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.

OPINION OF THE COMMISSION

On June 19, 1967, the Commission issued its complaint, stating it had reason to believe that respondents violated Section 5 of the Federal Trade Commission Act in the advertising, sale and installation of various home improvement products, including aluminum siding and storm windows. This matter is before the Commission upon respondents' interlocutory appeal, filed pursuant to § 3.35 of the Commission's rules of practice, from the hearing

examiner's order of August 30, 1967, denying respondents' motion to quash the hearing examiner's order to permit the inspection and copying of documents.

The motion filed by complaint counsel and granted by the examiner would require respondents to permit the inspection and copying of various documents described in seventeen specifications.

Respondents argue that the examiner's order, ostensibly issued under § 3.32 of the new rules of practice (effective July 1, 1967), is inappropriate since the former rules of practice (effective August 1, 1963) apply to these proceedings. Respondents assert that complaint counsel have requested the production of documents and that only § 3.11 of the former rules of practice authorizes motions for production. Alternatively, respondents assert that if the July 1, 1967, rules do apply, there is no longer any authority for the motion granted by the examiner inasmuch as orders requiring the production of documents are no longer provided for. Irrespective of which rules apply, respondents also argue that the order must be quashed because it is overly broad, basically investigative in nature, and outside the scope of the Commission's intended discovery processes. The Commission agrees with respondents' last contention.

The complaint in this proceeding was served upon respondents on June 22, 1967. The Commission's rules of practice which went into effect on July 1, 1967, were first published in the *Federal Register* on June 13, 1967. The motion which gave rise to this appeal was filed on July 24, 1967. The examiner held that the July 1, 1967, rules were applicable throughout the trial of this proceeding. Respondents have not called our attention to any instance or manner in which they will be prejudiced by the application of the new rules. In the absence of a showing of prejudice, the examiner's ruling was correct.

Since the July 1, 1967, rules apply, it is obvious that if complaint counsel's motion and the examiner's order call for the *production* of documents, as such, the order must be quashed. The new rules authorize the hearing examiner to issue orders directing access to files (§ 3.32), the taking of depositions (§ 3.33), or the issuance of subpoenas (§ 3.34), but not the production of documents, except as such may be incidentally involved in granting access to files or as may be required in responding to an order for the taking of a deposition or to a subpoena.

The Commission, on occasion, has excused a respondent's technical noncompliance with the rules where the failure was insubstantial and inadvertent or where respondent's counsel was not

sufficiently familiar with Commission procedure.[1] Where justice would be served, we may extend similar limited exemptions to counsel supporting the complaint. However, as a general proposition, it is not unreasonable to insist that the Commission's own staff scrupulously adhere to the letter and the spirit of the rules of practice.

Complaint counsel appears to have fused the provisions of former § 3.11 (production of documents) with the present § 3.32 (orders requiring access). Both the caption and the request by complaint counsel are for a motion to *produce* documents, books and papers. The hearing examiner in his order of August 8, 1967, appears to have adhered more closely to the letter of § 3.32. The examiner, however, did order respondents to "produce" documents for inspection and copying.

Although we admit to considerable perplexity as to whether the order in question is more like an order calling for production, or an order calling for access, we rule that, under the circumstances of this case, respondents will not be prejudiced by treating the examiner's order as one calling for access.

Inasmuch as this appeal indicates some confusion concerning particular provisions of the present rules of practice, a few general comments concerning the underlying reasons for some of the provisions of the rules are appropriate.

Sections 2.7 (subpoenas in investigations), 2.10 (depositions), 2.11 (orders requiring access), and 2.12 (reports) authorize Commission counsel's broad and extensive use of these procedures in *pre*complaint *investigation.*

The Supreme Court has distinguished between the Commission's "power to get information from those who best can give it" and the judicial power to summon evidence in the course of litigation, saying that the Commission—

> * * * has a power of inquisition if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not.[2]

Holding that the order of the Commission requiring the filing of a special report did not transgress the Fourth and Fifth Amendments, the Court stated:

> Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies

[1] *E.g., The Carl Mfg. Co.*, Docket No. 8689, order issued December 23, 1966 [70 F.T.C. 1846].
[2] *United States* v. *Morton Salt Co.*, 338 U.S. 632, 636 (1950).

have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.

Of course, a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter under inquiry to exceed the investigatory power. . . . But it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.[3]

Therefore, it should be manifest that the Commission's rules of practice are intended to and do provide for comprehensive *pre-complaint investigation.*

The rules for adjudicatory proceedings are intended to embody the Commission's conviction that, to the fullest extent practicable, the strategy of surprise and the art of concealment will have no place in a Commission proceeding. Hence, we have also provided for thorough *post* complaint *discovery* procedures. It should be obvious that discovery is a two-way street and that it is the hearing examiner's responsibility to insist that both complaint counsel and respondent's counsel be provided with sufficient data to insure an expeditious and completely fair hearing.[4]

To attain this end, the rules provide several different discovery techniques. Wherever possible, opposing counsel are encouraged and authorized to make extensive use of admissions as to facts and documents (§ 3.31). Opposing counsel are also authorized to use depositions (§ 3.33)[5] and subpoenas (§ 3.34).[6]

Orders for the production of documents, as such, are no longer authorized because proper use of § 3.33 and/or § 3.34 makes the use of such orders superfluous.

Complaint counsel may also make application for an order requiring a respondent corporation to grant access to files for the purpose of examination and the right to copy documentary evidence (§ 3.32). Such application must meet the same requirements as an application for subpoena (§ 3.34).

A subpoena, deposition, or order requiring access aimed at obtaining information not ordinarily obtainable before issuance

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[3] *Id.*, at 641.

