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BEATRICE FOODS CO. AND THE KROGER CO., INC.

Docket 8663. Order and Opinion, Jan 19, 1966

Order modifying hearing examiner's order of Oct. 29, 1965, by striking therefrom the last sentence of numbered paragraphs 1 and 2 which constituted official notice of competitive injury; respondents' petition for rehearing of an interlocutory appeal denied.

OPINION OF THE COMMISSION

This matter is before the Commission on the interlocutory appeal of respondent The Kroger Co., Inc. (hereinafter referred to as Kroger), from the hearing examiner's order granting in part complaint counsel's request for official notice, and on the petition of both respondents to rehear their request to file an interlocutory appeal from the examiner's orders of October 25 and 26, 1965, which request was denied by the Commission December 1, 1965. Complaint counsel has filed briefs in opposition to the appeal and to the request for rehearing.

Kroger's Appeal

Kroger argues (a) that the examiner's order violates the requirements of due process, the Administrative Procedure Act and the Commission's Rules of Practice, (b) that it is improper because it notices "facts" which are not the proper subject of

official notice, and (c) that the "facts" noticed are not relevant to the proceeding.

The statements noticed by the examiner are as follows:

1. The retail grocery business is a highly competitive one. Net profits are low; consequently cash discounts and other allowances are important. Price is a very important factor in enabling a food retailer to compete. A low price to some, but not to all, competing retail stores in a city would normally be expected to hinder competition between them.

2. Milk is a staple, highly standardized, food item sold by virtually all food retailers. Substantial and continuous discrimination in price of a major grocery product, such as milk, creates a probability of competitive injury.

I

On the first argument made by Kroger, that is, the alleged violation of due process, the claim is that the examiner's order will deprive Kroger of a fair hearing because (a) the order has the effect of improperly shifting the burden of proof to Kroger and (b) it denies Kroger the opportunity to test the validity of complaint counsel's case through cross-examination.

Neither point is persuasive. The Commission as an administrative body may take official notice of facts which are appropriate for such notice. Thus, it is entitled to rely on established general facts within the area of its expertise subject to a respondent's right to rebut. *Brite Manufacturing Co.* v. *Federal Trade Commission*, 347 F. 2d 477 (D.C. Cir. 1965). See also *Manco Watch Strap Co.*, 60 F.T.C. 495 (1962); *The Dayton Rubber Company*, Docket No. 7604 (final order issued August 5, 1964 [66 F.T.C. 423]; on appeal before Sixth Circuit Court of Appeals.) The taking of official notice is in no way inconsistent with the requirement of a fair hearing. A fair hearing is had where respondent is given adequate opportunity to rebut the facts noticed. A provision to this effect is contained in both the Administrative Procedure Act and the Commission's Rules of Practice.[1] Kroger, of course, will have such opportunity. *Ohio Bell Tel. Co.* v. *Public Utilities Commission*, 301 U.S. 292 (1937), cited by Kroger, is not apposite since there, among other things, the company was denied an opportunity to explain or rebut. By using official notice which does not require the presentation of witnesses, there necessarily is no opportunity for cross examination on the partic-

[1] See Administrative Procedure Act, § 7(d), 5 U.S.C. 1006(d): "Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary." Federal Trade Commission Rules of Practice, § 3.14(d): "When any decision of a hearing examiner or of the Commission rests, in whole or in part, upon the taking of official notice of a material fact not appearing in evidence of record, opportunity to disprove such noticed fact shall be granted any party making timely motion therefor."

ular item of evidence noticed. However, as indicated, Kroger's right to rebut or explain is fully protected and, thus, the requirement of due process is satisfied. Also, there is no shift in the burden of proof in the taking of official notice as claimed by Kroger; there is merely a change in the initiative in going forward with the evidence. See *Dayton Rubber Company, supra* (Slip Opinion, page 10) [66 F.T.C. 459].

II

The other two arguments raised on the appeal, that is, that the "facts" noticed are not the proper subject of official notice and that they are not relevant to the proceeding are related and will be disposed of together in the paragraphs below.

In contesting the official notice taken by the examiner, Kroger appears to be essentially concerned with (a) the last sentence in each of the two paragraphs noticed, which sentences are in the nature of conclusions as to probable competitive injury and (b) with the factual propositions set forth in the first paragraph which Kroger states suggest a judgment that price is a paramount factor in enabling a food retailer to compete. Kroger, so far as we can see, has not seriously contested the merits of the factual propositions noticed otherwise except to generally assert that markets are different and broad generalizations do not apply. The latter claim is the basis for Kroger's argument that the facts noticed are not relevant.

