It is further ordered, That respondent's time within which to file its appeal brief be, and it hereby is, extended until twenty (20) days after the service upon the parties of this order.

Commissioner Elman would grant the motion for remand.

SEACREST INDUSTRIES CORPORATION ET AL.

Docket C-719. Orders, May 19, 1967

Order denying motion of Eugene Lissauer that this consent order be reopened for the purpose of dismissing it as to him. Motion for hearing denied May 23, 1967.

ORDER DENYING MOTION TO REOPEN

The Commission on February 28, 1964 [64 F.T.C. 1279], issued a consent order against respondents herein requiring them to discontinue certain practices in connection with food purchasing plans.

Petitioner Eugene Lissauer, on May 1, 1967, filed with the Secretary a motion pursuant to Section 3.28(b) of the Commission's Rules asking that this matter be reopened and that the consent order entered into by him be dismissed. In support of his motion, petitioner states: (1) that he has resigned as president of Seacrest Industries Corporation, (2) that Seacrest is out of business, (3) that he knows of no violations of the order, and (4) that he executed the consent order herein in reliance upon representations by the Commission's investigating attorney, who is no longer in the Commission's employ, that "* * * if the alleged acts had not been committed the entry of such an order was of no consequence, had no importance and would not affect me in any way."

The first three grounds set forth are obviously lacking in merit. The status of the corporate respondent and petitioner's relation thereto are wholly irrelevant to the question of petitioner's obligation to comply with the order as an individual. Moreover, the fact that the order may be currently being complied with is no such assurance as to future compliance as to warrant reopening and setting aside.

The fourth ground cited by petitioner, although it requires somewhat fuller consideration than the first three, is similarly insufficient to warrant reopening.

If there is reasonable likelihood that the statement petitioner alleges was in fact made by a Commission representative and petitioner in fact relied upon it in executing the consent order,

the matter should be reopened and referred to a hearing examiner for the limited purpose of establishing what in fact transpired.

The Commission is not, however, warranted in reopening the matter on the basis of a bald averment by petitioner alluding to a somewhat ambiguous statement by a Commission representative which in practical effect says that the Commission's consent settlement process is a pointless charade.

Although petitioner's motion is subscribed and sworn to, no affidavit has been submitted setting forth the precise circumstances surrounding the making of the statement and petitioner's reliance upon it. Nor has petitioner explained how he could have been under so vital a misapprehension when he had the advice of counsel and when the order to which he consented required of him a report of compliance within 60 days of the execution of the consent order setting forth in detail the manner and form of his compliance with the order.

Finally, respondent, Lissauer, has made no attempt to explain to the Commission why it is that he has filed a petition in May 1967 because of a misapprehension he was under in connection with an order issued on February 28, 1964.

We think the motion must be denied. Accordingly,

It is ordered, That Motion to Reopen filed by Eugene Lissauer on May 1, 1967, be, and it hereby is, denied.

SUBURBAN PROPANE GAS CORPORATION

Docket 8672. Order, May 25, 1967

Order denying respondent's request to join Phillips Petroleum and to dismiss complaint, and returning case to hearing examiner for further consideration of cost justification.

ORDER RULING ON INTERLOCUTORY APPEALS

This matter is before the Commission upon respondent's interlocutory appeals from the examiner's order denying its motions (a) to join Phillips Petroleum Company (Phillips) as a party respondent, (b) to dismiss the complaint and (c) to render an order establishing the burden of proof in connection with an asserted cost justification defense, upon complaint counsel's answer thereto, and upon respondent's reply.

The Request to Join Phillips as a Party Respondent

Respondent's request to join Phillips was denied by the examiner in his order of March 7, 1967. The examiner should have certified

the question to the Commission with his recommendation. The request to name in the complaint a new additional respondent and to allege a violation by such new respondent of a section of law different from that pleaded in the complaint as issued, clearly constituted a question on which the examiner had no authority to rule. The requested allegations would concern a different practice which would require a different determination as to the belief that a violation has occurred and as to the public interest. It was, therefore, not "reasonably within the scope of the proceeding initiated by the original complaint." See §§ 3.7(a)(1) and 3.6(a) of the Commission's Rules of Practice. *Cf. Capital Records Distributing Corporation,* 58 F.T.C. 1170 (1961); *Standard Camera Corporation,* Docket No. 8469 (November 7, 1963) [63 F.T.C. 1238]; *Hafner Coffee Co.,* 54 F.T.C. 1917 (1958). Nevertheless, there has been no prejudice to respondent since the matter is now before the Commission for *de novo* consideration and determination.

