BAKERS OF WASHINGTON, INC., ET AL.

Docket 8309. Order and Opinion, May 21, 1964

Order reopening proceeding and remanding case to hearing examiner to permit respondent an opportunity "to show the contrary" of facts officially noticed in the opinion of Feb. 28, 1964 (64 F.T.C. 1079).

Order Reopening Proceeding and Remanding Case to Hearing Examiner

The Commission having considered respondent Continental Baking Company's petition of April 27, 1964, for reconsideration or, in the alternative, for reopening to permit respondent "to show the contrary" of the facts officially noticed in the Commission's decision of February 28, 1964 [64 F.T.C. 1079], and having determined that the petition for reopening should be granted to the extent set forth in the accompanying opinion, and that determination of the petition for reconsideration should be reserved until the hearings on remand have been completed:

It is ordered, That the proceeding be, and it hereby is, reopened for the limited purpose set forth in the accompanying opinion.

It is further ordered, That the matter be, and it hereby is, remanded to Hearing Examiner Raymond J. Lynch for such further proceedings in accordance with the accompanying opinion.

It is further ordered, That the hearing examiner, upon completion of the said hearings, shall certify the record and his recommendations to the Commission for final disposition of the proceeding.

It is further ordered, That the petition for reconsideration be, and it hereby is, reserved pending completion of the hearings on remand.

Commissioner Elman not concurring, and Commissioner Reilly not participating.

OPINION ON PETITION FOR RECONSIDERATION OR REOPENING

By DIXON, *Commissioner:*

The Commission issued its decision and order in this matter on February 28, 1964, directing respondents to cease and desist fixing bread prices. One of the issues determined there was whether the unlawful acts and practices had occurred in interstate commerce. Resolving that question in the affirmative, the Commission took official notice of certain facts concerning the nature of respondent Continental Baking Company's business that had been developed in another and earlier proceeding before this agency, *In the Matter of Continental Baking Company*, Dkt. 7630 (1963) [63 F.T.C. 2071].

As we noted in our earlier opinion in the instant case, the facts noticed from the record of the prior proceeding appeared to have been undisputed: "They were taken from another record involving the same party; they were presented there through the party's own officers, employees, and written records; they were adduced there for the same purpose as here (to show interstate commerce); and cross-examination and opportunity to present rebuttal evidence were afforded. These facts were then found by the examiner and set forth with great particularity in his initial decision in that case (Dkt. 7630, initial decision filed March 8, 1963, particularly pp. 11–21) [63 F.T.C. 2071, 2084–2092]. On its appeal to the Commission, Continental challenged the examiner's legal conclusion that those facts evidenced interstate commerce, but made no effort to dispute any of the factual findings themselves. We could, of course, remand the instant case for the taking of this same evidence a second time. And on a proper showing of the necessity therefor, we would do so. But until such a showing has been made, we are guided by the principle that 'the intelligent functioning of the administrative process demands that the Commission [ICC] be not required to indulge in lengthy evidentiary recapitulations of

matters just decided in a companion case.' *Crichton* v. *United States*, *supra*, 56 F. Supp. at 880." *Bakers of Washington, Inc., et al.*, Dkt. 8309 (February 28, 1964), at 14–15, n. 10 [64 F.T.C. 1079, 1118].

Section 7(d) of the Administrative Procedure Act provides: "Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary." In accordance with this provision, we said in our earlier opinion in this matter: "Section 3.25 of our Rules of Practice authorizes the filing of a 'petition for reconsideration' of any Commission decision. Should Continental desire to challenge any of these noticed facts, it will thus have an opportunity to do so in such a petition for reconsideration, specifying those particular factual statements it wishes to dispute, and setting forth, preferably by affidavits of knowledgeable persons, the true facts in those particulars." *Id.*, at 14, n. 10 [64 F.T.C. 1118].

On April 27, 1964, respondent Continental filed a "Petition for Reconsideration or Reopening," accompanied by a 2½ page "Memorandum in Support of Petition for Reconsideration [1] or Reopening." The latter declares that "many of the facts which the Commission has lifted from another record are inaccurate when applied to Continental's participation in the Seattle market." Then follows a conclusory recitation of the things that its Seattle plant does or is responsible for. None of them appear to be inconsistent with the facts officially noticed by the Commission. None of the facts officially noticed by the Commission are specifically challenged. Respondent has not seen fit to accept our invitation to tell us succinctly, "by affidavits of knowledgeable persons, the true facts in those particulars."

