INTERLOCUTORY, VACATING, AND MISCELLANEOUS ORDERS

MODERN MARKETING SERVICE, INC., ET AL. C. H. ROBINSON COMPANY AND NASH-FINCH COMPANY

Dockets 3783, 4589. Order and Opinion, Jan. 7, 1966

Order denying respondents' request for a subpoena duces tecum directed to the Secretary of the Commission requiring him to produce intra-agency memoranda and other Commission and staff documents relating to attempted industrywide enforcement of Sec. 2(c) of the Clayton Act in the Fresh Fruit and Vegetable Industry.

OPINION OF THE COMMISSION

This matter is before the Commission on the certification by the hearing examiner appointed to preside over the investigational hearings in the above-entitled proceedings of a request by respondent, Nash-Finch Company, submitted on November 19, 1965, for a subpoena duces tecum. The subpoena would require Joseph W. Shea, Secretary of the Commission, to appear and produce certain generally described intra-agency memoranda and other documents prepared by the Commission's staff, individual Commissioners and the Commission, including several Commission minutes, pertaining to Docket No. 3783 and Docket No. 4589, and certain other such writings pertaining to the Commission's activities in the area of its attempts to effectuate industrywide enforcement of Section 2(c) of the Clayton Act, as amended, in the Fresh Fruit and Vegetable Industry.

The Commission's order directing an investigation to determine whether respondents C. H. Robinson Company and Nash-Finch Company have violated the provisions of a cease-and-desist order entered under Section 2(c) of the amended Clayton Act, on January 6, 1947 [43 F.T.C. 297],[1] was issued on February 1,

[1] That order provides:

I. *It is ordered*, That the respondent C. H. Robinson Company and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the purchase of fruits, vegetables, and other commodities in commerce as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from—

1963 [62 F.T.C. 1486]. Following the termination of court proceedings in this matter,[2] Commission counsel moved the Commission to amend its order to include an investigation of respondent Nash-Finch's compliance with the provisions of a cease-and-desist order issued under Section 2(c) on September 8, 1943.[3] Respondent, Nash-Finch filed an answer in opposition to this motion and moved that this proceeding be terminated. On June 2, 1965, the motion of Commission counsel was granted, respondent's motion was denied, and the amended order issued.

Respondent contends that the documents specified in the subpoena are necessary for the presentation of its defense in two respects. First, respondent contends that the documents contain information relevant to its contention that the cease-and-desist orders in Dockets 4589 [43 F.T.C. 297] and 3783 [37 F.T.C 386] do not cover the practices challenged by Commission counsel. In this regard, respondent takes the position that the order in Docket No. 4589 deals solely with receipt of brokerage by Nash-Finch on its own purchases through C. H. Robinson Company, a North Dakota corporation owned by Nash-Finch. As to Docket

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1. Receiving or accepting from any seller, directly or indirectly, anything of value as a commission or brokerage, or any compensation, allowance, or discount in lieu thereof, on or in connection with purchases made by respondent Nash-Finch Company while acting under the control of and in fact for and on behalf of said respondent Nash-Finch Company.

2. Receiving or accepting from any seller, directly or indirectly, anything of value as a commission or brokerage, or any compensation, allowance, or discount in lieu thereof, on or in connection with purchases made for respondent's own account or while acting for or in behalf of a purchaser as an intermediary or agent or subject to the direct or indirect control of such purchaser.

3. Paying, transmitting, or delivering to or for the benefit of any purchaser, either directly in the form of money or credits or indirectly in the form of dividends, or otherwise, any commission or brokerage, or any compensation, allowance, or discount in lieu thereof, received from any seller while acting as an intermediary or agent for such purchaser or while subject to the direct or indirect control of such purchaser.

II. *It is further ordered,* That the respondent Nash-Finch Company and its officers, agents, representatives, and employees, directly or through any corporate or other device in connection with the purchase of fruits, vegetables, and other commodities in commerce as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from—

1. Receiving or accepting from any seller, directly or indirectly, anything of value as a commission or brokerage, or any compensation, allowance, or discount in lieu thereof, on or in connection with purchases made for respondent's own account, either directly or by or through respondent C. H. Robinson Company.

2. Receiving or accepting from respondent C. H. Robinson Company, either directly in the form of money or credits or indirectly in the form of dividends, or otherwise; any commission or brokerage, or any compensation, allowance, or discount in lieu thereof, received by said C. H. Robinson Company from any seller while acting for or in behalf of said respondent Nash-Finch Company as an intermediary or agent for said respondent or while subject to the direct or indirect control of said respondent.

[2] *Nash-Finch Co.* v. *Federal Trade Commission,* 233 F. Supp. 910 (D. Minn. 1964).

[3] By the terms of that order, respondent Nash-Finch Company and its officers, agents, representatives and employees, in connection with the purchase by such respondent of commodities in commerce, as commerce is defined in the Clayton Act, were ordered to cease and desist from—receiving or accepting from the sellers of such commodities, directly or indirectly, any brokerage fee, commission, or other compensation, or any allowance or discount in lieu thereof.

