## 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.

# BEST & CO., INC.

*Docket 8669. Order and Opinion, June 23, 1966*

Order denying respondent's appeal from hearing examiner's motion for depositions from 14 supplier corporations, and from his denial of motion to suspend complaint counsel, and remanding the suspension motion to the hearing examiner.

## OPINION OF THE COMMISSION

On November 1, 1965, the Commission issued its complaint, stating it has reason to believe that respondent violated the Federal Trade Commission Act by inducing or receiving promotional allowances not made available on proportionally equal terms to its competitors. This matter is now before the Commission on respondent's appeal from the hearing examiner's order of May 10, 1966, denying respondent's motion for depositions from fourteen supplier corporations, respondent's request for permission to file an interlocutory appeal from the hearing examiner's order of the same date refusing to suspend complaint counsel from further participation in this proceeding, complaint counsel's answers and respondent's reply.

The crux of respondent's appeal relating to the deposition issue seems to be the contention that the hearing examiner's prehearing order of December 21, 1965, has not been observed by complaint counsel. Respondent contends in this connection that had complaint counsel complied with that order the need for depositions would have been either wholly obviated or at least the scope of the request would have been materially reduced.

The prehearing order in question provided, in pertinent part, that complaint counsel should furnish to respondent's counsel the following data:

a. A statement of the issues of fact and of law which they regard as being involved in the proceeding, and of the party's position on each such issue. Such statement shall include each party's version of the facts, transactions or events out of which the complaint or any defense thereto arises, and shall not be a mere repetition of the pleadings.

b. A list of the witnesses which the party proposes to call in support of his or its position on each issue of fact. Such list shall include the name, address, occupation and business connection of each witness, and the issue with respect to which it is expected he will testify.

c. A narrative statement of the testimony which it is expected each witness named in subparagraph b, above, will give in support of the party's version of the issues.

d. A list of the documentary evidence which the party proposes to offer in support of his or its position on each issue of fact, and the issue with respect to which it will be offered. Such list shall include a brief description

of the document, the date (if any), by whom prepared or written, and to whom sent.

e. Copies of all documents proposed to be offered, unless the documents came from the files of the opposing party or there is otherwise reason to believe that such party has a copy thereof. In the event it is not feasible to supply copies of particular documents by reason of the size or nature thereof, compliance with this subparagraph may be effected by affording opposing counsel a reasonable opportunity to inspect and make appropriate notes regarding the document in advance of the prehearing conference.[1]

Respondent, in its appeal, claims that disclosure by complaint counsel, although formidable in bulk, is more superficial than real. (Page 3, respondent's appeal brief.)

The hearing examiner, in ruling on respondent's motion for depositions, stated it is his opinion that the taking of such depositions is unnecessary and would result in undue delay of the proceeding, involving to a large extent a duplication of the trial in this case. In supporting this conclusion, he pointed to the fact that two prehearing conferences had already been held. He stated further that as a result of his order scheduling the initial prehearing conference and additional directions to counsel that complaint counsel has turned over, or will have completed turning over, substantially in advance of the hearing, a list of their witnesses, narrative statements of the testimony of such witnesses, a list of their documents and copies of all but those voluminous documents for which summary tables have been substituted.[2] The examiner, in denying the motion for depositions, stated that he is satisfied that counsel for respondent has been supplied with sufficient information so as to be reasonably prepared for cross-examination and the offering of defense evidence. He further stated that in large part the information which counsel for respondent seeks to elicit by the deposition procedure is irrelevant, since it involves such matters as other alleged forms of discriminatory payments and services, and a possible cost justification defense.

It is important to note that the examiner further stated that to the extent that there may be relevant information which respondent may have to obtain from such supplier witnesses, he

[1] According to respondent's appeal, compliance with items a through d would apparently have given it sufficient information to prepare its defense and for the trial of this case so as to obviate the depositions in question or at least permit a material reduction in their scope.

[2] These summary tables are apparently the summarizations referred to as Tables I, II and III in the pleadings. Table I purports to reflect certain suppliers' total sales and advertising allowances in 1962 and 1963 to respondent and certain other retailers. Table II purports to reflect advertisements by respondent during the years 1962 and 1963, to the cost of which certain suppliers contributed. This data, according to the motions filed, includes the names of the publications, the suppliers and style numbers of merchandise featured in such advertisements. Finally, Table III purports to reflect sales by such suppliers to respondent in 1962 and 1963, of the style numbers shown in Table II, as well as the sales by certain suppliers of identical styles during the same period to other retailers.

is satisfied that despite the alleged failure of one of fourteen suppliers to cooperate that the respondent would be able to obtain such information by voluntary processes. The examiner went further, stating that if he were wrong in this assumption, that appropriate arrangements could be made without undue delay in the hearings to secure such information by compulsory process. In this connection, we note that § 3.10 of the Commission's Rules of Practice specifically states that at any time during the course of a proceeding the hearing examiner, in his discretion, may order that the testimony of a witness be taken by deposition and that a witness produce documentary evidence in connection with such testimony.

