ASSOCIATED MERCHANDISING CORPORATION ET AL.

Docket 8651. Order and Opinion, Sept. 23, 1965

Order denying respondents' request to appeal from hearing examiner's order for the production of respondents' business records on the grounds that the action was investigatory and not adjudicatory.

ORDER AND OPINION DENYING RESPONDENTS' REQUEST FOR PERMISSION TO FILE INTERLOCUTORY APPEAL

This matter is before the Commission upon respondents' request for permission to file an interlocutory appeal pursuant to § 3.20 of the Commission's Rules of Practice, from the hearing examiner's order of August 12, 1965, granting complaint counsel's motion for the production of documents.[1] Complaint counsel have filed a statement opposing the request and respondents have filed a reply thereto.

The production sought by complaint counsel and granted by the examiner first would require respondents Associated Merchandising

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[1] Section 3.20 provides in pertinent part that:

"* * * Permission [to file interlocutory appeal] will not be granted except in extraordinary circumstances where an immediate decision by the Commission is clearly necessary to prevent detriment to the public interest."

Corporation (AMC) and Aimcee Wholesale Corporation (AWC) to produce or, in the alternative, to grant access to certain records described in fourteen specifications and, secondly, would require the individual shareholder store respondents to produce or grant access to certain documents described in four additional specifications. As to some items, the request would permit, as an alternative, a tabulation of the information sought.[2]

The examiner first received the substance of the request for production of records here under consideration in complaint counsel's submission to him in response to his prehearing Order No. 1. Subsequently, at a prehearing conference on July 16, 1965, the matter was discussed in detail; the parties at that time had full opportunity to present their views. Respondents' primary contention there, as it is here, was that the production of records requested was investigatory in nature and not permitted under the Commission's rules for adjudicatory proceedings. As a result of the prehearing conference on the matter, the examiner ordered that complaint counsel submit a motion, in writing, setting forth again the documents sought, along with a statement for each item justifying the production under § 3.11 of the Commission's Rules of Practice. Complaint counsel thereafter submitted their request and respondents filed an answer in opposition. The examiner, on August 12, 1965, granted complaint counsel's motion. The request for permission to appeal herein is taken from that order.

The examiner found that good cause has been shown for the request for production. It is apparent from the examiner's formal order and from the statements which he made in the prehearing conference that he construes the request not as investigatory, as charged by respondents, but primarily as a justifiable demand for production of documents which supply additional details or an extension of information as to disclosed transactions or events for

[2] The information requested from AMC and AWC includes records disclosing: the gross volume of sales by AMC (1963-1964) to Fedway Stores; records disclosing for some 200 resources or suppliers information relating to such things as total value in dollars of the transactions with AWC for the years 1960, 1961 and 1963, 1964, and other information relative to designated transactions; records disclosing names of officers and directors of AMC and AWC and their positions with AMC shareholders; invoices of sales and other sales memoranda, correspondence and other documents relating to prices, terms of sales, etc., and certain other described records, all concerning transactions with ten listed resources or suppliers; names of salesmen; certain designated publications; records on the purchase or sale of shares in AMC by two designated shareholders; reports issued by AMC and AWC on operating results of stores; and records disclosing information as to stores paying service fees to AMC.

On the individual shareholder stores the information requested includes: records as will disclose, among other things, the net sales for the years 1961 through 1964 of each department store and branches; correspondence and other communications between AMC shareholder stores, AWC, AMC and the some 200 suppliers listed; records relating to participation by employees in any AMC or AWC buyers meetings or other meetings with certain buyers connected with ten suppliers listed in the request and for a designated period; and certain records relating to the purchase of shares in AMC and AWC by respondent Woodward & Lothrop, Inc.

which evidence is to be produced in support of the complaint. In other words, he treated the request as manifestly within the bounds of proper pretrial discovery.

Since the examiner is responsible for the conduct of adjudicative proceedings and his rulings on procedural matters in the absence of unusual circumstances will not be reviewed or disturbed by the Commission (*Topps Chewing Gum, Inc.*, Docket No. 8463, order issued July 2, 1963 [63 F.T.C. 2196]), and there being no showing here of any need to review the examiner's decision, as required by § 3.20 of the Commission's Rules, this matter could well rest here. However, in light of the vigorous argument by respondents that the examiner is permitting a "dragnet" investigation allegedly contrary to the Commission's Rules of Practice, we believe that comment is in order.

