initial decision based on the record developed therein, with direction that such further proceeding be conducted as expeditiously as possible.

SOUTHERN FRUIT DISTRIBUTORS, INC.

Docket 7566. Order, Jan. 26, 1965

Order denying respondent's petition to reopen proceeding involving the brokerage section of the Clayton Act.

Order Denying Petition of Respondent To Reopen Proceeding

This matter is before the Commission on petition of respondent to reopen proceeding, filed December 28, 1964, and answer in opposition thereto filed by the Bureau of Restraint of Trade January 7, 1965.

On February 13, 1960, the Commission issued its order to cease and desist against respondent prohibiting discounts in lieu of brokerage to buyers of its products. The complaint had alleged discounts in lieu of brokerage to "certain favored buyers," not otherwise identified, purchasing for their own accounts in violation of Section 2(c) of the Clayton Act as amended, U.S.C., title 15, sec. 13.

The matter was disposed of without hearings upon acceptance by the Commission of an Agreement Containing Consent Order to Cease and Desist executed pursuant to the then effective Rule 3.25, of the Commission's Rules, governing consent orders.

Thus, the entire record upon which the Commission's decision and order rests consists of the complaint and consent order.

The respondent's petition to reopen, citing the Commission's decision in *Hruby Distributing Company*, Docket 8068, December 26, 1962 [61 F.T.C. 1437], states that the challenged discounts in this matter paid by respondent were not discounts in lieu of brokerage because the recipient was an independent food distributor not competing on the same functional level with the wholesalers to whom he sold.

In support of this, respondent's petition cites *In the matter of Smith Grain Company, Inc., et al.*, Docket 7641, wherein the Commission's complaint, issued October 29, 1959 [58 F.T.C. 1058], charged Smith Grain Company with violation of 2(c) of the amended Clayton Act based upon discounts received by Smith from petitioner herein.

Petitioner states that it was sales by it to Smith Grain which formed the basis also of the Commission's complaint against petitioner in the instant matter and that a fair reading of the complaint in Docket 7641 reveals that Smith Grain was operating at a different functional

permitted to elapse between the completion of the proceedings before the examiner and the oral argument of the appeal from the examiner's decision. Such a delay would not be consistent with the Commission's policy of reasonable dispatch and, on the showing made by respondent in its motion, cannot be justified in terms of "due regard * * * for the convenience and necessity of the parties or their representatives." Accordingly,

It is ordered, That respondent's motion to postpone oral argument be, and it hereby is, denied.

THE ELECTRA SPARK COMPANY ET AL.

Docket 8274. Order, Jan. 18, 1965

Order vacating the initial decision and final order of June 5, 1964, 65 F.T.C. 877, reopening the proceeding and remanding the case to the hearing examiner.

Order Reopening Proceeding

The Commission having issued its order on December 30, 1964 [66 F.T.C. 1590], granting respondents Electra Spark Company, Lectra Sales Corporation, Fred P. Dollenberg and Bernard L. Silver certain alternatives in response to their motion requesting that this proceeding be reopened for the purpose of setting aside or modifying the final order issued herein on June 5, 1964; and

The aforesaid respondents by motion filed January 11, 1965, and respondent Harry J. Petrick by motion filed January 12, 1965, having elected to withdraw the document entitled "Stipulation as to Facts and Proposed Order" received in the record by the hearing examiner by order filed February 27, 1964, and to proceed to trial; and

The Commission having noted that the parties requesting withdrawal of the document are the principal respondents named in the complaint and being of the opinion that the other respondents would desire the same action; and

The Commission having duly considered said requests and having determined that they should be granted:

It is ordered, That this proceeding be, and it hereby is, reopened.

It is further ordered, That the final order issued by the Commission on June 5, 1964, and the hearing examiner's initial decision filed March 31, 1964, be, and they hereby are, vacated and set aside.

