of respondents' brief. Respondents shall advise the Secretary within seven days after service of this order upon them whether or not they intend to file such supplementary brief.

Commissioner Elman not concurring.

BEST & CO., INC.

Docket 8669. Order, Jan. 13, 1967

Order adopting the findings of the hearing examiner that complaint counsel not be barred from further participation in this proceeding.

ORDER RULING ON CERTIFICATION OF EXAMINER'S FINDINGS AND RECOMMENDATIONS ON INTERLOCUTORY MATTER

This matter was remanded to the examiner by the Commission's order of June 23, 1966 [69 F.T.C. 1193], directing him to make findings on respondent's charges against complaint counsel raised by respondent's motion to suspend and bar complaint counsel from further participation in this proceeding.

The examiner held a hearing to resolve the issues raised by respondent's motion. On the basis of the testimony adduced in the course of that hearing, he concluded:

> It is the conclusion and finding of the examiner that the record fails to establish that Ronald D. Schwartz, or any other member of complaint counsel's staff, made any misstatements or concealed any facts of the nature set forth in respondent's motion, or any similar statements or material facts, with the intent of preventing respondent from gaining access to information to which it was entitled in the files of Majestic Specialties, Inc.; and further, that the record fails to establish that the communication by complaint counsel with counsel for Majestic prevented respondent from obtaining information which it sought and to which it was entitled.

The Commission has decided to adopt the findings contained in the examiner's certification of October 24, 1966 [70 F.T.C. 1793], to which respondent's counsel has not taken exception, and concludes that the charges against Commission counsel are groundless. Accordingly,

It is ordered, That the findings in the hearing examiner's certification filed October 24, 1966, be, and they hereby are, adopted by the Commission.

It is further ordered, That the request to file an interlocutory appeal from the hearing examiner's order of May 10, 1966, refusing to bar and suspend complaint counsel from further participation in this proceeding, be, and it hereby is, denied.

THE CROWN CORK & SEAL COMPANY, INC.

Docket 8687. Order and Opinion, Jan. 13, 1967

Order denying Continental Can's appeal from hearing examiner's quashing of its subpoena requiring production of certain documents.

OPINION OF THE COMMISSION

BY REILLY, *Commissioner:*

This matter is before the Commission on the appeal of Continental Can Company pursuant to Section 3.17 (f) of the Commission's Rules from denial by the hearing examiner on November 30, 1966, of Continental's motion to limit or quash subpoena duces tecum issued October 11, 1966, directed to Continental at the instance of respondent Crown Cork & Seal Company, Inc.

The Commission's complaint in this matter, issued May 31, 1966, alleges violation by Crown of Section 7 of the amended Clayton Act in the acquisition on November 13, 1963, of Mundet Cork Corporation. Both Crown and Mundet at the time of the acquisition were manufacturers of metal crowns commonly used as closures on beer and soft drink bottles and cans.

The adverse competitive effect alleged in the complaint is a lessening of competition in the manufacture and sale of metal crowns.

Respondent Crown contends that metal crowns do not comprise an appropriate line of commerce within which to test the competitive effect of the merger. It contends that other types of closures and containers for beer and soft drink bottles and cans are functionally interchangeable with metal crowns and thus sales of these products should figure in any delimitation of the relevant line of commerce.

Accordingly, at respondent's request, subpoenas duces tecum were directed by the hearing examiner to 33 manufacturers of cans, bottles and closures requiring sales data of specified products for years before and after the acquisition of Mundet by Crown. Thirty producers have complied. Three of the largest, Continental, American Can Company, and National Can Company, have not

complied pending the outcome of this appeal. American and National have stipulated with respondent that they will submit data to the same extent Continental is required to submit it.

Continental appeals from the adverse ruling of the examiner urging that a ruling on the question should be made by the Commission before the conclusion of the hearings because substantial rights of Continental are involved and justice requires that a determination of the correctness of the examiner's ruling be made now because a later determination of error cannot retrieve secrecy lost by virtue of the examiner's denial of Continental's motion to quash or limit.

We can rule at the outset that Continental has made sufficient showing under Section 3.17(f) of the Commission's Rules, and accordingly we entertain its appeal.

The subpoena in pertinent part calls for:

A. Such records as will disclose for each of the calendar years 1960, 1961, 1962, 1963, 1964, 1965, and the first six months of the calendar year 1966 for (a) beer and (b) soft drinks in (i) dollars and (ii) units,

1) cans sold by your company;
2) * * *
3) * * *
4) * * *
5) tear-type cans sold by your company;
6) crown-type bottle closures sold by your company;
7) tear-type bottle closures sold by your company;
8) screw-type bottle closures sold by your company;
9) other types of bottle closures sold by your company.

