ISRAEL RETTINGER ET AL. DOING BUSINESS AS RETTINGER RAINCOAT MFG. CO.

Docket 6534. Order and Opinions, Apr. 7, 1967

Order denying respondent's motion to reopen proceeding and modify the order.

DISSENTING OPINION

BY ELMAN, *Commissioner:*

What is involved here is essentially a private controversy between The Goodyear Tire & Rubber Company of Akron, Ohio, a billion-dollar corporation, and a small company that has been using "Goodyear" on its raincoats since 1911. In 1888, in *Goodyear India Rubber Co.* v. *Goodyear Rubber Co.*, 128 U.S. 598, the Supreme Court held that "Goodyear" is a generic name in the public domain. Subsequent to that decision, many companies (including most of the rainwear industry) have been using the term "Goodyear." Goodyear of Akron is now embroiled in private litigation with respondent and others, claiming infringement of private trademark rights. I do not think it is in the public interest for this Commission to intervene in such essentially private controversies. The point was made more than forty years ago by Gerard Henderson in his classic study, "The Federal Trade Commission" (1924):

> The argument is sometimes made that there is a legitimate place for the Federal Trade Commission in cases of this sort, as the protector of the weak against the strong. A large corporation, it is said, can hire eminent lawyers and experts, and prolong the litigation until the strength and resources of the small competitor, whose private brand the corporation is trying to appropriate, have been exhausted. The difficulty with this argument is that, in the cases in which complaints have been issued, the object has as often as not been to protect a large, nationally known company against a small but unscrupulous competitor. Among the companies for whose protection such complaints have been issued are the * * * Goodyear Tire & Rubber Company, * * *. These companies would hardly admit that they were applying, *in forma pauperis*, to have the Government assume the expense of their private litigations.
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> Where the deceptive brand or name, or the misleading advertisement, is designed to lead customers to confuse respondent's product with the product of a specific competitor, there is a remedy in the courts of law and equity which is more prompt and more efficacious than the cumbersome procedure of the Commission. * * * In such cases it would seem that the person injured should be made to pursue his remedy in a private litigation, and that public funds should not be expended by a governmental agency to relieve him of that burden. (Pp. 174–75, 228.)

More recently, a perceptive observer of the Commission has made the same point:

> Where the Commission intervenes in an essentially private controversy, it effectively relieves one of the prospective parties of the financial burden of the litigation and presents the other party with an adversary of practically unlimited means. The public thus subsidizes some private litigants at random to the detriment of others, and sometimes in the pursuit of unmeritorious causes. Moreover, the course of the litigation is distorted. What the Commission may see as an appropriate remedy may well differ from what a court would have imposed or what the private parties would have accepted in settlement. (French, *The Federal Trade Commission and the Public Interest*, 49 Minn. L. Rev. 539, 545 (1965).)

SEPARATE CONCURRING STATEMENT

BY REILLY, *Commissioner*:

I am in agreement with the Commission majority that respondents' petition to reopen should be denied. If the Commission in eliminating deceptive representations incidentally benefits a private party, I can think of no useful purpose being served by focusing attention on the incidental rather than the principal effect and insisting that the Commission has immersed itself in a private controversy.

Simply stated, the Commission in the present instance is fully aware that the Goodyear Tire & Rubber Company of Akron, Ohio, is currently engaged in asserting trademark rights in a series of infringement actions directed against firms using the name "Goodyear" in connection with the sale of rainwear manufactured by them. The Commission as a body has neither stake nor official interest in this litigation. However, if the use by these firms of the name "Goodyear" deceives the public into buying their products in the mistaken belief that they were manufactured by Goodyear of Akron, the Commission has an obligation to act.

Whether or not Goodyear of Akron manufactures raincoats, the brand name "Goodyear" is advertised throughout the United States mainly in connection with tires but also in relation to other products. It is frequently advertised on an institutional basis wherein the name "Goodyear" is alone featured. A notable example of this, familiar to those attending sporting events, is the "Goodyear" blimp which carries no message beyond the name.