It is further ordered, That the document entitled "Stipulation as to Facts and Proposed Order" dated November 20, 1963, and accepted by the hearing examiner's order filed February 27, 1964, be, and it hereby is, withdrawn from the record.

It is further ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner for trial of this case and for an

On December 10, 1964, respondent filed its Motion to Vacate Complaint Addressed to Hearing Examiner. A subsequent amendment to its motion was filed December 31. Counsel supporting the complaint filed an answer in opposition to respondent's motion on December 22.

The hearing examiner by order dated January 4, 1965, denied respondent's motion on the ground that he had no authority to grant the relief requested, and he further refused to certify the motion to the Commission.

On January 5, 1965, respondent filed a Reply to Answer in Opposition to Motion to Vacate Complaint and on January 14, 1965, complaint counsel filed motion to strike this reply.

Respondent has now filed with the Commission its Memorandum Regarding Respondent's Motion to Vacate Complaint or in the Alternative Request for Interlocutory Appeal asserting that its original Motion to Vacate was filed "* * * *with the Commission*" and the hearing examiner had no alternative but to certify it. Complaint counsel on January 18, 1965, filed answer in opposition to respondent's memorandum.

The hearing examiner in his order denying request to certify motion and denying motion to vacate complaint dated January 4, 1965, stated that while he had no authority under the Commission's Rules to grant the relief requested, nonetheless, it did not follow that he had no authority to deny it.

We think the hearing examiner's ruling was in error and that respondent's motion should have been certified.

Under § 3.6(a) of the Commission's Rules of Practice the hearing examiner must certify to the Commission any question on which he "* * * has no authority to rule." He correctly concluded that he had no authority to grant the relief but construed the Section as implicitly authorizing him to deny it. Since the denial of a motion is as much a ruling as the granting of one, we conclude that the hearing examiner should have certified it to the Commission. And since the motion is before us on respondent's request for interlocutory appeal, we can dispose of it now.

Briefly, respondent's motion to vacate embraces three prayers: (1) a request for an informal conference with the Commission to show that the Commission's complaint was improvidently issued, (2) a motion to vacate complaint and (3) an opportunity to negotiate a consent order.

Regarding respondent's request for opportunity to dispose of this matter by consent order we have decided that § 2.4(d) of the Com-

level from the wholesalers to whom it sold and that under the ruling in *Hruby*, neither Smith nor Southern should be charged with a violation of Section 2(c).

Notwithstanding petitioner's assertion that the Commission's complaint herein was based on Southern's dealings with Smith Grain, it is obvious that the only record upon which the Commission can rely in this matter consists of the complaint and consent order wherein the challenged discounts in lieu of brokerage were alleged and found to be paid to "favored buyers," not further identified.

Whatever the character of Smith Grain in its relationship to petitioner, it cannot be held on this record to either identify or exhaust the class of customers described in the complaint and consent order as "favored buyers." *Russell-Ward Company, Inc.*, Docket 8207, order of June 24, 1963 [62 F.T.C. 1563].

Moreover, for the Commission to attempt to determine, at this time, whether in fact the complaint was predicated solely on transactions declared to be lawful in the *Hruby* decision would require inquiry into acts and practices now several years in the past. In this connection, we note that respondent has offered no explanation as to why it waited two years after the *Hruby* decision was rendered to file this petition. And since conduct in compliance with the requirements of law as stated in the *Hruby* decision would not violate the terms of the order against respondent, we fail to see, and respondent has made no attempt to explain, how it is prejudiced by the order.

Respondent has not therefore shown changed conditions of fact or law necessary under § 3.28(b)(2) of the Commission's Rules to support a petition to reopen for purposes of altering or modifying the order herein. Accordingly,

It is ordered, That respondent's petition to reopen be, and it hereby is, denied.

Commissioner MacIntyre not concurring.

R. H. MACY & CO., INC.

Docket 8650. Order, Feb. 4, 1965

Order denying respondent's request for informal conference and motion to vacate, suspending proceedings for thirty days, and granting opportunity to settle by consent order.