STERLING DRUG, INC., ET AL.

Docket 8554. Order and Opinion, May 16, 1963

Order denying respondent's motions that Commission disqualify itself from adjudicating issues in Paragraph Seven (1) of the amended complaint.

Order Denying Motions

Respondents, by motions filed April 22, 1963, and April 23, 1963, having requested the Commission to declare itself disqualified to make any adjudication on the issues presented by Paragraph Seven (1) of the amended complaint herein; and

The Commission for the reasons stated in the accompanying opinion having determined not to declare itself disqualified:

It is ordered, That respondents' motions be, and they hereby are, denied.

Memorandum Opinion

By the Commission:

Respondents have filed motions requesting the Commission to declare itself disqualified to make any adjudication on the issue raised in Paragraph Seven (1) of the amended complaint and respondents' answer thereto. In substance, that issue is whether or not the United States Government endorsed or approved certain findings reached by clinical investigators who conducted a study referred to in respondents' advertising. Respondents state as grounds for their motion that the issue involves the conduct and credibility of the Commission.

In pertinent part, Paragraph Seven of our amended complaint states that "In truth and in fact: (1) The findings and conclusions reached by the clinical investigators * * * have not been endorsed or approved by the United States Government, * * *." Respondents apparently believe that in view of this statement, the Commission should not sit in judgment on the issue since, in their contention, it was the Commission that endorsed or approved the findings.

In support of their motion, respondents refer to "all of the proceedings and facts of record" in the case on appeal from the order of the District Court denying the Commission's motion for preliminary injunction pending disposition of the complaint herein.[1] Although respondents' reference to that case is somewhat vague, it is apparently their contention that the injunction proceeding indicates that the Commission had prejudged this issue and was thereby requesting the court to enjoin a practice which the Commission, of its own knowledge, had determined was in violation of the statute. To have any validity, this argument must rest on the premise that to obtain the injunction, the Commission was required to present evidence to the court sufficient to prove a violation. That this is not the proper legal principle to be applied in such a proceeeding was recognized by the District Court in its statement that "the Court in this proceeeding has only to resolve whether there was *reasonable cause* to believe that the alleged violation had taken place" (italics supplied).[2] Thus, it is not required in an application for a preliminary injunction that a full presentation of all of the facts with

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[1] Subsequent to the filing of the motion herein, the Court of Appeals issued its decision affirming the action of the District Court. 317 F. 2d 669 (2d Cir. 1963) [7 S.&D. 683].

[2] *Federal Trade Commission* v. *Sterling Drug, Inc., et al.*, 63 Civ. 335 (USDC SD NY, 1963). The Court of Appeals, in affirming the District Court's decision, applied this principle (Slip Opinion, p. 1968) [7 S.&D. 655].

reference to an issue be made to the court.[3] It is sufficient for the Commission to show a justifiable basis for believing that such a state of facts probably existed as reasonably would lead it to believe that respondents were engaging in the practice charged.[4] Respondents' position that the application for an injunction reflects a final decision by the Commission on this issue is in error and is rejected.

In further support of their motion requesting the Commission to declare itself disqualified, respondents refer to a statement by counsel supporting the complaint at the prehearing conference to the effect that he proposed to offer the quoted statement in Paragraph Seven of the complaint as proof of the charge. Respondents are mistaken if they assume, on the basis of the prehearing statement, that we will accept the allegation in Paragraph Seven as proof of anything. Obviously, the purpose of that statement is procedural. It is an allegation of fact which requires proof to establish a violation. Respondents may be assured that our decision will depend upon whether or not the facts of record concerning the study warrant a finding of Government endorsement. Their reliance on complaint counsel's statement in support of their motion to disqualify is misplaced.

We shall not declare ourselves disqualified to make an adjudication on the issue raised in Paragraph Seven (1) of the complaint. An appropriate order will be entered.

