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

This matter is before the Commission upon respondents' appeal pursuant to § 3.17(f) of the Commission's Rules of Practice, filed

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[1] *Vanity Fair Paper Mills* v. *Federal Trade Commission*, 311 F. 2d 480 (2d Cir. 1962).

May 15, 1967, which appeal is from the hearing examiner's ruling on various motions to quash or limit subpoenas duces tecum, filed April 27, 1967, and from the hearing examiner's order denying respondents' motion for reconsideration and other relief, filed May 5, 1967; the answer of complaint counsel in opposition to the appeal; respondents' motion filed May 16, 1967, requesting oral argument on their appeal; answers to the appeal, filed separately by Royal Typewriter Company, Inc., SCM Corporation, Gibson Greeting Cards, Inc., and Protex Products Company, Inc., all of whom were served with the subpoenas duces tecum at issue; respondents' reply, filed May 29, 1967, to the various briefs filed in opposition to their appeal; and the appeal of SCM Corporation, filed May 8, 1967, from the examiner's ruling denying in part its motion to quash subpoena duces tecum.

The contention is made by some of the persons subpoenaed, though not by complaint counsel, that respondents, who have five days to appeal after service under § 3.17(f), have not filed their appeal in time. In their motion to the hearing examiner for reconsideration of his order of April 27, 1967, respondents requested, among other things, that he defer the effective date of that order until the motion had been ruled upon. The examiner denied such motion without extending the effective date as requested. Respondents, who have not requested an extension of time from the Commission, failed to file their appeal within five days of the time they were served with the examiner's order of April 27, 1967. Although they have filed their appeal within five days from the date they were served with the examiner's denial of their motion for reconsideration, there is some doubt, in the circumstances, whether they have preserved their right to appeal from the examiner's order of April 27, 1967, and, also, whether they may appeal under § 3.17(f) from the denial of the later motion. We do not believe it is necessary to decide such questions, however, since we have otherwise determined that respondents' appeal should be denied.

Respondents' main contention on this appeal appears to be that the hearing examiner's grounds for granting the motions to quash or limit subpoenas duces tecum are inappropriate or inadequate. They claim that under the examiner's ruling they have been deprived of documents which they need to try their case. Respondents seem to further claim that the examiner, having originally approved the issuance of the subpoenas, could not thereafter, under the Commission's Rules, reconsider the merits of such issuance upon motions to limit or quash except in extraordinary circumstances. This latter contention, which we will consider first,

is without substance. The right of a party named in a subpoena duces tecum to move that such subpoena be quashed or limited is inherent in the Commission's Rules and it is not limited to cases of an extraordinary showing of error. See § 3.17(b) of the Commission's Rules of Practice. It was proper, therefore, for the examiner to consider the merits of the requests upon the motions to quash or limit.

As to respondents' main argument, the Commission has stated many times in past cases that the hearing examiner is vested with broad discretion in matters relating to evidentiary and procedural questions, particularly in the area of discovery, and that his ruling on such questions will not be disturbed unless there is a clear showing of an abuse of discretion. *American Brake Shoe Company,* Docket No. 8622 (order issued September 1, 1965) [68 F.T.C. 1169]; *Graber Manufacturing Co., Inc.,* Docket No. 8038 (order issued December 13, 1965) [68 F.T.C. 1235]; *Crowell-Collier Publishing Company,* Docket No. 7751 (order issued March 3, 1967) [p. 1648 herein]. No such showing has been made here.

In this instance the examiner considered in detail each of the specifications in the requested subpoenas duces tecum. He concluded that specification No. 1 as limited by his order was justified. He quashed the other specifications in their entirety. As to the latter, he found generally a lack of relevance and undue burdensomeness. He also found as to some that compliance would unduly delay the proceeding and that the requests were unduly broad in scope. The examiner indicated that the respondents will be permitted to renew their request to the extent necessary at the proper time during the course of the hearing and so respondents will not be deprived by his ruling of evidence they may need for their defense. It appears that the examiner has carefully considered the issues, and we do not believe that there is any justification shown for disturbing his ruling.

The respondents, under the Commission's Rule 3.17(f), have failed to make a showing that the ruling complained of involves substantial rights and will materially affect the final decision and that a determination of its correctness before the conclusion of the hearing will better serve the interests of justice. Therefore, their appeal will be denied. The appeal of SCM Corporation from the part of the examiner's action denying its motion to quash subpoena duces tecum will be denied for the same reason. Additionally, the Commission has determined that oral argument would serve no useful purpose, and that request will likewise be denied. Accordingly,

It is ordered, That the respondents' appeal from the hearing

examiner's ruling on various motions to quash or limit subpoenas duces tecum and from the hearing examiner's order denying respondents' motion for reconsideration and other relief be, and it hereby is, denied.

