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

proceedings. At this time the examiner is in a better position to make such determination than the Commission. Accordingly,

It is ordered, That respondent's appeal from the hearing examiner's order denying application for issuance of subpoenas duces tecum filed June 27, 1966 be, and it hereby is, denied.

Commissioner Elman not participating.

DEVCON CORPORATION ET AL.

Docket C-607. Order, April 7, 1966

Order directing hearing examiner to receive evidence on question of whether Commission's order of Oct. 11, 1963, 63 F.T.C. 1034, should be changed to focus on the applied properties of the products in question rather than on their metal content.

ORDER DIRECTING HEARINGS

The Commission on October 25, 1965, having issued its order to respondents to show cause why the order to cease and desist in this matter issued October 11, 1963 [63 F.T.C. 1034], should not be changed so that the order's proscriptions should focus upon the applied properties of the products in question rather than upon their metal content, and

Respondents having filed a response to said order to show cause averring that the change proposed by the Commission raises questions of fact requiring evidentiary hearings, and

The Commission being of the opinion that the public interest will be best served by reopening this proceeding for the reception of evidence for and against the alteration and modification of Paragraph 1(a) of its order to cease and desist dated October 11, 1963, and setting aside Paragraph 1(b) of said order in accordance with proposed order to cease and desist contained in its show cause order of October 25, 1965.

It is ordered, That this matter be assigned to a hearing examiner for the purpose of receiving evidence in support of and in opposition to the question whether the public interest requires that the Commission's order to cease and desist of October 11, 1963, be altered, modified or set aside in accordance with the Commission's order to show cause dated October 25, 1965.

It is further ordered, That the hearings be conducted in accordance with Part 3, Subparts C, D, E and F of the Commission's Rules of Practice.

It is further ordered, That the hearing examiner, upon conclusion of the hearings, certify the record together with his recommendation to the Commission for final disposition of this matter.

No. 12. Promotional assistance—Publisher payments to a single reseller of the publisher's periodical.

The Federal Trade Commission announced today that it had recently advised a publisher of a periodical that the proposed promotional assistance Plan described below would be violative of Section 2(d) of the Robinson-Patman amendment to the Clayton Act. Section 2(d) provides in essence that it is unlawful for a supplier in interstate commerce to offer promotional assistance to his customer in reselling the supplier's product unless a proportionally equal offer also is made to the customer's competitors who sell the same product.

Essentially, the proposed Plan provided for a payment of $75 weekly to the operator of a chain of newsstands. In return, the operator would (1) place the publication on sale on the newsstands, (2) submit daily sales reports to the publisher for each newsstand, (3) favorably display the publication on the stands and (4) provide stock control to avoid sell outs.

The Plan was deemed violative of Section 2(d) because it was to be offered only to the one operator of newsstands. Under the Plan, his competitors in selling the publication were not to be offered promotional assistance—proportional or otherwise.

The Commission's Guides for Advertising Allowances discuss the requirements for such promotional assistance Plans in considerable detail and will be of assistance to persons comtemplating their use. Copies of the Guides are available from the Secretary, Federal Trade Commission, Washington, D.C. 20580. (File No. 663 7020, released Jan. 5, 1966.)

No. 13. Discount-buying membership organization.

A recent Federal Trade Commission advisory opinion informed a promoter that there were no actionable trade restraints inherent in his proposed plan.

As explained by the promoter, the plan involved the formation

*In conformity with policy of the Commission, advisory opinions are confidential and are not available to the public, only digests of advisory opinions are of public record. Digests of advisory opinions are currently published in the Federal Register.