This advertising in the case of Goodyear, as indeed in the case of most manufacturers, emphasizes the claim of superior quality and it is not too much to suppose that those who buy a product emblazoned with the name "Goodyear" are responding to the ad-

vertising claim as applying as much to the name as it does to the product. To say "Goodyear" applies only to tires is to ignore the fact that the name "Goodyear" alone may suggest quality, that is, that it conveys an abstract impression of quality.

If the prospective buyer may respond to the name "Goodyear" under the mistaken assumption that the product has been manufactured by Goodyear of Akron, he may have been deceived, and that is what the Federal Trade Commission Act is designed to cure. It makes not the slightest difference that Goodyear of Akron has or has not a valid claim or can successfully press infringement suits against rainwear manufacturers using the name "Goodyear." It even makes not the slightest difference whether or not the name "Goodyear" stands for quality. It makes no difference that Goodyear does not make rainwear. If the public chooses a raincoat because it is led to believe it is made by Goodyear of Akron and it is not so made, the public is injured because it "* * * is entitled to get what it chooses though the choice may be dictated by caprice or by fashion or perhaps by ignorance." *F.T.C.* v. *Royal Milling Company,* 288 U.S. 212, (1933) ; *F.T.C.* v. *Algoma Lumber Company, et al.,* 291 U.S. 67, (1934).

It is not for the Commission to play Big Brother and to pick and and choose which material facts are sufficiently crucial to the question of the public's judgment to demand adherence to the truth and which are sufficiently peripheral to permit dissimulation. *Double Eagle Refining Company* v. *F.T.C.,* 265 F. 2d 246, (C.A. 10 1959), *cert. den.* The Commission has long proceeded upon the principle that the public is entitled to know the facts with respect to a product and make its own judgment whether or not it wants to buy, however capricious and ill-advised that judgment may be. As the Commission said in its "Statement of Basis and Purpose" accompanying its Trade Regulation Rule on Cigarette Advertising and Labeling issued June 22, 1964, p. 89, "* * * Section 5 forbids sellers to exploit the normal expectation of consumers in order to deceive * * *."

ORDER DENYING MOTION TO REOPEN

This matter is before the Commission on respondent's motion to reopen the matter pursuant to the provisions of § 3.28(b) of the Commission's Rules of Practice and to modify the order to cease and desist, entered by consent on July 9, 1956 [53 F.T.C. 132]. The order prohibits respondent from "[u]sing the name 'Goodyear' unless in immediate connection therewith the name of the person, firm, or corporation manufacturing such merchandise and the fact

that such person, firm, or corporation is the manufacturer thereof, is clearly and conspicuously revealed."

The Commission, in an advisory opinion pursuant to the provisions of § 3.26(b), dated December 5, 1966, interpreted the order as prohibiting the use of the name "Goodyear" except where respondent's proper name, "Rettinger Raincoat Mfg. Co.," and the phrase "mfg. by" appeared in conjunction therewith. This interpretation superseded the interpretation given the order in 1956 by a letter from the Commission's General Counsel, wherein respondent was informed that the use of its trade name, "Lucky Rainwair," instead of its proper name constituted compliance with the terms of the order. Respondent, through its motion to reopen the proceeding and to modify the order, requests that the order be altered so that it would state that respondent is prohibited from "[u]sing the name 'Goodyear' unless in immediate connection therewith the name 'Lucky Rainwair' is clearly and conspicuously revealed."

Under § 3.28(b) of the Rules of Practice, a respondent who is subject to an order which has become final may, if he is of the opinion that "* * * changed conditions of fact or law require that said * * * order be * * * modified * * *, or that the public interest so requires," file a petition requesting reopening for that purpose. Respondent alleges that its decision to begin importing rainwear manufactured in Japan, a practice initiated after entry of the order herein, constitutes a change of fact sufficient to require reopening and modification. The change of law allegedly authorizing reopening and modification is the Commission's new interpretation of the terms of the order as expressed in the advisory opinion of December 5, 1966.