Respondent's argument is that the absence of Phillips in this proceeding will unfairly prevent Suburban from obtaining and presenting evidence which would establish its defenses such as cost justification and the meeting of competition in good faith. More specifically, respondent argues that should Phillips not be joined in this proceeding and should complaint counsel come forward with some evidence of the lack of cost justification, respondent will be faced with having to present evidence on the issue of Phillips' cost savings arising from its dealings with Suburban without the affirmative cooperation of Phillips.

Respondent, although asserting that it would be inconvenienced in making its defense, has not shown that it could not without Phillips make an adequate defense on the matter of possible cost justification or any other issue. It has available to it all the investigative and discovery techniques provided by the Commission's Rules, including the use of subpoenas, if necessary. Thus, it is not dependent upon the voluntary cooperation of the seller in the preparation of its defense. Furthermore, Phillips, if it were charged with a Section 2(a) violation as urged by respondent, might not seek to defend itself under the cost justification proviso and so the naming of Phillips, in that event, would be of no help to respondent. Finally, the Commission issues a complaint only when it believes that a section of the laws it administers has been violated and that a proceeding in respect thereto would be in the interest of the public. The Commission would not consider it an appropriate exercise of its discretion to issue a complaint primarily as a matter of convenience to another charged with a

law violation. For such reasons respondent's request to name Phillips in the complaint will be denied.

Request to Dismiss Complaint

On March 7, 1967, the examiner denied respondent's request to dismiss the complaint, which request was on the ground that in view of the alleged discontinuance of the practice and changed circumstances there is no public interest in the continuation of the proceeding. The examiner recognized that the question involved the Commission's administrative discretion in issuing a complaint and that it presented an issue on which he had no authority to rule. Nonetheless, he denied the motion. The matter should have been certified to the Commission with the examiner's recommendation. Section 3.6(a), Commission's Rules of Practice; *Drug Research Corp.*, Docket No. 7179 (October 3, 1962) [63 F.T.C. 998].[1] Respondent, however, has not been prejudiced, since the matter is now before the Commission for *de novo* consideration and determination.

Respondent argues, as it did before the examiner, that the complaint should be dismissed because the practice complained of has been discontinued and because there assertedly is no reasonable likelihood that these or similar practices will arise in the future. Among the grounds for this argument is the claim that Phillips has withdrawn from the Eastern market, which assertedly indicates that there is no reasonable likelihood that the contractual arrangements complained of or any similar arrangements between Phillips and Suburban will arise again. Respondent also argues that the developments in the industry have made it unlikely that the practice will be renewed. It is claimed, for instance, that the markets for LP gas have changed; that whereas formerly it was a seasonable market in which supply exceeded demand, now new marketing developments and new uses—particularly the use in the petrochemical industry—has reversed this situation. Respondent urges that as a result of the different circumstances referred to, a cease and desist order, if obtained, would accomplish nothing constructive, and it requests, therefore, that the complaint be dismissed.

Complaint counsel argues, among other things, that Suburban's abandonment of purchases from Phillips, which they claim was forced, offers no assurance that the public interest will be pro-

[1] Compare *The Drive-X Company, Inc.*, Docket No. 8615 (June 10, 1964), in which the Commission held that the examiner had authority to rule on such a motion since there the motion challenged the Commission's legal power to issue the complaint rather than its discretion or judgment on whether or not a proceeding would be in the public interest.

tected as to respondent's future conduct with its other suppliers (or with Phillips, if Phillips reenters the Eastern market in the future). Such counsel also aver, in effect, that certain of respondent's factual assertions are not correct.

Respondent, in its reply brief filed May 1, 1967, sharply challenges the assertion that its statements are untrue and presents asserted facts in defense of its position.

The question of discontinuance is one which, in the Commission's view, should not be decided upon the claims and arguments of counsel in interlocutory appeal briefs. This is an issue which, if further raised, should be resolved, not in a piecemeal way, but on the basis of the whole record to be made in this proceeding. Therefore, respondent's request to dismiss the complaint will be denied.

