INTER-STATE BUILDERS, INC., ET AL.

Docket 8624. Order and Opinion, Oct. 23, 1967

Order denying petition for reconsideration of two provisions of the final order and toll the time for appeal.

OPINION AND ORDER DENYING RESPONDENT'S PETITION FOR RECONSIDERATION

On September 18, 1967, respondents petitioned for reconsideration by the Commission of certain sections in the order entered in the instant matter. The decision and order in this matter were served upon respondents by registered mail. Service was completed on August 21, 1967. On September 6, 1967, the Commission granted to respondents an extension of the time until September 18, 1967, for filing a petition for reconsideration.

The first issue respondents bring before the Commission for reconsideration involves paragraph 8(d) of the order which in effect requires respondents to advise customers that they may cancel contracts within a designated period if in executing them they relied in whole or in part on any oral representations not contained in the contract.[1] Respondents argue that no evidence was presented and no findings were made dealing with or supporting the provision of paragraph 8(d), that the particular section extends far beyond the violation charged and that it is vague and ambiguous and beyond the authority of the Commission. Respondents ask that the Commission withdraw its order and remand the case to the hearing examiner "to take evidence, hear argument and make appropriate findings and conclusions" upon what respondents call the "new issues" described above.

Rule 3.55 of the Commission's Rules of Practice for adjudicative proceedings limits reconsideration to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission.

Respondents have raised no new questions nor have they adduced any grounds in the instant petition as to why issues with respect to the illegality of these practices and the scope of the order dealing with them should now be relitigated. The issues were fully explored at the hearing and on appeal before this Commission.

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[1] Respondents are ordered to cease and desist from failing:

"8(d) Prior to the acceptance of any contract, to deliver to the customer who has executed the contract a copy of the contract and a separate written statement clearly and conspicuously advising the customer (1) that no oral representation which may have been made by any salesman or representative of respondents and which is not contained in the contract is binding upon respondents; and (2) that such customer may, within a designated period which shall in no case be less than ten days after receipt of such statement from respondents, elect to cancel this contract if in executing it he has relied in whole or in part upon any oral representation not contained in the contract."

Respondents' deceptive practices in issue in the complaint were embodied in the representations made orally by their salesmen. The written contracts signed by respondents' customers expressly stated that respondents were not responsible for any oral statements not contained in the contract.

The provision of the order now questioned by respondents was directly designed to prevent respondents from continuing their practice of inducing contracts by oral representations and then disclaiming responsibility for such statements in the text of their contracts.

It is not true as respondents argue that no evidence was presented or findings made dealing with or supporting the provisions of paragraph 8(d). Findings on these issues are contained in the Hearing Examiner's Initial Decision, findings 6 to 11. The Commission opinion deals with them expressly at pp. 22 to 32 [pp. 397–404 herein].

The mere fact that the order entered by the Commission contained provisions which were not found in the order proposed by the examiner does not constitute "new questions raised by the decision or final order" such as to require reconsideration or remand. The scope of the order is always in issue in every proceeding and the mere fact of new provisions in an order entered by the Commission does not warrant remand. See *Williams Co.* v. *FTC,* 381 F. 2d 884, 888 (6th Cir. 1967).

Paragraph 8(d) of the order on which respondents would have a full evidentiary hearing is merely a method of implementation, selected by the Commission, to enforce its findings of violation of the act. *FTC* v. *The National Lead Company,* 352 U.S. 419, 508 (1957). The framing of an order is of necessity a matter of discretion, an area in which the Commission has wide latitude. *Jacob Siegel* v. *FTC,* 327 U.S. 608 (1946); *FTC* v. *Ruberoid Co.,* 343 U.S. 470, 473 (1952).

Respondents also call for full evidentiary hearings on the excision of the "unless" clause from paragraphs 1 and 2 of the order entered by the hearing examiner. Here again respondents argue that no evidence was presented or findings made supporting the absolute ban imposed by these paragraphs of the order on the enumerated representations which the Commission found to have been deceptive, false and misleading.