No. 3783, it is respondent's position that the order deals only with a group purchasing program, that Nash-Finch was named only as representative of a number of wholesalers who owned stock in the buying organization, and that, hence, the order has nothing to do with the individual acts of Nash-Finch. Respondent contends that none of the transactions as to which Commission counsel has introduced evidence in this investigational hearing relate to the practices prohibited by the two orders, as thus interpreted.

Second, respondent contends that the documents are necessary to support its asserted defense that the prosecution of this proceeding is not in the public interest inasmuch as "it involves the harassment of a single company when its competitors have been allowed to effect compliance with Section 2(c) through acceptance of industrywide rules promulgated by the Federal Trade Commission during the past year."

In his certification, the hearing examiner indicated a belief that the requested documents are not only confidential and privileged but have "no relevancy to the issues involved in whether the respondent violated the orders of the Commission proscribing respondent's acceptance of brokerage." He concluded that respondent had failed to show good cause in the application for the requested subpoena and recommended that it be denied.

The documents requested by the respondent include staff memoranda and recommendations, and Commission minutes, memoranda and directives as well as the writings of individual Commissioners, leading to the issuance of the complaints and orders in the two matters under investigation and to reports of compliance with the orders. All of these documents are classified as confidential under § 1.133 of the Commission's Rules of Practice. Under § 1.134 of the Rules, such documents can be made public only by the Commission and only upon a showing of good cause, due consideration being given to the public interest in allowing such disclosure. As we have stated in the *Macy* case, a request for confidential information made to a hearing examiner in the course of a litigated proceeding will be treated as an application under § 1.134.[4]

We first consider respondent's contention that certain of the documents are relevant to its defense that the transactions under investigation do not come within the scope of the two orders. Thus, it would appear that, in substance, respondent proposes

[4] *R. H. Macy & Co., Inc.*, Docket No. 8650, September 30, 1965, petition for declaratory judgment dismissed, Civil No. 2707-65 (D.D.C. Dec. 17, 1965).

to establish this defense by probing the deliberative processes of the Commission in formulating a proper order.

Of vital importance to an issue as to the scope of an order is the well-established principle that the Commission has wide discretion to formulate a remedy adequate to prevent repetitions of a violation.[5] Of particular significance here is the decision in the *Western Fruit Growers* case wherein the court, in sustaining a broad order issued under Section 2(c), relied upon the holding by the Supreme Court to the effect that the Commission is not limited to prohibiting an illegal practice in the precise form existing in the past but may fashion its relief to restrain other like or related unlawful acts.[6]

Turning to respondent's request for a subpoena, we find that other than its own assertions as to the scope of the orders, the only bases it has advanced in support of its request are an affidavit attached to its motion to terminate, filed on April 26, 1965, and certain compliance reports which it has introduced in evidence in this proceeding. The affidavit is that of an attorney who served as counsel for respondent in the proceeding in Docket No. 4589. Giving full credit to this affidavit, we find that it asserts only that in affiant's dealing with the staff, the staff was solely concerned with respondent's ownership of stock in C. H. Robinson and the possibility that respondent might be paid dividends from brokerage received by C. H. Robinson on respondent's purchases.

These assertions do not provide sufficient cause for releasing the requested documents. Obviously, the staff's primary concern would be "the illegal practice in the precise form" [7] in which it then existed, and not related practices not then before it. Moreover, it is well established that "The responsibility of decision is upon the Commission alone," [8] and that the staff's action would in no way bind the Commission as to the scope of the order.[9]

As to staff memoranda and correspondence relating to compliance reports and the receipt and filing thereof, it is obvious that these documents cannot serve to limit the scope of the orders as to practices not therein considered. Respondent does not contend that any of the transactions involved in this investigation were the subject of a compliance report accepted by the Commission.

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[5] *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608 (1946).
[6] *Western Fruit Growers Sales Co.* v. *Federal Trade Commission*, 322 F.2d 67 (9th Cir. 1963).
[7] *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470 (1952).
[8] *In the matter of Carpel Frosted Foods, Inc.*, Docket No. 5482, 48 F.T.C. 581 (1951).
[9] *P. Lorillard Co.* v. *Federal Trade Commission*, 186 F.2d 52 (4th Cir. 1950).

With respect to minutes, memoranda, directives, recommendations or other writings of the Commission or any individual Commissioner, these documents relate solely to the Commission's function in reaching a decision. In effect, by requesting these documents, respondent would inquire into the mental processes of the Commission in determining the scope of the orders under investigation. In denying the right to such inquiry, the Supreme Court in the *Morgan* case [10] has stated that "Such an examination of a judge would be destructive of judicial responsibility. * * * Just as a judge cannot be subjected to such a scrutiny, * * * so the integrity of the administrative process must be equally respected." In a case involving the National Labor Relations Board, the court had aptly pointed out that if information as to the deliberations of an administrative agency were made public "The function of deciding controversies might soon be overwhelmed by the duty of answering questions about them." [11]

Considering respondent's arguments and weighing them against the public interest in preserving the confidentiality of information dealing with internal agency operations, we conclude that respondent has failed to show good cause for the release of the documents requested in support of its defense as to the limited scope of the orders.

