SUBURBAN PROPANE GAS CORPORATION

Docket 8672. Order and Opinions, June 3, 1968

Order granting complaint counsel's appeal from hearing examiner's ruling against amending complaint counsel's trial brief.

OPINION OF THE COMMISSION

JUNE 3, 1968

This matter is before the Commission on the interlocutory appeal of counsel supporting the complaint from the hearing examiner's order of October 20, 1967, granting respondent's motion to strike an amendment to complaint counsel's trial brief and respondent's answer in opposition to the appeal. Also before the Commission is the hearing examiner's certification of complaint counsel's motion of October 18, 1967, to postpone commencement of formal hearings from November 13, 1967, to February 5, 1968, together with the examiner's recommendation that said motion be denied and that the proceeding be dismissed for want of prosecution. The hearing examiner has also certified to the Commission, with request for instructions, complaint counsel's request for subpoenas returnable during the week of November 13 through November 17, 1967.

I. Complaint Counsel's Appeal from the Hearing Examiner's Order of October 20, 1967

The question presented by this appeal concerns complaint counsel's initial burden in coming forward with evidence in a proceeding under Section 2(f) of the Clayton Act. The facts relevant to this appeal are as follows:

On February 28, 1967, respondent, having apparently convinced the hearing examiner that it purchased in larger quantities and was served by different methods than its competitors, asked the examiner for an order which in substance would state (a) that complaint counsel would have the burden of showing that the difference in methods by which Suburban was served by its supplier, Phillips Petroleum Company (Phillips), and the different quantities involved, compared with alleged disfavored competitors, could not give rise to sufficient savings to cost justify the alleged differential in prices between Suburban and said disfavored competitors, and that Suburban knew or should have known that the differences involved as to methods and quantities could not have given rise to sufficient pertinent savings to justify such differentials, and (b) require that complaint

counsel amend their previously filed trial brief and therein allocate exhibits and otherwise specify in indicated detail the evidence to be offered on the cost justification issue.

The hearing examiner denied this request, stating that he "assumes that complaint counsel are familiar with the legal precedents which respondent has cited and will interpret them correctly with reference to the evidentiary burden imposed upon complaint counsel to prove the absence of cost justification." On appeal from this denial, the Commission pointed out in its order of May 25, 1967 [71 F.T.C. 1695], that the examiner had erred in refusing to resolve the question raised by respondent and instructed him to hear complaint counsel in answer to respondent's motion and to dispose of the matter in such a way as to provide respondent with sufficient knowledge of the evidence complaint counsel would adduce on the cost justification issue to allow respondent adequately to prepare its defense. We also made the following comment with respect to complaint counsel's burden in those instances where the favored buyer purchases in different quantities or by different methods than its competitors [71 F.T.C. 1699]:

> * * * assuming the matter to involve different methods or quantities, if complaint counsel show such facts and circumstances as would have given the buyer reason to believe, based on the knowledge available to him, including knowledge of the methods of doing business in the particular industry, that the different methods or quantities could not have resulted in cost savings sufficient to justify the differential allegedly accorded him, they would have met their initial burden.

On June 26, 1967, the hearing examiner entered a pretrial order which provided in pertinent part:

> * * * that complaint counsel shall have the burden of showing, as part of their prima facie case, that the difference in the methods by which Suburban was served by Phillips and the difference in the quantities purchased by Suburban from Phillips, as compared with the alleged disfavored competitors, could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the alleged differential in prices paid to Phillips by Suburban as compared with prices paid to Phillips by the alleged disfavored competitors *and* that Suburban knew or should have known that the difference in the methods by which it was served and the difference in the quantities which it purchased could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the aforesaid price differentials * * *.

Complaint counsel disagreed with this order since they interpreted it as requiring them to introduce into evidence a cost study which would indicate statistically that the discriminatory prices accorded to respondent were not in fact cost justified. Since they so construed the order they requested permission to file an interlocutory appeal. We denied this request by order of July 20, 1967 [72 F.T.C. 989], but specifically pointed out that if the hearing examiner intended by the order to require complaint counsel to introduce a formal cost study

such order would be inconsistent with applicable case law. We went on to say that we did not interpret the pretrial order as requiring the introduction by counsel supporting the complaint of a cost study and we assumed that the hearing examiner would apply the pretrial order in accordance with the Commission's order of May 25 [72 F.T.C. 1695]. It seems, however, that this assumption was incorrect.

