CURTISS-WRIGHT CORPORATION

Docket 8703. Order and Opinion, Dec. 1, 1967

Order denying respondent's and Martin A. Sherry's appeals from hearing examiner's denial of their motions to quash subpoenas duces tecum and remanding case to hearing examiner for further proceedings.

OPINION OF THE COMMISSION

This matter is before the Commission upon the hearing examiner's certification, filed November 3, 1967, of Martin A. Sherry's and respondent's motion to quash subpoena duces tecum, filed October 26, 1967, which he denied in part, and respondent's additional motion to quash the same subpoena duces tecum; and upon respondent's and Martin A. Sherry's interlocutory appeal, filed November 15, 1967, from the hearing examiner's order denying motion to quash subpoena duces tecum. Complaint counsel, on November 21, 1967, filed an answer in opposition to respondent's and Martin A. Sherry's appeal, and respondent, on November 28, 1967, filed a reply to such answer.

In this matter, the hearing examiner, on June 12, 1967, issued an order against respondent to produce documents covering certain of respondent's cost and profit data on aircraft engine parts for the years 1960 through 1963. Upon respondent's refusal to comply therewith the matter was certified to the Commission on September 25, 1967. The Commission, on October 2, 1967, issued an order directing the hearing examiner to withdraw the order to produce documents and to consider, upon application and in lieu of the order to produce, the issuance of a subpoena duces tecum pursuant to § 3.34 of the Commission's Rules of Practice "to the extent that the production may be justified under such rule." Thereafter, upon application by complaint counsel, a subpoena duces tecum was issued, directed to Martin A. Sherry, Curtiss-Wright Corporation, One Passaic Street, Wood-Ridge, New Jersey 07075. This subpoena required the appearance of Martin A Sherry and the production of documents pursuant to specifications which are, except as to certain modifications in form, the same as the specifications in the earlier order to produce. It is in connection with such subpoena duces tecum that respondent (and in the one case, Martin A. Sherry) has made its motions to quash and to certify to the Commission. It is also from such subpoena that respondent and Martin A. Sherry have filed interlocutory appeal.[1]

The contentions of respondent and Martin A. Sherry in the

[1] Complaint counsel, on November 2, filed answer in opposition to the motions to quash. Respondent, on November 7, 1967, filed a reply to the answer in opposition to respondent's motion to quash and request to certify.

first motion to quash and in the appeal from the hearing examiner's order denying motion to quash are principally as follows: (1) that under the Commission's Rules of Practice dated July 1, 1967, the Commission cannot continue an investigation after an adjudicative proceeding has commenced, and (2) that the subpoena duces tecum is oppressive, burdensome and unreasonable and violates respondent's rights under the due process clause of the Constitution. The additional assertion is made that the subpoena was improperly addressed to Martin A. Sherry—who, it is asserted, is not a party to this proceeding—and therefore that no proper call has yet been made upon respondent's documents.

In respondent's second motion to quash subpoena duces tecum and requesting the certification of such motion to the Commission, respondent argues mainly that the Commission is bound by *stare decisis* and that it cannot retroactively apply the 1967 Rules of Practice to a question previously decided under the 1963 rules. Respondent contends that this action is beyond the Commission's authority and a violation of respondent's rights.

Apparently there has been some misunderstanding over the Commission's ordering herein of the substitution of a subpoena duces tecum, if applied for, in lieu of the previously issued order to produce. Our purpose and intent was that a request for a subpoena, if made, was to be evaluated in terms of the requirements of the new rules to insure that such request concerned discovery and did not constitute a postcomplaint investigation. We are not clear that the examiner has considered the issue before him on the subpoena duces tecum in exactly these terms. For one thing, he did not have the benefit of the Commission's recent opinion covering the scope of its new discovery rules—that is, *All-State Industries of North Carolina, Inc., et al.* (order granting interlocutory appeal issued November 13, 1967 [p. 1020 herein]. Therein the Commission held in effect that while complaint counsel is not required to have *all* evidence that he will need prior to the issuance of the complaint—that is, he may properly seek additional documentation which may be required to *round out, extend or supply further details* for the particular transactions to be pursued—he may not, under the new rules, engage in "comprehensive postcomplaint investigation." [2]

[2] In *All-State Industries of North Carolina, Inc., et al.*, the Commission held that complaint counsel would be entitled to gather "additional documentation . . . to *round out, extend or supply further details* for the particular transactions to be pursued." (Emphasis in original.) The Commission further elaborated on the question of discovery as follows:

"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."

