Docket 8463. Order, August 1, 1963

Order Denying Motion To Dismiss Complaint

Respondent has filed on July 23, 1963, a motion requesting the Commission to dismiss the complaint in this proceeding as not in the public interest and to conduct a supplemental investigation to determine whether a complaint against respondent would be in the public interest. In support of this extraordinary motion, respondent contends that the

*This order was made effective on Sept. 16, 1964.

complaint "never contained a proper description of the markets in which the violations were alleged" and that "new and changed competitive activities which have occurred since the issuance of the complaint . . . show that the Commission cannot and does not know whether the complaint is in the public interest."

Under the statute, Commission proceedings are initiated only when found to be in the public interest. It does not follow that, at every succeeding stage of the proceeding as the issues raised by the complaint are sharpened by pre-trial procedures and as changes in the industry may take place, the matter of "public interest" should be continually reexamined by interlocutory applications to the Commission. To entertain such applications would result in dragging the proceedings out interminably, and would only defeat the public interest in prompt disposition of the case. Moreover, although the matters urged here by respondent may be relevant to an ultimate determination as to its alleged violations of law, they clearly have no relevance to any issue of "public interest" independent of the question of violation, and are therefore not properly addressed to the Commission while the matter is before the hearing examiner.

It is ordered, That respondent's motion to dismiss the complaint be, and it hereby is, denied.

Commissioner Anderson not concurring for the reason that he is in favor of dismissing the complaint.

DUOTONE COMPANY, INC., ET AL.*

Docket C-87. Order and Opinion, Aug. 19, 1963

Order granting respondents leave to file briefs and present oral argument on their motion to reopen and modify a consent order regarding the foreign origin of phonograph needles.

On Request for Oral Argument and Motion for Modification of Consent Order by the Commission

This matter is before us on the motion and affidavit of respondents to amend the consent order in this proceeding filed June 10, 1963, which is opposed by the answer of complaint counsel filed June 18, 1963. By letter of June 19, 1963, respondents' counsel requested permission to appear before the Commission and present an oral argument in support of the motion.

Respondent Duotone Company and the individual respondents, Stephen Nester and Virginia Nester, are primarily engaged in the

*Respondents' request for modification of the consent order of Feb. 28, 1962, 60 F.T.C. 453, denied but clarified by order of Feb. 17, 1964.

manufacture, importation and distribution of phonograph needles and accessories to wholesalers or distributors for resale to retailers. The complaint in this matter issued February 28, 1962 [60 F.T.C. 453], and alleges that respondents engaged in practices violative of Section 5 of the Federal Trade Commission Act, by not disclosing the origin of their products, misrepresenting the composition of their phonograph needles, engaging in deceptive pricing practices and misrepresenting the guarantees on their products. On the same date, the Commission accepted a consent agreement disposing of the allegations of the complaint.

The issues raised by respondents' motion relate to the construction of the first three paragraphs of the order which require respondents to disclose the foreign origin of their products to prospective purchasers on the packages of their products as well as in the display of point of sale material used to promote the products in question, and in any case to refrain from selling in such a manner as not to clearly disclose the place of origin of their products to prospective customers.

In their affidavit respondents argue that the Commission's compliance division has improperly construed the scope of the order. Duotone interprets the phrase in the order "any such product" to mean a "completely finished imported article sold in the same condition as imported." Duotone argues that the term "products" in the order does not encompass articles made of parts originating in various countries and assembled in the Duotone factory or needles made in the Duotone factory of foreign as well as domestic parts. The consent agreement entered by respondents has the standard provision that the complaint may be used in construing the terms of the order. We have examined the allegations of the complaint and these on their face apparently relate only to finished phonograph needles.[1]

In the light of the foregoing, we are persuaded a serious question exists whether the term "any such product" in the order covers phonograph needles made wholly or in part of foreign components assembled in the United States. We will therefore grant the request of respondents for oral argument on this issue. Both complaint counsel and respondents' counsel should therefore be prepared to enlighten the Commission as to the proper scope of the term "any such product" as used in paragraphs 1 to 3 of the order.

Counsel for both sides, in addition, should be prepared to give the Commission their views on whether the proceeding should be reopened and the complaint amended in the event it is decided that the consent

[1] "PARAGRAPH SIX: Said statements and representations were and are false, misleading and deceptive. In truth and in fact:

1. All of said phonograph needles are not manufactured in the United States. Some of said phonograph needles are manufactured in Japan or other foreign countries and this fact is not clearly or adequately disclosed so as to give the purchasing public notice of the countries of origin of said phonograph needles."

order in this proceeding does not encompass the practices described in respondents' affidavit namely the sale and distribution of articles made wholly or in part of components originating in foreign countries and assembled in the Duotone factory.

Finally, counsel for both sides should be prepared to discuss whether the representation on respondents' wall charts "Needles Of Foreign Origin Will Be So Designated On The Individual Packages" adequately discloses the foreign origin of either completely finished imported needles or of needles constituted of foreign parts to varying degrees, but assembled in respondents' factory.