On September 22 complaint counsel, pursuant to the examiner's order of June 26, filed an amendment to trial brief allocating exhibits and summarizing expected testimony of witnesses with respect to the cost justification issue. Respondent then moved that this amendment be stricken on the ground that it failed to comply with that part of the examiner's order which required a showing that differences in methods and quantities of purchases could not give rise to sufficient savings in cost to justify the price differential. Respondent also requested that the examiner either direct complaint counsel to comply with the order or dismiss the complaint. On October 20, the examiner issued the following order striking the amended trial brief:

IT IS ORDERED that respondent's motion filed October 13, 1967, to strike complaint counsel's Amendment to Trial Brief filed September 22, 1967, be, and hereby is, granted; and

IT IS FURTHER ORDER that complaint counsel comply with the hearing examiner's order of June 26, 1967, within two weeks after the Federal Trade Commission acts upon the hearing examiner's recommendation, being forwarded this date, that this proceeding be dismissed, if the Commission does not dismiss this proceeding.

It is from this order that the present appeal is taken.

Unfortunately, the hearing examiner has failed to indicate in what respect he found the amended trial brief to be deficient. It seems fairly obvious, however, that he accepted the arguments made in respondent's motion to strike the amendment. We note in this connection that respondent argued to the examiner that the Commission, by refusing to grant complaint counsel's request to file an interlocutory appeal from the examiner's order of June 26, not only upheld that order but also approved the examiner's interpretation of the order as requiring the introduction of a statistical cost study. This is, of course, a wholly erroneous version of the Commission's ruling since we specifically pointed out in our order denying the request to file an interlocutory appeal that "the pretrial order would indeed be incorrect as inconsistent with the case law on this point" if it were interpreted as requiring complaint counsel "to introduce into evidence a cost study which indicates statistically that the discriminatory prices accorded to Suburban were not cost justified."

Respondent also argued in its motion to strike that complaint counsel had openly defied the examiner and had conceded that the amendment to their trial brief did not comply with his order of June 26.

Respondent asserted, in this connection, that "by complaint counsel's own admission the amendment to their trial brief does not comply with the hearing examiner's order" and that "It is apparent that complaint counsel are attempting to ignore not only the order of the hearing examiner, but the decision of the Commission in affirming that order." These arguments would have some semblance of merit only if the examiner's order would require the introduction by complaint counsel of a statistical cost study, which, as we have held, it does not. Even the most casual reading of the amended trial brief clearly reveals that complaint counsel are prepared to come forward with evidence as to respondent's supplier's costs, although not in the form of a formal cost study.[1]

The position maintained by complaint counsel throughout this proceeding has been that, insofar as the cost justification issue is concerned, the burden imposed upon them by *Automatic Canteen*[2] is satisfied by the prima facie showing that a reasonable and prudent businessman, on the basis of facts known to him, should have believed that a favorable price granted to him could not have been cost justified by his supplier. In other words, they have claimed that their initial burden is limited to a prima facie showing of *knowledge* on the buyer's part that the lower prices it received could not be cost justified. They have never denied, however, and in fact have recognized that to make this showing of knowledge complaint counsel may in some instances be required to come forward with evidence as to the seller's costs. In this connection, they stated in answer to respondent's interlocutory appeal filed April 24, 1967, that in certain factual situations "general testimony as to costs involved [must] necessarily [be] elicited by complaint counsel in order to establish the requisite knowledge on the part of the buyer," and in their request for permission to file an interlocutory appeal on June 30, 1967, they reiterated that "complaint counsel recognize that they must come forward with some generalized evidence as to costs from which the inference can be drawn that Suburban knew or should have known that the price differences could not have been cost justified."

