LEHIGH PORTLAND CEMENT CO.

Docket 8680. Order and Opinion, Mar. 19, 1968

Order denying a third party's appeal from hearing examiner's order refusing to quash a subpoena duces tecum on behalf of the respondent in this case.

OPINION OF THE COMMISSION

MARCH 19, 1968

This matter is before the Commission upon the interlocutory appeal of Buffalo Concrete, a Division of Joseph Smith & Son, Inc. (Buffalo). This appeal, filed pursuant to § 3.35(b) of the Commission's rules of practice, is based upon the hearing examiner's order of January 31, 1968, denying in part [1] Buffalo's motion to quash a subpoena duces tecum issued to Buffalo by the hearing examiner on behalf of respondent Lehigh Portland Cement Co.

The examiner ruled that the contested subpoena was authorized by § 3.34(b)(2) of the current rules of practice. Buffalo contends that § 3.34(b)(2) does not authorize the issuance of a subpoena duces tecum, returnable at a prehearing conference for discovery purposes, to a nonparty for the production of documents which may not contain or constitute evidence.

Buffalo's argument that the Commission's rules of practice do not authorize the issuance of prehearing subpoenas duces tecum to persons other than complaint counsel or respondent is based upon its reading of § 3.34(b)(2). This subparagraph provides:

> (2) 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. When used for discovery purposes, a subpoena may require any party to produce and permit the inspection and copying of nonprivileged documents, papers, books, or other physical exhibits which constitute or contain evidence relevant to the subject matter involved and which are in the possession, custody, or control of such party.

Buffalo interprets the second sentence as imposing a limitation on the first by requiring that subpoenas duces tecum, when used for discovery purposes, "only be directed to parties to the litigation." At the same time it concedes that when the proper showing has been made under § 3.33, a subpoena duces tecum for discovery purposes may be directed to persons other than parties to the litigation if the subpoena is to be used in connection with the taking of a deposition. Buffalo does not explain its theory of the basis for such a third-party subpoena if, as it contends, § 3.34 imposes a general limitation on the use of prehearing subpoenas duces tecum for purposes of discovery.

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[1] Buffalo also moved that portions of the subpoena duces tecum be quashed on the ground of irrelevancy. The examiner has not yet ruled upon this ground. This appeal is limited to the examiner's denial of the motion to quash on the ground that the Commission's rules do not authorize the issuance of subpoenas duces tecum to third parties.

Subparagraph (b)(1) of § 3.34 specifies the form and method of making application for issuance of "a subpoena requiring a person to appear and depose *or testify and to produce specified documents* * * * at the taking of a deposition, *or at a prehearing conference*, or at an adjudicative hearing * * *" (emphasis added). Subparagraph (2) of that section relates to the same subpoenas duces tecum, and the first sentence clearly authorizes, without restriction, the use of such subpoenas "for purposes of discovery or for obtaining documents for use in evidence, or for both purposes." The second sentence of this paragraph supplements the first sentence, as the hearing examiner has held. It does not, however, limit the scope of the coverage of the first. It simply makes explicit what might otherwise be open to interpretation, namely, that under the rules of practice if a subpoena is used for discovery purposes, it may require any party (as well as a nonparty) to produce and permit the inspection and copying of documents and exhibits therein referred to.

A consideration of the development of this rule illustrates the specific purpose of the second sentence. As noted in the footnote to the second sentence of § 3.34(b)(2), "Orders for the production of documents, provided for under former rules of practice, are no longer used." This footnote (1) calls attention to the fact that the rules of practice no longer provide for the use of orders to produce, and (2) makes clear that the use of subpoenas has been substituted for the use of orders to produce as provided for in former rules.

Section 3.11 of the former rules stated in pertinent part:

> § 3.11 Production of documents.—Upon motion of any party showing good cause therefor and upon such notice as the hearing examiner may provide, the hearing examiner may order any party to produce and permit the inspection and copying of nonprivileged documents, papers, books, or other physical exhibits which constitute or contain evidence relevant to the subject matter involved and which are in the possession, custody, or control of such party * * *.

This rule was very similar to Rule 34 of the Federal Rules of Civil Procedure. It specifically provided for orders requiring the production of documents by a *party*. It had nothing to do with and was not related to any other process which might be available under this or any other rule to require the production of documents by nonparties.[2] Thus, since the Commission in promulgating its new rules of practice abolished the use of orders to produce (by a party) and substituted therefor the use of subpoenas to require production (also by a party), it merely undertook by the second sentence of § 3.34(b)(2) to make this clear. It did not by this provision limit or restrict the use of subpoenas elsewhere authorized (in the first sentence of § 3.34(b)(2) to require the

[2] The scope of § 3.34 is in some respects similar to Rule 45 of the Federal Rules of Civil Procedure. Rule 45 authorizes the issuance of subpoenas duces tecum to parties and nonparties for purposes of general discovery before trial as well as for testimony and production of documents at the trial. Moore *Federal Practice and Procedure* 1168, 1453 (1964).

production of documents generally whether for discovery purposes or for obtaining documents for use in evidence, or for both purposes.

