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.

It is further ordered, That respondents be, and they hereby are, authorized to defer filing their report of compliance until sixty (60) days from the effective date of the final order in this proceeding.

It is further ordered, That the request of respondents for oral argument on their application be, and it hereby is, denied.

SHELL OIL COMPANY

Docket 8537. Order, Nov. 15, 1963

Interlocutory order denying respondent's motion requesting the Commission to disqualify itself from reviewing the initial decision on the ground that it had prejudged the matter.

Order Denying Motion To Disqualify Commission

Respondent has filed, on October 18, 1963, a motion requesting the Commission to disqualify itself from reviewing the initial decision issued by the hearing examiner on October 1, 1963, and from any further judicial or quasi-judicial participation in this proceeding other than to grant said motion, contending that the Commission had prejudged the matter even before the complaint issued, and that, therefore, respondent has been deprived of due process of law from the outset and will be further deprived of due process of law if the Commission reviews the hearing examiner's initial decision.

In support of its charge of prejudgment, respondent points to (1) our opinion in the matter of *American Oil Company*, Dkt. 8183 (June 27, 1962) [60 F.T.C. 1804], in which certain references were made to respondent's pricing practices; (2) the Commission's denial, on February 1, 1963, of respondent's motion for an order requiring counsel supporting the complaint to produce certain documents from the Commission's files [62 F.T.C. 1488]; (3) the Commission's denial, on September 6, 1963, of respondent's motion to dismiss the proceeding [p. 2206 herein]; (4) the hearing examiner's issuance, on October 1, 1963, of an initial decision finding respondent in violation of Sec. 2(a) of the amended Clayton Act (but not of the Federal Trade Commission Act); and (5) the fact that the Chairman of this Commission, testifying before a Subcommittee of the Committee on Appropriations, House of Representatives, 88th Congress, 1st Session, on January 22, 1963, in reply to questions regarding the Commission's proceedings against various oil companies, particularly *Sun Oil Co.* v. *Federal Trade Commission*, 371 U.S. 505 (1963) [7 S. & D. 621], stated: "We have other cases. We have had a case decided against the American Oil Co. and against Shell Oil Co., and Atlantic, and many others. *They are on the way.*" (Emphasis added.)

The Chairman's reference to this respondent, and to the Atlantic Refining Company, and to other unnamed oil companies in the quoted testimony before the Appropriations Subcommittee was intended to, and did, merely advise the Subcommittee of some of the oil company matters that were then in the process of litigation.

Respondent's challenge to the other actions cited are but an attack upon the administrative process itself. The Commission's opinion in *American Oil* was based upon the facts established by the evidence received in that case. That evidence, along with other evidence developed subsequently, gave the Commission "reason to believe" (Sec. 11(b) of the Clayton Act, 15 U.S.C. 21(b); Sec. 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b)) the respondent, Shell Oil Company, was also violating the law, and that a proceeding against it would be in the public interest. Such a preliminary determination does "not necessarily mean that the minds of its members [are] irrevocably closed on the subject of the [respondent's] practices" but simply forms the basis for the initiation of an adjudicative hearing at which the respondent is free to demonstrate, on the record, "by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which [it thinks keeps] these practices within the range of legally permissible business activities." *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 701 (1948). See also *Campbell Taggart Associated Bakeries, Inc.*, Dkt. 7938 (Memorandum, May 7, 1963, p. 13) [62 F.T.C. 1498, 1506]. Certainly the Commission is not precluded from bringing an action to suppress an apparent violation of law merely because part of the information that forms the statutory prerequisite for such an action came to the Commission's attention in the course of one of its own adjudicative proceedings.

The Commission's denial of the two motions referred to by respondent was in accordance with well-settled principles of law. The papers respondent sought to secure from our files were not only lacking in any materiality or relevance to the issues, but were of the most confidential nature. The effort to secure them was, as the Commission pointed out in its denial of the motion, "an obvious attempt to probe the mental processes of the Commission, a practice universally condemned by administrative agencies and the courts." *E.g.*, *United Airlines, Inc.* v. *Civil Aeronautics Board*, 281 F. 2d 53, 56 (D.C. Cir. 1960).

Similarly, respondent's motion to dismiss was denied for equally sound reasons, all of which were set forth at considerable length in the Commission's order of September 6, 1963 [p. 2206 herein].

The fact that the hearing examiner has issued an initial decision finding that respondent has discriminated in price in violation of

Section 2(a) of the amended Clayton Act, but dismissing the complaint as to the charge that it has also engaged in resale price fixing in violation of Section 5 of the Federal Trade Commission Act, in no way suggests that the Commission has prejudged the matter. In conformity with our prescribed procedures, respondent has filed its notice of appeal to the Commission from the findings, conclusions, and order of the hearing examiner. In briefing and arguing the case before us, respondent will have ample opportunity to demonstrate any alleged prejudgment or impropriety in the proceeding. And in the event the Commission's decision should be adverse to respondent, respondent will then have an absolute, statutory right to a review of the proceeding in the appropriate United States Court of Appeals.

Respondent having advanced no reason why the Commission should regard itself as disqualified from deciding this case, and the Commission itself being aware of none:

It is ordered, That respondent's motion be, and it hereby is, denied.

Commissioner Elman not participating.