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[1] Complaint counsel state on page 2 of the amended brief that "Necessarily included is the allocation of evidence of certain facts related to costs which indicate that Suburban knew or should have known that cost justification by Phillips was improbable." And an example of such facts is set forth in a study referred to as follows in the Explanatory Note to the brief: "The following study was undertaken on an invoice-by-invoice basis to compare the relative expense incurred by Phillips Petroleum Company in shipping LPG to Suburban with the costs incurred by Phillips with respect to five nonfavored customers who took product primarily by truck. This study was made necessary when an issue was raised by respondent in the course of interlocutory appeals as to whether it cost Phillips substantially more to transport LPG to these nonfavored purchasers than to ship to Suburban, and whether these cost differentials more than compensate for the lower prices accorded Suburban."

[2] *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61 (1953).

Throughout this proceeding, therefore, complaint counsel have maintained that their burden of establishing a *prima facie* case may be satisfied with something less than a formal cost study demonstrating that the lower prices to respondent were not in fact cost justified. They consider that their burden may be met by the introduction of such evidence that will create a *prima facie* showing that respondent, as a reasonable and prudent businessman, should have known that the differential it received could not be cost justified.

As indicated in our earlier rulings in this matter, we believe that complaint counsel's position is consistent with applicable case law. In the leading case on point, *Automatic Canteen*, *supra*, the sole issue before the court was whether the prima facie showing that respondent induced and received a discriminatory price which it knew may have proscribed anticompetitive effects was sufficient to shift to respondent the burden of introducing evidence. The court held that the Commission had an additional burden, that as part of its prima facie case it must show actual or constructive knowledge on the part of respondent that the difference in the prices involved were not based on cost differences. The court also pointed out "by way of example" that this burden could be sustained by a showing that there was no difference in the quantities and methods, by which respondent and its disfavored competitors were served and that respondent was aware of that fact, or, if there was such a difference, that it could not result in sufficient cost savings to justify the discrimination and that respondent was aware of that fact. In either case the showing to be made by the Commission was that respondent *knew or should have known* that the lower prices it received could not be cost justified. It is apparent that counsel for the Commission is not required to introduce into evidence a detailed cost study. An application of common sense makes the correctness of this conclusion obvious, for in any factual situation where the discrepancy between the price differential and the cost differential is so minute that it can be demonstrated only by a cost study, knowledge of the absence of a cost justification defense cannot reasonably be imputed to the recipient of the lower price by such a showing. In a case in which complaint counsel's proof consists of a showing that the differences in quantities or methods of purchase could not give rise to sufficient cost savings to justify the lower price, the requisite knowledge may be inferred, in the absence of other circumstances indicating knowledge, only in those instances where "the cost differences are very small compared with the price differential and could not reasonably have been thought to justify the price difference." (346 U.S. at 80.)

It is also clear from the court's opinion in *Automatic Canteen* that in making the prima facie showing of knowledge on the part of the recipient of the lower price, the Commission is not restricted to the

type of proof specifically mentioned in the court's example. As a matter of fact, the court stated that it need not attempt to illustrate "what other circumstances can be shown to indicate knowledge on the buyer's part that the price cannot be justified." (*Id.*, at 80.) And that there are other circumstances which can be shown to indicate such knowledge is a fact not unknown to the Commission. *In the Matter of Fred Meyer, Inc.*, Docket 7492 (March 29, 1963) [63 F.T.C. 1, 26], for example, a showing of circumstances other than those mentioned by the court was held to be sufficient to support an inference of knowledge on the part of the buyer-respondent. The Commission held in that case that ". . . a buyer who gets a 33⅓% price concession during only one month out of each year, paying the same price as his competitors during the other eleven months, has every reason to believe that there is not the remotest possibility of 'cost justification' for that temporary concession. . . . In the absence of . . . an explanation, we think the inference is inescapable that respondents 'knew' there could be no cost justification" (Commission opinion, p.58) [63 F.T.C. at 70]. In affirming the Commission's decision on this point, the court held that the Commission's failure to prove the suppliers' costs was immaterial and that ". . . where the facts and the inferences to be drawn are as clear as they are on this point, we think the method of proof adopted by the Commission here is appropriate to . . . showing that the buyer 'is not an *unsuspecting recipient* of prohibited discriminations.'" *Fred Meyer, Inc.* v. *Federal Trade Commission*, 359 F. 2d 351, 364 (9th Cir. 1966) (emphasis in original).[3]

