duty of the committee staff, including its counsel, to present to the committee all information available and pertinent to any question under investigation including the opposing views of both sides in any controversial matter. The committee's staff counsel is definitely not an advocate of any side of any question but acts properly only as the conduit whereby relevant material is presented to the committee.

Thus, it is my view that the Administrative Procedure Act has no proper application in these premises and I reject respondent's argument that I am disqualified from further proceedings herein as a matter of law.

But more important to me than respondent's legal argument is the implication implicit in this motion that I have prejudged the issue in this matter and am incapable of rendering an impartial decision. This respondent is entitled to a fair and impartial hearing and a de-

cision based solely upon the evidence in the record. And certainly if I should, for any reason, be unable to approach this decision completely free of bias I would be morally and ethically disqualified to participate. But if such were the circumstances and I had formed any sort of definite opinion concerning the facts in this matter, a motion to disqualify would be unnecessary as I would have, before this time, *sua sponte* withdrawn from participation. However, I have not formed any opinion with respect to this matter and can honestly state that I have a free and open mind with respect thereto. Therefore, I shall not withdraw and shall cast my vote in accordance with a decision to be arrived at after a careful study of the entire record.

In view of the circumstances, I shall not participate in the Commission's deliberation and decision upon the respondent's motion that the Commission enter an order directing that I be disqualified from further participation in this proceeding.

ORDER DENYING MOTION TO DISQUALIFY

Respondent filed a motion on September 14, 1962, to disqualify Commissioner Dixon from participating in this proceeding. The motion was addressed primarily to Commissioner Dixon, and alternatively to the Commission in the event that he should determine not to disqualify himself.

In an accompanying memorandum, filed this date Commissioner Dixon has determined, for reasons stated in such memorandum, not to withdraw from participation in this proceeding. To the extent that respondent's motion is addressed to the Commission, it fails to make a sufficient showing to justify so extraordinary an action by the Commission as would be involved in requiring one of its members to withdraw from participation in a proceeding on the ground of personal disqualification. See Order Denying Motions to Disqualify in *American Cyanamid Company*, Docket No. 7211, dated December 20, 1961.

It is ordered, That the motion directed to the Commission requesting the disqualification of Commissioner Dixon from participation in this proceeding be, and it hereby is, denied.

By the Commission, Commissioner Dixon not participating.

FOSTER PUBLISHING COMPANY, INC., ET AL.

Docket 7698. Order, Nov. 13, 1962

Interlocutory order broadening scope of remand and directing hearing examiner to receive allegedly new evidence.