IN THE MATTER OF

FRITO-LAY, INC.

Docket 8606. Order, July 13, 1964

Order remanding to hearing examiner the issue of the admission of the truth of statements in certain documents submitted by respondent.

ORDER REMANDING PROCEEDINGS TO THE HEARING EXAMINER FOR FURTHER CONSIDERATION

The Commission has before it an application by respondent for leave to file an interlocutory appeal from a ruling of the hearing examiner. During the course of the pretrial proceedings, complaint counsel served upon respondent a request for the admission of the authenticity of a large number of documents and in addition a request for the admission of the truth of all statements contained in certain of them. Respondent filed an objection to the requests in their entirety, contending that they are unreasonable, unduly burdensome, harassing, and inconsistent with the purpose and spirit of Section 3.13 of the

Commission's Rules of Practice. The hearing examiner held lengthy oral argument upon respondent's objections, and he subsequently denied all the objections, without indicating the grounds for his ruling. Subsequently the examiner declined to postpone respondent's answers to the requests until the Commission shall have acted upon its application for an interlocutory appeal. Since respondent then promptly sought a stay from the Commission itself, the Commission will regard this application, not heretofore acted upon, as having effectively stayed respondent's duty to answer the request for admissions. Accordingly, respondent's submittal of the affidavit of John D. Williamson, Jr., on June 19, 1964, in response to the request for admissions has not mooted respondent's objections.

The Commission has considered the application for leave to file an interlocutory appeal, complaint counsel's answer in opposition, and respondent's reply, and has concluded that this matter should be remanded to the hearing examiner for his further consideration. The Commission has not had the benefit of a statement by the examiner of the reasons that led him to overrule respondent's objections in their entirety, but upon examination of the transcript of the prehearing conferences, it appears that both the examiner and the parties may have misapprehended the purpose and scope of the procedure set forth in Section 3.13 of the Commission's Rules. If the request for admissions and the objections thereto are reevaluated in the light of a clearer understanding of the purpose of the pretrial discovery procedures, it should be possible to arrive at a solution that satisfactorily accommodates the legitimate interests of both parties. Thus, we need only set forth certain considerations that ought to guide the examiner's decision.

The admissions device provided by Section 3.13 is primarily designed to spare a party the burden and expense of proving elements of his case which his opponent does not intend to controvert and which indeed may be incontrovertible. Admissions serve the further and subsidiary purpose of clarifying the issues between the parties, revealing the areas of agreement and thereby exposing the matters of genuine controversy.

Since the revised Rules of Practice emphasize the goals of expeditious and continuous hearings, with a full identification of the relevant issues at the outset and with a minimum of surprises during the trial, the Commission encourages an effective and proper use of Section 3.13. Moreover, pretrial discovery ought ordinarily to proceed with a minimum of intervention by the examiner or the Commission. In this instance, however, complaint counsel's request for admission encompasses an unusually large number of documents, and it would

appear that if respondent is to have reasonable opportunity to give conscientious consideration to each of the items for which an admission is requested, serious delays in commencement of the hearings might be required.

Respondent's most vigorous objections center upon the complaint counsel's requests for the admission of the truth of all statements contained in 827 documents, selected from the much larger list of documents with respect to which requests for the admission of authenticity are made. Respondent states that these 827 documents contain literally tens of thousands of statements, many of which have no apparent relevance at this point to any issue in the case.

The Commission has noted that, in large measure, these documents constitute the statements of respondent itself or its agents. Thus, for example, 167 of the documents are respondent's answers to specific questions asked by the Commission staff during the course of its investigation. There are many company press releases, notices to stockholders, annual reports, house publications, etc. Some 267 of the documents represent market surveys that were prepared by respondent's employees.

