

PERMANENTE CEMENT COMPANY ET AL.

Docket 7939. Order, Dec. 17, 1964

Order denying hearing examiner's request for recessed hearings and respondent's motions to set oral argument and to disqualify hearing examiner.

ORDER RULING ON CERTIFICATE OF NECESSITY AND DENYING MOTION TO DISQUALIFY AND REMOVE HEARING EXAMINER AND TO SET ORAL ARGUMENT

On November 20, 1964, the hearing examiner in the above-captioned proceeding, pursuant to Section 3.16(d) of the Commission's Rules

of Practice (effective August 1, 1963), filed with the Commission a certificate of necessity in which he stated "that it is necessary and in the public interest that the hearings in the above-entitled case be recessed until November 30, 1964, and for such further period as may be required for the Commission to pass upon an application by respondent pursuant to Rule 3.15(g)(2)." The certificate states that while hearings in the above-captioned proceeding were being conducted before the examiner, and before they were completed, counsel for respondents requested a recess to permit him to make, on or before November 30, 1964, a motion, pursuant to Section 3.15(g)(2) of the Commission's Rules of Practice, to disqualify and remove the examiner from continuing to preside. The examiner, while stating that he knew of no basis for disqualification, granted respondents' motion for a recess.

On November 30, 1964, respondents filed with the Commission a motion pursuant to Section 3.15(g)(2) to disqualify and remove the hearing examiner, along with an affidavit of respondents' counsel and a memorandum of points and authorities in support of the motion. On December 9, 1964, the examiner filed a reply with supporting papers and on December 10 complaint counsel filed a memorandum of legal authorities on the standards for disqualification. On December 14, 1964, respondents filed a supplemental affidavit in support of their motion and a motion requesting oral argument before the Commission be scheduled.

Section 3.15(g)(2) of the Procedures and Rules of Practice provides as follows:

Whenever any party shall deem the hearing examiner for any reason to be disqualified to preside, or to continue to preside, in the particular proceeding, such party may file with the Commission a motion to disqualify and remove the hearing examiner, such motion to be supported by affidavits setting forth the alleged grounds for disqualification. Copy of the motion shall be served by the Commission on the hearing examiner whose removal is sought, and the hearing examiner shall have ten (10) days from such service within which to reply. If the hearing examiner does not disqualify himself within ten (10) days, then the Commission shall promptly determine the validity of the grounds alleged, either directly or on the report of another hearing examiner appointed to conduct a hearing for that purpose.

This provision establishes an expeditious procedure for handling motions to disqualify the hearing examiner. It is not necessary for the examiner to recess hearings that have already commenced until and unless he disqualifies himself pursuant to this procedure. For the examiner to interrupt the hearings automatically whenever counsel stated that he intended to file a motion to disqualify him would be productive of delay and inconsistent with the Commission's announced policy that "all hearings . . . shall continue without suspension until

concluded." Section 3.16(d), Rules of Practice. While there may be circumstances where recessing the hearings pending determination of a motion to disqualify may advance rather than retard the fair, expeditious, and orderly completion of the proceeding, that is a matter to be determined by the examiner in his sound discretion. In any event, since the requested recess here was only for the period necessary for the Commission to dispose of respondents' motion to disqualify, which the present order disposes of, the examiner's request is moot.

In their motion to disqualify the examiner, respondents, to support their contention that the examiner is biased against them, first note that this matter is now before the examiner on remand from the Commission, the Commission having vacated an initial decision by the same examiner which was adverse to respondents on the issues involved in the remand. This circumstance is not grounds for disqualification of the examiner. There is "no warrant for imposing upon administrative agencies a . . . rule . . . whereby examiners would be disentitled to sit because they ruled strongly against a party in the first hearing." *N.L.R.B. v. Donnelly Garment Co.*, 330 U.S. 219, 236-37 (1947).

Respondents' principal argument is that the examiner in the conduct of the remand hearings has "abandoned his role as an impartial adjudicator of the facts and has assumed management and direction of complaint counsel's case and has aided, assisted and guided complaint counsel in the presentation of their case." It is evident from the portions of the transcript relied on by respondents that they misconceive the function of the hearing examiner in an administrative proceeding. "It is the function of an examiner, just as it is the recognized function of a trial judge, to see that facts are clearly and fully developed. He is not required to sit idly by and permit a confused or meaningless record to be made." *Bethlehem Steel Co. v. N.L.R.B.*, 120 F. 2d 641, 652 (D.C. Cir. 1941). The Commission has repeatedly enjoined that it is "the examiner's duty to exercise firm direction over adjudicative proceedings to insure that the Commission's policy of orderly, expeditious, and continuous proceedings is not thwarted by either deliberate or inadvertent actions of the parties." *Topps Chewing Gum, Inc.*, F.T.C. Docket 8463 (Order of July 2, 1963) [63 F.T.C. 2196]. The examiner, by exercising firm direction of this proceeding, has not thereby abandoned his role as impartial adjudicator; and he has not assumed the management of complaint counsel's case.

