DEVCON CORPORATION ET AL.

Docket C–607. Order and Opinion, Dec. 16, 1966

Order denying respondents' request to file an interlocutory appeal and returning the case to hearing examiner for the receipt of additional evidence on the question of the metallic content of respondent's products.

OPINION OF THE COMMISSION

By REILLY, *Commissioner:*

The Commission on October 11, 1963 [63 F.T.C. 1034], issued its consent order herein requiring in relevant part that respondents cease and desist from:

1. (a) Using the words "steel" or "aluminum" or any other word or words denominating metallic substances in brand names to designate, describe or refer to a product that consists principally of non-metallic ingredients: *Provided, however,* That if a product contains a metallic substance in some form, the percentage thereof may be stated.

On October 25, 1965, the Commission issued its order to show cause why the October 11, 1963, cease and desist order should not be modified so that the thrust of the order provision is to

the metallic properties of the products rather than to their metallic content and thus in relevant part should read as follows:

1. (a) Using the words "steel" or "aluminum" or any other word or words denominating metallic substances in brand names to designate, describe or refer to a product which, after application, does not have the same physical and chemical properties of metal and of any particular metal represented: *Provided, however,* That nothing herein contained shall prohibit truthful representations in advertising and labeling of the percentage of content of any metallic substances in such products.

Thereafter, respondents in their answer filed February 21, 1966, requested a full evidentiary hearing on the issues raised by the Commission's order to show cause, and on April 7, 1966, the Commission issued an order directing hearings ". . . 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 [63 F.T.C. 1034], be altered, modified or set aside in accordance with the Commission's order to show cause dated October 25, 1965."

Evidentiary hearings in response to this order of the Commission have been held and the record has been closed by the hearing examiner.

On November 23, 1966, respondents filed with the Commission a Request for Permission to File Interlocutory Appeal, pursuant to § 3.20 of the Commission's Rules of Practice, averring in substance that the hearing examiner has erroneously confined the scope of the hearing to a consideration of the single issue whether the products involved herein after application have the same physical properties of metal or of a particular metal. It is respondents' contention that the hearing examiner should have permitted the introduction of evidence on the question of public interest, deception and whether a suitable remedy other than excision of trade names should be provided.

Complaint counsel has opposed respondents' request on a number of procedural and substantive grounds.

In the opinion of the Commission the hearing examiner's interpretation of the Commission's order directing hearings was unduly restrictive.

In directing a hearing to determine ". . . whether the public interest requires that the Commission's order of October 11, 1963, be altered, modified or set aside in accordance with the Commission's order to show cause" the Commission implicitly charged the hearing examiner to resolve the central issue, namely, whether after application the products have the same physical and chemi-

cal properties of metal, and any subsidiary issues pertinent thereto.

Specifically, although the Commission is charged in the first instance with responsibility for determining public interest, it is wholly appropriate to entertain any evidence proffered by respondents on the point suggesting that there is none. *Moretrench Corporation* v. *Federal Trade Commission,* 127 F. 2d 792 (1942).

Similarly, on the question of deception, while it is not necessary that actual deception be proved, rather that the records show capacity and tendency to deceive, *Charles of the Ritz Distributors Corp.* v. *Federal Trade Commission,* 143 F. 2d 676 (1944); *Goodman* v. *Federal Trade Commission,* 244 F. 2d 584 (1957), nevertheless, respondents should not for that reason be prevented from submitting probative evidence tending to negate capacity to deceive. Finally, the possibility that this proceeding may result in the excision of valuable trade names, brands or designations makes it vitally important that respondents have an opportunity to submit whatever evidence they have which they feel demonstrates that excision is not reasonably necessary to cure whatever deception may inhere in the trade names. *Federal Trade Commission* v. *Royal Milling,* 288 U.S. 212 (1933); *Jacob Siegel* v. *Federal Trade Commission,* 327 U.S. 608 (1946).

This matter is before the Commission on an application under Rule 3.20 for permission to file an interlocutory appeal. As noted above, the record for reception of evidence has been closed. However, in the interest of efficiency and speed, there seems little reason to insist upon the formal requirement of entertaining an interlocutory appeal since the issue involved is clear from the application.

Accordingly, an appropriate order directing the hearing examiner to reopen and receive evidence will issue.

ORDER DIRECTING FURTHER HEARING AND DENYING REQUEST FOR PERMISSION TO FILE INTERLOCUTORY APPEAL

The Commission on April 7, 1966, having issued its order directing hearings on the issues raised by its order to show cause of October 25, 1965, in this matter, and

The hearing examiner in the course of said hearings having ruled that the only relevant issue was whether the products in question after application have the same properties as does metal or particular metals, and

The respondents on November 23, 1966, having filed a Request

for Permission to File Interlocutory Appeal from said ruling, averring that other relevant issues which should have been considered by the hearing examiner are: (1) whether the proceeding is in the public interest, (2) whether the trade names in question are in fact deceptive and (3) whether a remedy other than excision might not be adequate in curing any deception which might be present, and

The Commission being of the opinion that the public interest will be best served by ruling now on the issues raised in the Request for Permission to File Interlocutory Appeal and that therefore interlocutory appeal is unnecessary,

It is ordered, That respondents' Request for Permission to File Interlocutory Appeal be, and it hereby is, denied.