In these circumstances, we think it would not be unreasonable to conclude that respondent Continental has been afforded, but has declined to accept, its "opportunity," under Section 7(d) of the APA, "to show the contrary" of the officially noticed facts. We do not understand this provision as meaning that, in every case of official notice, "the opportunity to show the contrary" contemplates a hearing; as we understand the requirements here, the type of rebuttal opportunity to be afforded may be, and in fact should be, tailored in accordance with the nature of the facts officially noticed. "The cardinal principle of fair hearing is * * * that parties should have opportunity to meet in the

[1] In support of its petition for reconsideration, respondent challenges our right to take official notice at all. This argument was fully answered in our prior opinion. Secondly, respondent contends the complaint should be dismissed because we allegedly "relied upon testimony stricken from the record by the Examiner and not admissible against Continental * * *," citing pages 30–31 and 33 of our prior opinion. Those three pages contain 19 separate references to the trial record; we are not told which of those 19 citations refer to stricken evidence. We have re-examined each of them, however, and have been unable to find any instance in which any of the evidence relied upon in our opinion had been stricken by the hearing examiner.

appropriate fashion all facts that influence the disposition of the case. What is the appropriate fashion depends upon three main variables—how far the facts are from the center of the controversy between the parties, the extent to which the facts are adjudicative facts about the parties or legislative facts of a general character, and the degree of certainty or doubt about the facts. Nothing short of bringing the facts into the record, so that an unabridged opportunity is allowed for cross-examination and for presentation of rebuttal evidence, will suffice for disputed adjudicative facts at the center of the controversy. Debatable and critical legislative facts probably need not always be brought into the record, but such facts should be subject to challenge through briefs and arguments, and the tribunal should have a discretionary power to determine whether cross-examination is appropriate in the circumstances." Davis, 2 *Administrative Law Treatise* 400, 432 (1958). See also Davis, "On Official Notice," Proceedings of the Federal Hearing Examiners' First Annual Seminar 13, 21–22 (September 23–25, 1963). The facts officially noticed in this case—dealing largely with the routine, internal management procedures of the corporation, and already developed on another adjudicative record through the testimony of respondent's own officials—would see, at first blush, to be capable of prompt resolution on affidavits alone.

However, we are mindful of the fact that the taking of official notice of such facts is a relatively novel procedure. While we are anxious to expedite our proceedings as much as possible, we think it appropriate to err here, if error it be, on the side of excessive fairness.

Respondent Continental will be permitted an opportunity to "show the contrary" of any or all of the facts officially noticed in our opinion of February 28, 1964. For this purpose, and for the purpose of permitting counsel supporting the complaint to rebut any of the evidence adduced by respondent,[2] the proceeding will be reopened with directions to the hearing examiner to hold, as expeditiously as possible, such further hearings as may be necessary to fully determine the accuracy of the facts heretofore noticed. At the conclusion of such hearings, the record and the examiner's recommendations shall be certified to the Commission for final disposition of the matter. The effective date of the Commission's order of February 28, 1964, will be stayed pending such final determination by the Commission.

Commissioner Elman did not concur, and Commissioner Reilly did not participate.

[2] Respondent has requested a further hearing in Seattle only. Since counsel for respondent, in the original proceeding in this case, questioned whether its Seattle plant manager "was competent to testify as to what goes on internally in Rye, New York," Dkt. 8309, tr. 424–425, counsel supporting the complaint must have an opportunity to rebut respondent's evidence on remand, if necessary, by calling respondent's regional and headquarters officials, in California and New York, respectively.

IN THE MATTER OF

UNITED STATES RUBBER COMPANY

Docket 8586. Order, May 28, 1964

Remanding of initial decision to hearing examiner for ruling on respondent's motion to correct transcript.

ORDER REMANDING PROCEEDINGS

On March 24, 1964, the presiding examiner filed his initial decision in the above case. Subsequently, on May 19, 1964, the examiner received a motion by respondent, addressed to him, to correct the transcript of the proceedings in numerous respects. Since Section 3.21 (d) (2) of the Commission's Rules of Practice provides that "except for the correction of clerical errors, the jurisdiction of the hearing examiner is terminated upon the filing of his initial decision," the examiner has referred respondent's motion to the Commission. Upon consideration of respondent's motion by the Commission,

It is ordered, That the proceedings be, and they hereby are, remanded to the examiner for the sole and limited purpose of ruling on respondent's motion to correct transcript.

O. K. RUBBER WELDERS, INC., ET AL.

Docket 8571. Order, June 4, 1964

Order granting leave to reopen consent order negotiations and present results to Commission by June 11, 1964.

ORDER GRANTING LEAVE TO REOPEN CONSENT ORDER NEGOTIATIONS

On June 1, 1964, respondents in the above-entitled case filed with the Commission a motion for leave to reopen consent order negotiations. Hearings are now scheduled to commence on June 16, 1964, and respondents request that they be postponed pending the further negotiations. Respondents state that the Commission's recent acceptance of a consent order in *Kaiser Jeep Corporation*, Docket No. C–739 [65 F.T.C. 562] and the Seventh Circuit's affirmance of the Commission orders in *Goodyear Tire and Rubber Company* v. *F.T.C.*, Docket Nos. 13339 and 13340, constitute changed circumstances in the light of which consent negotiations can again be profitably undertaken. Complaint counsel, on June 1, 1964, filed an answer stating that they do not oppose the motion for leave to reopen the consent negotiations but that they do oppose any postponement of the presently fixed hearing date. Complaint counsel urge that respondents' motion be granted only on the condition that the result of any such negotiations be presented to