It is further ordered, That respondents' request for an oral argument on their appeal be, and it hereby is, denied.

It is further ordered, That the appeal of SCM Corporation from the ruling of the hearing examiner on the motion to quash or limit subpoena duces tecum be, and it hereby is, denied.

Commissioner Elman not concurring.

THE CROWN CORK & SEAL COMPANY, INC.

Docket 8687. Orders and Opinion, June 26, 1967

Orders denying appeal of Consolidated Cork Company and Armstrong Cork Company from the hearing examiner's decision not to treat records furnished by them as *in camera.*

OPINION OF THE COMMISSION

This matter is before us on appeals by Consolidated Cork Company and Armstrong Cork Company from refusal by the hearing examiner to grant *in camera* treatment to 1960–1964 sales data furnished by the appellants to and at the behest of the parties herein. The hearing examiner has reserved his decision as to 1965–1966 data because it has not as yet been offered in evidence.

As to Armstrong, the examiner's refusal was both on the merits and upon his finding that Armstrong's motion was untimely and moot. Nevertheless, because of the importance of the question involved we will entertain Armstrong's appeal on the merits.

The hearing examiner has denied the motion for *in camera* treatment essentially on the ground that he could not see how appellant would be hurt by disclosure of the material. We think his ruling was correct.

These appeals present in somewhat acute form the conflicting interests represented on the one hand by the necessity for public hearings and a public record and on the other by the desirability that a heavy handed bureaucracy be prevented from needlessly compromising business information to the injury of innocent bystanders.

We have taken the position and it is reflected in our Rules that our proceedings should, as far as possible, be open and that those seeking instruction and guidance should have access to the testi-

monial and documentary evidence upon which our decisions rest. The principle of open proceedings and public records is, of course, so integral to our judicial system as not to admit of serious dispute. Here, on the other hand, petitioner's plea warrants special solicitude coming as it does from a third party bystander in no way involved in the proceedings whose records, if *in camera* treatment is denied, will be open to the scrutiny of its competitors including respondent herein. Moreover, as petitioner points out, neither of the parties to the proceedings raises any objection to the receipt of the material *in camera*.

Notwithstanding these compelling considerations, however, we think as we noted above that the hearing examiner acted correctly in refusing *in camera* treatment. Certainly we see no abuse of discretion.

The Commission Rules Section 3.16(h) authorize the granting of *in camera* treatment "* * * only in those unusual and exceptional circumstances where good cause is found on the record * * *."

The records herein involved range in age from two and one-half to six and one-half years. Assuming arguendo that they are otherwise of a character warranting *in camera* treatment we fail to see, nor has petitioner demonstrated how, despite the fact that they are old or at least aging records, their exposure even to the prying eyes of competitors will result in the clearly defined and serious injury required by the criteria set forth in *H. P. Hood & Sons, Inc.*, D. 7709, March 14, 1961, 58 F.T.C. 1184, and incorporated by reference into the Commission Rules.

More recent or current records may require different treatment. As to these, although injury may not be demonstrated, it might be more readily inferred since injury flowing from their disclosure would be more immediate and palpable. And we think the hearing examiner was correct in reserving his decision as to 1965 and 1966 records.

In an effort to meet the good cause requirement in the Commission's Rules, petitioner in addition to citing its status as an innocent bystander, notes *inter alia*, the high degree of security the firm has traditionally accorded its records and the fact that denial of *in camera* treatment will expose them to the scrutiny of competitors. These statements illustrate the precatory character of petitioner's appeal and fall considerably short of a showing of good cause based upon possible injury. The records in question are obviously records which petitioner would prefer to keep confidential but their disclosure would hardly create any "* * * probability of concrete injury." *H. P. Hood, supra.*

It may be argued as indeed petitioner has in effect done that where no one cares one way or the other and no demonstrable benefit accrues from disclosure other than vindicating the abstract ideal of public hearing and public record, it is foolishly punctilious to insist upon disclosure. We think not.

The fact that neither of the parties involved in this proceeding objected to *in camera* treatment in this instance suggests only that in their judgment the prosecution of their respective cases in the matter at hand will be unaffected by the hearing examiner's ruling. Their indifference is thus wholly irrelevant to the larger question whether the integrity of the principle of public records is important enough to be preserved, except for good cause, regardless of the ephemeral preferences of individual litigants. Moreover, the principle of open records and open hearings cannot be contingent in its application upon a demonstration of the utility to subsequent litigants or to the public at large of the material placed in the record. This would require a degree of foreknowledge which the Commission does not possess.

