

appeal; to vacate the hearing examiner's order of March 24, 1964; and to direct further proceedings before the hearing examiner with respect to the subject matter of the appeal. Accordingly,

It is ordered. That the hearing examiner shall, pursuant to Section 3.21(d) (I) of the Commission's Procedures and Rules of Practice, reopen the above-captioned proceeding for the reception of the testimony of Bernard Turiel, Esq., and Ernest Brod, Esq., and such other evidence as the examiner deems pertinent to resolve the issues raised by the motions of respondent denied by the order of the hearing examiner of March 24, 1964.

Commissioner MacIntyre not participating.

IN THE MATTER OF
FRITO-LAY, INC.

Docket 8606. Order and Opinion, Nov. 23, 1964

Order denying respondent's motion for a mistrial and dismissal of complaint.

OPINION OF THE COMMISSION

BY MACINTYRE, *Commissioner*:

This matter is before the Commission on respondent's interlocutory appeal from the hearing examiner's order, entered July 29, 1964, denying respondent's motion for a mistrial and to dismiss the complaint.

The facts of the controversy are simple and few: On February 28, 1964, the hearing examiner issued a pretrial order which required complaint counsel to disclose to respondent's counsel the names and addresses of all witnesses which complaint counsel expected to call in the course of the proceeding. On June 22, 1964, the names of approximately 200 prospective witnesses were turned over to respondent's counsel and on about June 25, 1964, complaint counsel dispatched a letter to each of the prospective witnesses, which read in part:

It will be necessary to call a number of witnesses to establish facts concerning the manufacture and sale of potato chips, corn chips and pretzels. It is anticipated that you will be called as a witness in this case. Hearings will probably begin in the fall and your name, with other witnesses in your area, has been submitted to the respondent, Frito-Lay, and its attorneys, pursuant to the Commission Rules of Procedure.

You may be contacted by Frito-Lay or its attorneys in connection with this matter and you are advised that you may take the following courses of action:

1. Discussing the case with Frito-Lay or its attorneys.

2. Discussing the case with Frito-Lay or its attorneys with a Commission counsel in support of the complaint present during the discussion.

3. Refusing to discuss the case with Frito-Lay or its attorneys.

In the event that you choose alternative number two above, please contact one of the undersigned.

It is respondent's contention before the hearing examiner and here that this letter has deprived it of an opportunity for a fair trial and constitutes "improper tampering with respondent's right to free and complete access to the truth and to the evidence." The letter is alleged to constitute a breach of the Canons of Professional Ethics of the American Bar Association and a violation of § 7(c) of the Administrative Procedure Act (5 U.S.C. § 1006(c) (1946)). Because of the very serious nature of these charges we granted respondent's request to file this appeal and directed the parties to file briefs in support of their views.

The solution to the question here raised must be found within the four corners of complaint counsel's letter itself, for respondent alludes to no additional facts in support of its appeal. It does not claim, for example, that any of the prospective witnesses have either withheld information or refused to talk to respondent's counsel. Respondent's allegations of prejudice are based upon fears of future occurrences and not upon a pragmatic showing of injury. This is a real distinction in this matter, for it may well be that respondent's appeal is premature. However, we prefer not to put off resolution of this issue to a later date, for such postponement would require the parties to conduct the hearings under a cloud of uncertainty.

In their answer to respondent's appeal brief, complaint counsel aver that the purpose of the letter was "... to inform the prospective third party witnesses of the Commission's Rules of Practice, and to dispel any misapprehension on the part of prospective witnesses that the disclosure of witnesses to respondent's counsel was improper." Complaint counsel argue that if they had wished to deny respondent's counsel access to their prospective witnesses they would have opposed disclosure of the names of witnesses. They urge that the letter should be read in its entirety and when so read, patently does not constitute an attempt to interfere in any way with respondent's right to interrogate and elicit full information from the witnesses. As we see it, there are two facets to the problem. The first concerns complaint counsel's intent or purpose in writing the letter and the second is the likely effect upon the actions of the recipients, whether intended by the authors or not.

