INTERLOCUTORY, VACATING, AND MISCELLANEOUS ORDERS

TOPPS CHEWING GUM, INC.

Docket 8463. Order and Opinion, July 2, 1963

Order dismissing several appeals from hearing examiner's rulings as to subpoenas as being premature and remanding such appeals to hearing examiner for further consideration.

Opinion and Order Disposing of Motions

The Commission now has before it the following applications for permission to file interlocutory appeals from rulings of the hearing examiner, pursuant to Section 4.18 of the Rules of Practice, and appeals from the hearing examiner's grant or denial of motions to issue, limit, or quash subpoenas, pursuant to Section 4.15(e) of the Rules:

1. Complaint counsel's request, filed March 6, 1963, for permission to file an interlocutory appeal from:

(a) The order of the hearing examiner of February 27, 1963, granting leave to respondent to take depositions of chewing gum manufacturers, and

(b) The order of the hearing examiner of February 28, 1963, denying complaint counsel's motion for reconsideration of his previous orders of January 18, granting leave to respondent to take depositions of bubble gum manufacturers, and of November 13, 1962, granting leave to respondent to take depositions of companies using baseball picture cards.

2. Respondent's appeal, filed March 8, 1963, from the examiner's denial of its motion for leave to take depositions of certain wholesalers and retailers. (This appeal was improperly filed under Section 4.15 (e) of the Commission's Rules and will be treated as an application for permission to file an interlocutory appeal under Section 4.18.)

3. Respondent's appeal, filed March 12, 1963, from the hearing examiner's order of March 1, 1963, limiting certain subpoenas *duces tecum* addressed to bubble gum manufacturers to the production of documents necessary to refresh the recollection of the deponents and denying to respondent the right to inspect such documents.

4. Respondent's appeal, filed April 3, 1963, from the hearing examiner's order quashing subpoenas directed to Frank H. Fleer Corporation.

5. The appeal of Ford Gum and Machine Company, Inc., filed April 8, 1963, from the examiner's order of March 29, 1963, denying Ford's motion to quash a subpoena directed to it.

6. The appeal of Philadelphia Chewing Gum Corporation, filed April 16, 1963, from the hearing examiner's order of April 11, 1963, denying Philadelphia's application to limit or quash a subpoena *duces tecum* directed to it.

7. The appeal of respondent, filed May 9, 1963, from the hearing examiner's order of April 30, 1963, granting the motion of Salada Foods, Inc., to quash a subpoena directed to it.

8. Complaint counsel's appeal, filed June 11, 1963, from the hearing examiner's order of June 6, 1963, granting respondent's motion for leave to take depositions of certain wholesalers. (This appeal was improperly filed under Section 4.15(e) of the Commission's Rules and will be treated as an application for permission to file an interlocutory appeal under Section 4.18.)

Certain basic considerations are relevant to the disposition of all of these matters. The conduct of adjudicative proceedings is primarily the responsibility of the hearing examiners, and, as Sections 4.15(e) and 4.18 of the Commission's Rules of Practice make clear, an examiner's rulings upon evidentiary or procedural matters arising in the course of such proceedings will not be reviewed or disturbed in the absence of unusual circumstances. It is therefore the examiner's duty to exercise firm direction over adjudicative proceedings to insure that the Commission's policy of orderly, expeditious, and continuous proceedings is not thwarted by either deliberate or inadvertent actions of the parties. The need for positive control of proceedings involving the trial of complicated issues of fact cannot be too strongly emphasized.

> It is not practical to proceed in these cases as in a lawsuit of ordinary complexity and bulk; that is, to let the parties exhaust the cross fire of pleading, to conduct open-court pre-trial hearings, or to let counsel try the case as they please. The potential range of issues, evidence and argument is so great, and the necessities of adversary representation so compelling, that the activities of counsel will result in records of fantastic size and complexity unless the trial judge exercises rigid control from the time the complaint is filed. (Report of the Judicial Conference of the United States on Procedure in Anti-Trust and Other Protracted Cases, Sept. 26, 1951, p. 7.)

