cussions.

Commissioner MacIntyre not participating.

CROWELL-COLLIER PUBLISHING COMPANY ET AL.[1]

Docket 7751. Order and Opinion, Mar. 3, 1967

Order denying respondents' appeal from the hearing examiner's denial of motion to quash certain subpoenas.

OPINION OF THE COMMISSION

This matter is before the Commission on respondents' appeal from the hearing examiner's denial of respondents' motion to quash certain subpoenas issued at the request of counsel supporting the complaint.

Respondents' motion to quash giving rise to this appeal was filed on December 6, 1966, and denied by the examiner on January 9, 1967.[2] Three of the subpoenas challenged on this motion are subpoenas *ad testificandum* directed to three officers of the respondents. A fourth seeks documents from one of the respondents.[3]

[1] Now Crowell Collier and Macmillan, Inc.

[2] Since we have considered this matter on its merits, it is unnecessary to decide whether this appeal is pursuant to the Rules of Practice in effect at the time of the issuance of complaint, or those presently in existence.

[3] Subpoenas *ad testificandum* were issued for Mr. John Boe, president of Crowell Collier and Macmillan, Inc.; Mr. Norman Bennett, president of P. F. Collier, Inc.; and Mr. John G. Ryan, a former official of respondent P. F. Collier & Son Corporation. A subpoena *duces tecum* was issued for Mr. E. M. Harris, secretary of Crowell Collier and Macmillan, Inc. Other subpoenas which were issued at the request of complaint counsel have now become moot by the substitution of new witnesses or the issuance of duplicate subpoenas.

Complaint counsel has also stated that he proposes to request subpoenas *ad testificandum* for representatives of Standard and Poor's, Moody's, the Copyright Office of the Library of Congress and The Washington Post and a subpoena *duces tecum* for a representative of the National Better Business Bureau.[4] Respondents and complaint counsel jointly request that the Commission consider on this appeal the extant subpoenas as well as those proposed by complaint counsel.

Respondents' motion to quash the subpoenas is based on two grounds: (1) the remand to the examiner is illegal; and (2) the subpoenas are beyond the scope of the remand order.

Preliminary to a consideration of the validity of the grounds urged by respondents in support of their motion to quash, it is necessary to review briefly the circumstances of this remand proceeding. This matter was remanded on September 30, 1966, after the Commission's consideration of the appeal of counsel supporting the complaint from the initial decision of the hearing examiner dismissing the complaint. The Commission in its remand opinion found that respondent P. F. Collier & Son Corporation had made the misrepresentations charged in the complaint and that an order to cease and desist was necessary. The Commission reserved its determination on the liability of respondent Crowell-Collier Publishing Company and on the liability of P. F. Collier, Inc., as the alleged successor to respondent P. F. Collier & Son Corporation. Further hearings were ordered to determine this limited issue of liability.

On November 3, 1966, in accordance with the mandate in the remand opinion for expeditious disposition, the examiner contacted counsel for each side requesting a pre-hearing conference and the submission by counsel of a memorandum "setting forth the issues in connection with the remand, the names of the witnesses, the nature of their testimony, and the documents that he intended to employ" (Tr. 3676). Counsel supporting the complaint complied on November 16, 1966. Respondents, however, refused to comply or to agree to any procedure to be followed during the hearing, contending that the entire remand proceeding was illegal (Tr. 3680). In view of respondents' position, the examiner ruled that he would not bind complaint counsel to the witnesses and matters

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[4] The return dates of all of the subpoenas have expired as a result of respondents' appeal. Respondents state on their appeal that they are assuming, without conceding, that the subpoenas are still outstanding but in any event wish to have a decision on the subpoenas to guide them in the hearings as they progress. We agree that the issue raised by respondents in respect to these subpoenas is not moot, whether or not the subpoenas may have to be reissued.

set forth in the pretrial memorandum (Tr. 3690).[5] Respondents' instant motion to quash was filed on December 6, 1966.

Respondents challenge the legality of the remand on the ground that the issues have already been tried once, and that the evidence initially submitted did not support a finding of liability; hence, according to respondents, complaint counsel should not be afforded an opportunity to supplement the evidence.[6] In effect, respondents argue that the Commission prejudged the issue, found liability, concluded that the evidence was insufficient to support its conclusion and remanded the matter to obtain sufficient evidence. Thus, respondents conclude, the remand is illegal as an abuse of discretion (Resps. App. Br. p. 3). We do not find any support either in law or in logic for this argument.

