C. H. ROBINSON COMPANY AND NASH-FINCH COMPANY

Docket 4589. Order and Memorandum, Nov. 4, 1963

Order denying respondent's request to dismiss investigational hearing into alleged violation of an earlier order, but granting a motion for a clarification of the order.

MEMORANDUM IN DISPOSITION OF PETITION FOR CLARIFICATION OF ORDER

Nash-Finch Company, by petition filed October 14, 1963, has requested the Commission to dismiss the investigational hearing initiated by the Commission's order of February 1, 1963 [62 F.T.C. 1486], on the ground that such investigation is not within the Commission's statutory right and authority. In the alternative, petitioner requests clarification of the order, asserting that it wishes to determine the precise nature and scope of the proceeding and the procedure to be followed in the conduct thereof.

The Commission's order of February 1, 1963, directs that a "public investigational hearing" be conducted to ascertain the extent to which C. H. Robinson Company and Nash-Finch Company may have violated the provisions of the order to cease and desist entered against these parties on January 6, 1947. It is well settled that the conduct of such a proceeding is within the authority of the Commission,[1] and petitioner's request for dismissal of the investigation is hereby denied.

We next consider the alternative request for clarification of the order. This order is in virtually the same language as that used in the Commission's order directing a formal investigation to determine compliance with the order to cease and desist in *Washington Fish & Oyster*.[2] As a part of its application to the Court for enforcement of the order to cease and desist in that case, the Commission filed a report in which it found, on the basis of its investigation, that the company had violated the order. The company moved to strike that part of the application pertaining to the investigation, including the filing of the record thereof in the enforcement action. The Court, after observing that Congress provided for the Commission to apply to a United States Court of Appeals for enforcement "if such person fails or neglects to obey a cease and desist order," pointed out that Congress must, therefore, have expected the Commission to first determine the "fact of

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[1] "We hold that by virtue of the statutes cited the Commission had authority to conduct the questioned formal investigation as to violations of the cease and desist order of March 25, 1946." *Federal Trade Commission* v. *Washington Fish & Oyster Co., Inc.*, 271 F.2d 42 (9th Cir. 1959).

[2] *Ibid.*

violation." Noting that the procedure to be followed by the Commission in determining the fact of violation is not spelled out in the Clayton Act, the Court declared that any reasonable and fair method or procedure not forbidden by statute would be appropriate. The Court then ruled that in the Commission's investigational hearing there had been compliance with all requirements of statute and rule concerning procedure in that the company had full opportunity to cross-examine all witnesses and examine all documents and had full opportunity to contest the issue of violation of the order by introducing evidence. Additionally, the Court held that this record constituted "pleadings, evidence, and proceedings before the agency" within the meaning of Section 2112(b) of Title 28, United States Code,[3] and that it was properly filed as a part of the enforcement action.

The order herein directs that the parties under investigation be accorded all of the rights and privileges provided in the Commission's Rules of Practice governing hearings in adjudicative proceedings[4] which may be appropriate in a formal investigation. This, of course, includes the rights referred to by the Court in *Washington Fish & Oyster*, as well as others, one of which is the right of interlocutory appeal. Thus, if one of the parties is of the view that a particular ruling by the examiner is not in accordance with the Commission's direction or is otherwise improper, the rules prescribe the procedure for obtaining a review of such ruling.

Since the issuance of its order herein on February 1, 1963, the Commission has made certain revisions in its Rules of Practice.[5] The rules revised include those specifically referred to in the order, and for the purpose of removing any question as to which rules now apply to this proceeding:

It is ordered, That the Commission's order issued herein on February 1, 1963, 62 F.T.C. 1486, be, and it hereby is, amended by striking "Rule No. 1.34" from line two on page 1488 thereof and substituting therefor "Section 1.35," and by striking "Section 4.13" in line six on page 1488 thereof and substituting therefor "Section 3.15."

Commissioner MacIntyre not concurring.

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[3] "(b) The record to be filed in the court of appeals in such a proceeding [to review or enforce an order of an administrative agency] shall consist of the order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, evidence, and proceedings before the agency, board, commission, or officer concerned, * * *."

[4] Rules of Practice, Procedures and Organization, 27 Fed. Reg. (1962), Part 4, Subpart E.

[5] Rules of Practice, Procedures and Organization, 28 Fed. Reg. (1963).

SUN OIL COMPANY

Docket 6641. Order, Nov. 12, 1963

Order reopening proceedings and remanding to hearing examiner to comply with directions of the Court of Appeals.

Order Reopening Proceeding and Remanding Case to Hearing Examiner

The United States Court of Appeals for the Fifth Circuit having on October 9, 1963 [7 S.&D. 191, 808], with the consent of the Commission, entered judgment remanding this proceeding to the Commission with specific directions, and the Commission having considered the matter,

It is ordered, That the proceeding be, and it hereby is, reopened.

It is further ordered, That the matter be, and it hereby is, remanded to Hearing Examiner Robert L. Piper for such further proceedings as are necessary to comply fully with the said judgment of the Court of Appeals.

It is further ordered, That the Hearing Examiner, upon completion of the hearings contemplated by the Court's said judgment, shall file with the Commission a revised initial decision based upon the additional evidence adduced.

OXWALL TOOL COMPANY, LTD., ET AL.

Docket 7491. Order, Nov. 13, 1963

Order granting respondent's request for a stay of the effective date of the order to preserve right of appeal.

Order Staying Effective Date of Final Order

This matter has come before the Commission on respondents' motion filed November 1, 1963, for a clarification of the final order issued September 9, 1963 [p. 566 herein] and a request for an extension of time within which to file their report of compliance as well as a request for a stay of the effective date of the order to preserve their right of appeal to the Court of Appeals pending Commission action on their motion. Respondents further request an opportunity to be heard before the Commission on this motion. The Commission has determined that under the circumstances the effective date of the order should be stayed, but that there is no necessity for oral argument on the issues presented by respondents' motion. Accordingly,

It is ordered, That the effective date of the Commission's final order be, and it hereby is stayed, until further order of the Commission.