The requested modification of the order would alter entirely its basic effect and application. The use of the trade name "Lucky Rainwair" does not adequately reveal the name of the manufacturer of the product and the use of "by" instead of "mfg. by" does not put the purchasing public on notice that respondent is the manufacturer. Where modification of this nature is requested, the alleged changes of fact and law must be such as to render the underlying theory of the complaint inapplicable to the changed circumstances and make the order completely inappropriate. In addition, a change by the Commission in its interpretation of a consent order is not usually grounds for modification and is clearly not grounds in the absence of any indication that the consent agreement was predicated upon the original interpretation.

In the present case, the public interest in requiring disclosure of the name of the individual or company manufacturing the prod-

uct and the fact that such individual or company is the manufacturer has not changed. Thus, the underlying theory of the case is as equally applicable now as it was when the order was entered. The fact that respondent, after consenting to the order, began to import products from Japan does not affect the necessity for requiring the above disclosures on products of domestic manufacture. Thus, this change is not a basis for reopening this proceeding and modifying the order as it applies to domestic products. Moreover, there appears to be no reason to treat imported products differently by permitting respondent to substitute some other name for the name of the true manufacturer. In reply to respondents' objection that it should not be required to disclose the names of its Japanese sources, it should be noted that the order makes such disclosure necessary only when the name "Goodyear" is placed on such products. If respondent omits this name entirely and uses instead its trade name "Lucky Rainwair," the order has no application.

The agreement to entry of a consent order, as executed by respondent, contains no indication that it was predicated upon the understanding that the Commission would interpret the order in a particular manner. To the contrary, the Commission's present interpretation of the order is more nearly consistent with the wording of the order than was the original interpretation. Thus, the change in the Commission's interpretation of the order does not constitute grounds for reopening and modification.

For the foregoing reasons, the Commission concludes that respondent has failed to demonstrate that there are changed conditions of fact or law sufficient to warrant reopening of this proceeding for the purpose of modifying the order in the manner requested, and that the public interest does not so require. Accordingly,

It is ordered, That respondent's motion to reopen the proceeding and to modify the order be, and it hereby is, denied.

Commissioner Elman dissented and has filed a dissenting statement. Commissioner Reilly has filed a concurring statement.

SUBURBAN PROPANE GAS CORPORATION

Docket 8672. Order, Apr. 7, 1967

Order granting respondent permission to file interlocutory appeals from examiner's order denying joinder of Phillips Petroleum Co.

ORDER GRANTING PERMISSION TO FILE INTERLOCUTORY APPEALS

Respondent having filed, on March 15, 1967, two petitions for leave to file interlocutory appeals, one requesting leave to file an

interlocutory appeal from the denial of its motion for a prehearing order establishing the burden as to cost justification and the other requesting leave to file two interlocutory appeals from the failure of the examiner to certify motions (a) for the joinder of Phillips Petroleum Company in the complaint and (b) for the dismissal of the complaint for the lack of public interest or, in the alternative, for the Commission to decide such motions *de novo* and complaint counsel, on March 22, 1967, having filed answers thereto; and

The Commission having determined that respondent has justified its request to file interlocutory appeals from the denial by the examiner of its aforementioned motions:

It is ordered, That respondent be, and it hereby is, granted permission to file interlocutory appeals from the examiner's order filed March 7, 1967, denying its motions requesting joinder of Phillips Petroleum Company in the complaint, dismissal of the complaint, and a prehearing order covering complaint counsel's burden on the issue of costs.

PACIFIC NORTHWEST COLLECTIONS, INC., ET AL.

Docket 8730. Order, Apr. 7, 1967

Order withdrawing complaint and affording respondents the opportunity to enter into consent order.