There is no basis for respondents' arguments. The order provisions in question were directed to respondents' model home-special price representations, factual issues which were fully explored in the hearings, Initial Decision of the examiner and Opinion of the Commission. See Hearing Examiner's findings

3 to 9. Commission Opinion, pp. 23, 32–35 [pp. 398, 404–407 herein]. Respondents admitted these practices as we pointed out in our opinion:

> At the hearing respondent Gottesman conceded on examination by complaint counsel that Inter-State had never used the home of any customer as a model home (Tr. 93). There is no indication in the record that respondents ever intend in the future to use a home as a point of reference for advertising purposes. Since purchasers' premises are not used as models we fail to see how in any case respondents could grant allowances or discounts in return for such use. Moreover, it would make little business sense for respondents in the future to use this kind of advertising and thereby discount their own prices when they can simply use photographs of homes, which they are presently doing, in order to illustrate what aluminum siding looks like (Slip Opinion, p. 34) [p. 406 herein].

Respondents had full opportunity to argue their position with respect to the ruling which should be entered in connection with these misrepresentations. Again as we pointed out above, the scope of orders is always in issue in Commission proceedings and new issues within the meaning of the applicable rule are not raised by provisions of the order entered by the Commission after argument on appeal. In the instant case, the Commission determined that in order to have an effective remedy to cure respondents' misrepresentations, the "unless" clauses in the prohibitions of paragraphs 1 and 2 of the order must be excised. The Commission noted in its opinion in this matter that its ban was subject to modification.

> If respondents devise a nondeceptive sales message embracing some type of testimonial which might violate these two paragraphs in the order, the Commission's procedures afford such respondents ample opportunity to petition the Commission, either for an interpretation of the order as to whether the new sales program would or would not violate the order, or for a modification of the order if one is clearly necessary in order to permit respondents to engage in what can be demonstrated to be a nondeceptive sales promotional solicitation (Op. p. 35) [p. 406 herein].

A similar action by the Commission in other cases has been sustained by the Courts (*Century Metalcraft Corp.* v. *FTC*, 112 F. 2d 443, 446 (7th Cir. 1940)).

There is nothing novel about including absolute bans on certain types of representations even though they conceivably in some situations might be true under certain conditions. The test is always whether under existing facts they are likely to ever be true. *Consumers Sales Corp.* v. *FTC*, 198 F. 2d 404, 408–409 (1952); *Carolyn R. Macher, et al.* v. *FTC*, 126 F. 2d 420 (2nd Cir. 1942); *Century Metalcraft Corp.* v. *FTC*, 112 F. 2d 443, 446–47 (7th Cir. 1940); *Product Testing Company Inc.*, Docket No. 8534, Opinion of the Commission, February 17, 1964, pp. 4–5 [64 F.T.C. 857, 882–883]; See *P. Lorillard* v. *FTC*, 186 F. 2d 52, 59 (4th Cir. 1950).

Thus respondents can hardly be heard to argue that they did not have an opportunity to argue fully the scope of the ruling before the Commission. Respondents have had full opportunity to litigate these issues. Respondents have pointed to no new questions raised by the decision or final order which they could not have anticipated or on which they did not have full opportunity to offer evidence before the examiner and to argue before the Commission.

Respondents have requested that the Commission stay the effectiveness of its Final Order and toll the running of the time for appeal. Section 3.55 of the Commission's Rules of Practice for adjudicative proceedings provides that the filing of a petition for reconsideration shall *not* operate to toll the running of any statutory time period affecting such decisions or order unless specifically so ordered by the Commission. Respondents have offered no cause as to why the time for filing appeal should be tolled and we see none.

For the foregoing reasons, respondents' Petition for Reconsideration and its motion to toll time for appeal should be and they hereby are ordered denied.

Commissioner Elman dissents for the reason that the petition for reconsideration satisfies the requirement of Section 3.55 of the Commission's Rules of Practice that it "be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission."

NATIONAL BISCUIT COMPANY

Docket 5013. Order, Nov. 9, 1967

Order denying respondent's request to suspend compliance proceedings on grounds of appeal to circuit court.

