DEAN FOODS COMPANY ET AL.

Docket 8674. Order, April 25, 1966

Order vacating hearing examiner's order denying respondent's request for subpoenas duces tecum directed to four dairies and ordering hearing examiner to reconsider the matter.

ORDER GRANTING APPEAL, VACATING RULING DENYING REQUEST FOR SUBPOENAS AND DIRECTING RECONSIDERATION

This matter is before the Commission upon the appeal of complaint counsel under § 3.17(f) of the Commission's Rules of Practice from the hearing examiner's ruling contained in his memorandum to complaint counsel, dated March 29, 1966, denying their request to issue subpoenas duces tecum directed to four named persons to appear and to testify and to produce documents, for the reason that a hearing had not been scheduled in the proceeding. The hearing examiner stated, in his memorandum, that the time and place of hearings will be fixed at a prehearing conference scheduled for May 23, 1966, that he sees no necessity to require the appearance of the parties prior to the time of the "regular hearings," and that the said counsel's request could be renewed after hearings have been scheduled.

Respondent Dean Foods Company filed a statement on April 11, 1966, in which it states it takes no position on whether the ruling appealed from should be affirmed or reversed, but that it does not want to be prejudiced in the securing, at a later time, of the information obtained.

The hearing examiner, under § 3.15(c) of the Commission's Rules of Practice, has the power and duty, *inter alia,* to take all necessary action to avoid delay in the disposition of proceedings and has all powers necessary to that end, including, among others, the power to issue subpoenas. The examiner's authority to issue subpoenas in a particular proceeding begins the moment he is designated as the hearing examiner in the matter. Thus, here the examiner had the power to issue the subpoenas requested by complaint counsel even though hearings had not yet been scheduled.

It seems to us that the examiner, considering complaint counsel's representations to him that the subpoenas are necessary because of the refusal or failure of four dairies to provide information necessary to such counsel in an attempt to obtain accurate market share data, took a very narrow view of his responsibilities in failing to provide such process so as to prevent future delay in the preparation for trial and in the trial of this case. We believe that it would be wholly appropriate in the circumstances to issue such subpoenas. The information sought would be obtained as an aid in the trial of the case. Such subpoenas are not considered, and are not to be considered, as investigational subpoenas.

This appeal will be entertained because the ruling complained of involves substantial rights, will materially affect the final decision, and because a determination of its correctness before the conclusion of the hearing will better serve the interests of justice. Accordingly,

It is ordered, That complaint counsel's appeal from the examiner's ruling denying their request for subpoenas duces tecum be, and it hereby is, granted.

It is further ordered, That the hearing examiner's ruling denying the request of complaint counsel for subpoenas duces tecum be, and it hereby is, vacated.

It is further ordered, That the hearing examiner forthwith reconsider, in the light of this order and the views of the Commission stated herein, the request of complaint counsel for the issuance of subpoenas duces tecum.

HUMPHREYS MEDICINE COMPANY, INC., Docket No. 8640
E. C. DeWITT & CO., INC., Docket No. 8642
GROVE LABORATORIES, INCORPORATED, Docket No. 8643
THE MENTHOLATUM COMPANY, Docket No. 8644

Order, Apr. 26, 1966

Order denying petitions of respondents that hearing examiner reconsider his denial of motion to suspend proceedings in all four cases pending the outcome of the *American Home Products* case, Docket 8641, and directing hearing examiner to offer respondents the opportunity to settle their cases through stipulation.

ORDER RULING ON MOTIONS CERTIFIED BY THE HEARING EXAMINER

This matter is before the Commission on the certification to the Commission, on April 20, 1966, by the hearing examiner of motions by the respondents in *Humphreys Medicine Company, Inc.,* Docket No. 8640, *The Mentholatum Company,* Docket No. 8644, *Grove Laboratories, Inc.,* Docket No. 8643, and *E. C. DeWitt & Co., Inc.,* Docket No. 8642. In each case respondent requested the hearing examiner to certify to the Commission its motion that the Commission permit reargument of, and reconsideration of, the motion of complaint counsel to suspend hearings in these proceedings pending issuance of the Commission's decision *In the Matter of American Home Products Corporation,* Docket No. 8641 [70 F.T.C. 1524]. Complaint counsel's motion to suspend was denied in each case by orders of the Commission, dated March 16, 1966.*

Respondent E. C. DeWitt & Co. also moves, in the alternative, that the proceeding in Docket No. 8642 be joined and consolidated with the *Matter of American Home Products Corporation,* Docket No. 8641. In this connection, DeWitt requests permission to withdraw its answer and to file an amended answer by which respondent "shall agree to be bound in the manner, and at the time and to the extent appropriate, by any order which the Commission may enter in said *Matter of American Home Products Corporation.*" Such order, according to respondent's motion, may include an affirmation of the hearing examiner's initial decision in that proceeding but is not limited to such a result or the Commission may take substantially the same action in Docket No. 8642 as it deems appropriate *In the Matter of*

*DeWitt requests the Commission to authorize the hearing examiner to reinstate his order of February 14, 1966.

American Home Products Corporation, Docket No. 8641. DeWitt's motion, in the alternative, further provides that the Commission may grant such additional relief as is deemed appropriate and in the public interest.