The right of an administrative agency to return a matter for further proceedings by its hearing examiners is well established. *Federal Trade Commission* v. *Weingarten*, 336 F. 2d 687 (5th Cir. 1964), *cert. denied*, 380 U.S. 908 (1965), *Deering Milliken, Inc.* v. *Johnston*, 295 F. 2d 856 (4th Cir. 1961). The courts are clear that questions of remand are within the broad discretion of the agency in discharging its adjudicative responsibility and that the courts should not interfere in this process except in extraordinary situations.

In *Deering Milliken, Inc.*, the court in limiting the scope of the District Court's injunction against any further remand hearings by the National Labor Relations Board, stated:

> we think a court should not interfere with the Board's processes to the extent that in any view additional hearings and additional evidence might have been reasonably regarded by the Board as of assistance to its administrative procedures and not unduly oppressive (295 F. 2d 868).

In *Weingarten*, the circuit court set aside the injunction obtained by respondent from the District Court against remand proceedings ordered by the Commission holding that:

> we think it would be the extremely rare case where a court would be justified in holding—as Weingarten urges us to do here—that the passage of time and nothing more presents an occasion for preemptory intervention of an outside court in the conduct of an agency's adjudicative proceedings (336 F. 2d 692).

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[5] The day prior to this pretrial hearing, November 15, respondents filed a motion with the examiner to certify the matter to the Commission for clarification of the remand order. The examiner denied the motion on November 16. On November 25, respondents filed an interlocutory appeal with the Commission from this ruling, which appeal was denied by the Commission on December 6, 1966.

[6] It should be noted that respondents are raising this issue for the first time before the Commission. Respondents did not question the legality of the remand on their earlier appeal to seek clarification of the remand order.

In setting aside the injunction, the Court specifically held that the Commission's remand did not constitute prejudgment of an issue already tried before the examiner and could not on that ground be held to be illegal. The Court further observed:

> it was not prejudgment at that stage for the Commission to indicate some likely, even though tentative views. * * * With the record in this stage of development, the Commission's action shows no prejudgment. On the contrary, it shows the Commission's careful regard for the protection of the rights of both Weingarten and the public in its insistence on evidence which not only pointed the finger accusingly at the respondents, but qualitatively afforded a reliable basis for a final adjudication. 336 F. 2d 395.

No case has ever suggested that a remand may take place only upon a showing that evidence to be adduced on the remand could not have been adduced at the original hearing. Indeed in *Weingarten* the evidence to be adduced was clearly available at the original hearing from witnesses who had testified. In *Deering Milliken, Inc.*, the court specifically stated that an agency may remand for additional evidence which it reasonably regards to be of "assistance" to its proceeding (295 F. 2d 868).

Nor do we find any support for respondents' argument in the two cases relied upon by them.[7] Neither of these cases involved the action of an administrative agency remanding a proceeding to obtain further evidence on which to render a decision on a pending matter.

In sum, we find no merit in respondents' contention that the remand is illegal.

Respondents' second ground for quashing the subpoenas is that they exceed the scope of the remand order as they go beyond the introduction of the specific documentary evidence referred to by the Commission in its opinion as not having been offered in proper probative form. Respondents also argue that by the same token it is improper and outside the scope of the remand to call any witnesses except those representing Poor's and Moody's which publish the documentary evidence which respondents claim is the sole subject of the remand. Respondents' interpretation of our

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[7] *Southport Petroleum Company* v. *NLRB*, 315 U.S. 100 (1942) held that it was not error for the Circuit Court of Appeals, from whom the Board had sought enforcement of its order prohibiting certain unfair labor practices, to refuse to remand the matter to the Board to allow Southport to introduce evidence indicating that the original corporation had been dissolved and that the new one was not subject to the order. The court observed that Southport's change in corporate status was nothing more than "a disguise intended to evade the provision" of the order and this was a matter for the Circuit Court to decide in enforcing the order (315 U.S. 106). *Gladstone-Arcuni*, Docket 8664, Order Denying Permission to File Interlocutory Appeal, November 17, 1966 [70 F.T.C. 1831], held that the hearing examiner had not abused his discretion in refusing to reopen a hearing to allow respondents to introduce evidence relating to another case.

opinion and remand order is erroneous. Our opinion is not limited as counsel now argues. In our opinion we stated:

> It should be explicitly understood that at this remand hearing the burden is on counsel supporting the complaint to submit in probative form evidence to which reference was made during the appeal *and such other evidence as the hearing examiner may consider appropriate* (Opinion, p. 8; emphasis added) [70 F.T.C. 977, 1010].