Section 3.34, read as a whole, makes it clear that the Commission is authorizing the fullest and most complete discovery practicable.

> 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.[3]

The examiner's ruling was in compliance with the spirit and letter of the rules of practice. Buffalo has failed to make any showing that the examiner abused his discretion or authority. 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.[4] The appeal of Buffalo from the part of the examiner's action denying its motion to quash the subpoena duces tecum on the ground that the subpoena duces tecum issued to Buffalo was not authorized by the Commission's rules will be denied. Accordingly, the motion will be denied and an appropriate order will be entered.

Commissioner MacIntyre did not participate.

Order Denying Interlocutory Appeal

This matter is before the Commission upon the interlocutory appeal of Buffalo Concrete, a Division of Joseph Smith & Son, Inc. (Buffalo). This appeal, filed pursuant to § 3.35(b) of the Commission's rules of practice, is based upon the hearing examiner's order of January 31, 1968, denying in part Buffalo's motion to quash a subpoena duces tecum issued to Buffalo on behalf of respondent Lehigh Portland Cement Co. The Commission has determined that the appeal should be denied. Accordingly,

It is ordered, That the appeal of Buffalo Concrete, Division of Joseph Smith & Sons, Inc., from the ruling of the hearing examiner on the motion to quash or limit subpoena duces tecum on the ground that the subpoena duces tecum issued to Buffalo was not authorized by the Commission's rules be, and it hereby is, denied.

By the Commission, with Commissioner MacIntyre not participating.

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[3] *All-State Industries of North Carolina, Inc.*, Docket No. 8738, order issued November 13, 1967 (emphasis in original) [72 F.T.C. 1020, 1023].

[4] *Topps Chewing Gum, Inc.*, Docket No. 8463, order issued July 2, 1963 [63 F.T.C. 2196].

MARLO FURNITURE COMPANY ET AL.

Docket 8745. Order, Mar. 28, 1968

Order denying respondents' motion to discuss complaint and quash hearing examiner's order for a post-complaint investigation.

Order Denying Motion to Dismiss and Appeal From Hearing Examiner's Order

This matter is before the Commission on respondents' motion to dismiss the complaint certified by the examiner with the recommendation it be denied and their appeal from the hearing examiner's order of February 27, 1968, refusing to quash an order for access. The complaint in this proceeding, which issued on September 27, 1967, charges respondents with engaging in fictitious pricing, misrepresenting in certain instances the identity of the seller appearing in their advertisements, and the composition and construction of certain products, failing to advise purchasers that deposits were not refundable, and not disclosing that conditional sales contracts or other instruments of indebtedness may be assigned or transferred to a finance company or other third party to whom the customer thereby becomes indebted.

On February 2, 1968, complaint counsel filed an application for an order requiring access to certain respondents' records revelant to the fictitious pricing allegations set out in paragraphs 4 through 6 of the complaint. By order of the same date, the hearing examiner required respondents to grant access to the inventory stock records and sales vouchers relating to certain items promoted in specific advertisements which have already been identified as Commission Exhibits. Respondents moved to quash the order for access on the ground complaint counsel were embarking on a post-complaint investigation in violation of the Commission's rules. Respondents argue that the request for access goes beyond the "rounding out" permitted once the case is in the adjudicative stage by recent Commission decisions, *viz*, *All-State Industries of North Carolina, Inc., et al.*[1] and *Curtiss-Wright Corporation*,[2] since Commission counsel seek evidence necessary to prove the charges set forth in the complaint. In addition, respondents assert that the order for access is improper on the ground that it would be unduly burdensome, and that the records sought could have been secured prior to issuance of complaint.

Essentially, the motion to dismiss and the appeal from the hearing examiner's refusal to quash the order for access are based on the

[1] Docket 8738, November 13, 1967 [72 F.T.C. 1020].
[2] Docket 8703, December 1, 1967 [72 F.T.C. 1027].

same grounds. Respondents argue in effect that in asking for the order of access, complaint counsel conceded they have insufficient evidence to sustain the charges in the complaint. They contend, therefore, the complaint should be dismissed, since the Commission was misled into believing that there was good cause to issue it. The examiner in certifying respondents' motion to dismiss expressly held, however, that the access required by his order is consistent with the Commission's decisions in *All-State Industries*, and *Curtiss-Wright Corporation.*

The determination of whether complaint counsel's request is within the bounds of permissible post-complaint discovery outlined by *All-State Industries* is of necessity largely within the examiner's discretion. He is responsible for the conduct of the proceedings and the definition of the issues; and the decision on whether the criterion of *All-State Industries* has been met depends on the particular facts and circumstances of every case. His ruling on whether requests for discovery are appropriate will, therefore, in the absence of unusual circumstances not be disturbed by the Commission. In this instance, the documents encompassed within the order requiring access on their face do not involve a post-complaint attempt to investigate such as that condemned in *All-State Industries.* In this case, requiring access to stock record cards and sales vouchers for six items of furniture for a ten month period pertinent to advertisements already specifically identified as Commisssion Exhibits is well within the examiner's discretion.