As for the first question, it is apparent that whether read cursorily or thoroughly studied the letter contains no overt invitation to refuse to discuss the facts with respondent's counsel or to withhold part of the

facts during such a discussion. But respondent claims that the invitation is "subtle" in that implicit in the letter is an "overtone of governmental coercion"; that it was designed to "plant in the witnesses' minds the seed of qualification as well as refusal." We are not unaware that it is possible to shape men's minds with cleverly disguised nuances of meaning. As a matter of fact, the science (if it can be called such) of propaganda is primarily based upon this technique. Moreover, we have frequently issued cease and desist orders against respondents who utilized advertising which was literally truthful but nonetheless deceptive. However, in this instance we can find no basis for a conclusion that the drafters of this letter had any evil intent. Respondent's entire complaint stems from the fact that the prospective witnesses were correctly advised that they need not discuss the case with respondent's counsel or could have complaint counsel present if such a discussion was held. If these two alternatives were offered alone, we might have a different question, but they were not alone and were presented as second and third choices behind the choice of "Discussing the case with Frito-Lay or its attorneys." Thus, respondent's charges of unethical conduct on the part of complaint counsel are rejected.

We turn now to the question of the effect of the letter upon the recipients. As respondent sees it, the letter "[c]oming from the Federal Trade Commission, in a franked envelope and by registered mail . . ." impresses the witness with the importance of the matter and establishes a "nexus between the Commission and the witness, a relationship of mutual interest and concern." In this connection respondent suggests that witnesses called to testify on behalf of the government are not trustworthy "even when not reinforced by suggestions such as those contained in the instant letter" and quotes the separate opinion of a former Commissioner to the effect that being called as a government witness "... does funny things to people. It expands their virtue out of all proportion. They become parties to a game and they are out to have their side win, especially if their side is the all-powerful Uncle Sam." *Manhattan Brewing Company*, 42 F.T.C. 226, 241 (1946). It seems to us that this argument not only denigrates the character of the average American citizen called as a witness for his government but when carried to its logical conclusion questions the foundations of our legal system. Respondent is saying that under the best of circumstances it is impossible to have a fair trial when sued by the government, for improbity is the consistent hallmark of the government witness. As we see it, the average government witness is as likely to be prejudiced against the government case as for it. Every lawyer knows of the difficulty in getting disinterested witnesses to inconvenience themselves and appear in court. Very few citizens, and especially those

gainfully occupied in making their livelihood, welcome the prospect of being subpoenaed to spend a day or two in a courtroom, offering testimony in a cause with which they have no immediate concern. This is a merger case, brought under Section 7 of the amended Clayton Act, and in all probability almost all of the 200 prospective witnesses are businessmen connected in some way with the manufacture, sale or distribution of goods similar to those offered by respondent and the corporations it has allegedly unlawfully acquired. Such witnesses are not likely to be impressed by a government letter.

Respondent, in a separate but somewhat related argument, claims that the letter, appearing as it does upon the Commission's stationery, has "compromised the impartiality of the Commission." It is argued that the power and prestige of the Commission make its slightest action of great weight with the prospective witness and that "[a]ny action of the Commission, the adjudicator in this case, which would tolerate the use of its name or that of its counsel to influence prospective witnesses to withhold information essential to the preparation of respondent's defense would . . . violate all pre-existing notions of fair play and a fair trial." While it is, of course, perfectly true that the Commission occupies the dual position of complainant and adjudicator, this circumstance is inherent in the theory and practice of administrative law and there is no reason to suspect that the recipients of the letters will confuse the statements of Commission attorneys whose signatures appear over the title "Counsel Supporting the Complaint" with adjudicatory action of the Commission.

There is much more which could be said on the questions raised by this appeal, but additional discussion might well serve to obscure rather than enhance our basic holding, which is that complaint counsel's letter was not calculated to and is not likely to induce prospective witnesses to withhold information from respondent's counsel. While the letter might well have affirmatively urged the prospective witnesses to frankly discuss the case with respondent's counsel, the fact that the prerogative of free discussion was offered was sufficient to dispel any unreasonable suspicion that the "government" would prefer the witness to remain silent to respondent's request for information. Moreover, if any of these prospective witnesses, for any reason, refuses to confer with respondent's counsel, there are ample means available to remedy such a situation upon proper application and showing to the hearing examiner.

The respondent's right to a fair trial has not been harmed in any way and its appeal must, and will be, denied.

Commissioner Elman concurred in the result.

Commissioner Jones did not participate.

ORDER DENYING INTERLOCUTORY APPEAL

This matter having come on to be heard upon respondent's appeal from the hearing examiner's order entered July 29, 1964, denying respondent's motion for mistrial and to dismiss the complaint; and

It appearing to the Commission, for the reasons stated in the accompanying opinion, that the hearing examiner's order appealed from has not been shown to be erroneous in any particular; therefore:

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