SCHOOL SERVICES, INC., ET AL.

Docket 8729. Order, June 16, 1967

Order denying respondent's request for an order directing the taking of depositions of Commission employees and production of Commission documents.

ORDER DENYING REQUEST FOR TAKING OF DEPOSITIONS AND PRODUCTION OF DOCUMENTS

This matter is before the Commission on the hearing examiner's certification of respondents' application for an order directing the taking of depositions and production of documents, filed June 13, 1967, and complaint counsel's answer thereto filed June 15, 1967. Respondents desire to take depositions from Joseph W. Shea, Secretary of the Commission, Charles Sweeney, Director of the Bureau of Deceptive Practices, and Sheldon Feldman, an attorney of the Commission, and, in addition, request that Mr. Shea be required to produce certain documents.

The order which respondents seek would require the Commission Secretary to produce the following:

A. All memoranda, directives, orders and other documents of the Federal Trade Commission ("Commission" hereinafter), initiating and creating the Special Consumer Protection Program on or about July, 1965, in the District of Columbia.

B. All minutes of meetings of the Commission on or before February 13, 1967 concerning findings or rulings that the Commission had "reason to believe" that the Respondents were or are presently using any unfair methods of competition or unfair or deceptive acts or practices in commerce and that the issuance of a Commission Complaint, Docket No. 8729 ("Complaint" hereinafter) "would be in the interest of the public."

C. All memoranda, directives, orders and other documents of the Commission initiating any and all investigations pertaining to the Respondents resulting in the issuance of the Complaint.

D. All memoranda and other documents from Commission officers, employees or agents to the Commission and/or any of the individual Commissioners prior to February 13, 1967 summarizing the results of investigations of the Respondents and all recommendations accompanying said memoranda.

E. All investigative reports, statements of witnesses and summaries of statements of witnesses relating to the investigation of the Respondents prior to February 13, 1967 resulting in the issuance of the Complaint.

In addition, respondents state that the Secretary of the Commission will be expected to testify about the duties and responsibilities of the officers and employees of the Commission and the procedures followed by them in making investigations and reporting to the Commission thereon.

Respondents assert this testimony and the documents in question are relevant to certain issues raised by their answer to the complaint.[1] In this connection, respondents deny the allegation in the complaint that the Commission has reason to believe the Federal Trade Commission Act has been violated or that a proceeding by this agency would be in the public interest. In addition, they assert that the documents in question and Mr. Shea's testimony are relevant to certain defenses which they have raised in this proceeding.[2] In essence, respondents assert that the Commission lacks jurisdiction to prosecute this case and to issue the complaint on the ground that it could not have had a basis to believe or to conclude that respondents had engaged in unfair methods of competition or unfair or deceptive acts or practices in commerce. They also contend that the Commission lacked jurisdiction because it had no basis to conclude that the proceeding against respondents would be in the public interest. Further, respondents state that the Commission lacks jurisdiction to decide this case or to grant relief against respondents on the ground that it is legally incapable of rendering a fair and impartial trial

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[1] Paragraph 2 of respondents' application.

[2] *Id.*

in disposition of this case. Finally, respondents assert that the testimony in question and the documents requested would be relevant to their defense and that if there is any public interest involved in this proceeding it is obviously *de minimis*.

In the case of Sheldon Feldman, respondents state that he will be expected to testify about the Commission's Special Consumer Protection Program and its relationship to the investigation of respondents prior to the filing of the complaint. According to the application, respondents also expect that he will testify with respect to his cooperation in the publication of news stories which " 'polluted the atmosphere of justice and impartiality' in these proceedings." Respondents also assert that Mr. Feldman's testimony is relevant to the issues set forth in paragraph 2 of their application.

In the case of Charles Sweeney, respondents expect that he will testify about the investigations of respondents prior to the issuance of complaint as well as with respect to the recommendations made to the Commission concerning such investigations. He also, according to respondents' application, will be expected to testify concerning his cooperation in the publication of news stories which " 'polluted the atmosphere of justice and impartiality' in these proceedings."