Respondents' arguments on the basis of these facts that the Commission did not have good cause to issue complaint is also without merit. Contrary to respondents' apparent position, the preliminary investigation need not "encompass the gathering of *all* of the details for each and every transaction which may eventually become an evidentiary item in a subsequent complaint." Complaint counsel may properly after the issues have been defined in a prehearing conference request additional documentation to round out, extend or supply further details for the particular transactions to be pursued in the course of the hearings. *All-State Industries*, *supra.* Since it appears that the examiner's exercise of discretion in issuing the order complained of was on its face reasonable, the motion to dismiss and respondents' appeal from his refusal to quash will both be denied. Accordingly,

It is ordered, That respondents' motion to dismiss the complaint be, and it hereby is, denied.

It is further ordered, That respondents' appeal from the hearing examiner's order of February 27, 1968, refusing to quash the order for access be, and it hereby is, denied.

It is further ordered, That respondents' request for oral argument be, and it hereby is, denied.

LEHIGH PORTLAND CEMENT COMPANY

Docket 8680. Order and Opinion, Apr. 8, 1968

Order denying a third party's motion to quash a subpoena directed to it on behalf of the respondent.

OPINION OF THE COMMISSION

APRIL 8, 1968

This matter is before the Commission upon the interlocutory appeal of District Concrete Company, Inc. (District). This appeal, filed pursuant to § 3.35(b) of the Commission's Rules of Practice, is based upon the hearing examiner's order of February 28, 1968. The order denied District's motion to quash a subpoena duces tecum issued to District by the hearing examiner on behalf of respondent Lehigh Portland Cement Co. and also denied District's incidental request for access to respondent's *ex parte* application for the subpoena duces tecum.

The examiner denied the motion on the ground that it was not made within ten days after service of the subpoena as provided for in § 3.34(b). Moreover, the examiner ruled that District neither requested an extension of time nor showed any "good cause" for an extension as required by § 4.3(b).

The motion to quash was filed thirty days after service and nineteen days after the expiration of time for filing such motion under the Commission's rule. Furthermore, the examiner noted that ten days after receipt of the subpoena, District, by its counsel at that time, executed a stipulation with respondent's counsel binding District to "comply in full with the subpoena duces tecum" by "mailing all responsive documents, correspondence, data and verified summaries" to respondent's counsel by February 9, 1968.[1]

The examiner found that District had not demonstrated "good cause" or other extenuating circumstances, which would permit him to allow movant to make its late motion. Additionally, the examiner noted that to allow District's motion would be tantamount to special treatment which "would produce a disorderly result in this case where over 100 witnesses have been subpoenaed to produce documents and over half of them have already informally complied." [2]

Moreover, the examiner did state that he "is not ruling, however, that after timely motions to quash of contesting witnesses have been passed on, he may not direct that the disposition thereof may in part apply to other witnesses." [3]

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[1] Order denying Motion to Quash, p. 2 (February 28, 1968).
[2] *Id.*, at p. 3.
[3] *Id.*

As to the request for access to the subpoena application, the only reason set forth for this request is that the application "is obviously necessary for District Concrete to know" respondent's reasons for seeking the information.[4] The examiner stated that granting the request might "prejudice the respondent, inasmuch as respondent prepared its application and supporting grounds, involving the disclosure of its strategy in this case, in respect to two different kinds of subpoenas and in respect to various types of witnesses, in reliance on the *ex parte* status."[5] The *ex parte* status of a subpoena application submitted by a respondent should not be disturbed without compelling reason. District has not made such a showing.

Section 3.35(b) states that interlocutory appeals will be entertained by the Commission only "upon a showing that the ruling complained of involves substantial rights and 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." District has failed to meet any of these requisites. In the absence of the required showing, the examiner's rulings upon evidentiary or procedural matters arising in the course of such proceedings will not be reviewed or disturbed.[6] Accordingly, District's appeal will be denied and an appropriate order will be entered.

Commissioner MacIntyre did not participate.