As to the remainder of the data called for, Continental is either ready to furnish it substantially as demanded or has agreed with respondent for a form of submission satisfactory to both.

Furthermore, as to all categories in dispute except A.(6), crown-type bottle closures, respondent will forego 1966 data, thus requesting data only for the years 1960 to 1965.

For its part, Continental stands ready to provide data for categories A(1), A(7), A(8) and A(9) for the years 1960 to 1964. It will provide data under A(6) for 1960 to 1965. As to A(5) it will agree only to submit data for the years 1960 to 1962.

In short, Continental urges limitation of the subpoena to the years 1960 to 1964 except that data for tear-type cans should be limited to 1960 to 1962 and for crown-type bottles to 1960 to 1965. Respondent wants the period to cover 1960 to 1965 for all categories except crown-type closures for which it asks for data covering the first 6 months of 1966 also.

In support of its motion and appeal, Continental directs its argument to the questions of relevancy and irreparable injury:

On the question of relevancy it argues first that information on sales of products other than crown-type bottle closures is not relevant to a charge that the merger will adversely affect metal crowns as a relevant market; and it cites *United States* v. *Von's Grocery,* 384 U.S. 270 (1966), to the effect that if competition is substantially lessened "* * * in a discernible market" it is irrelevant under Section 7 that competition in a larger market of which the lesser market is a part is relatively unaffected.

This argument must be rejected because it begs the question. Respondent's proposed defense, as we understand it from its memorandum brief in opposition to Continental's appeal, is that metal crowns is not a relevant line of commerce or submarket in the present context, that the sole relevant market is the larger market embracing all bottles, cans and closures. We note parenthetically that in rejecting Continental's argument in this connection we intimate no opinion as to the validity of respondent's proposed defense. We hold only that if it is argued that there is one indivisible line of commerce here involved embracing all containers and closures, industry universe figures for such containers and closures is relevant to this argument.

Secondly, regarding relevancy, Continental questions the propriety of respondent seeking data for years subsequent to the acquisition on November 13, 1963, arguing that "* * * post-acquisition evidence is of little, if any, relevance where a violation of Section 7 of the Clayton Act is charged because the mere probability of a lessening of competition at the time of the transaction complained of is sufficient to establish a violation," citing *F.T.C.* v. *Consolidated Foods,* 380 U.S. 592, 598 (1964).

Again, without ruling on the merits of respondent's defense prior to adjudication of the matter, we can nevertheless state that in supporting its argument that there can be no injury to competition in metal crowns because product obsolescence afflicts the industry and there has been a trend to other types of closures, it is relevant for respondent to project the trend beyond the acquisition date by examining post-acquisition sales. This, solely for the purpose of showing the fact of obsolescence.

Continental's principal argument in seeking to limit the data required under the subpoena is that recent and current sales data are business secrets which in the hands of a competitor would seriously disadvantage Continental. Expecially regarding the 1966 metal crown data sought by respondent, Continental argues that data which is that current "* * * goes to the very heart of Continental's competitive position and its disclosure would cause irreparable injury." The data relating to tear-type cans is also

particularly sensitive according to Continental because it is a recently developed product and data is being sought for a period of test marketing when extensive product changes were made.

Furthermore, in answer to respondent's offer to disclose the figures only to its counsel and expert witness and to seek *in camera* treatment of data submitted in evidence, Continental argues that such a course is no answer to its objections. It states in its appeal brief, p. 5, "It is well known that in cases of this kind statistics of the type here involved become available to competitors in the industry no matter what precautions are taken and what good faith is brought to bear in taking such precautions."

Respondent, on the other hand, relying on the Commission's ruling in *Mississippi River Fuel Corporation,* D. 8657, Interlocutory Opinion, June 8, 1966 [69 F.T.C. 1186, 1189], argues that it should be supplied the data because it is necessary as a "* * * foundation for whatever legal arguments based on market conditions [respondent] may wish to make." It points out that the data is relevant to its proposed defense and that industry universe figures so necessary in defining line of commerce cannot be constructed without the data from Continental, American and National.

The hearing examiner, relying upon *Covey Oil Company, et al.* v. *Continental Oil Company, et al.,* 340 F. 2d 993, *cert. den.,* 380 U.S. 964, and having balanced the claim of irreparable injury with the necessity that respondent's preparation of its defense be facilitated, has denied the motion of Continental. We know no reason for disturbing that ruling.