ORDER DENYING RESPONDENT'S REQUEST TO SUSPEND COMPLIANCE PROCEEDINGS

This matter is before the Commission upon certification by the hearing examiner of respondent's motion, filed October 10, 1967, requesting suspension of the compliance proceeding herein until such time as the court of appeals rules on respondent's petition to set aside both the modified cease-and-desist order entered on April 26, 1954 [50 F.T.C. 932], and the order issued by the Commission on August 31, 1967 [p. 994 herein], denying respondent's motion to reopen the proceeding.

Respondent contends that since, on its petition, the record has

now been certified to the court of appeals, the Commission has no authority to exercise jurisdiction. In support of this argument, respondent relies in part on the provision in Section 11 of the Clayton Act, prior to its amendment by the Finality Act of 1959, that upon the filing of the record with the court on a petition to review an order:

> The jurisdiction of the United States court of appeals to enforce, set aside, or modify orders of the Commission or Board shall be exclusive.

There can be no doubt that upon respondent's petition, the court of appeals has exclusive jurisdiction to affirm, modify, or set aside the Commission's order. However, since the petition before the court is that of respondent, there is no issue as to enforcement of the order. In this regard, Section 11 of the Clayton Act, prior to 1959, provided that "If any person fails or neglects to obey such order of the Commission or Board while the same is in effect, the Commission or Board may apply to the United States court of appeals, * * * for the enforcement of its order, * * *." In construing this provision, the courts have held that an evidentiary hearing is required on the question of whether a person has failed or neglected to obey an order of the Commission. The present compliance proceeding in this matter constitutes such a hearing. It is, therefore, a step which must be taken before a determination is made whether or not to petition the court of appeals for enforcement. Since the compliance proceeding does not, of itself, constitute the enforcement, setting aside or modification of an order, it does not come within the purview of that provision in Section 11 which vests exclusive jurisdiction in the court of appeals. Accordingly, respondent's argument that the Commission does not have authority to proceed is rejected.

In further support of its contention that the Commission must suspend the compliance hearings, respondent relies on a parenthetical comment by the court in *Standard Brands* [1] that:

> If, in future cases, a respondent, believing the Commission's order invalid, wishes to avoid what it may consider the needless expense of such a [compliance] hearing if the order is invalid, such a respondent can promptly test the order's validity by a petition to review the order.

The modified order to cease and desist, which the respondent contends is invalid, was issued in 1954. At that time, respondent contested the validity of the modification before the Commission, and now states that the original order was modified over its strong objections. However, thirteen years elapsed from the issuance of the modified order until respondent decided to test its validity.

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[1] *Federal Trade Commission* v. *Standard Brands, Inc.*, 189 F. 2d 510 (2d Cir. 1951).

Certainly, this does not constitute a prompt testing of the order's validity, as specified by the court. In any event, we do not believe the court's comment can be construed to condone an attempt to avoid the expense of a compliance hearing by a decision to test the validity of an order after such hearing has been instituted.

Respondent further contends that, as a matter of comity to the court of appeals and of fair play to it, the Commission should suspend the compliance hearings while the validity of the modified order is *sub judice*. Respondent alleges that, with full knowledge of its pricing structure, the Commission delayed for thirteen years in invoking the modified order, and rejected its attempt to achieve immediate voluntary compliance. These are the same arguments advanced by respondent in its motion of May 12, 1967, requesting that the order directing compliance hearings be rescinded. We have ruled on these contentions in our order issued June 26, 1967, denying the request for the reason, among others, that respondent has been aware since at least 1964 that its reported compliance was not satisfactory and that, in its administrative discretion, the Commission had determined that an investigational hearing is necessary to develop sufficient facts to ascertain compliance with the order.

There are additional factors which must be considered in weighing a decision as to whether the public interest requires a continuation of the compliance hearing. The Commission has issued orders against several of respondent's major competitors, which orders, as is respondent's, are directed at prohibiting discriminatory pricing practices in the sale of biscuits and crackers. The pricing programs developed and engaged in by these competitors are allegedly patterned after those engaged in by respondent. Accordingly, the evidence developed in this proceeding will directly affect the Commission's decision in other matters involving members of this industry.