ORDER DENYING INTERLOCUTORY APPEAL

This matter is before the Commission upon the interlocutory appeal of District Concrete Company, Inc. (District). This appeal, filed pursuant to § 3.35(b) of the Commission's Rules of Practice, is based upon the hearing examiner's order of February 29, 1968. The order denied District's motion to quash a subpoena duces tecum issued to District by the hearing examiner on behalf of respondent Lehigh Portland Cement Co. and also denied District's incidental request for access to respondent's *ex parte* application for the subpoena duces tecum.

For the reasons stated in the accompanying opinion, the Commission has determined that District's appeal should be denied. Accordingly,

It is ordered, That the appeal of District Concrete Company, Inc., from the ruling of the hearing examiner on the motion to quash subpoena duces tecum and for production of the application therefor be, and it hereby, is, denied.

By the Commission, with Commissioner MacIntyre not participating.

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[4] Appeal to the Commission, p. 5.

[5] Order, p. 4.

[6] See, *e.g.*, *Topps Chewing Gum, Inc.*, Docket 8463 (order issued July 2, 1965).

REPUBLIC CONSTRUCTION COMPANY, INC., ET AL.

Docket C-1164. Order, Apr. 8, 1968

Order denying petition to reopen proceeding for the purpose of amending a prohibition in the order.

Opinion and Order Denying Petition to Reopen the Proceeding for the Purpose of Amending Order to Cease and Desist

This matter is before the Commission upon the petition of respondents Lester Mossman and Irving Kaplow, filed March 4, 1968, termed a petition for modification of decision and order and construed to be a request for a reopening of the proceeding and for a modification of the order to cease and desist pursuant to § 3.72(b) (2) of the Commission's Rules of Practice. The petitioners allege that the order of the Federal Trade Commission issued January 31, 1967 [71 F.T.C. 84], based upon a consent agreement, prohibits respondents, in paragraph 3 thereof, from representing that:

Any commission is given by respondents to purchasers of respondents' products for referrals who subsequently purchased respondents' products;

that the petitioners intended such paragraph to contain the modifying phrase "unless such commissions are in fact given as represented," and that they believe the absence of such qualifying language was a mistake. The Acting Director of the Bureau of Deceptive Practices filed an answer opposing such requested reopening and modification of the order, and in the event respondents produce evidence supporting their position that significant payments of referral commissions are now being made, proposing an alternative form of order.

The petitioners have made no showing, other than the bare assertion that they did not intend the unqualified prohibition in paragraph 3, that this provision is contrary to the understanding of the parties at the time of the execution of the consent agreement. Respondents do not claim that there is any ambiguity or unclearness in the challenged provision nor do they state any circumstances which might suggest an original misunderstanding as to its meaning.

Moreover, the petitioners have made no sufficient showing under § 3.72(b) (2) of the Commission's Rules of Practice that changed conditions of fact or law require the modification of paragraph 3 or that the public interest so requires the modification of paragraph 3 or that ing for modification of an order must state the changes desired, the grounds therefor, and must include, when available, such supporting evidence and argument as will, in the absence of a contest, provide a basis for a Commission decision on the petition. Petitioners have made no such showing. All that they have done is to include in their petition the unsupported assertion that they and other companies in their marketing area and throughout the United States "have offered and given

[c]ommissions and [g]ifts." Petitioners do not claim, as we construe their statement, that they are presently offering or paying commissions and gifts for referrals; that they have any current program for such payments, or even that they anticipate beginning such a program. In other words, they have not shown any presently existing change in law or fact or public interest considerations which would constitute grounds for reopening the matter for the purpose stated. Accordingly,

It is ordered, That the request of Lester Mossman and Irving Kaplow for the reopening of this proceeding and for the modification of the order to cease and desist be, and it hereby is, denied.

AMERICAN BRAKE SHOE COMPANY

Docket 8622. Order and Memorandum, Apr. 9, 1968

Order denying respondent's motion to disqualify Commissioner Jones and for additional information and stay.

MEMORANDUM OF COMMISSIONER JONES IN RESPONSE TO THE MOTION OF RESPONDENT AMERICAN BRAKE SHOE COMPANY THAT SHE WITHDRAW FROM THIS PROCEEDING

MARCH 29, 1968

Respondent American Brake Shoe Company by motion dated March 26, 1968, has requested that I disqualify myself from participation in the decision in the above-captioned case. If I decide not to disqualify myself, respondent moves the Commission to determine that I be disqualified from such participation.

As alleged grounds for its motion, respondent relies on the facts communicated to it in my letter of March 12, 1968, that subsequent to the oral argument of this case before the Commission, the attorney of record, V. Rock Grundman, Jr., joined my staff as attorney-advisor. I am attaching a copy of my letter to respondent which further advised that I have not discussed this case in any way with Mr. Grundman, and do not intend to do so in the future and that Mr. Grundman and my other assistants are under instructions not to discuss this case among themselves.