It is apparent that the examiner carefully weighed the possibility of obtaining substantial results from the deposition procedure which respondent seeks against the delay which, in his opinion, would entail an interruption of many months in the trial of this proceeding and that he came to the conclusion that such a delay is simply not warranted in light of the extremely tenuous possibility that substantive results would be achieved.

In effect, the examiner, in his order of May 10, 1966, held that his directions for pretrial disclosure by complaint counsel have been complied with. This, of course, is a factual determination which the hearing examiner is far better equipped to make than we. The hearing examiner is in a position to discuss these matters with counsel for both sides and to thoroughly examine the material submitted pursuant to his order. In his capacity as trier of fact and in his proximity to the proceeding in the trial stage, the examiner is in a far better position than the Commission to determine what is necessary for either side to prepare for the trial of the case and for cross-examination of the other party's witnesses. We affirm, therefore, in this case the rule that as to matters of discovery the hearing examiner has broad discretion and that he will not be reversed absent a clear showing of abuse of such discretion. See *American Brake Shoe Company*, Docket No. 8622, Order Denying Appeal From Denial Of Applications For Depositions And Subpoenas, issued September 1, 1965 [68 F.T.C. 1169]. We have little hesitation in applying that rule in this instance since it is clear that the examiner is keenly aware of his responsibility to respondent to ensure it has the information necessary for the preparation of its defense and for cross-examination of complaint counsel's witnesses. In this connection, we have already noted the examiner has stated his willingness to grant respondent compulsory proc-

ess for such information as it may need for these purposes should that need become apparent during the course of the hearing. We also note the statement of the examiner, brought to our attention by complaint counsel's answer, that if respondent is unable to cross-examine certain witnesses because they do not have the requisite information or if the witnesses called by respondent in its defense are not familiar with the transactions under consideration, he would then recess the hearing until respondent could obtain appropriate witnesses. The examiner specifically stated, in this connection, that he would follow this procedure to ensure that respondent would not be precluded from being able to make a full cross-examination and to offer a complete defense. It is clear that the hearing examiner will fully protect respondent's rights during the course of these proceedings and there is no need for Commission intervention at this time.

Finally, it is apparent that the examiner has only followed the mandate of the Commission to exert positive control of the proceedings, to define the relevant issues, and to exclude irrelevant material in the prehearing stage of the case. Here the examiner has exercised the responsibility of isolating the essential issues, which is primarily his. He should not be reversed for taking that initiative. See *Topps Chewing Gum, Inc.*, Docket No. 8463, Opinion And Order Disposing Of Motions, July 2, 1963 [63 F.T.C. 2196].

We turn now to respondent's request for permission to file an interlocutory appeal from that part of the examiner's order denying respondent's motion to suspend complaint counsel from further participation in this proceeding. The ground for that motion was that complaint counsel allegedly communicated with a prospective witness so as to induce it not to make available to respondent certain information material to the defense. According to respondent, complaint counsel communicated with counsel for such witness in order to encourage the witness not to cooperate with respondent's counsel in verifying data contained in tables which had been turned over to respondent.

The examiner, in his order of May 10, found the conduct of complaint counsel regarding the communication with the witness in question did not come within the scope of § 3.15(d) of the Rules of Practice, whereunder the examiner is authorized to suspend attorneys who refuse to comply with his direction, are guilty of disorderly conduct, dilatory tactics or contemptuous language. He found, however, that complaint counsel's action was ill-advised under the circumstances in view of the fact that

counsel for respondent had given assurance during the prehearing conference that the confidentiality of the tables would be maintained and that complaint counsel had given no inkling of the need to communicate with any witness before turning over the tables in question. The examiner further found that nevertheless the tables had been turned over to respondent's counsel and there had been no prejudice to respondent as a result of the communication with the witness. The examiner stated that it was his understanding that the witness would cooperate with respondent's counsel in verifying the information in Table II [3] and that any delay in completing the work has not been the result of any communication from complaint counsel. In making these findings, he took into consideration the fact that it is to the advantage of complaint counsel that the checking of this data be completed as soon as possible so that the table may be offered in evidence by agreement without the necessity of the calling of a witness.