[4] The examiner is responsible for the conduct of adjudicative proceedings, and his rulings on procedural matters in the absence of unusual circumstances will not be reviewed or disturbed by the Commission (*Topps Chewing Gum, Inc.*, Docket No. 8463, order issued July 2, 1963) [63 F.T.C. 2196].

[5] Section 3.33 states, in pertinent part, "[T]he hearing examiner, in his discretion, may order the taking of a deposition and the production of documents . . . upon a showing that the deposition is necessary for purposes of discovery, and that such discovery could not be accomplished by voluntary methods."

[6] Section 3.34 states, in pertinent part, "Application for issuance of a subpoena . . . shall be made in writing to the hearing examiner, and shall specify as exactly as possible the documents to be produced, showing the general relevancy of the documents and the reasonableness of the scope of the subpoena.

". . . Subpoenas duces tecum may be used by any party for purposes of discovery or for obtaining documents for use in evidence, or for both purposes."

of the complaint, additional details, or an extension of information as to disclosed transactions or events for which evidence is to be adduced in support of the complaint is manifestly within the bounds of proper pretrial discovery. Section 3.1 which provides for the expedition of adjudicative proceedings in no way prevents and is in no way inconsistent with a complaint counsel's request for access to a respondent's records or for a deposition or for a subpoena duces tecum for records in the possession of a respondent. There is no provision in the Commission's rules, nor is there any precedent which would, in effect, require complaint counsel to have *all* evidence that he will need prior to the issuance of the complaint.[7]

The general rule still remains that an onerous burden would be placed not only on the investigator but upon the party or parties investigated if the preliminary investigation must encompass the gathering of *all* of the details for each and every transaction which may eventually become an evidentiary item in a subsequent complaint. Many Federal Trade Commission proceedings present factual and conceptual complexities. In such cases, complaint counsel may properly find, particularly after the issues are refined in a prehearing conference, that some additional documentation may be required to *round out, extend, or supply further details* for the particular transactions to be pursued.

Thus, the rules are not intended to provide for comprehensive postcomplaint investigation, but only postcomplaint discovery. The Commission recognizes that, in the abstract, the meaning of "discovery" is necessarily vague. We are also aware that terms such as "round out," "extend," or "supply further details" are incapable of concise definition and will depend on the particular facts and circumstances in every instance.

Whatever the conceptual difficulties, it is clear that the particular order which is the subject of this appeal goes far beyond the proper scope of discovery and must be quashed.

The order in question, taken as a whole, appears to be more in the nature of an investigational subpoena. For example, we are unaware of any reason why, at this stage of the proceeding, complaint counsel requested and the examiner ordered the inspection and copying of broad classes of documents such as "Records or files containing all correspondence relating to purchases, sales and

[7] That is not to say that §§ 3.32, 3.33 and 3.34 are to be used for broad investigational purposes even though the Commission has the authority to investigate after complaint issues. *Federal Trade Commission* v. *Menzies*, 242 F. 2d 81 (4th Cir. 1957), *Federal Trade Commission* v. *Waltham Watch Co.*, 169 F. Supp. 614 (S.D.N.Y. 1959). See also *Kaiser Industries Corporation*, Docket No. 8341, order issued March 2, 1962, where the Commission held that it has the authority to issue subpoenas in the course of an investigation to obtain information which relates to the subject matter of an adjudicative proceeding.

we can't have RTB if subpoena is narrow.

advertising for the period January 1, 1965 to date." While there may be innumerable instances where such broad specifications may be generally relevant, reasonable in scope, and within the bounds of proper discovery, it is incumbent upon the moving party, in explaining the reasonableness of scope, to offer some explanation for the failure to specify the needed documents more exactly and for the failure to obtain the requested information by other less burdensome means—for example, a request for admissions under § 3.31 of the rules.

In short, we have been presented with a legal chimera. It has the head of an order for the production of documents, the body of a broad investigational subpoena, and the tail of an order requiring access. While we cannot condone the existence of such a creature, upon proper application by complaint counsel the examiner is fully empowered to issue a more limited and unified order which measures up to the letter and spirit of the current rules of practice. Accordingly, respondents' appeal is granted and an appropriate order will be entered.

ORDER GRANTING INTERLOCUTORY APPEAL

This matter is before the Commission upon respondents' interlocutory appeal, filed pursuant to § 3.35 of the Commission's rules of practice, from the hearing examiner's order of August 30, 1967, denying respondents' motion to quash the hearing examiner's order to permit the inspection and copying of documents, and upon briefs and argument in support thereof and in opposition thereto. The Commission has determined that the appeal should be granted. Accordingly,

It is ordered, That the respondents' motion to quash the hearing examiner's August 8, 1967, order to permit the inspection and copying of documents, be, and it hereby is, granted.

It is further ordered, That this matter be, and it hereby is, remanded to the hearing examiner for further proceedings in accordance with the views expressed in the accompanying opinion.

A & R AGENCY, INC., ET AL.

Docket 8716. Order, Nov. 28, 1967

Order denying effective date of initial decision until further order of the Commission. See 73 F.T.C. 5, for final order.

ORDER STAYING EFFECTIVE DATE OF INITIAL DECISION

The initial decision in this case having been mailed on October 27, 1967; and service thereof having been made as to some of the respondents but not as to all of the respondents:

It is ordered, That the effective date of the initial decision of the hearing examiner filed October 25, 1967 [73 F.T.C. 5], be, and it hereby is, stayed until further order of the Commission.

It is further ordered, That this order is not to be construed as extending the time provided under Section 3.52 of the Commission's Rules of Practice for filing notice of intention to appeal from