Respondent, American Brake Shoe Company, has also moved for additional information with respect to whether Mr. Grundman has "communicated about this case with any persons on the staff of the Chairman or any Commissioner" and whether such persons have "subsequently communicated about the case with the Chairman or any Commissioner who participated in the decision."

Since I wish the public record to be as complete as possible on this matter, I have asked Mr. Grundman to furnish me with a statement

as to any and all communications he may have had with any Commissioner or member of the staff of any Commissioner about this case since he has been on my staff. A copy of Mr. Grundman's statement is attached hereto.

I am fully cognizant of the provisions of Section 5(c) of the Administrative Procedure Act and of Section 4.7 of the Commission's Rules of Practice with respect to *ex parte* communications and of Canon 17 of the Canon of Judicial Ethics. There has been no breach either of the letter or of the spirit of any of my legal, ethical or moral obligations as reflected in any of these provisions and principles. Accordingly, there is no ground on which I should or must disqualify myself. It is my decision, therefore, not to disqualify myself from participation in this proceeding.

I shall not be present and shall not participate in any deliberation or decision by the Commission on respondent's alternate request that I be disqualified from participation by the Commission.

EARL W. KINTNER, Esq.,
RALPH S. CUNNINGHAM, JR., Esq.,
GEORGE KUCIK, Esq.,
ARENT, FOX, KINTNER, PLOTKIN & KAHN,
1815 H Street, N.W.,
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HUGH J. KELLY, Esq.,
Counsel for Complaint,
Bureau of Restraint of Trade,
Federal Trade Commission,
Washington, D.C. 20580

Re: In the Matter of American Brake Shoe Company
Docket No. 8622

GENTLEMEN:

I wish to advise you that in July, 1967, subsequent to the oral argument before the Commission in the above-captioned case, one of the complaint counsel, Mr. V. Rock Grundman, joined my staff as an attorney-advisor.

I have never discussed this case with Mr. Grundman. I do not intend to discuss this case with Mr. Grundman nor ask him to furnish me with any assistance on any matter which may arise in connection with this case. Furthermore, I have instructed Mr. Grundman not to discuss this case with any member of my staff, as an added precaution in case I decide to utilize the assistance of another member of my staff in connection with this case.

I wish to advise you that I intend to participate in the decision

in this case, but I wanted you to know of Mr. Grundman's present connection with my office and of my instructions to him.

Very sincerely yours,

MARY GARDINER JONES,
Commissioner.

AFFIDAVIT OF V. ROCK GRUNDMAN, JR.

I received this day copies of (1) a motion for stay, (2) a motion for additional information and (3) a motion for disqualification of Commissioner Jones filed by respondent in this matter. The motion for additional information requests information including but not limited to:

(a) whether Mr. Grundman has communicated about this case with any persons on the staff of the Chairman or any Commissioner and

(b) whether any of those persons subsequently communicated about the case with the Chairman or any Commissioner who participated in the decision.

Since the date of oral argument in this case in February of 1967 I have done nothing related to the case in any way. I have written no letters, memoranda, or anything else to any person either within or without the Commission. I have spoken to no Commissioners, their individual staffs nor member of the Commission's staff with respect to the case except to mention to Commissioner Jones, prior to accepting the position as attorney advisor, that I was counsel on the case, I also mentioned to each of Commissioner Jones' other staff members that I was counsel on the case to ensure that nothing related to the case would come to my attention.

In my position as attorney advisor with Commissioner Jones I have seen no writing nor participated in any conversation nor heard any conversation dealing with the merits of the case. The only thing I have seen which mentions the case is a routine circulation put out by the Secretary of the Commission listing the names of the cases pending with the Commission, the docket number and the date of the oral argument.

The only other person with whom I have discussed the case since the oral argument is Mr. George R. Kucik, attorney for respondent. That conversation was a casual one on meeting in the street and consisted of mutual speculation on when the Commission decision would be forthcoming and what we might do differently if the case were to be tried again.

The foregoing is true and correct to the best of my knowledge and belief.

V. ROCK GRUNDMAN, JR.

418-345—72——80

Order Denying Motions for Disqualification, Additional Information and Stay

Respondent moved on March 26, 1968, that Commissioner Jones disqualify herself from participating in the decision in this proceeding. In the alternative, respondent has moved that if Commissioner Jones does not disqualify herself that the full Commission consider the request for disqualification. In addition, respondent has filed a motion for additional information and a motion for a stay in the proceedings until five (5) days after disposition of the motion for additional information and the motion for disqualification filed by respondent on the same date. Commissioner Jones for the reasons stated in her memorandum attached hereto has decided not to disqualify herself. Mr. Grundman, complaint counsel in this proceeding, has filed an affidavit in response to respondent's motion for additional information, a copy of which is also attached.