We turn next to respondent's contention that certain documents are needed to support its defense of "harassment." Specifically, respondent charges the Commission with "unequal enforcement" of the law and with having "arbitrarily singled out this respondent for prosecution, while allowing its competitors to effect voluntary compliance because of the industrywide nature of problems arising under Section 2(c)." In substance, respondent states that after promulgation of Trade Practice Rules for the Fresh Fruit and Vegetable Industry (April 15, 1965), the Commission forwarded cards to members of the industry requesting them to pledge that they would adhere to the rules. Respondent requests confidential documents from the Commission's files to support its belief that the Commission has closed investigations involving its competitors upon receipt of signed pledges from them, while refusing to terminate this proceeding after receiving a card executed by Nash-Finch.

We recently considered a request for confidential documents of a similar nature from a respondent to support its contention that the Commission had discriminated against it and in favor

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[10] *United States* v. *Morgan*, 313 U.S. 409 (1941).

[11] *National Labor Relations Board* v. *Botany Worsted Mills*, 106 F.2d 263 (3d Cir. 1939).

of its competitors in the enforcement of the Wool Products Labeling Act.[12] The alleged discrimination there involved related to the issuance of a complaint against the respondent.

In that case, we concluded that respondent had failed to show good cause and our position with respect to such matters was set forth, in part, as follows:

> All that the respondent is challenging in effect is the Commission's authority to exercise its discretion in the issuance of a complaint in this matter while administratively closing investigations in other matters with related charges. The Commission, however, is vested with discretion in bringing a complaint. *Moir* v. *Federal Trade Commission*, 12 F. 2d 22, 28 (1st Cir. 1926). It has the administrative discretion to decide whether or not to proceed against individual respondents or on an industry-wide basis, and it alone is "empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress." *Moog Industries* v. *Federal Trade Commission*, 355 U.S. 411, 413 (1958). Also, respondent has no "right" to the administrative treatment it here apparently seeks. *Coro, Inc.* v. *Federal Trade Commission*, 338 F. 2d 149 (1st Cir. 1964). Clearly, an assertion of a difference in treatment alone does not create an issue of the denial of due process.
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> Respondent's claim of alleged difference of treatment does not create or even suggest any inference or even a suspicion that the Commission's action was in any way the result of discrimination or bias, conscious or unconscious, intentional or unintentional. The mere assertion of such a plea, without more, cannot enable a respondent to interrogate Commission employees or to rummage through investigative reports and staff memoranda in the hope that something will turn up to support the claim.

The matter before us goes beyond the question of whether to issue a complaint. Respondent, Nash-Finch, is bound under two outstanding orders to cease and desist. The Commission has reason to believe that it may have violated the provisions of these orders and, pursuant to its authority and public duty, has ordered investigational hearings.

In substance, respondent's defense would have the Commission terminate a proceeding inquiring into its compliance with the actual prohibitions of two orders on the grounds that it, together with its competitors, has signed a card pledging to abide by a trade practice rule. However, respondent denies that the practices which are the subject of this inquiry are illegal. Moreover, it is to be noted that nowhere in its present request does respondent claim that the products covered by the trade practice rule are the only products involved in the transactions under investigation.

In support of its request, respondent quotes that part of a recent address by Commissioner Jones dealing with industry-

[12] *R. H. Macy & Co., Inc.*, Docket No. 8650, September 30, 1965, petition for declaratory judgment dismissed, Civil No. 2707-65 (D.D.C. Dec. 17, 1965).

wide enforcement. Under the facts before us, we think that the following is a more appropriate quote from that speech:

> The Commission's case-by-case technique of law enforcement is of major importance in stopping law violations and defining through its decisions the conduct which it regards as violative of the statutes. It is also an imperative in maintaining respect for those laws and in achieving voluntary compliance with them. Failure to enforce the law's prohibitions promptly and impartially can only breed disrespect and encourage disregard of the law's strictures. Moreover, for the great majority of business which keeps its conduct within the law, it is essential that law violations be promptly proceeded against as a simple matter of fairness if nothing more.[13]

We are of the opinion that respondent has failed to provide sufficient cause for the release of documents to support a defense of unequal treatment.

An appropriate order will be entered.

Commissioner Elman did not concur.

Commissioner MacIntyre did not participate.

ORDER RULING ON QUESTION CERTIFIED

This matter having come before the Commission on the certification by the hearing examiner appointed to preside over the investigational hearings in the above-entitled proceedings of the question as to the issuance of a subpoena duces tecum, and the Commission having determined that the subpoena should not be issued:

It is ordered, That the hearing examiner be, and he hereby is, instructed not to issue the subpoena duces tecum requested by respondent on November 19, 1965, requiring Joseph W. Shea to appear and to produce certain Commission documents.

Commissioner Elman not concurring and Commissioner MacIntyre not participating.

ASSOCIATED MERCHANDISING CORPORATION ET AL

Docket 8651. Order and Opinion, Jan. 19, 1966

Order directing General Counsel to prepare papers for transmittal to Attorney General requesting him to initiate civil enforcement proceedings against respondents requiring them to comply with hearing examiner's order of August 12, 1965.

DISSENTING OPINION