It is further ordered, That the hearing examiner be, and he hereby is, directed to reopen the record of these proceedings for receipt of evidence on issues outlined herein and in the accompanying opinion.

THE CARL MFG. CO. ET AL.

Docket 8689. Order and Opinion, Dec. 23, 1966

Order granting respondents' request for extension of time to Jan. 9, 1967, in which to file an appeal brief.

DISSENTING OPINION

By ELMAN, *Commissioner:*

The complaint in this case, issued by the Commission on June 27, 1966 [71 F.T.C. 1156], alleged that the respondent corporation misled the public by calling itself a manufacturer when actually it manufactured none of the merchandise it sells. At the hearing, however, complaint counsel—in direct contradiction to the information given the Commission when it decided to issue the complaint—conceded that respondent does in fact manufacture many of the products it sells. Complaint counsel thereupon moved to amend the complaint to conform to the evidence, and the hearing examiner granted the motion. As amended by the hearing examiner, the complaint alleged deception of the public in that "all" of the merchandise sold by the respondent company is not manufactured by it. The hearing examiner found that the evidence supported the allegations of the amended complaint, and his initial decision, filed November 1, 1966, contains an order prohibiting respondent from using the word "manu-

facturer" or any similar word as part of its trade name unless it also discloses that respondent is a distributor and assembler of many of the products it sells.

On November 15, 1966, the corporate and individual respondents filed a notice of appeal. On December 12, 1966, their counsel sent the Commission a letter in which respondents offer to withdraw their appeal, allowing the initial decision of the hearing examiner to become the final order of the Commission, if they are allowed a period of one year to bring themselves into full compliance with the order. Their counsel states that "it would take my client that length of time to comply with the order, because of the fact that a new catalog will have to be compiled, printed, and distributed. My client will definitely comply with the order, but in view of the above, needs the necessary time to do so."

This request seems to me to be entirely reasonable. In many cases the Commission has granted similar requests in order to avoid unnecessary financial hardship. I see no reason to put respondents to the burden and expense of an appeal in order to have their request considered. If respondents do no more than pursue their statutory right of appeal, more than a year will elapse before any final order could be entered in this case. We would serve the public interest, and not merely respondents', by accepting their offer and entering a final order immediately, with compliance to be fully completed by December 1967. It seems most unlikely that the course pursued by the Commission will produce the same result.

ORDER GRANTING EXTENSION OF TIME TO FILE APPEAL BRIEF

This matter is before the Commission upon the receipt of a letter from respondents' counsel, filed December 13, 1966, herein treated as a motion, requesting the Commission to delay the effective date of the Commission's decision in this matter for a period of one year, with the understanding that in such a case respondents will withdraw their appeal.

Respondents were served with the initial decision on November 9, 1966, on which date the service of the initial decision was completed, and on November 15, 1966, respondents filed their notice of intention to appeal. Under § 3.22 of the Commission's Rules of Practice, respondents' appeal brief was due to be filed December 9, 1966, thirty days after completion of the service of the initial decision. Therefore, respondents are already in default because they have failed to file their brief within

the time prescribed by the Commission's Rules. Section 3.21(a) of the Commission's Rules provides, however, that the failure of an appellant to file a brief within the prescribed time shall extend for ten days the period within which the Commission may by order stay the effective date of the initial decision or place the case on its own docket for review and so the initial decision has not yet become the decision of the Commission.

Respondents' counsel professes a degree of unfamiliarity with the Commission's Rules of Practice and in the circumstances it appears that the failure to timely file their appeal brief may have been unintentional. The Commission, therefore, at this time will not hold respondents to be in default for failure to file their appeal brief. Rather, we will treat respondents' proposal as in part a request for an extension of time for the filing of their appeal brief, and we will grant such extension so as to preserve for them this opportunity. Also, in the event the Commission should decide to issue a cease and desist order herein, it will then determine whether or not to require compliance or the filing of reports of compliance therewith for a period of one year from the date of this order instead of the usual period of sixty (60) days from the date of the issuance of the cease and desist order. Accordingly,

It is ordered, That respondents be, and they hereby are, granted an extension of time within which to file their appeal brief to and including January 9, 1967.

Commissioner Elman dissented and has filed a statement.

GENERAL TRANSMISSIONS CORPORATION OF WASHINGTON ET AL.

Docket 8713. Order, Dec. 28, 1966

Order denying respondents' request that it be allowed to take depositions and serve subpoenas duces tecum upon certain of its competitors.

ORDER DENYING REQUEST FOR PERMISSION TO FILE INTERLOCUTORY APPEAL

This matter is before the Commission on respondents' request for permission to file an interlocutory appeal from the hearing examiner's order of December 6, 1966, denying respondents' application for orders to take oral depositions of competitors, accompanied by subpoenas *duces tecum*. In support of their request, respondents cite the Commission's order of December 1, 1966 [p. 1833 herein], denying their motion for suspension of pro-