This admonition is repeated in the recent Handbook of Recommended Procedures for the Trial of Protracted Cases, 1961, 25 FRD 351, 383–84:

> The nature of the long or protracted case is such that strong control must be exercised from the time of filing to its disposition. The "remedy is for the trial

judge to take the case in hand at the outset, study it, and act as his best judgment dictates." Judge Prettyman coined the expression "Iron Hearted Judges" in an address before the New York State Bar Association in 1951. The phrases repeatedly found in the literature suggesting that the judge "take the case in hand at the outset," "gain control of the case in an early stage," take "full control of a case from the time of filing," and exercise "rigid control" all suggest that firmness and resolve [are] required of the trial judge in undertaking the pre-trial of the protracted case. "A judge must be willing to assume his role as the governor of a lawsuit. He can't be just the umpire."

Cf. First Draft of Recommended Procedures for the Trial of Protracted Cases Before Administrative Tribunals, Committee on Information and Education of the Judicial Conference of the United States, June 1962, pp. 10–11.

The exercise of this responsibility is particularly important in directing and limiting the scope of the deposition procedure afforded by the Commission's Rules. Properly used, depositions afford a valuable method for the preparation of the respondent's defense, thereby making possible the continuous hearings contemplated by the Commission's Rules. Cf. *L. G. Balfour Company*, Dkt. 8435, Order Directing Disclosure of Documents, May 10, 1963 [62 F.T.C. 1541]. At the same time, care must be taken that depositions are not substituted for the continuous hearings required by these Rules and that they are not used as a means to delay the disposition of the proceeding. Depositions may be taken only upon a showing of good cause. As we recently had occasion to point out in *Balfour*, *supra*, with regard to a similar requirement under Section 1.163 of the Commission's Rules, "It is neither necessary nor desirable to frame a firm rule of general application defining with particularity the elements of a showing of good cause * * *" In general, a determination of good cause for the taking of depositions requires a showing of the relevance and usefulness for defensive purposes of the information sought and of the need for eliciting it by deposition rather than by testimony at the hearings, together with appropriate consideration of claims of confidentiality, basic fairness to the parties, and the paramount need for avoiding delay.

Moreover, if the dangers of delay, confusion and an unwieldy record are to be avoided, depositions must be strictly limited to the questions actually in issue in the proceeding. This requires a clear delineation of the issues to be tried before depositions are permitted.

Definition of issues and control of discovery are closely interrelated and must be coordinated. * * * [D]iscovery cannot be kept within reasonable bounds until there is some understanding of the issues that must mark the bounds of possible discovery. And those bounds must be set early if confusion is to be avoided. The remedy suggested is that each side be required to submit promptly, in writing, its tentative statement of the issues. When these statements are discussed at a pre-trial conference, consideration can be given to limiting discovery, for

example as to subject matter, geographical area and period of inquiry. Initial discovery can then proceed within the bounds established. (First Draft of Recommended Procedures for the Trial of Protracted Cases Before Administrative Tribunals, Report of Committee on Information and Education of the Administrative Conference of the United States, June 1962, p. 14.)

Although the examiner here has required the filing of statements of issues and has entered an order, dated October 15, 1962, tentatively identifying the issues to be tried, the matters now before us indicate a need for further clarification before the scope of depositions can be determined. This is in part at least due to the narrow view indicated in the examiner's order as to his role in the definition of the issues in a proceeding of this sort. The examiner's duty under Sections 4.8 and 4.13(c) of the Commission's Rules of Practice is not limited to the passive recording of the assertions of the parties regarding the issues to be tried. He "must not be satisfied to accept counsel's statement of the issues without further analysis." Seminar on Procedures Prior to Trial, 20 FRD 485, 491 (1957). In a complicated proceeding the issues often cannot be deduced from the pleadings alone and the examiner must take an active role in their definition, overcoming the "reluctance of lawyers to be specific lest they thereby forego some advantage which might develop in the course of trial" or because of the lack of complete preparation of their case (Report of the Judicial Conference on Procedure in Anti-Trust and Other Protracted Cases, *supra*, p. 9).