Respondent's argument of alleged unfairness loses sight of one other factor. Basically, it is respondent's position that the end result of the compliance hearing would be "utterly futile" if the court of appeals determines to enter its order modifying the Commission's modified order issued in 1954. We do not agree with this contention. Respondent has raised no issue as to the validity of the original order issued in 1944. Thus, the information developed in the compliance hearing may be used to determine whether respondent's pricing practices comply with the 1944 order or such information may serve as a basis for a determination as to whether a new proceeding is warranted.

Finally, respondent's argument that a continuation of the com-

pliance proceeding would be an affront to the court must be rejected. As Commission counsel point out, by suspending the compliance proceeding at this time, the court may be burdened with twice considering what is essentially but two phases of the same case. The court may prefer a final disposition of the compliance proceeding before ruling on respondent's petition in order that the matter of enforcement, if deemed warranted by the Commission, may be determined at the same time.

For the foregoing reasons, it is the Commission's position that a continuation of the compliance proceeding is necessary and proper. Accordingly,

It is ordered, That respondent's motion, filed October 10, 1967, be, and it hereby is, denied.

It is further ordered, That this matter be, and it hereby is, returned to the hearing examiner for further compliance hearings as directed by Commission order issued April 14, 1967 [71 F.T.C. 1674].

Commissioners Elman and MacIntyre not participating.

ASSOCIATED MERCHANDISING CORPORATION ET AL.

Docket 8651. Order and Opinion, Nov. 13, 1967

Order denying respondents' appeal from hearing examiner's denial of application for depositions and subpoenas duces tecum of 173 witnesses. Interprets Secs. 3.33 and 3.35(b) of the rules of practice.

OPINION OF THE COMMISSION

This matter is before the Commission upon respondents' appeal from the hearing examiner's order filed October 5, 1967, denying their application for depositions of, and the issuance of subpoenas duces tecum to, certain companies and persons listed in the application. Respondents have appealed pursuant to § 3.17(f) of the Commission's Rules of Practice effective August 1, 1963, which they deemed applicable, and they have also appealed, in the alternative, under § 3.35(b) of the Commission's current rules effective July 1, 1967. We believe it is clear, since respondents' motion and the ruling complained of occurred subsequent to the effective date of the Commission's present rules (*i.e.,* July 1, 1967), that such current rules are applicable to the subject matter concerning which appeal is sought. In any event, there has been no claim made nor is there any indication that the application of the Commission's present Rules of Practice to this issue would be in any way prejudicial to respondents.

Respondents' application for depositions and the issuance of subpoenas duces tecum to "nonresource" companies and persons was filed September 22, 1967, with the hearing examiner. The request covered 173 persons, assertedly designated by complaint counsel as witnesses against respondents, as well as 50 persons not designated as witnesses by complaint counsel. The latter include 47 organizations described by respondents as "buying offices" and 3 large retail chains, namely, Sears-Roebuck, Montgomery Ward, and J. C. Penney. These are all individually listed in Exhibits A through D attached to the application. Respondents assert that of the 173 designated as witnesses 153 were described by complaint counsel as "unfavored customers" of the vendors who allegedly discriminated in respondents' favor, 15 described as "wholesalers" and 5 as "competitors."

Respondents included in their application for depositions a statement as to justification on each grouping of persons named. Referring to the "unfavored customers," respondents contended that an important purpose of examining them would be to test the validity, accuracy and relevance of complaint counsel's tabulations of alleged discriminatory transactions. They also stated that they would question the alleged unfavored customers as to any affiliations with buying offices, cooperatives and similar organizations, the opportunities of these customers to affiliate with such organizations and the reasons that they may not have chosen to do so. On the "wholesalers" and the "competitors," respondents stated that they as yet had no indication of the specific legal or factual matters which will be involved in these depositions, claiming that complaint counsel had failed to provide any information concerning the anticipated testimony of such witnesses.

With reference to so-called "buying offices" and retail chains, which include such organizations as R. H. Macy & Co., New York, New York, Gimbel Brothers, Inc., New York, New York, and others, respondents state they seek to discover broad categories of information, including the accuracy and validity of complaint counsel's figures, the extent to which buying offices received rebates on purchases made by their affiliated retailers, and other data. On the chain stores in particular, they claim the depositions are essential because these retailers are major competitors of the store respondents and that through them respondents would seek to establish that any competitive injury suffered by alleged unfavored customers was due to price benefits accorded the chain stores.