It is a familiar rule of evidence, even in judicial proceedings where perhaps more rigid rules prevail, that any relevant and nonprivileged statement of an opposing party or his agent may be received in evidence under the "admissions" exception to the hearsay rule. See McCormick, Evidence, p. 502 (1954). Thus the party who bears the burden of proof in a proceeding may establish his *prima facie* case simply by introducing into evidence, for the truth of the matters contained therein, the out-of-court statement of his opponents, whether it appear in a document or in the testimony of a third party. It is therefore unnecessary ordinarily to seek the opponent's admission of the truthfulness of his own document in order to accomplish the primary purpose of Section 3.13 of the rule—the document is already admissible to prove the point. In these circumstances, the only function that would be accomplished by extracting an admission of truthfulness is to limit the possibility of the opponent's introducing rebuttal evidence to detract from the force of its own admission. For example, the opponent might be able to show, by testimony or some other document, that the author of the statement received in evidence against it was mistaken; but an admission of truthfulness under Section 3.13 would ordinarily preclude the possibility of such rebuttal (even then a party may be relieved of an improvident admission of truthfulness upon an adequate showing of justification).[1]

[1] See 4 Moore, Federal Practice ¶ 36.08 (2d ed. 1963)

A party undoubtedly has a legitimate and understandable interest in knowing before trial the approximate nature and extent of his opponent's defense. Thus, we do not rule that it is in all circumstances unnecessary or improper to seek admissions of truthfulness with respect to a party's own documents. But in this instance we are mindful of the great volume of the documents included within complaint counsel's request.[2] We believe that the examiner, who has a greater familiarity with the matters that are likely to be at issue in the proceeding, should consider whether the additional clarification that might be expected to result from responses to the requests for admission of truthfulness in their entirety is sufficient to justify the expenditure of time and effort that would be required of respondent.

Somewhat different considerations are applicable to complaint counsel's requests for the admission of authenticity of the documents. Regardless of whether a document appears on its face to be respondent's own or that of some third person, complaint counsel would be obliged, in the absence of an admission or waiver of objection to genuineness, to stand ready to prove that the document is authentic. Since challenges to the authenticity of documents are quite rare in Commission proceedings, there is all the more reason to have the question settled at the outset and avoid the uncertainty that may hang over a party who proposes to introduce documentary evidence. Such a consideration is especially pertinent in this case, for all of the documents listed by complaint counsel in its request were supplied by respondent from its own files in response to staff requests during the course of an investigation. While the number of documents is very large, there is little reason to anticipate that respondent would be unable to determine readily whether each of them is in fact what it purports to be. The authenticity of most of them ought to be immediately apparent on their face.

As we understand respondent's present application, their principal objection to the scope of complaint counsel's requests for admission of genuineness is not primarily to the number of documents or the time required to accomplish the task, but rather to the effect that the examiner intends to give an admission of genuineness. Referring to a portion of the transcript of prehearing conference,[3] respondent ex-

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[2] It is pertinent to observe here that requests for admissions of truthfulness demand more than a perfunctory searching of present knowledge—a party is obliged to resort to sources of information reasonably available to him in order to determine whether he is in a position to make the admission. See 4 Moore, Federal Practice ¶ 36.04.

[3] "MR. HOWREY: Now, you are suggesting as I understand it, if we concede authenticity to those documents, which I think is a normal request, then you suggest we put them in a book and offer them in evidence and they'll be admitted if you think they are relevant.

"HEARING EXAMINER BENNETT: Yes.

"MR. HOWREY: Now, then I come along. I suppose in my own case, and subpoena

presses its understanding of the examiner's position as follows: that respondent must indicate at the time it responds to the requests for admission of genuineness whether it intends to introduce any testimony to rebut the inferences that would normally be drawn from any of the documents and that, if it does not do so then, it will be regarded as having waived the right of rebuttal. Although it is not altogether clear that this was the purport of the examiner's ruling, we think it appropriate, in order to facilitate the proceedings on remand, to indicate that respondent will not risk any such waiver of right of rebuttal by responding to the requests for admission of genuineness. An admission of genuineness of a letter concedes that the signer in fact sent this letter to the named addressee, but it would still be open to respondent to show that the signer was mistaken in what he said, did not intend to be taken seriously, etc. To attribute any greater significance to an admission of genuineness blurs the distinction between it and an admission of truthfulness. Accordingly,

It is ordered, That the proceeding be, and it hereby is, remanded to the examiner for the further consideration, in the light of this order, of respondent's objections to the requests for admissions.