In the matter now before us, complaint counsel, according to their amended trial brief, intend to come forward with evidence as to Phillips' costs in selling to Suburban and to certain of Suburban's nonfavored competitors for the purpose of showing the awareness of Suburban as a reasonable and prudent businessman that the lower price it received could not be cost justified. The ultimate burden of persuasion may require that additional evidence be adduced in response to evidence of respondent's counsel to whom the burden shifts upon proof of the initial prima facie case. It cannot be doubted that the ultimate burden of persuasion rests with counsel supporting the complaint, although the burden of going forward may shift back and forth dur-

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[3] There may, of course, be other circumstances which will demonstrate the requisite knowledge that price differences are not based on cost differences. For example, an intra-company memorandum prepared by a responsible official of the recipient of a lower price which would state that the discriminatory price was below the supplier's cost and could not therefore be justified by the different quantities or methods in which the recipient purchased, would, in our opinion, suffice to show that the recipient knew that the discriminatory price could not be cost justified. If in this case complaint counsel intend to rely on such a document to make a prima facie showing of knowledge, an order of the type issued by the hearing examiner would, of course, be wholly inappropriate. As in *Fred Meyer*, complaint counsel would not be required as part of their initial burden to introduce any evidence whatsoever as to the seller's actual costs.

ing the hearing. We now hold only that the amended trial brief on its face complies with the hearing examiner's order of June 26 as we have interpreted it, and that the examiner erred in striking this brief.

II. Certification of Motion to Postpone Hearings and Recommendations for Dismissal of Complaint

By motion filed October 18, 1967, complaint counsel requested the hearing examiner to cancel formal hearings set in Washington for November 13, 1967, and to reschedule them to commence on or about February 5, 1968, in New York City. Complaint counsel's motion also included an alternative request that the hearings be reset for New York City if the hearing examiner believed that they should commence on November 13, 1967.

This motion seems to be one upon which the hearing examiner should have been able to rule. Certainly he had the authority to do so. Instead of granting or denying complaint counsel's request, however, he certified the motion to the Commission without giving any reason for his refusal to rule.

Included in his certification is the recommendation that the proceeding be dismissed for want of prosecution. According to the examiner, complaint counsel were not prepared at the time the complaint issued to prove their case and "have repeatedly expressed reluctance to proceed to formal hearings and still do." We find nothing in the public record of this proceeding, however, to support this statement. While there has been a misunderstanding on the part of the examiner as to the nature of the proof required to make a prima facie showing of the knowing inducement or receipt of an unlawful price discrimination, we have no reason to believe from any public statements or documents filed by complaint counsel that they are not prepared to make out a prima facie case. The record does not indicate that complaint counsel must bear the responsibility for the seemingly interminable delay in bringing this matter to trial.

The hearing examiner also bases his recommendation for dismissal on certain assertions made by Suburban in a motion filed on February 28, 1967, requesting dismissal of the proceeding on the ground that the practices complained of had been terminated and that the public interest no longer required the Commission to seek the issuance of a cease-and-desist order against respondent. The hearing examiner's reliance on these statements is difficult to understand since he had previously denied respondent's motion in which these statements were made, and the Commission had held on appeal from his ruling that the issue of whether the practices had been discontinued "if further raised, should be resolved * * * on the basis of the whole record to be made in this proceeding." The fact that the issue has now been raised by the examiner is no reason for changing our earlier ruling.

We will consider the issue of abandonment only when the record has been completed.

The passing of time since the matter was certified to the Commission has rendered moot complaint counsel's request for postponement of formal hearings as well as complaint counsel's request for subpoenas returnable during the week of November 13 through November 17, 1967. The matter is, therefore, being returned to the examiner with instructions to commence hearings at the earliest date possible, allowing complaint counsel sufficient time to make the necessary arrangements for an orderly and continuous presentation of their case-in-chief.