Request for Pretrial Order on Burden of Proof

Respondent, in its motion to the hearing examiner filed February 28, 1967, additionally requested the examiner to issue an order establishing the burden on complaint counsel in connection with the cost justification issue. Respondent asked for an order which in substance would state (a) that complaint counsel would have the burden of showing that the difference in methods by which Suburban was served by Phillips and the different quantities involved, compared with alleged disfavored competitors, could not give rise to sufficient savings to cost justify the alleged differential in prices and that Suburban knew or should have known that the differences involved as to methods and quantities could not have given rise to sufficient pertinent savings to justify such differentials, and (b) require that complaint counsel amend their previously filed trial brief and therein allocate exhibits and otherwise specify in indicated detail the evidence to be offered on the cost justification issue.

The examiner denied respondent's motion, stating that he had noted the cases referred to by respondent, including *Automatic Canteen Co. of America* v. *Federal Trade Commission*, 346 U.S. 61 (1953), and "assumes that complaint counsel are familiar with the legal precedents which respondent has cited and will interpret them correctly with reference to the evidentiary burden imposed upon complaint counsel to prove the absence of cost justification." [2]

[2] If this statement of the examiner means that complaint counsel has the initial burden of proving that the alleged discriminations in price are, in fact, not cost justified, it is incorrect. The rule in *Automatic Canteen*, to the extent it can be reduced to a mechanical formula, is as follows: (a) Where a buyer knows that he buys in the same quantities as his competitor and is served by the seller in the same manner or with the same amount of exertion as the other buyer, the Commission need only show, to establish its prima facie case, that the buyer

On a question of such importance as this, it seems to us that the examiner erred in failing to clearly resolve it. It is his responsibility to properly regulate the course of the hearing and to rule upon, as justice may require, procedural and other motions. This means that at times he may have to construe case law precedents so that the parties will know how to proceed. Moreover, the examiner ruled on the motion and denied it without first hearing from complaint counsel. Insofar as respondent's requested order is concerned, it is conceivable (though we do not draw a conclusion on this one way or the other) that complaint counsel and respondent might have found an area of agreement.[3]

It seems clear that one of the issues herein will be the nature and the extent of the proof which complaint counsel must adduce to comply with their burden on the matter of defenses such as cost justification in a Section 2(f) proceeding. *Cf. Automatic Canteen, supra; Fred Meyer, Inc.*, Docket No. 7492, *aff'd*, 359 F. 2d 351 (9th Cir. 1966), *cert. denied on this ground*, 87 S. Ct. 851 (*cert. granted on other grounds*, 87 S. Ct. 853 (1967).) Respondent, under the Commission's Rules requiring continuous hearings, will need to know complaint counsel's intended evidence on the cost justification issue to allow it to adequately prepare its defense. Complaint counsel, to the extent they have not already done so, can and should specify as nearly as possible what this proof will be.[4] Therefore, the appeal on this motion is partially granted, as

---

knew that the methods by which he was served and quantities in which he purchased were the same as in the case of his competitor; and (b) if the methods or quantities differ, the Commission must only show that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential and that the buyer, knowing these were the only differences, should have known that they could not give rise to sufficient cost savings.

In a matter where the methods or quantities differ, which is frequently the case, the evidence to be adduced by complaint counsel initially will vary from case to case. We do not propose to state, nor could we in this instance, what complaint counsel's exact burden would be until all the facts are available on the record. However, assuming the matter to involve different methods or quantities, if complaint counsel show such facts and circumstances as would have given the buyer reason to believe, based on the knowledge available to him, including knowledge of the methods of doing business in the particular industry, that the different methods or quantities could not have resulted in cost savings sufficient to justify the differential allegedly accorded him, they would have met their initial burden. For the application of such rule to specific cases see *Fred Meyer, Inc., infra; National Parts Warehouse, et al.*, Docket No. 8039 (December 16, 1963) [63 F.T.C. 1692], *aff'd, General Auto Supplies, Inc.* v. *Federal Trade Commission*, 346 F. 2d 311 (7th Cir. 1965); *D & N Auto Parts Co., Inc.*, 55 F.T.C. 1279 (1959), *aff'd, Mid-South Distributors* v. *Federal Trade Commission*, 287 F. 2d 512 (5th Cir. 1961), *cert. denied*, 368 U.S. 838 (1961).

[3] To this time we do not know whether or not complaint counsel in fact object to the order on cost justification requested by respondent in its motion of February 28, 1967. We do not find in their answering brief on this appeal a discussion of such specific requests.