There is no question here nor does Continental assert that it has an absolute right to protection from disclosure. And the question whether Continental should be required to produce the information sought by the subpoena should be resolved by the hearing examiner in the exercise of his sound discretion. In absence of a showing that this discretion has been abused, the Commission will not interfere with the examiner's decision. We find no abuse here.

Nor are we persuaded by Continental's argument that protective provisions designed to reduce the effect of disclosure upon its competitive position would be unavailing. We remain of the conviction, which we have repeatedly expressed, that the hearing examiner may, consistent with Commission policy, order appropriate safeguards to protect sensitive data from falling into unauthorized hands. *National Dairy Products Corp.,* D. 8548, Interlocutory Opinion, February 14, 1964 [64 F.T.C. 1441]; *The Grand Union Company,* D. 8458, Interlocutory Order, February 11, 1963 [62

F.T.C. 1491] ; *Furr's Inc.*, D. 8581, Interlocutory Opinion, November 18, 1963 [63 F.T.C. 2225].

Because matters "* * * so intimately connected with the conduct of hearings as the terms and conditions of production of documents [should] be left very largely to the responsible judgment of the examiner," *Furr's Inc., supra,* we will not circumscribe him in the matter of determining what, if any, safeguards should be adopted, *National Dairy Products Corp., supra.* It is for the examiner to decide whether simple restrictions for example as to those who should have access to the material be imposed as contemplated by the proffered agreement of respondent to keep the figures confidential and disclose them only to counsel and respondent's expert witness or whether more rigorous limitations are required such as a direction that the data be submitted to an accounting firm for compilation and presentation of aggregate industry figures to respondent's counsel as directed in our Interlocutory Order of June 8, 1966, in *Mississippi River Fuel Corporation,* D. 8657 [69 F.T.C. 1186].

An appropriate order will issue.

ORDER ENTERTAINING AND DENYING APPEAL FROM HEARING EXAMINER'S DENIAL OF MOTION TO QUASH OR LIMIT SUBPOENA

The hearing examiner, at the instance of respondent herein, having on October 11, 1966, issued a subpoena duces tecum to Continental Can Company, Inc., requiring the production of certain information and material allegedly necessary to the respondent's defense to the charges contained in the Commission's complaint of May 31, 1966, and,

Continental Can Company having filed with the hearing examiner a motion to quash or limit said subpoena and the examiner having denied said motion, and

Continental Can Company having on December 7, 1966, filed with the Commission pursuant to Section 3.17(f) of the Commission's Rules an appeal from the hearing examiner's ruling, and

The Commission being of the opinion that said appeal should be entertained, and

The Commission being further of the opinion that nothing in the hearing examiner's denial of the motion to quash indicates an abuse of discretion,

It is ordered, That the appeal of Continental Can Company, filed December 7, 1966, be, and it hereby is, denied.

AMERICAN HOME PRODUCTS CORPORATION

Docket 8641. Order, Jan. 23, 1967

Order extending time for filing reconsideration petition from January 24 to February 6, 1967, and extending time for filing review petition in Court of Appeals from March 6 to March 17, 1967.

ORDER GRANTING RESPONDENT'S MOTION FOR EXTENSION OF TIME WITHIN WHICH TO FILE PETITION FOR RECONSIDERATION OF COMMISSION ORDER AND FOR RELATED RELIEF

Respondent American Home Products Corporation has moved by its counsel for an order extending for a period of ten days the time for filing of a petition for reconsideration of the Commission's Order dated December 16, 1966 [70 F.T.C. 1524], and staying the Commission's Order so that the time for filing a petition for review in the Court of Appeals may also be extended for a period of ten days.

In his supporting affidavit respondent's attorney stated that he was seriously injured in an automobile accident last October, has only recently returned to his office and still has not recovered his full strength and that he is required in addition to the instant matter to devote considerable attention to two other pending matters. In our opinion respondent's request for this short extension of time is reasonable in the circumstances and should be granted. Accordingly,

It is ordered,

(1) That respondent's time for filing a petition for reconsideration of the Commission's Order dated December 16, 1966, be and it hereby is extended from January 24, 1967, to and including February 6, 1967; and

(2) That the date of service of said Order shall be deemed to be January 16, 1967, instead of January 4, 1967, thus tolling the running of the statutory time period for filing a petition for review in the Court of Appeals, from March 6, 1967, to and including March 17, 1967.

GROVE LABORATORIES, INCORPORATED

Docket 8643. Order, Jan. 26, 1967

Order denying respondent's motion that hearings in this case be reopened.

ORDER DENYING RESPONDENT'S MOTION TO REOPEN HEARINGS

Respondent has moved for an order reopening the hearings herein before the hearing examiner for the purpose of presenting