Respondents' application will be denied. Clearly the testimony and documents which respondents seek from the Secretary of the Commission, in paragraph 1 of their application, as well as the testimony of Messrs. Feldman and Sweeney insofar as it relates to the issues raised in paragraph 2 of their application, are an attempt to probe the mental processes of this agency in investigating respondents and the decision leading up to the complaint in this matter.[3] Data of this nature is ordinarily privileged since they relate to an integral part of the decision-making process of this agency. *Walled Lake Door Company* v. *United States*, 31 F.R.D. 258, 260 (E.D. Mich. S.D. 1962). In addition, many of the documents sought would be privileged as an attorney's work product.[4]

Respondents may not seek internal documents and information relating to matters within the Commission's administrative dis-

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[3] ". . . the Commission's decision on whether to issue complaint is within its discretion. Preservation of the integrity of the administrative process precludes an inquiry into this Agency's mental processes leading up to that decision." (Footnote omitted.) *The Seeburg Corporation*, Docket No. 8682 (order and opinion issued October 25, 1966) [70 F.T.C. 1818, 1826].

[4] ". . . Documents coming within that category will not be released without a strong showing of special circumstances, good cause or necessity. . . ." *Graber Manufacturing Company, Inc.*, Docket No. 8038 (order and opinion issued December 13, 1965) [68 F.T.C. 1235].

cretion in instituting investigations and issuing complaints merely to satisfy their curiosity. Respondents have not demonstrated the good cause required to justify release of the confidential information they seek. Certainly, if an administrative agency could be required to disclose the information sought here on the basis of the showing made in respondents' application, "The function of deciding controversies might soon be overwhelmed by the duty of answering questions about them." See *NLRB* v. *Botany Worsted Mills, Inc.*, 106 F. 2d 263 (3d Cir. 1939).

Nor is the application saved by respondents' bare assertion of bias presumably linked to the controversy of whether the Commission has the authority to issue press releases after complaint. Respondents must make a more concrete showing of prejudice on the part of the agency or its employees than they have made here, for subpoenas probing the internal decision-making process of an administrative agency will not be issued on bare suspicion or to "[license] extended fishing expeditions in waters of unknown productivity in the vague hope of 'catching the odd one'." See *Coro, Inc.* v. *Federal Trade Commission*, 338 F. 2d 149, 153 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965). See also order and opinion of the Commission ruling on question certified and denying motion to strike certification in *R. H. Macy & Co., Inc.*, Docket No. 8650 (issued September 30, 1965) [68 F.T.C. 1179]. During the course of the hearings in this case on the merits, testimony may be required on behalf of the respondents concerning their allegation that there has been cooperation in the publication of news stories which " 'polluted the atmosphere of justice and impartiality' " to the extent that such proffered evidence is found to be relevant and material to the issues therein. The Commission does not permit the use of depositions as a substitute for the continuous hearings required by the Rules of Practice. See *Topps Chewing Gum, Inc.*, Docket No. 8463 (opinion and order disposing of motions issued July 2, 1963) [63 F.T.C. 2196].

Finally, in requesting confidential information from the Commission, respondents have not complied with the requirements laid down in § 1.134 of the Rules of Practice. Accordingly,

It is ordered, That respondents' application for an order directing the taking of depositions and production of documents be, and it hereby is, denied.

Commissioner Elman concurring in the result.

NATIONAL BISCUIT COMPANY

Docket 5013. Order and Memorandum, June 26, 1967

Order denying respondent's motion of May 12, 1967, that Commission's order of April 14, 1967, p. 1674 herein for compliance hearings in this case be rescinded.

MEMORANDUM OF COMMISSIONER MACINTYRE
JUNE 12, 1967

Approximately 23 years ago the Federal Trade Commission entered an order directing the respondent, National Biscuit Company, to cease and desist from engaging in certain discriminatory pricing practices deemed to be in violation of Section 2(a) of the Clayton Act, as amended (38 F.T.C. 213). Between that date and April 26, 1954, questions arose as to whether the respondent was violating that order. Respondent disputed arguments that the practices it was using were violative of the terms of the order to cease and desist. Arguments on this point were resolved when the Commission, on April 26, 1954 (50 F.T.C. 932), ordered that the record of the proceeding be reopened and that the order be modified, making it clear that the practices in question would thereafter be covered by the provisions of the order to cease and desist.

