However, considering the motion for a stay of proceedings in this matter as properly before it, the Commission finds that good and sufficient cause for such a stay has not been shown. Accordingly,

*It is ordered*, That respondents' requests for permission to file an interlocutory appeal be, and they hereby are, denied.

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## THOMASVILLE CHAIR COMPANY

*Docket 7273. Order and Opinion, Oct. 22, 1963*

Order dismissing complaint upon remand by the Fifth Circuit of order prohibiting the passing on of a reduction in brokerage to favored buyers, without acquiescence by the Commission on the Court's opinion.

### Memorandum Accompanying Final Order

By the Commission:

This matter is before the Commission upon remand from the United States Court of Appeals for the Fifth Circuit. We read the Court of Appeals' decision as holding that the Commission, in a case in which it is alleged that a seller has violated Section 2(c) of the Clayton Act by passing on a reduction in brokerage to favored buyers in the form of a discriminatory price reduction, may not rely solely on the fact that the seller has paid less brokerage on the sales at the lower price, but must establish a causal relationship between the reduced brokerage and the reduced sales price. The Commission does not, however, acquiesce in the opinion of the Court of Appeals as such, which contains dicta with which the Commission does not necessarily agree. Since the Commission does not believe that the public interest would be advanced by a further proceeding to establish whether respondent has violated Section 2(c), the complaint must be dismissed.

### Order Dismissing Complaint

The United States Court of Appeals for the Fifth Circuit having, on August 14, 1962 [7 S.&D. 515], entered its judgment setting aside the Commission's order to cease and desist and remanding the matter to the Commission for further proceedings not inconsistent with its opinion of the same date, and the Commission after full consideration having determined that the complaint should be dismissed for the reasons stated in an accompanying memorandum;

*It is ordered*, That the Commission's complaint be, and it hereby is, dismissed.

# L. G. BALFOUR COMPANY ET AL.

*Docket 8435. Order and Opinion, Oct. 22, 1963*

Interlocutory order denying respondents' request for appeal from hearing examiner's denial of motion for disclosure of additional "missing" documents and for subpoena *ad testificandum* to complaint counsel.

## INTERLOCUTORY OPINION OF THE COMMISSION

By DIXON, *Commissioner:*

This matter is before the Commission as to (a) a request by respondents, filed September 5, 1963, for permission to file an interlocutory appeal from the hearing examiner's order denying their motion to compel compliance with the Commission's order of May 10, 1963 [62 F.T.C. 1541], directing disclosure of documents; and (b) an order of the hearing examiner filed September 16, 1963, certifying to the Commission a motion by the respondents for issuance of a subpoena *ad testificandum* for the appearance of complaint counsel in regard to the furnishing of documents under the aforesaid Commission's order. Both the request for interlocutory appeal and the order of certification relate to essentially the same subject matter.

The issues here raised developed over the Commission's order of May 10, 1963, above referred to, directing disclosure of certain documents in the Commission's files. Respondents, in their original request for access to the materials, made only the most general description of what they were seeking, and the hearing examiner, in referring the question to the Commission, noted "In sum, what counsel for the respondents seeks is a broad fishing license to examine everything in the Commission's files with the hope that something *may* be found that in some way may be used to aid him in the presentation of his defense." Nevertheless, the Commission granted broad access to records in the Commission's files, reasoning that respondents were trying to recover only their own documents for which they had not retained copies and that to deny such a request probably would cause some hardship.

Complaint counsel, pursuant to the Commission's order, made a thorough search of the Commission's files and turned over what they believe to be all the documents called for under the Commission's order. They assert that they have reviewed all the Commission files in their possession which might in any way contain documents which the Commission directed to be disclosed to respondents and that in addition they requested Commission employees responsible for cataloging, indexing and maintaining Commission records to conduct a

thorough and exhaustive search of Commission files for any and all material relating to respondents and to give it to complaint counsel. Items selected from this material covered by the Commission's order, some 900 or more exhibits, were thereafter turned over to the respondents. Complaint counsel, in their answer to respondents' motion to compel compliance, state: "Complaint counsel have fully complied with the Commission's order of May 10th. There has been no withholding or suppression of documents."

Among the documents handed over to the respondents are a few which contain references indicating that the Commission apparently had in its possession at one time certain other documents which were not made available to the respondents. It is as to these missing documents that respondents have raised the issues now before us. Complaint counsel advises that further additional search was made by them to uncover the missing documents but they were not to be found. They state flatly that "Such material simply cannot be located."

Respondents were given broad access to records in the Commission's files even though "there was a serious question" whether they had at that time made the necessary showing of "good cause" as required by Commission procedure. The disclosure was ordered for the respondents' convenience, since the request involved a large number of respondents' own records collected over a long period of time, copies of which had not been retained by them. It is clear that the Commission ruling referred only to a large mass of generally described records and did not pass upon the materiality or relevance to respondents' defense of any specific record. Moreover, there is no question that the Commission's order dealt only with records available in its files. It reads in part:

> IT IS ORDERED that complaint counsel have copies made of all documents *in the Commission's files.* * * * (Emphasis supplied.)

Respondents assert that the narrow issue here is whether they can be accorded their basic rights to a fair and impartial trial when documents relevant and material to the issues in the proceeding have been lost or destroyed after having been given into the custody of the Commission. Respondents cite the cases of *United States* v. *Consolidated Laundries Corporation*, 291 F. 2d 563 (2d Cir. 1961), and *United States* v. *Heath*, 260 F. 2d 623 (9th Cir. 1958), to support their position that they have been prejudiced, but the facts in those cases are so different from the facts herein that they cannot be considered controlling precedents.

Although we refrain from deciding the issue at this time, we doubt that respondents can show they will be in any way prejudiced by the unavailability of the records. For one thing, it appears that the documents cover matters about which available witnesses can testify or about which information can be obtained from other sources. Moreover, so far as we can determine, no part of complaint counsel's case has been built on the missing records. The precise way in which the respondents are allegedly prejudiced by the unavailability of the documents has not been made clear. Respondents are not foreclosed from raising this issue at a later time, if necessary, and we do not see that any prejudice will result to them by deferring the decision in the matter. Under § 3.20 of the Commission's Rules of Practice, the interlocutory appeal will not be granted unless a showing is made of extraordinary circumstances where an immediate decision by the Commission is clearly necessary to prevent detriment to the public interest. Since no such showing has been made here, respondents' request for permission to file such appeal will be denied.

As to the subpoena *ad testificandum*, respondents are apparently seeking to make an issue of the circumstances of the disappearance of the documents. We have no grounds for doubting the assertions of complaint counsel that everything has been done which could be done to locate such records. Since they simply cannot be found, we see no reason for further inquiry into the matter. We will therefore deny respondents' request for the issuance of a subpoena directed to complaint counsel.

ORDER DENYING RESPONDENTS' REQUEST FOR INTERLOCUTORY APPEAL AND SUBPOENA

This matter having come on to be heard upon respondents' request for permission to file an interlocutory appeal from an order of the hearing examiner denying their motion for disclosure of documents and upon an order of the hearing examiner certifying respondents' request for a subpoena *ad testificandum* directed to complaint counsel; and

The Commission, for the reasons appearing in the accompanying opinion, having determined that both requests should be denied:

*It is ordered*, That respondents' request for permission to file an interlocutory appeal, filed September 5, 1963, be, and it hereby is, denied.

*It is further ordered*, That respondents' request for a subpoena *ad testificandum* directed to complaint counsel be, and it hereby is, denied.

# 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.*