Commissioner Elman dissented and has filed a dissenting opinion.

Dissenting Opinion

JUNE 3, 1968

By Elman, *Commissioner:*

The issue here is a narrow one, concerning the burden of coming forward with evidence on the issue of cost justification in a proceeding against the buyer under Section 2(f) of the Clayton Act.[1] As the Commission recognizes, this is not a novel question. On the contrary, the Supreme Court has in the *Automatic Canteen* case[2] already decided the precise point. Our duty, as I see it, is simply to follow the clear and explicit mandate of *Automatic Canteen*. Although professing to follow the Supreme Court's decision, the Commission in my view has "rewritten" *Automatic Canteen*, reaching a result which is inconsistent with that case and unjustifiably scrambling the equitable allocation of the burden of proof there made by the Supreme Court.

I

Section 2(f) makes it unlawful for any person "knowingly to induce or receive a discrimination in price which is prohibited by" that Section of the Act. In the present case it is alleged that respondent induced its suppliers to sell liquefied petroleum gas to it at discount prices not available to respondent's competitors. This discount would not be illegal under Section 2(a), and *a fortiori* under Section 2(f), if the price differential made "only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities" were sold or delivered to respondent. It is, therefore, a premise of the instant complaint, unarticulated but nevertheless present, that the "prohibited" prices induced by respondent were not cost justified.

[1] 15 U.S.C. § 13(f).
[2] 346 U.S. 61 (1953).

In an ordinary proceeding against the seller under Section 2(a) it is not part of complaint counsel's *prima facie* case to show that the discriminatory prices charged were not cost justified. Cost justification is an affirmative defense to be alleged and proved by the respondent in a 2(a) case. The reasons for imposing such a burden on the seller are obvious. He has in his possession, or can obtain, the relevant information concerning his costs of manufacture, sale and delivery; he can undertake the necessary study, allocation, and analysis of these costs even more readily than can complaint counsel. In a case brought against the seller, therefore, it is reasonable and proper to invoke the ordinary rule of statutory construction that "the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." [3]

On the other hand, in a case brought against the buyer these considerations are inapplicable. Different but equally persuasive factors dictate that both the burden of going forward with evidence and the burden of persuasion be placed on complaint counsel. The Supreme Court set out these countervailing factors and stressed their importance in the *Automatic Canteen* opinion:

> Insistence on proof of costs by the buyer might thus have other implications; it would almost inevitably require a degree of cooperation between buyer and seller, as against other buyers, that may offend other antitrust policies, and it might also expose the seller's cost secrets to the prejudice of arm's-length bargaining in the future. Finally, not one but, as here, approximately 80 different sellers' costs may be in issue.
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> [T]he fact that the buyer does not have the required information, and for good reason should not be required to obtain it, has controlling importance in striking the balance in this case. . . . Certainly the Commission with its broad power of investigation and subpoena, prior to the filing of a complaint, is on a better footing to obtain this information than the buyer. 346 U.S. at 68, 78–79.

The Commission suggests that the *Automatic Canteen* case is distinguishable, and the Court's careful language inapposite, because, the majority opinion argues, the question whether the prices paid by Automatic Canteen were cost justified was not at issue.[4] There is no merit to this argument. In defining the issue before it the Court explained that the Commission had not only failed to "make any findings as to [respondent's] . . . knowledge of actual cost savings" but had also "made no finding negativing the existence of cost savings or stating that whatever cost savings there were did not at least equal price differentials [respondent] * * * may have received." 346 U.S. at 66–67. The Court's decision as to burden of proof is thus controlling here. It is no casual dictum but reflects careful consideration of the Act's "infelicitous language" in light of its legislative his-

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[3] *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 44–45 (1948).

[4] Majority opinion, p. 1273.

tory, and analysis of the consequences of possible alternative constructions. It is not a decision to be disregarded or eviscerated because it makes more difficult the prosecution of a buyer under Section 2(f). The short of it is that, on the cost-justification issue in a 2(f) case, the burden of coming forward with evidence, as well as the burden of persuasion, rests squarely on complaint counsel.