Because of the seriousness of an allegation that a hearing examiner is not discharging his function in an impartial and unbiased manner, the Commission has carefully and thoroughly considered the argument and allegations of respondents' motion and affidavits, and the transcript of hearings before the examiner, and we find that the hearings

have been "conducted in an impartial manner" as required by Section 7(a) of the Administrative Procedure Act and that no grounds for disqualification or removal of the examiner have been shown. No useful purpose would, in the Commission's judgment, be served by oral argument of respondents' motion before the Commission. Accordingly,

It is ordered, That the hearing examiner's request for recessed hearings, contained in his certificate of necessity filed November 20, 1964, be, and it hereby is, dismissed as moot.

It is further ordered, That respondents' motion to set oral argument be, and it hereby is, denied.

It is further ordered, That respondents' motion to disqualify and remove the examiner be, and it hereby is, denied.

IN THE MATTER OF
ELECTRA SPARK COMPANY ET AL.

* Docket 8274. Order, Dec. 30, 1964

Order granting respondent ten day extension of time to advise whether or not it wishes to withdraw stipulation and proceed to trial.

ORDER RULING ON RESPONDENTS' MOTION TO REOPEN PROCEEDING ¹

This matter is before the Commission upon motion of respondents, Electra Spark Company, Lectra Sales Corporation, Fred P. Dollenberg, and Bernard L. Silver, filed October 23, 1964, requesting that this proceeding be reopened for the purpose of setting aside or modifying the final order issued herein on June 5, 1964 [65 F.T.C. 877]. Respondents further request that the time for the filing of their report of compliance with the order be stayed pending a determination of their motion.

The entire evidentiary record in this case consists of a document entitled "Stipulation as to Facts and Proposed Order" executed by counsel. Upon motion of complaint counsel which was unopposed by respondents, this document was accepted by the hearing examiner by order filed February 27, 1964. In his initial decision, the hearing examiner concluded that on the basis of the facts as stipulated, paragraph A.2. of the proposed order was not appropriate, and accordingly, he modified this paragraph of the proposed order. The initial decision was filed on March 31, 1964, and service thereof on the respondents was completed on April 30, 1964. Respondents did not appeal from the examiner's decision and by order issued June 5, 1964,

¹ The correct name of this respondent corporation is Electra Spark Company [Captioned as The Lectra Spark Company, et al.].

the Commission adopted the initial decision as the decision of the Commission. The Commission's order to cease and desist became final on August 12, 1964, as to respondents, Electra Spark Company and Fred P. Dollenberg, and on August 13, 1964, as to respondents Lectra Sales Corporation and Bernard L. Silver.

As grounds for their request, respondents contend that their failure to appeal from the initial decision was the result of a mistake in fact and in law, that the hearing examiner did not have authority to modify the proposed order, and that the modified order is unduly burdensome and is inconsistent with the findings of fact and conclusions set forth in the initial decision.

The Commission has fully considered respondents' motion and has determined that under the circumstances, alternate methods of disposing of respondents' request are justified and that respondents should be afforded the opportunity to indicate their preference. Accordingly,

It is ordered, That respondents be, and they hereby are, granted ten (10) days after service upon them of this order within which they may advise the Commission whether they desire to withdraw the document entitled "Stipulation as to Facts and Proposed Order" received by the hearing examiner's order of February 27, 1964, and proceed to trial of this case, or, in the alternative, whether they agree that the facts as stipulated in the aforesaid document shall constitute the entire evidentiary record in this proceeding, with the understanding that the Commission may enter any order which it deems warranted.

It is further ordered, That in the event of the latter, respondents and counsel for the Commission may, within thirty (30) days after service upon them of this order, file with the Commission a brief in support of the order which they deem appropriate.

It is further ordered, That the time for filing of a report of compliance with the outstanding order be, and it hereby is, suspended until further order of the Commission.

ADVISORY OPINION DIGESTS*

No. 1. Use of the word "chamois."

The Commission was requested to express an opinion concerning the legality of describing unsplit sheepskin as "Chamois-like Sheepskin" or "Chamois-type Sheepskin" on the basis, it is claimed, that the product looks and feels like chamois leather, and possesses the same qualities as the genuine product.