STANDARD OIL COMPANY (INDIANA)

Docket 7567. Memorandum and Order, May 22 and 31, 1963

Memorandum of Chairman in response to respondent's motion that he withdraw from case and Commission's order denying the motion to disqualify.

MEMORANDUM OF CHAIRMAN DIXON IN RESPONSE TO THE MOTION OF RESPONDENT STANDARD OIL COMPANY (INDIANA) THAT HE WITHDRAW FROM THIS PROCEEDING

Respondent Standard Oil Company (Indiana), by motion filed May 2, 1963, has requested that I withdraw from participation in this proceeding or alternatively, that the Commission determine that I be disqualified from such participation.

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[3] *Federal Trade Commission* v. *Koch*, 3 S.&D. 720 (1942), not reported in Federal Reporter. This principle was likewise recognized by the Court of Appeals in the injunction proceeding herein in its statement that:

"Our affirmance of the order of the District Court should not, however, be thought to render fruitless the Commission's activities in its pending administrative proceeding against Sterling Drug, Inc. Should further evidence there be adduced in support of its allegations of violation of the Federal Trade Commission Act, a cease and desist order may well be valid and its issuance properly sustained upon judicial review." (Slip Opinion, p. 1978.) [7 S.&D. 683, 695.]

[4] *Rhodes Pharmacal Co., Inc.* v. *Federal Trade Commission*, 191 F. 2d 744 (7th Cir. 1951) [5 S.&D. 301].

Respondent refers to the fact that complaint herein issued August 7, 1959, and that the hearing examiner filed his initial decision dismissing the complaint in October, 1962. Respondent then states that a speech I made on July 25, 1961, before the National Congress of Petroleum Retailers, Inc., demonstrates that I am strongly prejudiced against this respondent, that I have prejudged the case against respondent and that I cannot impartially consider the appeal in this proceeding. Respondent sets forth certain of my remarks in support of its motion.

These same remarks have prompted requests by two other companies that I withdraw from participation in proceedings in which they are respondents.[1] My decision was not to withdraw from participation in those proceedings. The memoranda which I filed in response to those motions express the meaning I then and now attribute to my remarks.

As I previously stated, my remark that the Commission had challenged the legality of the practices of certain oil companies, including this respondent, indicated only that the Commission had determined that there was reason to believe that the practices were in violation of law. The Commission itself made this determination, as required by statute, in issuing this complaint. Restating this determination does not preclude a consideration of "conditions of the trade practices under attack" which respondent believes "kept these practices within the range of legally permissible business activities." [2]

The complaint in this proceeding, as in both the *Goodrich* and *The Pure Oil Company* matters, was issued before I became a member of the Commission. I can state without reservation that I have not prejudged the issues in this case nor am I prejudiced against this respondent. My vote in this matter will be based on all of the facts contained in the record when the case is presented to the Commission for decision. Accordingly, it is my decision not to withdraw from participation in this proceeding.

I shall not participate in any deliberation or decision by the Commission on respondent's alternate request. (Dated May 22, 1963.)

ORDER DENYING MOTION TO DISQUALIFY

Respondent, by motion filed May 2, 1963, having requested that Chairman Paul Rand Dixon withdraw from participation in this proceeding, or, in the alternative, that the Commission determine that Chairman Dixon be disqualified from such participation; and

The Commission having determined that respondent has failed to show justification for departure from the Commission's practice of

[1] *In the Matter of B. F. Goodrich Company and The Texas Company,* Docket No. 6485 [pp. 1513, 1514 herein]. *In the Matter of The Pure Oil Company,* Docket No. 6640 [p. 1548 herein].

[2] *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683 (1948) [4 S.&D. 676].

treating disqualification as a matter primarily for determination by the individual concerned; and

Chairman Dixon having filed with the Commission a memorandum denying the existence of any grounds for his disqualification from participation in this proceeding:

It is ordered, That the motion directed to the Commission request-