Respondent, not satisfied with this disposition, filed a request for permission to file an interlocutory appeal from the order of the examiner refusing to suspend Commission counsel. In this connection, respondent, on the basis of its reconstruction of complaint counsel's contact with the supplier witness, asserts that Commission counsel, in the course of such conversations, made various misrepresentations to the witness and concealed certain material facts in order to obstruct respondent's opportunity to secure information within the possession of such witness. Complaint counsel, in their answer before the Commission, deny having made the alleged misstatements or concealing material facts from the witness as alleged by respondent. Respondent, in its reply, claims this denial raises new matters not previously considered by the hearing examiner.

The Commission accepts the hearing examiner's finding that no harm has resulted to respondent as a result of the activities complained of. Nevertheless, it believes that in view of respondent's insistence on pressing its charges against complaint counsel the matter should be remanded to the hearing examiner for a specific finding on the issue of whether complaint counsel made misstatements to the witness in question and concealed from it material facts with the intent of preventing respondent from gaining access to information to which it is entitled. Merely contacting a witness to inform him that data he furnished the Commission will be turned over to a respondent or a third party without more is, of course, a neutral act not warranting charges

[3] See note 2, *supra*.

of impropriety. A determination of whether respondent's allegations have any basis in fact involves factual questions, including a resolution of the evident dispute between respondent's counsel on the one hand and complaint counsel and counsel for the witness on the other. The hearing examiner, in his position as trier of fact, is in a much better position to resolve such issues than the Commission. In fairness to all concerned, specific findings should be made on the questions outlined above. The examiner may make such findings on the basis of the information now available to him or, if it is necessary in his opinion, he may, in his discretion, at a suitable time in this proceeding, call as witnesses before him all those having knowledge of the facts relevant to respondent's charges against complaint counsel. There should, however, be no interruption of those hearings now scheduled to commence on June 29, 1966. When the examiner has made his findings on these points, he is to certify the matter to the Commission with his recommendation for disposition.

ORDER DENYING APPEAL AND REQUEST FOR PERMISSION TO FILE AN INTERLOCUTORY APPEAL

This matter is before the Commission on respondent's appeal from the hearing examiner's order of May 10, 1966, denying respondent's motion for depositions from fourteen supplier corporations, respondent's request for permission to file an interlocutory appeal from the hearing examiner's order denying respondent's motion to suspend complaint counsel, complaint counsel's answers in opposition thereto and respondent's reply. The Commission has determined that the appeal and the request for permission to file an interlocutory appeal should be denied. The Commission has further determined that the dispute in connection with respondent's motion to suspend complaint counsel should be remanded to the examiner for further findings and action in accordance with the instructions set forth in the accompanying opinion. Accordingly,

*It is ordered,* That respondent's appeal from the hearing examiner's order of May 10, 1966, denying depositions, and respondent's request for permission to file an interlocutory appeal from the hearing examiner's order of May 10, 1966, denying the motion to suspend complaint counsel, be, and they hereby are, denied.

*It is further ordered,* That this matter be, and it hereby is, remanded to the examiner for findings and further action in connection with respondent's motion to suspend in accordance with the directions set forth in the accompanying opinion.

## BEST & CO., INC.

*Docket 8669. Order, June 28, 1966*

Order denying respondents' appeal from hearing examiner's order denying issuance of subpoenas duces tecum directed to complaint counsel's witnesses.

### ORDER DENYING RESPONDENT'S APPEAL AND REQUEST FOR A STAY OF THE PROCEEDING

Upon consideration of respondent's appeal from the hearing examiner's order denying application for issuance of subpoenas duces tecum filed June 27, 1966, and respondent's request for a stay in the hearing pending disposition of this appeal, the Commission has determined that the appeal should be denied.

The examiner denied respondent's request for subpoenas against complaint counsel's witnesses on the ground that it made an insufficient showing of relevance to justify their issuance at this time in view of the magnitude of the request for information. The examiner further determined that much of the data which respondent desires to subpoena is either patently irrelevant, its relevance has not been adequately demonstrated, or is largely covered by the subpoenas issued on the application of complaint counsel. The examiner also took into consideration the fact that granting respondent's application to any substantial extent at this time would create a grave risk of a substantial postponement of the hearings.

We also note that the examiner recognized that respondent might more appropriately develop certain of the evidence which it seeks during its defense rather than in the course of cross-examination. In this connection, we further note that the examiner has stated his willingness, during the course of the hearings, to make compulsory process available to respondent if necessary. What respondent requires in the way of additional information for cross-examination will become apparent during the course of the hearings and the examiner has indicated that he will make ample provision to ensure that respondent will be able to fully cross-examine complaint counsel's witnesses as it is entitled to do. (See our Order Denying Appeal and Request for Permission To File Interlocutory Appeal issued June 23, 1966 [p. 1193 herein].)

In short, at this time there is no indication that the examiner has abused his discretion in denying respondent the subponeas which it seeks, and there is no reason for the commission to intervene at this stage and to interfere with his conduct of the