The argument that § 3.16(d), which provides for the expedition of hearings and bars trial by interval unless necessity is shown, precludes production in this instance is misplaced. That section in no way prevents, and is in no way inconsistent with, a request for production of records in the possession of a respondent by complaint counsel, pursuant to § 3.11.[3] As a matter of fact, compliance with § 3.16(d) might very well require an appropriate request for production under § 3.11 so as to permit complaint counsel to be adequately prepared for trial and possibly to obviate delays after the trial has begun. There is no provision in the Commission's Rules, nor has any precedent been referred to, which would in effect require complaint counsel to have all evidence that he will need prior to the issuance of the complaint.

The complexity of issues in large antitrust cases is such that counsel supporting the complaint may find upon the issuance of the complaint, and especially upon the refinement of the issues in a prehearing conference, that some additional documentation should be obtained. Moreover, in these big cases, to expect that in the preliminary investigation all of the details will be procured for each and every transaction which may ultimately become an evidentiary item in a subsequent complaint would create an intolerable burden on the investigator as well as upon the party investigated. It is apparent that with the delineation of the issues, particularly in the prehearing conference, further documents may be required to round

[3] Section 3.11 reads as follows:

"Production of documents.—Upon motion of any party showing good cause therefor and upon such notice as the hearing examiner may provide, the hearing examiner may order any party to produce and permit the inspection and copying of nonprivileged documents, papers, books, or other physical exhibits which constitute or contain evidence relevant to the subject matter involved and which are in the possession, custody, or control of such party. The order shall specify the time, place, and manner of making the inspection and taking the copy and may prescribe such terms and conditions as the circumstances require."

out, extend, or supply further details for the particular transactions to be pursued. If this were not so, while some delay might be prevented in the initial stages of an adjudicative proceeding, considerable delay might be developed in connection with the investigation of a case prior to trial. Accordingly, a demand for records may be made by complaint counsel under § 3.11 and the mere fact that the information requested may be contained in undifferentiated files and cover a number of years does not bar the production.

That is not to say that § 3.11 is to be used for broad investigational purposes even though the Commission has the authority to investigate after complaint issues.[4]

Moreover, there must be a showing of good cause for the production. Good cause is essentially a factual question and a determination as to whether adequate reasons for the desired production are given will depend on the circumstances in each case. The Commission has observed in other connections that it is "neither necessary nor desirable to frame a firm rule of general application defining with particularity the elements of a showing of good cause." *L. G. Balfour Company*, Docket No. 8435, order issued May 10, 1963 [62 F.T.C. 1541]; *Topps Chewing Gum, Inc.*, Docket No. 8463, order issued July 2, 1963 [63 F.T.C. 2196]. Generally, under § 3.11, as to the production of documents sought prior to the hearings, good cause means that the moving party must show that the documents will aid him in the preparation of his case. In this instance, involving a request at the prehearing stage, the detailed showing which complaint counsel has made for each item specified, showing its relevance and the purpose for which it is sought, appears clearly to meet the indicated requirements of § 3.11. The matter, however, is one in which the hearing examiner may exercise his discretion and here there is no showing that he has abused his discretion. Permission to appeal will not be granted because there has been no showing of extraordinary circumstances where an immediate decision by the Commission is clearly necessary to prevent detriment to the public interest.

Respondents claim that the compilation of the information and the gathering of the documents requested will take longer than the thirty days which the examiner has allowed (see note 2 on page 7 of their petition). But it appears that the examiner has given serious

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[4] The Commission's authority to investigate subsequent to the issuance of a complaint is well established. *Federal Trade Commission* v. *Menzies*, 242 F. 2d 81 (4th Cir. 1957); *Federal Trade Commission* v. *Waltham Watch Co.*, 169 F. Supp. 614 (S.D.N.Y. 1959); *cf. Flotill Products, Inc.* v. *Federal Trade Commission*, 278 F. 2d 850 (9th Cir. 1960). See also *Kaiser Industries Corporation*, Docket No. 8341, order issued March 2, 1962, where the Commission held that it has the authority to issue subpoenas in the course of an investigation to obtain information which relates to the subject matter of an adjudicative proceeding.

consideration to the time element, indicated by the questions asked in the prehearing conference, and has determined that the production can be accomplished within a reasonable period. We are confident that the examiner will not allow the proceeding to become bogged down in a delay over the production of documents. Accordingly,

It is ordered, That respondents' request for permission to file an