Since April 26, 1954, it has been claimed a number of times that the respondent is violating the order to cease and desist as thus modified. Counter claims have been made by the respondent that it is not violating the order. These claims and counter claims have continued for a period of almost thirteen years without resolution.

It is obvious to me that the respondent and the Commission are well aware of the facts and that the relevant facts cannot be in dispute. The differences in the views of the respondent and of the Commission stem from their conclusions based upon the same facts. It has not appeared to me that the respondent and the Commission are likely to resolve the differences evidenced by their conclusions. Only the appropriate United States Court of Appeals is authorized to make the judicial determination of which conclusion is correct. Therefore, it has appeared to me that the proper course would have been for the Commission to have decided whether to refer the matter to the appropriate court for a judicial determination. The Commission has not done that. Instead, it has undertaken proceedings which will delay for a long time any such decision on the part of the Commission.

This matter is now before the Commission on the request of counsel for the respondent that the order directing the investigational hearings be rescinded. I have decided to refrain from participation in the decision of the Commission on the respondent's pending motion and its pursuit of the particular proceedings now in progress.

Reluctantly, I have reached the decision to refrain from participation with the Commission in its pursuit of these particular proceedings. I would not have hesitated to have participated with the Commission in any consideration and decision it would have undertaken on the question of whether it should or should not refer this matter to the appropriate United States Court of Appeals for decision. In my view, that would have evidenced clearly an act of the Commission in its administrative capacity. However, the Commission didn't choose to make its decision in that way; instead, it has undertaken proceedings which perhaps the respondent may undertake to describe as adjudicative. However, if they should be so described by the respondent and should my participation with the Commission be challenged on the ground, then the court may become confused over the question as to whether my participation would contravene the Administrative Procedure Act. I say that because in the past, long ago, and before the Commission entered its modified order on April 26, 1954, I participated as a member of the staff in urging that the order be modified as the Commission then modified the order. I wish to avoid the possibility of any possible confusion over the question of my having participated in a matter as a staff member and later as a member of the Commission in any judicial capacity.

I always have been of the opinion, and I am now of the opinion, that investigational proceedings leading up to enforcement under Section 11 of the Clayton Act prior to its amendment by the so-called Finality Act are inherently investigational procedures, irrespective of whether the indicia of adjudicative proceedings are engrafted thereon. The Commission's function here is strictly an administrative one; it is in the same position as the Justice Department or a United States attorney in seeking enforcement of a court order.

As heretofore stated, it is my view that this proceeding is essentially an investigative proceeding and, although the courts have judicially approved in prior cases what the Commission is doing here, it is obvious that the engrafting of adjudicatory procedures on the Commission's essentially investigative function in this instance may lead to confusion and delay. This case and similar cases, I believe, could be disposed of more expeditiously

if the Commission proceedings were kept purely investigative in form as well as substance prior to assumption of jurisdiction by the courts in enforcement proceedings.

In any event, I intend to refrain from participating further in this proceeding, either in ruling on respondent's motion or ultimately on the question of whether the Commission should apply to a court of appeals for affirmance and enforcement. Recent developments have made it clear to me that putting a hearing examiner in charge of investigative hearings tends to compromise both his position and the nature of the proceeding. As I have noted above, this essentially administrative matter has now taken on the appearance of adjudicatory proceedings to such an extent that as a result many persons might be misled as to their true character. I would not wish my participation used as an excuse for another delay in a case which has been plagued by too many procedural pitfalls since its inception.

ORDER DENYING RESPONDENT'S MOTION TO RESCIND ORDER DIRECTING COMPLIANCE HEARINGS

This matter has come before the Commission upon certification by the hearing examiner of respondent's motion, filed May 12, 1967, requesting that the Commission's "Order Directing Compliance Hearings," issued herein on April 14, 1967 [p. 1674 herein], be rescinded, and upon Commission counsel's answer in opposition thereto.

The Commission's order of April 14, 1967, directs that public investigational hearings be conducted for the purpose of ascertaining the extent to which respondent may have violated the provisions of a modified order to cease and desist issued under Section 2(a) of the Clayton Act on April 26, 1954.

