MODERN MARKETING SERVICE, INC., ET AL.

C. H. ROBINSON COMPANY AND NASH-FINCH COMPANY

Dockets 3783, 4589. Order, June 9, 1966

Order denying respondents' request to either terminate case or to defer filing of proposed findings until the Supreme Court has ruled on *F.T.C.* v. *Jantzen, Inc.*, 356 F. 2d 253 (9th Cir. 1966), but granting a 30 day extension to prepare findings.

ORDER DENYING RESPONDENT'S MOTION TO TERMINATE PROCEEDING, OR, IN THE ALTERNATIVE, TO DEFER FILING OF PROPOSED RECOMMENDATIONS AND GRANTING REQUESTED EXTENSION OF TIME FOR FILING RECOMMENDATIONS

This matter is before the Commission upon the hearing examiner's certification, under § 3.6(a) of the Commission's Rules of Practice, of a motion of respondent, Nash-Finch Company, filed May 4, 1966, requesting that the proceeding be terminated, or, in the alternative, that the filing of proposed recommendations and other submissions with the examiner be deferred until such time as the United States Supreme Court has ruled that the Commission has authority to conduct a proceeding for enforcement of a pre-1959 Clayton Act order which was commenced subsequent to the enactment of the Clayton Act Finality Act. In addition, respondent, on May 6, 1966, filed a motion to extend from June 9, 1966, to August 9, 1966, the time to file its proposed recommendations with the examiner, in the event that its May 4, 1966, motion is denied.

In his certification of May 20, 1966, the examiner recommended that the Commission deny both parts of the first motion and grant the second.

Respondent's contention in support of the requested termination is that the Commission has no authority to prosecute this proceeding, inasmuch as all statutory provisions for the enforcement of pre-1959 Clayton Act orders, by a proceeding commenced after July 23, 1959, were repealed by enactment of the Clayton Act Finality Act. Respondent cites in support the recent decision of the Court of Appeals for the Ninth Circuit in *Federal Trade Commission* v. *Jantzen, Inc.*, 356 F. 2d 253 (1966).

Respondent supports its alternative request for a deferment of the filing of proposed recommendations until the Supreme

Court has ruled upon the *Jantzen* doctrine with a plea against subjecting it "to irreparable injury in the form of the costs of briefing and preparing and submitting proposed findings and conclusions, in a highly complex and confusing legal and factual context."

Commission counsel urge that both alternatives be denied. They argue that the decision of the Ninth Circuit conflicts with other judicial precedents and does not warrant immediate termination or deferment of all pending compliance matters relating to pre-Finality Act orders; that *Jantzen* does not curtail the Commission's investigative authority; and that the requests for termination or deferment "are but two more of respondents' continuing efforts in this 3½ year-old proceeding to stall and frustrate the Commission's inquiry."

The order directing an investigational hearing in this matter issued on February 1, 1963 [62 F.T.C. 1486]. The record was finally closed by the hearing examiner on April 25, 1966. There remains only the submission by the parties of proposed recommendations and the subsequent examiner's report to the Commission. The Commission considers the decision of the Ninth Circuit in *Jantzen* as being limited to that respondent only and does not find in the motion of Nash-Finch Company a valid reason for either terminating or staying this proceeding. Accordingly,

It is ordered, That respondent's motion to terminate the proceeding or, in the alternative, to defer the filing of proposed recommendations with the hearing examiner be, and it hereby is, denied.

Counsel for respondent in their second motion represent that they have insufficient time to prepare adequate proposed recommendations in this matter. As reasons they list the length of the record (approximately 3,000 pages), the number of exhibits involved (over 300), the complexity of the issues, and the fact that they are presently engaged in the preparation of proposed findings in a matter currently before another Commission hearing examiner. Counsel for the Commission have no objection to an extension, but would limit it to 30 days. We find that a reasonable extension to both sides is warranted. Accordingly,

It is further ordered, That respondent and counsel for the Commission are granted an extension to July 25, 1966, to file their proposed recommendations with the hearing examiner.

Commissioner Elman not concurring and Commissioner MacIntyre not participating.

BEST & CO., INC.

Docket 8669. Order, June 9, 1966

Order denying respondent's request to appeal from hearing examiner's order setting June 21, 1966, as date on which hearings will commence.

ORDER DENYING REQUEST FOR PERMISSION TO FILE INTERLOCUTORY APPEAL FROM HEARING EXAMINER'S ORDER SCHEDULING HEARINGS

Upon consideration of respondent's request for permission to file an appeal from the hearing examiner's order dated May 27, 1966, and filed May 31, 1966, setting hearings in this proceeding to commence on June 21, 1966, the Commission has determined that the request should be denied. The Commission now has before it respondent's appeal, filed May 19, 1966, from the hearing examiner's order of May 10, 1966, denying respondent's motion for depositions from 14 supplier witnesses and for subpoenas *ad testificandum* and *duces tecum* in aid of such depositions. The Commission also has before it respondent's request for permission to appeal from the hearing examiner's order of May 10, 1966, denying respondent's motion to suspend and bar complaint counsel from further participation in this proceeding, also filed on May 19, 1966. Complaint counsel's answers were filed on May 27, 1966. On June 6, 1966, the Commission granted respondent's motion of June 1, 1966, and permitted respondent to submit a reply to complaint counsel's answers on allegedly new matters raised by complaint counsel and allegedly not considered by the hearing examiner. This reply has not yet been received. In connection with its motions, respondent's rights wil be fully protected. After the Commission has decided respondent's appeal and request for permission to file an interlocutory appeal filed on May 19, 1966, the hearing examiner will be authorized to take whatever steps are necessary to carry out that decision. There has been no showing here, as required by § 3.20 of the Commission's Rules of Practice, of extraordinary circumstances necessitating an immediate decision by the Commission to prevent detriment to the public interest. Accordingly,

It is ordered, That respondent's request for permission to file an interlocutory appeal from the hearing examiner's order scheduling hearings be, and it hereby is, denied.

Commissioner Elman not concurring.