[4] It is noteworthy that complaint counsel, in the course of filing briefs in connection with this appeal, have not denied the burden upon them as set out in *Automatic Canteen* and, in fact, have delineated the proof which they believe is necessary as part of their case-in-chief. For instance, on page 7 of their answer to the appeal, they state as follows: "We reiterate our statement in the trial brief filed by us that in a Section 2(f) proceeding, counsel supporting

indicated, and otherwise denied. The examiner is instructed to hear complaint counsel in answer to respondent's motion on this issue and to dispose of this matter in such a way as to provide respondent with sufficient knowledge of the evidence complaint counsel will adduce on the cost justification issue to allow respondent adequately to prepare its defense. Accordingly,

It is ordered, That respondent's request to join Phillips Petroleum Company as a party respondent in this proceeding be, and it hereby is, denied.

It is further ordered, That respondent's request to dismiss the complaint in this proceeding be, and it hereby is, denied.

It is further ordered, On respondent's request for a pretrial order on the burden of proof on cost justification, that the matter be, and it hereby is, returned for further proceedings in accordance with the Commission's instructions in this order.

Commissioner Elman concurs on the basis of his understanding that the Commission's order, although somewhat opaque, in effect directs the hearing examiner to grant respondent's request for a pretrial order on the allocation of the burden of proof on the cost-justification issue.

A. & M. KARAGHEUSIAN, INC.

Docket 7636. Order, June 2, 1967

Order denying petition of J. P. Stevens, Inc., that this case be reopened for the purpose of setting aside the order.

ORDER DENYING PETITION TO REOPEN THE PROCEEDING FOR THE PURPOSE OF SETTING ASIDE THE ORDER

J. P. Stevens, Inc., has petitioned the Commission pursuant to the provisions of § 3.28(b) of the Rules of Practice for Adjudicative Proceedings to reopen this proceeding for the purpose of

---

the complaint need only show that a 'reasonable and prudent businessman' on the basis of the facts known to him, should have believed that a favorable price granted to him could not have been cost-justified by his supplier." Elsewhere, on page 13, such counsel further state that "Once it is established that Suburban should have known that no cost justification defense could have been maintained by its supplier, the burden of coming forward with evidence as to this issue shifts to respondent. The respondent may then either choose to rebut the showing of knowledge made by complaint counsel or show that any price preferences it received were, in fact, cost justified by its suppliers." This seems to us to be a reasonably clear statement of the evidence complaint counsel proposes to adduce on the issue. Respondent, however, in its requested order, seeks specific information and detailed identification of such evidence. Whether or not this further request is appropriate is a matter which should be passed on by the examiner after he considers the response, if any, of complaint counsel to respondent's request.

setting aside the order. The Director of the Bureau of Restraint of Trade has opposed the petition and Stevens has filed a document entitled "Memorandum Re Answer To Petition."

The Commission's order in this case was issued on February 10, 1964. The petition states that all of the stock of respondent Karagheusian was acquired by petitioner Stevens on February 18, 1964 [64 F.T.C. 781]. Prior to that date, Stevens held no interest in Karagheusian and Karagheusian held no interest in Stevens. Karagheusian was operated as a wholly owned subsidiary of Stevens until February 1, 1965, at which time it was dissolved by merger into Stevens. Since that date, the business formerly carried on by Karagheusian has been continued by Stevens through its Gulistan division.[1]

In support of its position that the above change of fact is one which is sufficient to warrant reopening of the proceeding for the purpose of setting aside the order, Stevens relies upon a recent action of the Commission in which the order entered against Karagheusian in another case was set aside. See *A. & M. Karagheusian, Inc.*, Docket No. 4305; Order Granting Request To Reopen Proceeding and Vacating Order to Cease and Desist (Sept. 13, 1965) [68 F.T.C. 452]. The order originally issued in that case required Karagheusian to cease and desist from using words connoting Oriental origin or characteristics to designate or describe rugs or carpets which were not in fact made in the Orient and which did not possess all of the essential characteristics and structure of Oriental rugs.[2] In concluding that there had been a change of fact sufficient to warrant reopening the proceedings in that case for the purpose of setting aside the order, the Commission noted, *inter alia*, that there was no reason to believe that the acquisition was made for the purpose of evading the order, or that Stevens had participated with Karagheusian in violation of the order.