In support of its appeal Consolidated cites a recent opinion of Judge Wyatt of the District Court for the Southern District of New York arising out of another interlocutory ruling of the Commission in this same case. In that matter, *Continental Can Company, Inc.*, had received a third party subpoena requiring production of sales data for the years 1963 through the first 6 months of 1966. As a condition precedent to complying with the subpoena, Continental sought a prior commitment from the hearing examiner to accord *in camera* treatment if and when the material was submitted in evidence. Upon his refusal which was upheld on appeal to the Commission, Continental refused to comply. The District Court's opinion arose out of the Commission's suit for enforcement. The question before the Court was the propriety of insistence upon promises of *in camera* treatment as a condition of compliance with the Commission's subpoenas. The Court implied that a prior commitment of *in camera* treatment was unnecessary. However, "* * * to avoid further expenditure of time and money" it was directed that *in camera* treatment be accorded the material.

Whatever the merits of that case and it appears the Court was clearly persuaded that the data involved therein was of a character warranting *in camera* treatment, neither of the appellants herein has shown why records which are two and one-half to six and one-half years old should be protected.

In sum, in the interests of a policy of public hearings and

public records the Commission has required that anyone seeking *in camera* treatment be granted it only in those unusual and exceptional cases where good cause is shown. We have set forth criteria in *H. P. Hood & Sons, supra,* to the effect that where good cause in the nature of a clearly defined and serious injury is shown an exception in unusual circumstances may be made. Although the request of a third party bystander is deserving of special solicitude the principle of public hearings and public records would obviously be subverted were the Commission to accede to the request for *in camera* treatment by third parties upon their mere affirmation that their records should not be subjected to exposure. In such circumstances the Commission would be abdicating its responsibilities and substituting the tendentious judgment of the petitioner in place of its own disinterested ruling.

Appropriate orders will issue.

ORDER DENYING APPEAL FROM RULING OF HEARING EXAMINER

Armstrong Cork Company, having on May 25, 1967, filed an appeal from the ruling of the hearing examiner denying its motion for *in camera* treatment of records furnished by respondent in response to subpoena and thereafter offered in evidence, and

The Commission being of the opinion that Armstrong Cork Company has made no showing of good cause pursuant to Section 3.16(h) of the Commission's Rules why the data should be given *in camera* treatment, and

The Commission therefore being of the opinion that the ruling of the hearing examiner does not reveal a clear abuse of discretion,

It is ordered, That the appeal of Armstrong Cork Company, filed May 25, 1967, be, and it hereby is, denied.

ORDER DENYING APPEAL FROM RULING OF HEARING EXAMINER

Consolidated Cork Company, having on May 15, 1967, filed an appeal from the ruling of the hearing examiner denying its motion for *in camera* treatment of records furnished by them to complaint counsel in response to subpoena and offered in evidence by complaint counsel, and

The Commission being of the opinion that Consolidated has made no showing of good cause pursuant to Section 3.16(h) of

competing customers on a nondiscriminatory basis, which means that if the supplier furnishes promotional assistance to one customer he must make that assistance available on proportionally equal terms to all competing customers. The court have also held that the supplier must comply with these provisions of the law irrespective of whether the promotional assistance is furnished to the retailer directly or through an intermediary."

Commenting upon specific features of the plan, the Commission said that it contained two features which would probably violate the law:

(1) "The Commission is of the opinion that the standard of payment to retailers, which you contemplate basing upon floor space, does not meet the statutory standard of 'proportionally equal terms' as required by Sections 2(d) and (e) of the Robinson-Patman Act. The proposed standard bears no ascertainable relation to the volume of business which any of the retailers involved might conduct with any of the participating suppliers. Moreover, the proposed standard could result in a situation in which retailers who have a small volume with the participating suppliers would receive more than competing retailers with a much larger volume solely because of larger floor space.

(2) "The Commission is of the opinion that the feature of the plan which induces customers to view the projected ads constitutes the sale of merchandise by means of a lottery or by means of a chance or gaming device contrary to public policy and the provisions of Sec. 5 of the FTC Act."

The Commission's opinion also pointed out that, if the plan is revised so as to eliminate the two foregoing objections, it would still be necessary for the following four conditions to be met:

(1) All competing retailers must be notified of their right to participate in the plan on a nondiscriminatory basis.

(2) It must be made available to all competing retailers within a given marketing area and to those who, geographically, are on the periphery of that area if they in fact compete with the favored retailers.