Taking first the argument referred to under (b) above, *i.e.*, the claim that the statements suggest that price is a "paramount factor" in enabling a food retailer to compete, we observe that no such fact is expressly noticed and we do not read into the statements any such meaning. It is noticed only that price is a "very important factor" in such connection.

Factual propositions of which notice has been taken, not including the conclusionary sentences, are that the retail grocery business is highly competitive; that net profits are low, consequently cash discounts and other allowances are important; that price is a very important factor in enabling a food retailer to compete; and that milk is a staple, highly standardized food item sold by virtually all food retailers. Findings to this effect have been made in a number of prior Commission cases dealing both with grocery products generally and the dairy line in particular. These, we believe, are established general facts within the area of the Commission's expertise.

In *Tri-Valley Packing Association,* 60 F.T.C. 1134, 1181 (1962),

the Commission found that the grocery business is highly competitive, that the markups at various levels of distribution are affected by competition and that the percentage of return on large volumes of sales is small. The Court of Appeals for the Ninth Circuit, in *Tri-Valley Packing Association* v. *Federal Trade Commission,* 329 F. 2d 694, 703 (9th Cir. 1964), in remanding the case to the Commission on other grounds, in part observed:

> . . . There was testimony that those engaged in the resale of such products operate on a very narrow margin—so narrow, in fact, that it is essential to take advantage of two per cent discounts for cash. The price discriminations, on the other hand, ranged from two per cent to ten per cent.
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> This would indicate that nonfavored retailers, and retailers who purchased from nonfavored wholesalers, were required to maintain retail prices at least two per cent higher than those of favored retailers in order to realize any appreciable profit on retail sales. In view of the highly competitive nature of the business, price disparities of this kind could well endanger the ability of these merchants to compete with favored retailers, or so the Commission could find.

In *United Biscuit Co. of America,* Docket No. 7817 (February 7, 1964) [64 F.T.C. 586], the Commission found that independent store owners testified generally as to the highly competitive nature of the retail food business and that net profits are low and cash discounts and other allowances are important. The Court of Appeals for the Seventh Circuit, in affirming the Commission decision in *United Biscuit Co. of America* v. *Federal Trade Commission,* 350 F. 2d 615 (7th Cir. 1965), specifically approved these findings. The Commission, in *Fruitvale Canning Company,* 52 F.T.C. 1504, 1514 (1956), agreed with the hearing examiner's finding that the grocery business is vigorously and highly competitive, that markups on fast-moving items such as canned fruits are low, and that price is the chief factor in making sales. In *Foremost Dairies, Inc.,* Docket No. 7475 (May 23, 1963) [62 F.T.C. 1344], the Commission adopted findings in the initial decision as to competitive effects, including those stating that milk is a staple, highly standardized food item sold by virtually all food retailers, that competition is keen among retailers and margins of profits and markups are small and that a lower price to some but not all competing retail stores in the market in question would normally be expected to hinder competition between them. In affirming, the Fifth Circuit Court of Appeals, in *Foremost Dairies, Inc.* v. *Federal Trade Commission,* 348 F. 2d 674, 679 (5th Cir. 1965), stated in part as follows:

There is also testimony from which the Commission could infer *what are well-known facts*—that profit margins in the sale of fluid milk are relatively low and that competition in the sale of milk at retail is quite lively. (Emphasis supplied.)

See also *Page Dairy Company,* 50 F.T.C. 395, 398 (1953) in which the Commission found that "In the sale of milk to the consuming public the gross margin of profit is very narrow. Therefore, any appreciable difference in price has the tendency to divert business from one seller to another."

The Commission in making its determination here additionally draws upon the experience and knowledge gained not only from the many other actions it has taken in the grocery and dairy industries but also from the general inquiries and studies it has made in both fields.

Kroger suggests, though mainly, it seems, as to the conclusionary statements on injury, that markets are different and that the general statements may not apply in the geographic market involved in the complaint, i.e., Charleston, West Virginia. The conclusionary statements will be considered below and as to the remaining statements the argument is rejected. The doctrine of notice, of course, recognizes the possibility of exceptions and that is why a respondent must be provided with the opportunity to rebut the noticed facts. Kroger will be provided that opportunity.