An order will therefore issue granting respondents and complaint counsel permission to file briefs and present oral argument on the issue of whether the proceeding should be reopened for modification of the order and whether it should be reopened for the purpose of amending the complaint and the reception of evidence.

Commissioner Elman did not participate in the decision of this matter.

Order Granting Leave to File Briefs and Present Oral Argument on Reopening Proceeding

Respondents having filed in motion requesting modification of their consent order and counsel supporting the complaint having filed an answer in opposition thereto whereupon respondents filed a request for oral argument on their motion; and

The Commission having decided for the reasons stated in the accompanying opinion that it will entertain briefs and listen to oral argument on the issue of whether the case should be reopened for modification of the order and/or whether it should be reopened for amending the complaint and further proceedings;

It is ordered, That opposing counsel may file briefs within thirty (30) days from the date of the service of this order upon them.

It is further ordered, That opposing counsel may present oral argument on the date set by the Secretary of the Commission.

Commissioner Elman not participating.

SHELL OIL COMPANY

Docket 8537. Order, Sept. 6, 1963

Order denying respondent's motion to dismiss the case or postpone the filing of the initial decision.

Order Denying Motion

This matter is before the Commission for consideration of respondent's "Motion To Dismiss Without Prejudice Or, In The Alternative,

To Postpone Time For Filing The Hearing Examiner's Initial Decision," originally filed with the hearing examiner but certified by him to the Commission. Complaint counsel has filed an answer, urging the Commission to deny respondent's motion.

Specifically, respondent's motion urges the Commission to dismiss this proceeding without prejudice to referral of the matter to the Attorney General for institution of a proceeding in a United States district court having concurrent jurisdiction of the subject matter and party. As grounds for the granting of such unusual relief, respondent charges that the Commission is disqualified from deciding the merits of this proceeding by statements in its opinion in the *American Oil Company*, Docket No. 8183, issued June 27, 1962 [60 F.T.C. 1786, 1804], and in the statements of Commission counsel contained in the Commission's brief filed before the Seventh Circuit in *American Oil Company* v. *Federal Trade Commission*, No. 13,879. It is urged that said statements indicate that the Commission has prejudged that certain prices granted by Shell to dealers in Smyrna, Georgia, in October 1958, were unlawful.

It should be unnecessary to point out that pursuant to the judicial process in general and the Administrative Procedure Act in particular, the Commission is required to reach its decisions solely upon the basis of the record before it. This was done in the *American* case and it will, of course, be done in this case. Shell Oil Company was not a respondent in the proceeding against the American Oil Company, and evidence in defense of its prices was not there introduced. The facts surrounding respondent Shell's pricing have been given full an extensive airing in this proceeding, and the Commission's decision will be based on them alone.

Moreover, this proceeding is not only concerned with Shell's operations in Smyrna, Georgia, but encompasses alleged price discriminations in Seattle, Washington. It also involves a separate charge of price fixing in violation of Section 5 of the Federal Trade Commission Act. Respondent's motion presents no grounds whatsoever for dismissing these charges. Splitting up the complaint charges between the Commission and a United States district court may avail respondent only additional expense, for an order requiring it to cease discriminating in price may be justified by its activities in Seattle, Washington, alone. Of course, the Commission at this juncture makes no finding whatsoever as to the lawfulness of Shell's pricing and related activities.

Alternatively, respondent asks the Commission to postpone the time within which the hearing examiner's initial decision must be filed until the United States Court of Appeals for the Seventh Circuit has rendered its decision in the *American Oil Company* matter. It is urged that the hearing examiner has been placed in an untenable position

by the circumstances surrounding the Commission's opinion and appeal in the *American* case and that he has been placed in "an atmosphere not conducive to the exercise of impartial and independent judgment."

This argument overlooks the point that the hearing examiner, as the Commission, is required to render his decision solely upon the basis of the record before him. As a matter of fact, the hearing examiner has already indicated on the record that he does not consider himself bound by any of the Commission's findings in the *American Oil Company* case and that he is going to make an independent judgment based upon the facts before him. By so stating, the examiner was announcing his recognition of his clear duty to arrive at an initial decision without consideration of any extrinsic materials, as required by Section 7(d) of the Administrative Procedure Act.

The fact that a decision is pending in the circuit court in a proceeding involving facts common to this proceeding does not place the examiner in an untenable position and whatever affect his initial decision may have upon the appeal now pending before the United States Court of Appeals for the Seventh Circuit is no concern of this respondent.

It is the Commission's conclusion and decision that the respondent has not shown good cause or adequate grounds for the relief which it requests and, therefore:

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

Commissioners Anderson and Higginbotham concurring in the result, and Commissioner Elman not participating.

OXWALL TOOL COMPANY, LTD., ET AL.