This problem has been before the Commission in different forms on several occasions. In each instance the Commission has taken the position that it will prohibit the branding or labeling of leather products as "Chamois," "Chamois Type" or "Chamois Like" unless such products are made (a) from the skin of the Alpine antelope, commonly known and referred to as Chamois, or (b) from sheepskin fleshers which have been oil-tanned after removal of the grain layer.

The word "chamois" has its origin in the common name of a small goat-like Alpine antelope whose skin was made into a soft, pliable leather used in the manufacture of gloves, and for polishing such articles as glass, jewelry, fine metals and wood. It possessed the additional feature of absorbing water readily and returning, when dry, to its original state of softness and pliability. The animal became virtually extinct for commercial purposes about 1890 and since that time the word acquired a secondary meaning after being widely used commercially to designate certain leathers produced from split sheepskin fleshers.

The necessity for splitting sheepskin is to remove the impervious grain layer so as to make the underside more receptive to tanning. Since the two layers do not react at the same rate, should an amount of the grain layer remain the skin will not stretch uniformly and will eventually rip and crumble. In any event, irrespective of the relative merits of the many processes which may be employed to produce the leather, the fact remains that the grain layer must be separated from the sheepskin flesher in order that an acceptable chamois will result. This requirement the requesting party's product does not fulfill.

*In conformity with policy of the Commission, advisory opinions are confidential and are not available to the public, only digests of advisory opinions are of public record. Digests of advisory opinions are currently published in the Federal Register.

The claim that the subject product is equal in all respects to genuine chamois is not true, since the grain layer has not been removed. The genuine product has become firmly established in industry and elsewhere as herein defined, and such product is what the public is entitled to get when it purchases chamois even though the choice may be dictated by caprice or fashion, or perhaps by ignorance. The fact that the product is equal or will serve substantially the same purpose is wholly immaterial. *F.T.C. v. Algoma Lumber Co.*, 291 U.S. 67, 78. To the same effect see *Benton Announcements, Inc. v. F.T.C.*, 130 F.2d 254.

The question posed herein is whether the word chamois might be a permissible designation for the subject product if qualifying terms as "like" or "type" were added. Use of the word in any manner is a representation that the product is that which has traditionally been sold as chamois and so accepted by the public after years of buying experience. Although the ordinary purchaser may not know how chamois is made, he is entitled to believe that the particular product sold under that name is in fact a chamois as it is understood in the industry, and such implication cannot be offset by qualifying words. After reading both, an ordinary consumer would still not know the truth about the product without resort to specialized information. In other words, the capacity and tendency to deceive through any other application of the word chamois would continue to exist.

The requesting party was advised that the definition of chamois has become firmly established in law, in industry, and in the public's mind to mean nothing less than those leather products made from the skin of the Alpine antelope or from the fleshers of sheepskin which have been oil-tanned after removal of the grain layer and that any other use of the word, whether or not modified by qualifying language, to describe leather made by other or incomplete processes would serve only to dilute its accepted meaning and would not be in the general public interest. Consequently, to label the subject product in the manner contemplated would be a deceptive practice and subject the requesting party to a charge of violation of Section 5, Federal Trade Commission Act. (File No. 643 7018, released Aug. 7, 1964.)

No. 2. Toy catalog advertising payments.

The Commission was asked to express an opinion with respect to the legality of payments by toy manufacturers for advertising in toy catalogs published by a firm which, assertedly, (1) is strictly a publisher and has no connection whatever with any toy manufacturer or toy jobber, and (2) affirmatively offered the catalogs for sale to all jobbers.

Previous Commission actions in this area have been concerned with

catalogs which were at least in part owned by jobbers engaged in the sale of the toys advertised in the catalogs. With respect to the instant request, the Commission advised as follows:

Payments for advertising in a catalog published by a firm which is not owned or controlled by, or in any way directly or indirectly affiliated with, any customer of the advertiser or group or class of such customers do not violate Section 2(d) of the Clayton Act where no discriminatory benefit is conferred by such payments on a particular customer, or class or group of customers, over competitors. The Commission notes that the catalogs projected are available at low cost to all toy jobbers and are apparently not designed to be usable only by particular jobbers, or classes or groups of jobbers; that you make every effort to distribute your catalogs as broadly as possible among toy jobbers; and that you do not limit distribution to any particular jobbers or group or class of jobbers. The Commission is of the opinion that if your catalogs are available, in a practical business sense, to all of the jobber customers of a manufacturer, then no objection could be raised to payments by that manufacturer for advertising in the catalogs. (File No. 643 7014, released Oct. 30, 1964.)