In connection with the subpoena in issue, it is apparent that the request is, in relatively broad terms, seeking the production of a whole category of documents. We believe that the examiner should have evaluated this request in terms of whether or not it was justified and appropriate postcomplaint discovery. We will remand this matter to the examiner for such an evaluation and for a determination consistent therewith. That is, if he finds the subpoena duces tecum to contravene the Commission's policy against conducting a comprehensive postcomplaint investigation, he should quash, or, if possible and appropriate, limit the subpoena to proper bounds. If he finds otherwise he should order compliance.

So far as this matter concerns the argument that the Commission has improperly proceeded in directing the withdrawal of the order to produce and to consider, upon application, the issuance of a subpoena duces tecum in substitution therefor, we hold against the respondent. After it is made clear that the examiner has evaluated the request and proceeded in terms of the limits of a subpoena duces tecum under the Commission's adjudicative rules, *i.e.*, § 3.34, it will be manifest that the Commission's action will not be to the prejudice of respondent.[3] So far as the other issues raised are concerned, by both respondent and the individual referred to in the subpoena, we believe that such are matters, in the present posture of the case, to be left to the discretion of the hearing examiner. Accordingly, the motions to quash subpoena duces tecum, to the extent certified, will be denied, and the interlocutory appeal from the hearing examiner's denial of the motion to quash will be denied. An appropriate order will be entered.

Commissioner Elman did not participate.

ORDER DENYING CERTIFIED MOTIONS TO QUASH AND INTERLOCUTORY APPEAL AND REMANDING WITH INSTRUCTIONS

This matter having come on to be heard upon the hearing examiner's certification, filed November 3, 1967, of Martin A. Sherry's and respondent's motion to quash subpoena duces tecum, filed October 26, 1967, which he denied in part, and respondent's additional motion to quash the same subpoena duces tecum; and upon respondent's and Martin A. Sherry's interlocutory appeal, filed

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[3] Respondent does not challenge "the Commission's right to apply new rules of practice retroactively in a pending proceeding—in the absence of a showing of prejudice to a respondent." (Request to certify, p. 11.) Moreover, respondent does not contest complaint counsel's right of discovery. It states:

". . . (of course, respondent has never contended that the Commission was barred from discovery after the issuance of a complaint—nor that Section 3.11 forbids discovery. Its argument has always been that the Commission is barred from continuing a pre-complaint investigation after the institution of an adjudicative proceeding.)" (Request to certify, p. 9.)

November 15, 1967, from the hearing examiner's order denying motion to quash subpoena duces tecum; and

The Commission, for reasons appearing in the accompanying opinion, having determined that respondent's and Martin A. Sherry's motion and respondent's separate motion to quash subpoena duces tecum and their appeal from the examiner's denial of their motions to quash subpoena duces tecum should be denied and that the matter should be remanded for further proceedings in accordance with the Commission's views expressed in the accompanying opinion:

It is ordered, That respondent's and Martin A. Sherry's motion and the separate motion of respondent filed October 26, 1967, to quash subpoena duces tecum, to the extent that they have not been denied by the hearing examiner, be, and they hereby are, denied.

It is further ordered, That respondent's and Martin A. Sherry's appeal from the examiner's denial, on November 3, 1967, of their motions to quash subpoena duces tecum, be, and it hereby is, denied.

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

Commissioner Elman not participating.

ASSOCIATED MERCHANDISING CORPORATION ET AL.

Docket 8651. Order, Dec. 11, 1967

Order denying respondents' request for the production of certain documents.

ORDER RULING ON HEARING EXAMINER'S CERTIFICATION OF RESPONDENTS' MOTION FOR PRODUCTION OF DOCUMENTS

This matter is before the Commission on the hearing examiner's certification of respondents' motion for production of documents filed September 22, 1967. The request is made pursuant to Amended Prehearing Order No. 1, and to § 3.11 of the Commission's rules of practice, effective August 1, 1963. Respondents move that complaint counsel be required to produce or permit them to inspect