MASON, AU & MAGENHEIMER CONF. MFG. CO. INC.

Docket 7733. Order and Opinion, Feb. 26, 1963

Interlocutory order placing on suspense—pending investigation of the current pricing practices of respondent's new parent company—proceeding charging a candy manufacturer with discriminating in price between certain vending machine operators and other customers, and with granting promotional allowances to certain retail food chains without making such payments available to their competitors.

ORDER OF THE COMMISSION PLACING THE PROCEEDING IN SUSPENSE

This matter having come before the Commission on the exceptions of counsel supporting the complaint to the initial decision of the hearing examiner and upon briefs and oral argument in support of said exceptions and in opposition thereto; and

The Commission having determined for the reasons stated in the accompanying opinion that the public interest would be best served by placing this proceeding on suspense, pending an investigation of the pricing practices of Bayuk Cigars, Inc., sole owner of respondent corporation:

It is ordered, That the adjudicatory proceedings pending against respondent, Mason, Au & Magenheimer Conf. Mfg. Co. Inc., in this matter be, and they hereby are, placed on suspense until further order of the Commission.

Commissioners Anderson and Higginbotham not participating.

OPINION OF THE COMMISSION

BY DIXON, *Commissioner:*

The complaint in this proceeding issued January 7, 1960, charging Mason, Au & Magenheimer Conf. Mfg. Co. Inc. (Mason), a candy manufacturer, with violation of Sections 2(a) and 2(d) of the Clayton Act as amended. Specifically, respondent was charged with discriminating in price between certain vending machine operators and other customers and granting promotional allowances to certain retail food chains without making such payments available to their competitors. The matter is now before us on the exceptions of counsel supporting the complaint to the initial decision dismissing this proceeding for lack of public interest.

The case-in-chief of counsel supporting the complaint was presented intermittently from May 2, 1960, to May 25, 1961. At the close thereof, Mason moved to dismiss the case on the ground that there was no public interest in continuing the proceeding since the challenged practices had been discontinued and because respondent had become subject to different management and control as a result

of the purchase of all of respondent's stock by Bayuk Cigars, Inc. In the alternative, Mason's motion stated that Count I of the complaint, relating to alleged violations of Section 2(a), should be dismissed for failure to establish a prima-facie case. Subsequently, on October 4, 1961, respondent requested the hearing examiner to take further testimony in support of the motion to dismiss the complaint for lack of public interest arising out of the alleged discontinuance of the challenged practices. By his order filed October 24, 1961, the hearing examiner denied respondent's motion to dismiss the complaint insofar as it requested dismissal on the ground no prima-facie case had been established but granted Mason the opportunity to produce evidence to indicate the "inability" of respondent to further pursue the practices challenged by the complaint. A hearing was held in February of 1962 for that purpose and the motion to dismiss the proceeding for lack of public interest in a continuation thereof was renewed. The examiner, in his initial decision filed May 8, 1962, granted the motion.

The hearing examiner, although concluding in his initial decision that a prima-facie case had been established by counsel supporting the complaint, dismissed the proceeding for lack of public interest on the ground that respondent had discontinued the challenged practices in good faith and that there was no likelihood of a resumption thereof. The evidentiary facts on which the hearing examiner based his conclusion that a recurrence of the allegedly illegal activities was unlikely were primarily the testimony of respondent's president, Fred E. Magenheimer, that Mason had discontinued the prices and promotional payments alleged to be unlawful as of May 1, 1959, some eight months prior to the issuance of the complaint. The hearing examiner also relied on the fact that Mason, on June 9, 1961, had become the wholly owned subsidiary of another corporation, Bayuk Cigars, Inc., which had acquired respondent's stock. In connection with this transaction, the examiner found that new directors and officers were elected to supervise and manage the activities of respondent and that a majority of both the new board of directors and the new slate of officers was composed of individuals from Bayuk, none of whom had had previous connection with respondent or Mason's practices challenged by the complaint. The examiner further found that on June 22, 1961, the new board of directors created an executive committee whose responsibility it was to keep informed of all pricing, merchandising and promotional activities of respondent and to insure the conformity of such practices with the applicable provisions of local, state, and federal laws.