(3) It must be made available to all retailers who compete in the resale of the supplier's product, irrespective of their functional classification. Therefore, if the items involved in the plan are also sold by non-grocery stores, they must be accorded the same opportunity to participate in any promotional assistance given by the suppliers to competing grocery outlets.

(4) An alternative plan on proportionally equal terms must be offered to those retailers who, for practical business reasons,

find the film projector not to be usable and suitable. (File No. 673 7036, released Jan. 7, 1967.)

Modified July 11, 1968, 69 F.T.C. 1211.

No. 107. Labeling of product composed of leather fibres

The Commission was requested to furnish an advisory opinion with respect to the use of the terms "Reconstituted leather" and "Man-made leather" to describe a material composed of 70 percent leather fibre with bonding agents added and a vinyl backing resembling leather.

In its opinion, the Commission advised that neither term would be considered as a satisfactory description of the material. The word "leather" has long been held to constitute a representation of top grain leather, unless properly qualified to show otherwise. In this connection, the terms "reconstituted" and "man-made," which at best create inferences of leather which has been in some manner reprocessed, were not considered by the Commission as adequate qualifications when the material in question is nothing more than ground leather or leather fibres held together by bonding agents.

The Commission advised that if the seller wished to show the leather fibre content of this material, it would be necessary to use such terms as "shredded leather" or "pulverized leather," together with a disclosure of the vinyl backing, in order to give the consumer a truthful description of the true nature of the material.

Further, if the seller decided not to disclose the ground leather or leather fibre composition of the material, the Commission stated that it would be necessary to disclose that the material was "Not leather" or "Imitation leather" or "Simulated leather," the reason being that the consumer is entitled to a disclosure that the material before him which has the appearance of leather is not actually what it appears to be. (File No. 673 7033, released Jan. 13, 1967.)

No. 108. Holding company ownership of both auto parts warehouse distributor and auto parts jobber

The Commission recently advised a requesting party that his proposed reorganization of properties which he owns or controls would not appear to violate the Clayton Act, as amended by the Robinson-Patman Act.

The requesting party proposes to establish a holding company which would control two operating companies, one an automotive

parts warehouse distributor, the other an automotive parts jobber. Two officers of the operating companies will initially hold a minority interest in these companies, an interest which might become a majority interest at some future date. The warehouse distributor will equitably sell to all jobbers who wish to buy from it, except that this distributor will not sell to the jobber with which it has common ownership except on a limited emergency basis. (File No. 673 7042, released Jan. 13, 1967.)

No. 109. Use of manufacturer's list prices to denote value

A concern engaged in the distribution of premiums for sellers who make premium offers on the labels of their merchandise recently requested an advisory opinion concerning the legality of using manufacturers' list prices as the value of the items so offered.

After advising that it is impossible to give a categorical answer to such a question since the answer is wholly dependent upon facts which are unknown to the Commission, the Commission advised that in no case could the company or its accounts rely completely upon manufacturers' list prices as an absolute indication of the value of the products offered as premiums. Instead, since these prices will be described as the value of the premiums on labels and in advertising, they must meet the test of Guide II of the Commission's Guides Against Deceptive Pricing, which provides that whenever an advertiser represents that he is selling below the prices being charged in his area for a particular article, he should be reasonably certain that the higher price he advertises does not appreciably exceed the price at which substantial sales of the article are being made in the area.

The Commission advised that if the sales history of any particular product can meet this test then the list price can be used as the value of the product on labeling and in advertising. If it does not meet this test, then the list price cannot be used. The important point to remember here is that the mere fact that a manufacturer has asserted that a given amount is his list price does not constitute a license to others to use that price as a representation of value. The concept of value is not abstract, but must instead be based upon concrete selling prices. Certainly, the Commission stated, if the list price for any particular product can meet the test of substantial sales in the seller's trade area, it can be used as a representation of value even though substantial sales are also made at less than that price by other dealers in the same area.

Additionally, the opinion pointed out that since the company was handling what was described as self-liquidating premiums, there was also the possibility that some of the list prices being employed were old in point of time and did not represent current values. In such a situation, it would not be permissible to use the list price as a basis for a representation of current value.

Finally, the Commission noted that the company was not itself engaged in advertising these prices, but was instead expected to furnish values for the products to the accounts which they could use in their own advertising and labeling. The responsibility for the truthfulness of the price representations made under these circumstances was held to be twofold, being shared by the sellers which actually use the prices in their advertising and labeling and by the distribution company as well under the principle that one who places in the hands of others the means and instrumentality of deception is himself guilty of deceit. Thus it was stated to be important for both to make certain that the prices used to represent the values of these premiums comply with the criteria of the Guides. (File No. 673 7044, released Jan. 24, 1967.)