Respondent states that upon issuance of the modified order in 1954, it revised its price structure and filed a comprehensive compliance report describing its new price structure. Respondent further states that it had every reason to believe that the Commission was satisfied with its report and refers to a request from the Commission in 1956 for a supplemental report, which request "suggested" that the report be limited to reflect any changes since the 1956 report. Moreover, respondent states that in response to Commission requests, it has submitted supplemental reports in 1960 and 1964, with supporting data, in which it advised that the 1954 price structure was still in effect.

Respondent contends that while the Commission has never explicitly "approved" its 1954 price structure, it has never been

advised of a single alleged deficiency therein either legal or factual. It is on this basis that respondent requests that instead of an order directing compliance hearings, the Commission issue an informal directive requiring the staff to reveal any alleged deficiencies in respondent's reports and to endeavor to work with respondent in good faith to develop a voluntary compliance program.

There is no question here as to the Commission's authority to conduct the subject investigational hearings. Rather, the question is one of alleged unfairness to respondent in view of the compliance history and whether, as further urged by respondent, the Commission's action in directing compliance hearings is contrary to § 3.26 of its Rules of Practice. This section provides, in part, that "The Commission will review such reports of compliance and will advise each respondent whether the actions set forth therein constitute compliance with the Commission's order."

With reference to § 3.26 of the Rules, the sentence relied upon by respondent was not included in the Rules prior to the revision thereof in 1963. As the prior Rules did not contain a similar provision, respondent's argument could only relate to its report of current compliance filed pursuant to Commission order issued April 10, 1964. However, Commission counsel states in his answer to this motion that after receipt of that report, respondent was advised by letter of October 5, 1964, that its report failed to provide sufficient information for the Commission to make an informed determination as to the nature and extent of respondent's compliance with the order. Additional data was requested and subsequently a field investigation was initiated to secure further information. Respondent was aware of this investigation and, in 1966, conferred with the staff concerning the scope and conduct thereof.

On this basis, it is obvious that the Commission has not acted contrary to its Rules but has, in fact, attempted to develop sufficient data to determine the extent to which respondent's present practices constitute compliance with the order. It was after review of the facts thus far developed that the Commission decided that additional data is required to make a decision. In the exercise of its administrative discretion, the Commission determined that such data could best be developed through investigational hearings. In short, respondent's apparent assumption that the Commission is presently in possession of all the facts upon which to determine compliance with the order is erroneous. These facts will be developed in the course of the hearings and respondent will be

fully apprised as to whether its current practices constitute compliance.

Respondent's reliance on the language of the court in the *Vanity Fair* case [1] is misplaced. In that case, the court stated that "* * * it is scarcely likely that if respondent proposes a method of compliance which the Commission accepts, and thereafter follows it, the Commission will subsequently and without notice claim a violation. * * *" As Commission counsel properly points out, the court concluded this sentence with the language "* * * entailing the civil penalties of 15 U.S.C. § 21(1)." Thus, the court was not referring to investigational hearings such as that here involved but had reference to Commission action in prosecuting suits to recover civil penalties. The modified order in this case issued prior to the enactment of the Finality Act of 1959, 73 Stat. 243. Therefore, if there is a presently existing violation of the order, it would not subject respondent to civil penalties at this stage but could result in application to the Court of Appeals for an order affirming and enforcing the modified order to cease and desist. It is only after a court has ordered enforcement and proof of a further violation has been established that respondent would be subject to the penalties with which the court was concerned in *Vanity Fair*.

On the basis of the foregoing, the Commission has determined that its order directing public investigational hearings should not be set aside. Accordingly,

It is ordered, That respondent's motion, filed May 12, 1967, and certified to the Commission by the hearing examiner, be, and it hereby is, denied.

Commissioner Elman not concurring. Commissioner MacIntyre did not participate.

ASSOCIATED MERCHANDISING CORPORATION ET AL.

Docket 8651. Order, June 26, 1967

Order denying respondents' appeal from various rulings of the hearing examiner and his denial of oral argument on their appeal.

ORDER DENYING INTERLOCUTORY APPEALS AND REQUEST FOR ORAL ARGUMENT