Counsel supporting the complaint, who made numerous exceptions to the examiner's findings, disputes, among others, the examiner's

finding that respondent had voluntarily terminated the practices alleged to be unlawful as of May 1, 1959, some eight months prior to issuance of the complaint. Counsel supporting the complaint, viewing the matter from a different perspective, in effect contends that Mason's discriminatory pricing practices were only discontinued some three months after the inception of the investigation, if they were, in fact, discontinued on May 1, 1959. Counsel supporting the complaint also points to two Commission exhibits which showed on their face that respondent was contracting for special promotional payments in June and September of 1959 to Food Fair and Penn Fruit, respectively, to take place in the fall of that year.

On the basis of the record, we are not satisfied that we can realistically appraise the circumstances surrounding respondent's asserted discontinuance of the practices allegedly violative of the Sections 2(a) and 2(d) of the Robinson-Patman Act so as to determine whether these practices have been surely stopped. At any rate, we cannot adopt some of the examiner's reasoning in support of his decision. For example, we are not persuaded by the hearing examiner's conclusion that, since a consent cease and desist order under Section 2(d) is already outstanding against Bayuk, it is unlikely that this corporation will permit its wholly owned subsidiary, Mason, to embarrass it by practices violative of the Robinson-Patman Act. Nor can we accept the examiner's view that it is unlikely that further violations of law on the part of respondent can be anticipated, since he had ruled that the Commission had established a prima-facie case; the examiner reasoned that his finding of a prima-facie case constituted a warning to Mason that the evidence as presently viewed by him would support a finding of illegal pricing practices unless respondent managed to rebut such evidence and that respondent would be deterred by such warning.

We are not convinced that the public interest would best be served by dismissing the complaint at this time. The situation here is somewhat unusual in that there is evidence that the parent company, Bayuk, is attempting to insure that its subsidiary will comply with the Robinson-Patman Act. The effectiveness of Bayuk's attempts to insure compliance with the law can best be determined by examining its current pricing practices. This procedure will avoid the possibility of an unnecessary expenditure of the Commission's funds and man power in this proceeding. An investigation will, therefore, be initiated by the Bureau of Restraint of Trade concurrently with the issuance of this decision and this proceeding will be placed on suspense pending completion thereof.

Commissioners Anderson and Higginbotham did not participate in the decision herein.

COLUMBIA BROADCASTING SYSTEM, INC., ET AL.

Docket 8512. Order, Feb. 26, 1963

Order granting respondent permission to inspect certain special reports to Commission.

ORDER FOR EXAMINATION OF DOCUMENTS

Complaint counsel has requested permission to disclose to respondents' counsel the special reports filed by ABC-Paramount Records, Inc., and Decca Records, Inc., in response to a Commission order issued under Section 6(b) of the Federal Trade Commission Act. Complaint counsel intends to introduce these reports or information taken therefrom into evidence and disclosure to opposing counsel in advance of hearings would appear to be appropriate unless some overriding consideration making disclosure inimical to the public interest intervenes.

These special reports are part of a group of 56 received from phonograph record manufacturers. Complaint counsel previously requested and received permission to disclose the contents of the 54 reports then in his possession and is now requesting permission to accord similar treatment to these two belatedly filed reports.

Inasmuch as there appears no reason why the two reports here involved should be withheld and thus treated differently than the 54 others of which they are a part, the Commission has determined that they should be disclosed to respondents' counsel. However, the Commission has recently formulated and promulgated a procedure for such disclosures which is designed to preserve the secrecy of such reports to as great an extent as possible. This procedure is described and was utilized in our interlocutory Order For Examination Of Documents, issued February 11, 1963, *The Grand Union Company*, Docket No. 8458. It is the Commission's view that the disclosure of these special reports should be made pursuant to this new procedure.

From the date of service of this order, all of the 56 special reports and the information obtained therefrom shall be dealt with in strict accordance with the terms of this order.

Accordingly, it is ordered, That counsel for respondents be, and hereby are, granted permission to examine the special reports filed by ABC-Paramount Records, Inc., and Decca Records, Inc., upon the following conditions:

1. Counsel for respondents who have filed an appearance and are actually engaged in the defense of this proceeding may examine the aforesaid documents on the Commission's premises, and may have made at their own expense and may remove from the Commission's premises one photocopy of each such document, or may make and