Section 7(a) of the Administrative Procedure Act clearly empowers the Commission to determine whether a presiding officer conducting a "hearing" on behalf of the Commission is subject to "personal bias or disqualification." It is not so clear whether this provision was meant to apply to the participation of an individual agency member in final or appellate determinations. The inquiry on the basis of which such motions must be decided is necessarily subjective. Weighing the ability of one of its own members to make an objective judgment is of necessity a difficult and delicate responsibility for a tribunal. In addition, the existence of such a power to disqualify carries with it an inherent danger of abuse as a potential instrument for suppression of dissent.

Under the Commission's practice, disqualification is treated as a matter primarily for determination by the individual member concerned, resting within the exercise of his sound and responsible discretion. In the Commission's view, this practice is proper and consistent with the law and in the instant proceeding no basis for departing from that practice has been shown. The motion for disqualification, the motion for a stay of the proceedings, and the motion for additional information, except to the extent that it has been satisfied by Commissioner Jones's memorandum and Mr. Grundman's affidavit are denied. Accordingly,

It is ordered, That the motion for disqualification of Commissioner Jones be, and it hereby is, denied.

It is further ordered, That the motion for additional information, except to the extent already satisfied by Commissioner Jones's memorandum and Mr. Grundman's affidavit, be, and it hereby is, denied.

It is further ordered, That the motion for a stay of the proceedings be, and it hereby is, denied.

By the Commission, with Commissioner Jones not participating.

UNIVERSE CHEMICALS, INC., ET AL.

Docket 8752. Order and Opinion, Apr. 9, 1968

Order denying appeal from hearing examiner's order scheduling hearings in more than one place.

DISSENTING OPINION

APRIL 9, 1968

BY ELMAN, *Commissioner:*

Under Section 3.41(b) of the Commission's Rules of Practice, hearings in more than one place are supposed to be the rare exception, and not the rule. The Rules say that they may be allowed by the hearing examiner only in "unusual and exceptional circumstances [and] for good cause stated on the record." In this case, the only justification for the hearing examiner's order is a desire to avoid inconvenience to witnesses and extra expense to the Commission. That is not enough. The Commission should firmly hold the line against retreating to the old pre-1961 peripatetic hearings. We should instruct the hearing examiners that the Rules of Practice mean what they say. Actions speak louder than words—by upholding the hearing examiner's order here, the Commission tolerates unnecessary delays in the conduct of adjudicative proceedings.

ORDER DENYING PERMISSION TO FILE INTERLOCUTORY APPEAL

Respondents, on February 29, 1968, filed a motion requesting permission to file an interlocutory appeal, under Section 3.23(a) of the Commission's Rules of Practice, from the hearing examiner's order filed February 16, 1968, granting in part and denying in part complaint counsel's motion for hearings in more than one place. As a result of the hearing examiner's order, hearings were scheduled to be held in Chicago, Illinois, Evansville, Indiana, Omaha, Nebraska, and Minneapolis, Minnesota. Complaint counsel, on March 5, 1968, filed an answer opposing respondents' request.

Respondents argued that, because they operate an assertedly small business enterprise which requires their presence for its operation, the scheduling of hearings in more than one place would be financially oppressive to them.

In order to facilitate our consideration of whether the hearing examiner's order satisfies the requirements of Section 3.14 of the Commission's Rules permitting the hearing examiner to order hearings in more than one place "in unusual and exceptional circumstances" or whether, on the other hand, appeal should be granted under Section 3.23(a) as involving substantial rights and materially affecting the final decision,

we directed the filing of supplemental affidavits by the parties setting forth respectively their reasons in support of their respective positions. The affidavits have been duly filed.

Section 3.41(b) of the Commission's Rules requires that hearings be held in one place insofar as practicable. The party requesting departure from that Rule has the burden of showing the unusual and exceptional circumstances justifying hearings at more than one place.

We are at pains to point out that matters such as that involved here are best left to the sound discretion of the hearing examiner, and we are satisfied from the affidavits submitted that complaint counsel has made sufficient showing warranting holding of hearings in more than one place. Thus, in the circumstances presented we do not believe that the hearing examiner has abused his discretion in this matter. Accordingly,

It is ordered, That respondents' request for permission to file an interlocutory appeal, filed February 29, 1968, be, and it hereby is, denied.

Commissioner Elman dissented and has filed a statement.

CONSOLIDATED MORTGAGE COMPANY ET AL.

Docket 8723. Order, Apr. 19, 1968.

Order reopening case and setting aside the complaint and order as to corporate respondent.