It is therefore clear that the remand proceeding is not limited solely to the documentary evidence as respondents are contending.

Respondents further argue that the number and scope of the subpoenas demonstrate that they generally exceed the limited remand intended by the Commission and also cite specific requests in the subpoenas *duces tecum* as being improper. It should again be noted that respondents refused to comply with the examiner's prehearing request that the parties exchange memoranda setting forth the issues in connection with the remand, the names of the witnesses, the nature of their testimony and the documents to be employed. Their refusal has placed complaint counsel in the difficult position of having to assume that respondents are unwilling to agree to any facts whatsoever and that he will be put to his proof on each of the factual issues involved in establishing the corporate history and responsibility of the respondent parent corporation and its various corporate subsidiaries.

The examiner, after hearing arguments for issuance of the subpoenas and considering respondents' objections thereto, concluded that the subpoenas were within the scope of the remand, relevant to the issues involved and that compliance would not be unduly burdensome. The Commission has consistently stated that the conduct of adjudicative proceedings is primarily the responsibility of the hearing examiner whose rulings on evidentiary and procedural matters should not be disturbed in the absence of unusual circumstances. *L. G. Balfour*, D. 8435, Order Directing Disclosure of Documents, May 10, 1963 [62 F.T.C. 1541]; *American Brake Shoe Company*, D. 8622, Order Denying Appeal From Denial of Application for Deposition and Subpoenas, September 1, 1965 [68 F.T.C. 1169]; *Associated Merchandising Corp.*, D. 8651, Order Denying Request for Permission to File Interlocutory Appeal, February 2, 1967 [p. 1616 herein].

The Commission will not under the circumstances of this appeal substitute its judgment for that of complaint counsel in determining which witnesses should be used in the presentation of his case. We feel that on issues which are hotly contested and where the facts must be adduced from respondents' officers, complaint

counsel must be permitted a certain leeway and flexibility in evaluating what proof must be adduced especially where it can be expected, as here, that the witnesses may be hostile.

The witnesses which are the subject of complaint counsel's subpoenas include three of respondents' officers and a former officer who can be expected to have direct knowledge of the respondent corporations' history and relationships, facts which are central to the remand proceeding. The other witnesses consist of persons who in their official or business capacities have knowledge relevant to the purposes of the remand.

Respondents have not demonstrated that the examiner abused his discretion by issuing the subpoenas or denying the motion to quash. The mere issuance of the subpoenas themselves does not support respondents' position. We cannot find any reason to assume that the witnesses which complaint counsel seek to call are not necessary in order to enable counsel to comply with the remand order.

Accordingly, we agree with the examiner's conclusion that the subpoenas are within the scope of the remand order.

Respondents also challenge the subpoenas on the ground that they are vague, unreasonable and oppressive. Specifically, respondents challenge certain items in the subpoenas *duces tecum* issued to the National Better Business Bureau as oppressive insofar as it seeks correspondence from 1950 to the date of the subpoena, between the Bureau and respondents, "relative to the sales approach used in the sale of Collier's Encyclopedia" (Resps. App. Br., p. 6). Assuming without deciding that respondents have standing to challenge a subpoena issued to a third party, we find no validity in respondents' contention. Complaint counsel's theory in this proceeding is that the entire Crowell-Collier complex is a single operation irrespective of the change in the individual corporate identities of subsidiaries and that this is demonstrated by the continuity in the sale of the same publication, under the same name, from the same offices and utilizing essentially the same sales methods. The liability of the various respondents, all of whom are in some way connected to the Crowell-Collier corporate family, for the misrepresentation found to have been made in this case, is the central issue on this remand. Correspondence between the National Better Business Bureau and respondents, transcending the various changes in the corporate identity of the subsidiaries, certainly cannot be said at this stage to be irrelevant to this issue to be determined by the remand. Nor do we construe this subpoena as vague, unreasonable or oppressive. The request is specific as to the data desired, and in our opinion is neither oppressive or un-

reasonable. Further, if compliance with the request presents difficulties, it would appear to be a matter to be raised by the National Better Business Bureau, and not respondents herein.

We do not feel that the examiner erred in issuing this subpoena or in refusing to grant respondents' motion to quash.

Respondents assert additionally that the subpoena *duces tecum* issued to the Secretary of Crowell Collier and Macmillan, Inc., is improper in that the first six items on Schedule A of the subpoena exceed the scope of the "limited remand" and that the last three items are "unreasonable, vague and oppressive."