No. 110. Agreement among retailers for uniform store hours

The Commission was requested to furnish an advisory opinion with respect to a proposal by a retail trade association to conduct an informal survey of a number of grocery operators in the area to determine their individual preferences as to hours of doing business. Upon completion of the survey, the association plans to announce the results thereof. Although a majority of store operators may elect thereafter to operate on uniform hours, as determined by the survey, no sanctions are planned nor will there be any attempt to enforce or insure uniformity of closing hours. There are a number of stores which will not subscribe to such a suggestion and will remain open at other times.

The Commission stressed its understanding that while a majority may voluntarily elect to subscribe to uniform hours of doing business as a result of the survey of individual preferences, those who do not wish to do so will not be subject to any form of coercion or compulsory process and, indeed, it was expected that many will not so subscribe for business reasons of their own. On the basis of this understanding and assuming that the agreement or plan will relate to nothing other than hours of doing business, the Commission advised that it did not believe the plan would

violate any laws it administers. (File No. 673 7034, released Jan. 24, 1967.)

No. 111. Functional discounts unlawful whenever an adverse effect on competition results therefrom

The Commission recently issued an advisory opinion to the effect that the 14 percent discount which would be offered under the plan outlined below probably would result in violation of Commission administered law.

At present, the manufacturer sells his product to manufacturers of a complementary product exclusively. The purchasing manufacturers resell the product to independent distributors and to ultimate consumers.

The selling-manufacturer proposes to sell independent distributors direct, charging them approximately 14 percent more than the purchasing-manufacturers would be charged on shipments to the warehouses of the latter. On drop shipments to purchasers buying through the purchasing-manufacturers, the manufacturers would be charged the independent-distributors' price. On drop shipments to consumers of the product, the independent-distributor price would be charged. Drop shipments could be ordered by any customer and would be openly available to all on the same terms.

There would be no agreement between purchasing-manufacturers or distributors and the manufacturer as to prices the former would charge; however, the manufacturer does now suggest and would continue to suggest prices to be charged consumers. No other form of control over resale of the product is now or would be exercised by the manufacturer.

The Commission pointed out that the price difference which would result from the proposed discount is within the purview of Section 2(a) of the Robinson-Patman amendment to the Clayton Act. Section 2(a) provides, in essence, that it is unlawful for a seller in commerce to discriminate between different purchasers of goods of like grade and quality where the effect may be substantially to lessen competition or to tend to create a monopoly.

The Commission added that the 14 percent discount to be offered to purchasing-manufacturers is a functional discount and that such discounts are not prohibited by the applicable law or judicial interpretations thereof unless the discounts result in the adverse competitive effects the law proscribes. The Commission was of the view that such adverse effects were likely to result due to the fact that purchasing-manufacturers would compete against

distributors in selling to ultimate consumers and the manufacturers would enjoy a 14 percent price advantage on such sales. The Commission pointed out that unless the 14 percent only made due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which the tile cement would be sold or delivered to the manufacturers, substantial anticompetitive effects probably would result from implementation of the plan. Such a result would be violative of Section 2(a) of the Robinson-Patman amendment to the Clayton Act. (File No. 673 7045, released Feb. 2, 1967.)

No. 112. Foreign origin disclosure not required on outside of packaged badminton sets

In response to a question involving the sale of badminton sets which will be sold in an opened display case with the foreign country of origin marked on each imported component readily visible to prospective purchasers, the Commission ruled that it would not be necessary to disclose the foreign origin of each imported component on the outside of the package.

The company which requested the advisory opinion intends to merchandise badminton sets to various department stores throughout the United States. The package, instructions for use and the steel poles will be manufactured here in the United States. The remaining three items in the sets will be imported from three different foreign countries and each will be marked as to its specific country of origin. For example, the rackets will be imported from Japan, the shuttlecocks from England, and the net from Pakistan. The badminton sets will be sold in an opened display case with the country of origin marked on each imported component readily visible to prospective purchasers. (File No. 673 7048, released Feb. 2, 1967.)

No. 113. Premerger clearance

The following is a digest of an advisory opinion issued by the Federal Trade Commission regarding a pre-merger clearance matter.

A small manufacturer of a product used in the paper industry applied for clearance of the sale of 67 percent of its stock to another small company in the same line of business. There was strong competition in the line of business, a few companies dominated the market, and the selling company had had net losses for a number of years.