Order Reopening and Dismissing Complaint and Setting Aside Order as to Corporate Respondent

Respondents, on March 18, 1968, filed with the Commission a petition, requesting the Commission to reconsider its opinion and final order issued February 19, 1968 (p. 376 herein), on the grounds that the Commission assertedly failed or did not have the opportunity to consider respondents' submission of February 21, 1968, relating to a petition for dissolution filed in Superior Court of Rhode Island and that the Commission assertedly did not follow an interpretation of law as contained in certain cases referred to, and further requesting the Commission to grant respondents a reasonable time within which to submit to the Commission a final court order dissolving respondent corporation and to grant respondents an oral hearing on their petition. Complaint counsel, on March 25, 1968, filed an answer in opposition to the petition.

Subsequently, on April 8, 1968, respondents filed a letter with the Commission, enclosing a copy of the final decree of Superior Court of the State of Rhode Island, entered April 3, 1968, ordering that Consolidated Mortgage Company be dissolved. Complaint counsel filed

a supplemental answer April 11, 1968, in which he states he is opposed to any reconsideration of the Commission's decision and final order but that he has no objection to the exclusion of the corporate respondent from the order to cease and desist in view of its dissolution.

In the circumstances, the Commission is of the opinion that this proceeding should be reopened pursuant to § 3.72(a) of the Commission's Rules of Practice, the complaint dismissed and the order set aside as to the dissolved corporate respondent. This action will render moot or irrelevant respondents' other specific requests. Accordingly,

It is ordered, That this matter be, and it hereby is, reopened.

It is further ordered, That the order to cease and desist as to respondent Consolidated Mortgage Corporation be, and it hereby is, set aside and that the complaint as to such respondent be, and it hereby is, dismissed.

LEHIGH PORTLAND CEMENT COMPANY

Docket 8680. Order and Opinion, May 14, 1968

Order granting respondent's request that complaint counsel furnish him with a list of acquisitions of portland cement companies manufacturing ready-mixed concrete for the years 1965 through 1968.

OPINION OF THE COMMISSION

MAY 14, 1968

On April 30, 1968, counsel supporting the complaint requested: (1) Commission authorization to disclose certain confidential information and (2) permission to file an interlocutory appeal pursuant to § 3.23(a) of the rules of practice. Both requests are predicated upon the hearing examiner's order of April 23, 1968, requiring complaint counsel to furnish this information to respondent by April 30, 1968.[1] Pursuant to respondent's requests for admissions of fact and disclosure of information dated April 1, and April 3, 1968, the examiner ordered complaint counsel to divulge information "* * * insofar as known by complaint counsel or as they have reason to believe" concerning the identities and dates of acquisitions of ready-mixed concrete companies by cement companies. Complaint counsel wish to appeal from this portion of the order. Additionally, the examiner ordered complaint counsel to either furnish *all* such information from Commission files, regardless of whether they had knowledge thereof, or in lieu thereof, to seek authorization from the Commission to divulge this information. Respondent in its April 1, and April 3, 1968, requests asked for information in addition to that which the examiner recommends be disclosed. However, respondent, in its May 2, 1968, Opposition to Com-

[1] The effective date of the hearing examiner's order was stayed by the Commission on May 2, 1968.

plaint Counsel's Request for Permission to File an Interlocutory Appeal, urges support for the examiner's actions. Furthermore, since respondent has raised no objection to the scope of the information recommended for disclosure, we assume that the earlier additional requests are not before us.

Complaint counsel base their request for appeal upon the following assertions: (1) the information required by the examiner's order is confidential within the meaning of § 4.10 of the Commission's rules of practice, (2) respondent has not made a proper request for this information, (3) the hearing examiner has no authority to order disclosure, and (4) complaint counsel have no authority to disclose confidential information without Commission authorization.

It is evident that the orderly procedures specified by the Commission's rules of practice have not been followed in this instance.[2] However, complaint counsel have specifically requested Commission authorization to disclose the information covered by the examiner's order. Furthermore, on May 1, 1968, the examiner filed a certification to the Commission in which he stated: "Insofar as this [complaint counsel's request] may be regarded as a *motion* authorizing disclosure (and entirely apart from the request for permission to appeal) the examiner, having no authority to rule on a motion authorizing disclosure of confidential information, certifies the motion to the Commission under Section 3.22(a) of the Rules, and makes an affirmative recommendation." (Emphasis in original.) Inasmuch as we grant the disclosure requested by complaint counsel and the examiner, the appeal is moot.

The examiner has recommended that respondent's counsel be furnished with a list of acquisitions for the years 1965 through 1968, of portland cement companies engaged in the manufacture of ready-mixed concrete, containing the following:

(1) The name of the acquiring cement manufacturer.
(2) The name of the acquired ready-mixed concrete company.
(3) The date of the acquisition.

The only documents which would appear to contain such information are FTC Forms A (1-67) contained in File No. 681 0620, "Investigation to Effectuate Enforcement Policy With Respect to Vertical Mergers in Cement Industry."