The hearing examiner, in the case of all four certifications, recommended that the motions certified be granted.

The Commission has determined that the motions certified have not stated grounds justifying further suspension of the hearings in these proceedings and that the hearing examiner should be directed to go forward with the hearings in these cases unless respondents are willing to stipulate in the course of the prehearing conferences that they will submit these proceedings to the Commission for disposition on the basis of the record in *American Home Products Corporation,* Docket No. 8641, and that they waive any further intervening procedural steps before the hearing examiner. In this connection, if any of the respondents wish to dispose of their proceeding on that basis they should further stipulate, if they are able to, on the basis of the facts applicable in their proceeding, that:

1. The advertising of the particular respondent had no significantly different effect upon the reader than the effect of the advertisements in *American Home Products*;

2. The effect of the use of respondent's preparation is not significantly different from the use of the preparation of American Home Products;

3. If there are any significant differences between the advertisements of respondents and the advertisements in the record in *American Home Products,* then the Commission, in its order disposing of the case may include appropriate provisions to take into consideration such differences.

If any respondent wishes to avail itself of this procedure, it will also be necessary for it to attach to the stipulation the relevant advertising, which it has utilized, for inclusion in the record. Finally, those respondents desiring to conclude their proceeding without hearings before the examiner should include in their stipulations a provision that the Commission may dispose of their proceeding at the time *American Home Products* is decided by such order as it deems necessary to the public interest in the light of the record of the particular case. Such stipulation should contain the further provision that the record, on which the Commission is to make its final disposition of this case and for the purposes of judicial review, is limited to the record of the

proceeding at the time the stipulation is filed, the stipulation and the attached advertisements as well as the record in *American Home Products*. Accordingly,

It is ordered, That the hearing examiner is directed to proceed with the hearings in these cases forthwith: *Provided, however,* That the examiner will, without further action, certify the record in the particular case to the Commission if the respondent in that proceeding and complaint counsel, within 30 days of the service of this order upon them, file a stipulation providing that:

1. They will submit the case to the Commission on the record in Docket No. 8641, *American Home Products Corporation,* and such other facts and records as provided for below;

2. (a) The facts applicable to the case support the stipulation that advertisements in the case had no significantly different effect upon readers from the effect of the advertisements in *American Home Products,*

(b) The facts applicable to the case support the stipulation that the effect of the use of respondent's preparation is not significantly different from the use of American Home Products' preparations;

3. To the extent that a respondent's advertisements differ significantly from those in *American Home Products,* the Commission may, in its order disposing of the proceeding, include appropriate provisions to take into consideration such differences;

4. The advertisements attached to the stipulation are representative of respondent's advertising claims and are to be included in the record of such proceeding;

5. Respondent waives any intervening steps before the hearing examiner;

6. The Commission may, on the basis of the stipulation, the attached advertisements and the record in *American Home Products,* issue such order as it deems necessary to the public interest;

7. The Commission is to issue its order disposing of such proceeding concurrently with the order setting forth its final decision in *American Home Products*; and

8. The record on which the Commission is to make its disposition of such proceeding and for the purpose of judicial review is limited to the record at the time the stipulation is filed, the stipulation with the attached advertisements and the record in *American Home Products.*

ALHAMBRA MOTOR PARTS ET AL.

Docket 6889. Order, May 5, 1966

Order setting aside cease and desist order of December 17, 1965, 68 F.T.C. 1039, as to respondents Earl Crawford, Lester L. Congdon, Margaret A. Ludwick, Otis M. Ludwick, E. L. Covey, Edward Gaughn, Carl D. Haase and Emma F. Wright.

ORDER SETTING ASIDE CEASE AND DESIST ORDER AS TO CERTAIN RESPONDENTS

Earl Crawford, Lester L. Congdon, Margaret A. Ludwick and Otis M. Ludwick have filed motions to set aside the cease and desist order of December 17, 1965 as to them and complaint counsel has filed a motion in behalf of E. L. Covey, Edward Gaughn, Carl D. Haase and Emma F. Wright to set aside this order as to those respondents. These motions are made pursuant to a provision in the order providing:

It is further ordered, That those respondents who severed their connection with Southern California Jobbers, Inc., prior to January 17, 1963, be, and they hereby are, granted permission, within sixty (60) days of the service of this order upon them, to file a motion requesting the Commission to set aside as to them the above order relating to warehouse distributor discounts.

It appears from respondents' motions, complaint counsel's motion and the supporting affidavits that this requirement has been satisfied in the case of Earl Crawford, Lester L. Congdon, Margaret A. Ludwick, Otis M. Ludwick, E. L. Covey, Edward Gaughn, Carl D. Haase and Emma F. Wright. Accordingly,

It is ordered, That the cease and desist order of December 17, 1965 relating to warehouse distributor discounts be, and it hereby is, set aside as to Earl Crawford, Lester L. Congdon, Margaret A. Ludwick, Otis M. Ludwick, E. L. Covey, Edward Gaughn, Carl D. Haase and Emma F. Wright.

SUBURBAN PROPANE GAS CORPORATION

Docket 8672. Order, June 2, 1966

Order remanding certification of question of postponing hearing date to hearing examiner with instructions that he expedite the proceedings in this case.