The posture of the instant matter differs significantly from that in Docket No. 4305. In the present matter, the Commission's final order was amended on April 2, 1964, after respondent Karagheusian had become a wholly owned subsidiary of Stevens, to extend the period of time within which respondent Karagheusian would be required to file a report of compliance.[3] Thereafter, the practice prohibited by the order to cease and desist—that of granting cumulative annual volume discounts—was continued not

---

[1] Petition, pp. 3–5; Answer To Petition, pp. 9–10; Memorandum Re Answer To Petition, p. 3.
[2] 36 F.T.C. 446, 456 (1943).
[3] *A. & M. Karagheusian, Inc.*, Docket No. 7636, Superseding Order As To Time Within Which Respondents Shall File Report Of Compliance (April 2, 1964) [64 F.T.C. 781, 787].

only during the period when Karagheusian was operated as a wholly owned subsidiary of Stevens, but after Karagheusian was dissolved and became a division of Stevens.[4] Thus, it appears that Stevens itself has actively participated in the prohibited practice. Under the circumstances, the Commission's conclusion in Docket No. 4305 that the change of ownership was a change of fact sufficient to warrant reopening for the purpose of setting aside the order does not require a similar conclusion in the present matter. Moreover, as emphasized in the petition, the practice prohibited by the order is a current problem of industrywide proportions. In this setting, therefore, and for both of the above reasons, the Commission concludes that neither the acquisition by Stevens of respondent Karagheusian nor its subsequent dissolution is a change of fact sufficient to warrant reopening the present matter for the purpose of setting aside the order.

Petitioner alleges also that the public interest requires reopening of the proceeding for the purpose of setting aside the order on two theories. First, the petition states that industry conditions have changed since the institution of the proceeding and, because of this change, it is argued that Stevens, which had nothing to do with the original violation, should not be in a worse position than its competitors who are not under Commission order. This is not an allegation of a change of fact occurring subsequent to the issuance of the order, but is instead an assertion that the equities of the situation require vacation of the order. However, Stevens has not alleged that it was unaware of the Commission's order when it acquired Karagheusian or advanced any other reasons which would justify granting to it special treatment by vacating the instant order at a time when the Commission has similar orders outstanding against a large number of its competitors.[5]

Secondly, Stevens asserts that the public interest requires vacation of the order because, in its opinion, the order is ineffective as a matter of law against a successor corporation in a situation where there has been a bona fide discontinuance and a true change of ownership. See *Southport Petroleum Co.* v. *N.L.R.B.*, 315 U.S. 100 (1942). However, the petitioner has not stated the conditions under which the discontinuance was effected and, as previously noted, the discontinuance did not occur until after Karagheusian was dissolved. In addition, although the law relative to the application of administrative orders to successor corporations is not

---

[4] Answer To Petition, pp. 2, 4, 5, 8; Memorandum Re Answer To Petition, pp. 3, 6.

[5] Stevens has joined with a number of its competitors in requesting the promulgation of a Trade Regulation Rule designed to put all members of the industry on an equal footing. Memorandum Re Answer To Petition, p. 3.

entirely settled, the courts in considering this question have on several occasions indicated that the fact that the successor continued the prohibited practice was of significance. See *N.L.R.B.* v. *Birdsall-Stockdale Motor Co.*, 208 F. 2d 234 (10th Cir. 1953); *N.L.R.B.* v. *Lunder Shoe Corp.*, 211 F. 2d 284 (1st Cir. 1954); *N.L.R.B.* v. *New Madrid Mfg. Co.*, 215 F. 2d 908 (8th Cir. 1954). In any event, the ultimate decision as to whether a particular administrative order is applicable to a successor corporation must finally be made by a court of competent jurisdiction in the proper circumstances. It is the Commission's conclusion, however, that the alleged inapplicability of an order to a successor is not grounds for setting aside such order in circumstances where the successor has, as in this case, participated in and continued the practice prohibited by the order and where such practice is a current problem in the industry. As a result, the Commission concludes that the public interest does not require that the matter be reopened for the purpose of setting aside the order on either ground advanced by the petitioner. Accordingly,

It is ordered, That the Petition To Reopen The Proceeding For The Purpose Of Setting Aside The Order be, and it hereby is, denied.

SCHOOL SERVICES, INC., ET AL.

Docket 8729. Order, June 16, 1967