The Commission, acting upon the examiner's certification and complaint counsel's request for permission to disclose, has determined to order disclosure. Further, the Commission has considered this matter and has determined that the respondent's interest in being furnished with this information for the purpose of making its defense in this proceeding, and the Commission's interest in preventing unnecessary

[2] See *Lehigh Portland Cement Co.*, Docket 8680, order issued February 15, 1968 [p. 1237 herein].

or improper disclosure of information concerning the operation of many portland cement companies, including competitors of respondent, which have filed special reports pursuant to Commission orders, can best be accommodated and satisfied by establishing certain conditions and safeguards upon the disclosure of this information to counsel for respondent.[3]

An appropriate order will be entered.

Commissioner MacIntyre did not participate.

ORDER DIRECTING DISCLOSURE OF INFORMATION

The Commission has determined, as stated in the accompanying opinion, that complaint counsel's request for permission to disclose certain information, as certified by the examiner, should be granted. Accordingly,

It is ordered, That, without delay, complaint counsel furnish respondent's counsel with a list of acquisitions for the years 1965, 1966, 1967 and 1968 of portland cement companies engaged in the manufacture of ready-mixed concrete. The list shall contain the following:

(1) The name of the acquiring cement manufacturer.
(2) The name of the acquired ready-mixed concrete company.
(3) The date of the acquisition.

This list shall be compiled from documents contained in File No. 681 0620, "Investigation to Effectuate Enforcement Policy With Respect to Vertical Mergers in Cement Industry."

It is further ordered, That said list may be furnished only to counsel for respondent who have filed an appearance and are actually engaged in the defense of this proceeding, and only for the purpose of preparing such defense, and no information contained in such list shall be disclosed to any other person, including any officer or employees of respondent.

It is further ordered, That counsel for respondent may make application to the hearing examiner for permission to disclose said list or any information contained therein, to other specified persons for use in the defense of this proceeding. Application for such permission shall identify the names and positions of the persons to whom the list or information would be disclosed and the purposes for which this would be examined or used by those persons. Permission may be granted by the hearing examiner only upon a showing that such disclosure is necessary for the respondent's defense in this proceeding.

It is further ordered, That the hearing examiner's order of April 23, 1968, be, and it hereby is, vacated.

It is further ordered, That complaint counsel's request for permission to file an interlocutory appeal be, and it hereby is, denied.

By the Commission, with Commissioner MacIntyre not participating.

[3] See, *e.g.*, *The Grand Union Co.*, 62 F.T.C. 1491 (1963).

SCHOOL SERVICES, INC., ET AL.

Docket 8729. Order and Memorandum, May 14, 1968

Order denying the respondents' motion that the Chairman be disqualified from hearing this case.

MEMORANDUM OF CHAIRMAN DIXON

MAY 14, 1968

Respondents, School Services, Inc., et al., by motion filed May 3, 1968, have requested me to withdraw from further participation in this proceeding, or in the alternative that the Commission determine that I be disqualified from such further participation.

The complaint in this matter charges, in part, that respondents have falsely represented that they offer a course of instruction that qualifies students to be airline stewardesses and that Cinderella Career College and Finishing School is a college. In his initial decision issued on January 26, 1968 [74 F.T.C. 920, 926], the hearing examiner found that the evidence does not sustain the charges and ordered that the complaint be dismissed. The case is now pending before the Commission upon appeal of counsel supporting the complaint.

On March 15, 1968, I delivered an address before the Government Relations Workshop of the National Newspaper Association. Respondents, in their motion, quote the following excerpt from that speech:

> If really effective brakes are to be applied, they will have to be applied by business itself. Government can throw an assist, but whether our system of free competitive enterprise can survive depends on the vigor with which reputable business can serve the consumer. Granted that this is a very broad generalization, it is nonetheless valid. Consider, for example, how it fits the newspaper business. What kind of vigor can a reputable newspaper exhibit? The quick answer, of course, pertains to its editorial policy, its willingness to present the news without bias. However, that is only half the coin. How about ethics on the business side of running a paper? What standards are maintained on advertising acceptance? What would be the attitude toward accepting good money for advertising by a merchant who conducts a "going out of business" sale every five months? *What about carrying ads that offer college educations in five weeks,* fortunes by raising mushrooms in the basement, getting rid of pimples with a magic lotion, *or becoming an airline's hostess by attending a charm school?* Or, to raise the target a bit, how many newspapers would hesitate to accept an ad promising an unqualified guarantee for a product when the guarantee is subject to many limitations? Without belaboring the point, I'm sure you're aware that advertising acceptance standards could stand more tightening by many newspapers. *Granted that newspapers are not in the advertising policing business, their advertising managers are savvy enough to smell deception when the odor is strong enough.* And it is in the public interest, as well as their own, that their sensory organs become more discriminating. The Federal Trade Commission, even where it has jurisdiction, could not protect the public as quickly. (Emphasis added by respondents.)