ORDER WITHDRAWING COMPLAINT*

Upon consideration of the hearing examiner's certification on March 23, 1967, of respondents' motion to waive the Commission's order of January 6, 1967 (treated by the examiner as a request to waive § 2.4(d) of the Commission's Rules), complaint counsel's answer thereto filed March 22, 1967, and respondents' reply filed March 24, 1967, the Commission has determined that the complaint should be withdrawn to afford respondents a period of thirty days from the service of this order to take advantage of the consent procedures provided for in Part 2 of the Commission's Rules. The complaint is withdrawn subject to immediate reissuance on the expiration of this period if the parties do not submit a satisfactory consent settlement to the Commission. The original notice of a proposed adjudicative proceeding dated September 15, 1966, shall

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*See *In the Matter of Pacific Northwest Collections, Inc.*, Dkt. No. C-1287, dated Jan. 16, 1968, 73 F.T.C. 58.

satisfy the notice requirement under § 2.1 of the Rules. Accordingly,

It is ordered, That the complaint in this matter be, and it hereby is, withdrawn subject to reissuance in accordance with the conditions stated above.

It is further ordered, That respondents be, and they hereby are, afforded the opportunity to take advantage of the procedures provided by Part 2 of the Commission's Rules for a period of 30 days from the issuance of this order upon them.

THE CROWN CORK & SEAL COMPANY, INC.

Docket 8687. Order and Opinion, Apr. 10, 1967

Order directing General Counsel to take appropriate steps in the enforcement of the subpoena duces tecum against Continental Can Company, Inc., only.

OPINION OF THE COMMISSION

This matter is before us on memoranda submitted by third parties Continental Can Company, Inc., and American Can Company in answer to certification by the hearing examiner of noncompliance with subpoenas duces tecum served upon them in connection with the hearings herein.

The burden of Continental's memorandum is that the Commission should reexamine the matter before seeking enforcement because (1) the hearing examiner was in error in requiring compliance without a prospective grant of *in camera* treatment of material called for by the subpoena and (2) the Commission should alternatively consider the feasibility of resolving the problem involved herein by ordering the hearing examiner to direct that the Continental data be delivered to an accounting firm selected by the hearing examiner for consolidation with data from other firms comprising the relevant market and the presentation of the resulting aggregate values to respondent's counsel.

American in its memorandum alleges that the hearing examiner was in error certifying noncompliance because American, together with National Can Corporation, with the knowledge of the hearing examiner, has entered into a stipulation with respondent providing that they will produce documents upon the same terms Continental is compelled to produce them, that American Can Company stands ready to produce on these terms and is thus not in default.

In response to the hearing examiner's certification, and prior to the filing of the Continental and American memoranda, the

Commission by order dated March 3, 1967 [p. 1657 herein] directed the General Counsel to proceed for enforcement.

Because of the importance of the questions raised by these memoranda, the Commission is treating them as timely filed pleadings in opposition to the hearing examiner's certification.

The subpoenas to Continental, American and National are three of over 30 directed to third parties at the instance of respondent seeking data showing sales of cans, crowns and closures for purposes of delimiting what in respondent's opinion is the relevant line of commerce in this Section 7 case. The more than 30 other producers have already complied.

Continental originally filed a motion to quash which was denied by the Commission on January 13, 1967 [p. 1610 herein]. The hearing examiner thereafter ordered that return be made by Continental, American and National on February 20, 1967.

On the day appointed, Continental proposed that a stipulation be executed by it and the parties providing in essence that data furnished in response to the subpoenas be treated confidentially and that the parties join with Continental in asking the hearing examiner to enter an order providing that *in camera* treatment will be given any material furnished if and when it is placed in evidence. Although the parties, except for a minor objection by complaint counsel, were agreeable, the hearing examiner refused his consent on the stated ground that § 3.16(h) of the Commission's Rules providing for *in camera* treatment applies only in unusual and exceptional circumstances when good cause is found on the record and does not contemplate granting *in camera* treatment prospectively when the circumstances of its submission in evidence are not known and can only be speculated upon.

In response to the observations made in our opinion of January 13, 1967, accompanying the order denying motion to quash, the hearing examiner considered the feasibility of following the procedure set out in our opinion and order in *Mississippi River Fuel Corporation,* Docket No. 8657, June 8, 1966 [69 F.T.C. 1186], directing that data be submitted by Continental to an accounting firm for compilation and presentation of aggregate industry figures to respondent's counsel. The hearing examiner found this procedure unworkable because the question of relevant product line is at the present stage of the proceedings somewhat fluid, at least as far as its product composition is concerned, and because respondent has returns from 35 of the firms comprising various product universes and an accountant could not therefore effectively mask the sales figures of the remaining three.