In the circumstances, we believe that we may take official notice of and rely upon the factual propositions mentioned (*i.e.,* all except the last sentence in each paragraph noticed) as established general facts within the area of the Commission's expertise, subject, of course, to respondents' right to rebut. *Brite Manufacturing Co.* v. *Federal Trade Commission, supra.*

III

The last sentence in each of the paragraphs noticed are in a somewhat different category from the other statements because they appear to be as much conclusionary as factual. The first, which reads: "A low price to some, but not to all, competing retail stores in a city would normally be expected to hinder competition between them," appears to be drawn from a holding in a prior case. See Commission opinion in *Foremost Dairies, Inc.,* Docket No. 7475 (May 23, 1963) [62 F.T.C. 1344]. The statement, divorced from the factual circumstances in which a similar statement was made, is not sufficiently meaningful to warrant the taking of official notice.

Coming then to the last sentence, we observe that it states as follows: "Substantial and continuous discrimination in price of a major grocery product, such as milk, creates a probability of competitive injury." This statement appears to be a paraphrase of a conclusionary finding by the Commission in *Foremost Dairies, Inc., supra,* as follows: "The probability of competitive injury resulting from such a substantial and continuous discrimination in the price of a major grocery product is manifest." (Opinion, p. 1361.) It also follows closely, though not exactly, the test for competitive injury in a secondary line matter pronounced by the United States Supreme Court in *Federal Trade Commission* v. *Morton Salt Co.,* 334 U.S. 37, 50 (1948). There the Court said it believed it to be self-evident that there is a "reasonable possibility" that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This is precedent for the Commission in making its final determination, and specific official notice of such precedent is unnecessary. Moreover, this last sentence in the second paragraph is a statement which, if the conditions mentioned therein are found to exist, decides a major issue in the case, *i.e.,* the probability of competitive injury. In the circumstances here, we believe this determination should be made on the basis of the whole record upon the completion of the proceedings and not as a matter of official notice. Accordingly, on the last sentence in each of the two paragraphs of the official notice taken by the examiner Kroger's appeal is granted, and it is otherwise denied.

Respondents' Request for Rehearing

Respondents have filed a petition in this matter requesting a rehearing on the Commission's order of December 1, 1965 [68 F.T.C. 1231], denying their request for permission to file an interlocutory appeal from the examiner's orders of October 25 and 26, 1965. The examiner's orders granted complaint counsel's request for the production of documents and denied requests of respondents for an early trial and, alternatively, to dismiss the complaint. Respondents have presented no new arguments nor have they shown a change in circumstances to justify granting their request for a rehearing, and accordingly it will be denied.

An appropriate order will be entered.

Commissioner Elman dissented and has filed a dissenting statement.

DISSENTING OPINION

BY ELMAN, *Commissioner:*

If indeed it were the Commission's objective to stretch out this case as long as possible, no action would be better calculated to achieve that result than issuance of the present order. Instead of proceeding with reasonable dispatch to a conclusion of the case (see Section 6(a) of the Administrative Procedure Act), the Commission will now become embroiled in another protracted litigation over unimportant collateral issues. *Cf. Associated Merchandising Corporation,* Docket No. 8651 (Order issued January 19, 1966) [p. 1083 herein]. I agree with respondents that the Commission is improperly invoking the doctrine of official notice as a substitute for "adequate probative analysis" and "realistic appraisals of relevant competitive facts" (*F.T.C.* v. *Sun Oil Co.*, 371 U.S. 505, 527). But even if respondents are wrong and it should ultimately be held after years of litigation that these "facts" may be officially noticed, the game would not be worth the candle. If, as the Commission thinks, these are all "established general facts within the area of the Commission's expertise" and "self-evident," the burden of proving such facts would appear to be minimal. Does it serve the public interest for the Commission, in order to relieve complaint counsel of that burden, to make a big "federal case" out of the matter?

ORDER RULING ON INTERLOCUTORY APPEAL AND DENYING PETITION FOR REHEARING

This matter having come before the Commission upon the interlocutory appeal of respondent Kroger from the hearing examiner's order granting in part complaint counsel's request for official notice and upon a petition of both respondents to rehear their request to file an interlocutory appeal from the examiner's orders of October 25 and 26, 1965, and the Commission, in accordance with the accompanying opinion, having granted in part and denied in part the interlocutory appeal of respondent Kroger and having determined that the request for rehearing should be denied:

It is ordered, That the hearing examiner's order on official notice dated October 29, 1965, be, and it hereby is, modified by striking therefrom the last sentence in paragraph numbered 1 and the last sentence in paragraph numbered 2 of the statements of which he took official notice.

It is further ordered, That the petition of respondents filed

December 22, 1965, for rehearing of their request to file an interlocutory appeal be, and it hereby is, denied.

Commissioner Elman dissented and has filed a dissenting state-