This subpoena seeks to elicit the history of the parent corporation and its subsidiaries, including changes in name, the establishment and dissolution of the subsidiaries and the identities of certain officers of the corporations. It would appear that such record facts could easily have been stipulated by the parties. Nevertheless, respondents by their own action have refused to comply with the hearing examiner's request to submit a memorandum delineating the fact issues which they will contest and otherwise cooperate in the expeditious disposition of the matter. Complaint counsel has determined apparently, therefore, that the most expeditious way of ascertaining this information is by calling witnesses from respondents' business who have these facts readily at hand.

The enumerated items of the subpoenas *duces tecum* are clearly directly relevant to the purpose of the remand.

We have only respondents' rather vague assertion as part of its argument, that the material called for in the first six items of Schedule A covers a period of 60 years. This assertion in respondents' brief cannot substitute for the specific showing which must be made if allegations of oppressiveness are to be upheld by us. We assume that the evidence will be confined to periods which the examiner believes are relevant to the remand proceeding. We cannot determine this question on this appeal and do not believe respondents have made any showing that the subpoena is outside the remand or will be oppressive.

Respondents challenge the last three items of this subpoena on the ground that they too are "unreasonable, vague and oppressive." In support of their argument, respondents simply call upon the Commission to read the items. We have done so as did the hearing examiner. He concluded that the subpoenas were reasonable. Our attention has not been drawn to any facts which would cause us to interfere with his judgment. Certainly our own reading of these items does not require the conclusion that the subpoenas on their face are unreasonable or oppressive. The material sought appears

to be directly relevant to the issue of successorship, which is one of the central objects of the remand proceeding. Certainly, there is nothing vague in the specification. The information sought is precisely delineated.

We conclude that the subpoena *duces tecum* issued to the Secretary of Crowell Collier and Macmillan, Inc. neither exceeds the scope of the remand nor is "vague, unreasonable or oppressive."

The examiner has demonstrated a desire to implement the Commission's mandate for an expeditious disposition of this proceeding and has made every effort to utilize the usual pretrial procedures to reach agreement where the issues are incontrovertible and to restrict the evidentiary hearing to the contested issues. The reasonableness of complaint counsel's request for subpoenas and the examiner's rulings thereon must be considered in light of the circumstances that exist.

In originally remanding this matter for the limited purpose of determining the liability of the parties involved, it was the opinion of the Commission that this was the most expeditious means of disposing of the proceeding. The issue of deception which had required the bulk of the original hearings, has been resolved and is not involved in this remand proceeding. Should respondents reconsider their prior decision and cooperate with the examiner, it is possible that some parts of these subpoenas might not be necessary. The Commission is confident that the examiner will continue to make every effort to bring this matter to an early disposition through continuous hearings and such other means as appear feasible so that the matter can be expeditiously returned to the Commission for final disposition.

In our opinion, the examiner did not abuse his discretion in the issuance of the subpoenas or in his denial of the motion to quash. We deny the appeal and sustain the examiner in his decision.

An appropriate order will be issued.

Commissioner Elman did not concur, and Commissioner MacIntyre did not participate.

ORDER DENYING RESPONDENTS' APPEAL FROM THE DENIAL BY THE HEARING EXAMINER OF RESPONDENTS' MOTION TO QUASH CERTAIN SUBPOENAS*

On September 30, 1966, this matter was remanded for further hearings on the liability of the parties involved. The hearing examiner at the request of counsel supporting the complaint issued certain subpoenas ad testificandum and duces tecum.

*Now Crowell Collier and Macmillan, Inc.

Respondents moved to quash the subpoenas. Upon the hearing examiner's denial of this motion, respondents on January 23, 1967, filed an appeal with the Commission. On February 2, 1967, counsel supporting the complaint filed an answer in opposition to the appeal. Counsel for both sides have jointly requested that the Commission consider at this time not only the extant subpoenas, but also certain enumerated subpoenas which counsel supporting the complaint plans to request. We have granted this request and our decision herein is dispositive of all of the subpoenas.

The Commission, for the reasons set forth in the accompanying opinion, has concluded that nothing in the hearing examiner's denial of the motion to quash constitutes an abuse of discretion, and

The Commission being of the opinion that respondents have submitted no basis for quashing any of the subpoenas,

It is ordered, That the appeal of respondents, filed January 23, 1967, be, and it hereby is, denied.

Commissioner Elman not concurring. Commissioner MacIntyre not participating.

LEHIGH PORTLAND CEMENT COMPANY

Docket 8680. Order and Opinion, Mar. 3, 1967

Order denying respondent's application for transfer of case to the Department of Justice.