Respondents, in justification for subpoenas duces tecum, in conjunction with their request for depositions, claim that they have

encountered difficulties concerning the retaining of records in the prior discovery of resources (suppliers). The assertion is that in numerous instances relevant documents had already been destroyed or lost. Respondents also state that compulsory process is necessary because all witnesses to which the discovery pertains are hostile by definition and none of them can be expected to cooperate voluntarily in satisfying respondents' discovery requirements.

Complaint counsel, on October 4, 1967, filed a document which included an answer in opposition to respondents' application for depositions and subpoenas. Therein counsel state that respondents' application, if granted, would involve the holding of approximately 206 different pretrial discovery depositions in 12 different cities and the issuance of about 250 different subpoenas duces tecum. They assert that the delay involved in such discovery would be intolerable. Complaint counsel, in general, argue against the application on the ground that under § 3.33(a) of the Commission's rules depositions are not to be ordered when it appears that such would result in undue delay of the proceeding.

The hearing examiner, by order of October 5, 1967, denied respondents' application. He stated that in the main he subscribed to complaint counsel's statement and that to depose 173 persons—most, if not all, of whom he asserted would be called as witnesses in this proceeding—would unduly delay commencement of formal proceedings.[1] The examiner's position was that the overriding criteria for the taking of depositions is the question of undue delay, and he concluded that, particularly in light of respondents' previous actions, the depositions requested would result in interminable delay.

Respondents, as stated, have appealed from the examiner's order of October 5, 1967, denying their request. In their brief on appeal they dwell mainly on the merits of their request for the depositions. Additionally, they seem to be charging the Commission with unfairness in the application of its discovery rules by assertedly applying one standard for its rules to complaint counsel and another to the respondents. Finally, they aver that the Commission ought to abide by the *Hickman* v. *Taylor*[2] precept, which they claim is that the deposition-discovery rules are to be accorded a broad and liberal treatment. Complaint counsel, in answer to respondents' appeal, argue or seem to argue that in a big case

[1] The examiner, possibly inadvertently, referred specifically in his order only to the 173 persons to be called as witnesses. We believe it clear from his disposition of the matter that he was also ruling as to the 50 nonwitness organizations on which respondents seek depositions; however, if there is any doubt on this, respondents are not prejudiced from requesting the examiner to reconsider that part of their application.

[2] 329 U.S. 495 (1947).

discovery should be narrowly limited; that the Commission's rules specifically provide for not ordering depositions where undue delay will result; and, finally, they charge respondents with delay in making the application for depositions.

Under § 3.35(b) of the Commission's Rules of Practice, an appeal will be entertained only upon a showing that the ruling complained of involves substantial rights or will materially affect the final decision and that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice. Respondents, relying as they do on broad principles of claimed rights to discovery and the asserted unequal application of the Commission's discovery rules, have completely neglected to justify their appeal under the rule. Perhaps they intended to do so in connection with their claims of justification for the requested depositions and subpoenas. However, they have failed to spell out in what respects the rejection of their request brings them within the express terms of the Commission's rule.

Furthermore, the examiner, as we have frequently observed, is vested with a broad discretion in matters of discovery, *e.g., Topps Chewing Gum, Inc.*, Docket No. 8463 (order issued July 2, 1963) [63 F.T.C. 2196]; *American Brake Shoe Company*, Docket No. 8622 (order issued September 1, 1965) [68 F.T.C. 1169]. The rule on the taking of depositions (§ 3.33) explicitly grants the hearing examiner discretion in such matters. It states in part:

> . . . At any time during the course of a proceeding, whether or not issue has been joined, the hearing examiner, *in his discretion*, may order the taking of a deposition and the production of documents by the deponent. . . . (Emphasis supplied.)

Unless it can be clearly demonstrated that the hearing examiner has abused his discretion, his rulings in such a matter must stand. There has been no such showing here. As we have indicated above, respondents' contentions center mainly on the claim of broad discovery as a fundamental right. They fail to demonstrate that they could not adequately defend themselves without the depositions requested. They do not show, nor make any attempt to show, that there are no alternatives to the sweeping discovery demands made.