The present case provides a good example of the need for affirmative action by the examiner to provide the clarity which is lacking in both the pleadings and the parties' statements of the issue. The allegations of the complaint are in terms of respondent's practices in the markets for (1) "bubble gum", (2) "picture cards", (3) "bubble gum packaged and sold in combination with baseball picture cards", and (4) "baseball picture cards sold separately". The allegations themselves, however, are relatively uncomplicated. They challenge as "unfair methods of competition and unfair acts and practices in commerce" in violation of Section 5 of the Federal Trade Commission Act, respondent's alleged practice of obtaining and enforcing contracts with baseball players granting respondent the exclusive right to use such players' pictures, names, and biographies on picture cards. The proposed order served with the complaint would require respondent to cease and desist from entering into such exclusive contracts for periods in excess of one year.

The trial of such an essentially simple case, directed primarily to the legality of certain exclusive arrangements, clearly should not require proof of the relevance and appropriateness of four separate and distinct markets. But, for whatever reason, complaint counsel has

made no effort to reduce this proliferation of issues and the resulting confusion has been embraced by respondent as a basis for its demands for extensive and time-consuming discovery.

The cutting of this knot and the isolation of the essential issues must thus be primarily the responsibility of the examiner, and it is he who must take the initiative. According to the complaint, respondent's exclusive arrangements have foreclosed to other companies the opportunity to obtain and use baseball picture cards. If, as the complaint implicitly alleges, such picture cards are sold both separately and in conjunction with other products, the legality of respondent's practices can be determined by examining their probable effect upon competition either in the sale of the picture cards themselves or in the sale of the products with which they are distributed. Thus, there are in this case two potential market issues: (1) whether baseball picture cards are sufficiently distinct from other kinds of picture cards or similar picture devices to make their foreclosure to others who might wish to sell them or use them for promotional purposes competitively significant; and (2) whether bubble gum, the product with which respondent distributed baseball picture cards, is sufficiently distinct from other gums, candies or confections to make competitively significant the foreclosure of a promotional device to other bubble gum manufacturers.

Depending upon what complaint counsel is prepared to prove, however, both of these market issues may be avoided. If complaint counsel is prepared to prove that baseball picture cards account for a sufficient share of all picture cards or devices so that respondent's exclusive arrangements foreclosed a substantial share of this larger market, the existence of a narrower market limited to baseball picture cards would be irrelevant, and depositions directed to this question should not be permitted. Similarly, if complaint counsel is prepared to prove, as the contract provision set out in the complaint indicates, that respondent's exclusive arrangements foreclosed the use of baseball picture cards to all producers of gums, candies and confections, the existence of a narrower market limited to bubble gum would be irrelevant, and depositions directed to this question should not be permitted.

The first step in narrowing the issues is to require complaint counsel to state what he intends to prove, and consequently what markets he intends to rely upon. Since the scope of the depositions which may be taken in this proceeding will of necessity depend upon the further delineation of the issues, the appeals from the examiner's rulings as to such depositions, which are now before the Commission, are clearly not ripe for determination at the present time. Accordingly,

It is ordered, That the applications for permission to file interlocutory appeals and the appeals from the examiner's rulings as to subpoenas, as set forth above, be, and they hereby are, dismissed as premature, and the questions as to the taking of depositions in this proceeding which are raised in such appeals be, and they hereby are, remanded to the hearing examiner for further consideration in the light of this opinion and order.

BECTON, DICKINSON & COMPANY

Docket 8493. Order, July 9, 1963

Order denying respondent's request for a conference for a settlement of this