The hearing examiner indicated at the hearing that be would

order that the data produced by Continental would be kept confidential prior to introduction into evidence and at the time of introduction he would consider whether to grant *in camera* status under § 3.16(h).

Continental declined to produce on these terms and the examiner's certification followed.

Continental's memorandum substantially restates the position it took at the hearing and still insists upon prospective *in camera* treatment for some of the data required in response to the subpoena. Alternatively, Continental will accept, in lieu of prospective *in camera* treatment, an arrangement of the kind directed by the Commission in *Mississippi River Fuel Corporation,* Order and Opinion of June 8, 1966.

The memorandum presents questions of some importance including the propriety of prospective *in camera* treatment both in the abstract and in this case, the appropriateness to this case of the solution arrived at by the Commission in *Mississippi River Fuel Corporation,* and the primacy of the hearing examiner's ruling.

It can be said at the outset that the readiness of the parties to accept prospective *in camera* treatment in resolution of this impasse is obviously not controlling. Their immediate concern is the trial of the case and they have neither stake nor responsibility in the precedential effect such a ruling might have upon the effective discharge by the Commission of its broader administrative responsibilities.

In camera treatment is not binding on the parties; its purpose is to prevent the incorporation of sensitive data in the public record. The need for it therefore does not arise until the material is about to be submitted in evidence. It is an extraordinary device when applied as provided in the Commission's Rules to material about to be submitted. It is doubly difficult to justify its application prospectively.

The hearing examiner for the reasons set forth in his certification considers it inappropriate in the circumstances of this case, but has agreed that all data submitted will be accorded confidential treatment and that the question of *in camera* treatment will be given full consideration if and when the material is submitted in evidence.

There is no reason to suppose that the hearing examiner will not rule correctly when the time comes, nor that Continental will be prevented from securing Commission or court review of an adverse decision. Thus, Continental is fully protected by the rulings of the hearing examiner to date and the only reason for granting

prospective *in camera* treatment is to allay Continental's fears that the Commission's Rules and Procedures are unreliable. The Commission would be ill-advised to credit such fears by permitting prospective *in camera* treatment in this case. Continental in short is asking for something it neither has a right to nor needs. It asks for "greater protection" which in reality is protection from the Commission itself.

There is moreover an even more compelling reason for not acceding to Continental's demand. That is that while it is entirely appropriate for Continental to request, and for the hearing examiner to consider, the adoption of appropriate safeguards to protect sensitive data, nevertheless, in the present instance Continental has gone further and insisted upon a promise of *in camera* treatment as a condition precedent to its compliance with the Commission's subpoena. We believe that the integrity of the Commission's procedures requires that response to its process be unconditional and that the Commission not permit itself to be placed in the position of negotiating a response to its compulsory process. The determination whether data is deserving of *in camera* treatment must be made by the hearing examiner on the basis of an appraisal of the material itself, the applicable law and the circumstances of the case, free from the coercive effect of conditions precedent imposed by the parties subpoenaed.

We stated in our order of March 3, 1967 [p. 1657 herein], to the General Counsel, directing enforcement, that the hearing examiner acted properly in refusing a prior commitment to grant *in camera* treatment. We see no reason for disturbing that ruling. Certainly there is no abuse of discretion. We think the primacy of the hearing examiner's ruling is exceptionally important in a matter such as this and that the Commission should not substitute its judgment for his when it does not know what data will be introduced into evidence, what form it will be in when it is introduced, and whether, indeed, within the context of this case, it is now of a character to require *in camera* treatment or whether its character will change with the passage of time. Whether *in camera* treatment should be accorded now or in the future should be determined by the hearing examiner, considering all the facts, including the fact that over 30 other firms have submitted corresponding data without requiring *in camera* treatment.