The second sentence of § 3.33 on depositions reads as follows:

> Such order may be entered upon a showing that the deposition is necessary for purposes of discovery, and that such discovery could not be accomplished by voluntary methods.

Respondents have failed to make a satisfactory showing that the discovery here requested could not be made by voluntary methods. Their only apparent attempt in this direction is the statement in

their application to the examiner in which they aver, in a general way, that the witnesses are by definition hostile and that they cannot be expected to cooperate voluntarily. They do not suggest that voluntary methods were attempted and that such proved to be unsuccessful. This, we believe, is a wholly inadequate showing under the rule.

Section 3.33 of the Commission's rules also provides that a deposition should not be ordered to obtain evidence from a person relating to matters with regard to which he is expected to testify at the hearing or to obtain evidence which there is reason to believe can be presented at a hearing without the need for deposition or to circumvent the orderly presentation of the evidence at the hearing. Respondents' request for depositions relates mostly to persons who will be called as witnesses. They have made no showing that their application—at least so far as witnesses are concerned—should not be governed by the aforementioned provision in the Commission's rule.

Finally, § 3.33 also provides that, insofar as consistent with considerations of fairness and requirements of due process and the rules in such part, a deposition should not be ordered when it appears that it will result in undue burden to any party or in undue delay of the proceeding. The examiner clearly indicated his belief that the request was of such a broad and comprehensive nature that to grant it would unduly delay the commencement of formal hearings. To some extent he was influenced by the length of time respondents have already taken in connection with a previous request for discovery. We believe it is also clear that the examiner, in making his ruling, considered the questions of fairness to respondents and due process and found that respondents would not be prejudiced by his denial of their request. He has indicated his sensitivity to such considerations throughout this proceeding.

Full and adequate discovery is provided for under the Commission's rules, including the taking of justified depositions. The rules, however, carefully delineate the scope of discovery permitted by deposition and the circumstances under which such will be granted. Discovery provided under the rules does not require the examiner to grant every request or any particular request for a deposition—he has discretion in the matter. Moreover, there is nothing in the Commission's rules which would necessarily, or even ordinarily, require the examiner to grant the discovery of the vast scope here sought. In instances of broad requests for discovery (such as here), which, in essence, parallel the contemplated trial, a consideration—in addition to those of fairness and

justice—is whether or not the benefits, if any, could possibly justify the repetitive calling of witnesses, the extra burdens, and the delay, and in this case we do not believe they would. We do not hold that respondents are foreclosed from all discovery by deposition; our determination here is only that the broad request made has not been adequately justified. In the circumstances, we cannot say—nor has it been shown—that the examiner erred in denying respondents' application for depositions and subpoenas duces tecum.

We hold that respondents have not justified their appeal under the requirements of § 3.35(b) of the Commission's Rules of Practice, and, accordingly, it is directed that such appeal be denied. An appropriate order will be entered.

Commissioner Elman did not participate.

ORDER DENYING APPEAL FROM EXAMINER'S DENIAL OF APPLICATION FOR DEPOSITIONS AND SUBPOENAS

Respondents having filed an appeal from the hearing examiner's order filed October 5, 1967, which order denies respondents' application for depositions and supporting subpoenas duces tecum; and

The Commission having considered such appeal, the answer filed thereto by complaint counsel on October 23, 1967, and the reply of the respondents filed October 27, 1967, and having determined, in accordance with the views expressed in the accompanying opinion, that respondents' appeal should be denied:

It is ordered, That respondents' appeal from the hearing examiner's order filed October 5, 1967, denying their application for depositions and subpoenas duces tecum, be, and it hereby is, denied.

Commissioner Elman not participating.

ALL-STATE INDUSTRIES OF NORTH CAROLINA, INC., ET AL.

Docket 8738. Order and Opinion, Nov. 13, 1967

Order granting respondent's motion to quash hearing examiner's order permitting inspection and copying of documents. Interprets Secs. 3.32, 3.33, and 3.34 of the rules of practice.