Continental has presented a possible alternative in its offer to accept the sort of safeguard employed in *Mississippi River Fuel Corporation,* Docket No. 8657, Order and Opinion of June 8, 1966, wherein, in order to mask the data secured from respondent, it

was directed that the material submitted in response to the subpoena should be delivered to an accounting firm selected by the hearing examiner for consolidation of aggregate values for presentation to respondent's counsel. [69 F.T.C. 1186.]

We have already instructed the hearing examiner that he might properly consider this as an appropriate solution even though in the *Mississippi River* case it was to protect the material from respondent's eyes, while Continental's principal concern at present is protection of the material from publication. The distinction is not important except that protection from respondent would require a ruling in advance of submission such as that made in *Mississippi River Fuel,* while protection from publication could be adequately achieved through *in camera* ruling. In any event the hearing examiner has ruled that this device would be impracticable and unworkable because the relevant product market is being disputed and thus it is difficult to know beforehand what products will constitute the universe to be constructed from the data delivered to the accountant.

We have said repeatedly, most recently in the above-referred to order of January 13, 1967 [p. 1610 herein], denying Continental's motion to quash in this case, that the hearing examiner should decide what safeguards are suitable. We feel in this case, as in most, the Commission is too remote from the issues to intrude into the conduct of the hearing. Certainly, we are not prepared to say that the hearing examiner was clearly wrong in rejecting the *Mississippi River Fuel* solution and thus we see no abuse of discretion.

Finally, on March 7, 1967, American Can Company filed with the Secretary an answer in opposition to the hearing examiner's certification of noncompliance with subpoena duces tecum, stating in substance that American as well as National have each stipulated with respondent that they will comply to the extent Continental is required to and that American is therefore not in default.

Notwithstanding their stipulation with respondent, American and National are technically in default. However, we agree that in view of the stipulations in the record, the Commission should not seek enforcement of the American and National subpoenas at this time.

An appropriate order will issue.

Commissioners Elman and Jones would remand this matter to the hearing examiner with instructions to enter a protective order similar to that entered in *Mississippi River Fuel Corporation,* Docket 8657, June 8, 1966.

ORDER RULING UPON MOTIONS IN OPPOSITION TO HEARING EXAMINER'S CERTIFICATION

The hearing examiner on February 24, 1967, having certified to the Commission the noncompliance by American Can Company, National Can Corporation and Continental Can Company, Inc., with subpoenas duces tecum issued by the hearing examiner on October 10, 1966, as well as noncompliance with the hearing examiner's order of January 26, 1967, directing that return of said subpoenas be made on February 20, 1967, and

The Commission on March 3, 1967 [p. 1657 herein], having directed the General Counsel to proceed for enforcement of said subpoenas and Continental Can Company, Inc., on March 6, 1967, and American Can Company on March 7, 1967, having respectively filed with the Commission memoranda herein treated as motions in opposition to the hearing examiner's certification, and

The Commission for the reasons set forth in the accompanying opinion being of the view that the motion of Continental Can Company, Inc., must be denied and that of American Can Company be granted,

It is ordered, That memorandum of Continental Can Company, Inc., filed March 6, 1967, herein treated as a motion in opposition to the hearing examiner's certification be, and it hereby is, denied.

It is further ordered, That order of the Commission dated March 3, 1967, directing the General Counsel to seek enforcement of the three subpoenas therein specified, be, and it hereby is, amended so that the General Counsel is directed to take appropriate steps looking toward the enforcement of the subpoena duces tecum served upon Continental Can Company, Inc., only and not those of American Can Company and National Can Corporation.

Commissioners Elman and Jones would remand this matter to the hearing examiner with instructions to enter a protective order similar to that entered in *Mississippi River Fuel Corporation,* Docket 8657, June 8, 1966.

NATIONAL BISCUIT COMPANY

Docket 5013. Order, Apr. 14, 1967

Order directing investigational hearings to determine if respondent has violated the provisions of an order to cease and desist issued April 26, 1954, 50 F.T.C. 932.

ORDER DIRECTING COMPLIANCE HEARINGS

Whereas, pursuant to the provisions of an Act of Congress