How those burdens can be met was also discussed by the Supreme Court. In the case where it is shown by complaint counsel that the buyer knows he purchases "in the same quantities as his competitor and is served by the seller in the same manner or with the same amount of exertion as the other buyer," he can be charged with notice that substantial price differential cannot be cost justified. A showing by the Commission of such knowledge on the buyer's part would satisfy its obligation to come forward and make out a *prima facie* case. On the other hand, the Court held that in a case like that before us, where the methods or quantities differ:

> [T]he Commission must only show that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential, and that the buyer, knowing these were the only differences, should have known that they could not give rise to sufficient cost savings. 346 U.S. at 80.

The import of these words is clear. Complaint counsel must show that the prices paid by respondent could not be cost justified, and that respondent knew or should have known this. At an earlier stage of this proceeding, the Commission itself recognized the two-pronged nature of complaint counsel's burden. In its order of May 25, 1967 [71 F.T.C. 1695, 1699], the Commission, quoting the *Automatic Canteen* decision, said:

> [I]f the methods or quantities differ, the Commision must only show that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential and that the buyer, knowing these were the only differences, should have known that they could not give rise to sufficient cost savings.

Now the Commission departs from this ruling, holds erroneous the hearing examiner's order which is cast in the same language as *Automatic Canteen*, and, in effect, upholds complaint counsel's contention that "evidence showing actual or constructive knowledge on the buyer's part as to lack of probable cost justification by his seller completely satisfies the burden imposed in all 2(f) proceedings." Brief, p. 4. No justification is offered for this refusal to follow controlling precedent, and none is discernible save for the impermissible one that it makes complaint counsel's case easier to prove.

As was pointed out in our order of July 20, 1967 [72 F.T.C. 989], complaint counsel are not compelled to introduce a formal cost study. I do not suggest that, nor does respondent so contend. The question is not what kind or quantum of evidence will satisfy complaint counsel's

burden of persuasion as to absence of cost justification, but whether they have the burden of coming forward with evidence on this issue as part of their *prima facie* case. I agree, of course, that in a case brought under Section 2(f), just as in a case brought under 2(a), a detailed cost study should be unnecessary. It is unfair to expect a seller engaged in hard bargaining over price with his buyer, and concerned lest he be underbid by his competitors, to prepare a precise and complete cost study before setting his price. Some flexibility in assessing the quantum of proof required to establish a cost justification defense is also made necessary by the elusiveness of cost data.[5] Similarly, in a Section 2(f) case complaint counsel might satisfy their initial burden on this issue by showing a large price discrimination manifestly disproportional to any plausible cost savings attributable to the particular sale involved. How that burden is met will of necessity vary in each case, but some such showing is essential if the Commission is to make a finding supported by evidence that the price discrimination alleged was not cost justified, a finding that is essential if the discrimination is to be held illegal.

By ignoring the first branch of the *Automatic Canteen* rule the Commission permits a finding of illegality to be based solely on the buyer's "guilty knowledge," a result plainly at odds with the statute's meaning and purpose. Suppose, for example, a search of respondent's files uncovered a memorandum from the director of the purchasing department to the company's president in which he said, "I just obtained an incredibly large discount from *X* supplier, so large that I cannot believe it is cost justified. I just hope the FTC doesn't hear about it." Respondent's "guilty knowledge" would be manifest from such a memorandum, but the Section 2(f) violation would not be proven. However illegal respondent might have thought the discount to be, however evil its intentions, the discount would be perfectly legal if it were in fact cost justified; and since "the buyer does not have the required information, and for good reason should not be required to obtain it," the burden of bringing forward objective facts showing the discount to be illegal and not cost justified would be on complaint counsel.

The Commission shifts this example somewhat and argues that such an intra-company memorandum not only would "suffice to show that the recipient knew that the discriminatory price could not be cost justified," but would also relieve complaint counsel entirely of "their initial burden to introduce any evidence whatsoever as to the seller's actual costs." [6] I agree that such a memorandum would satisfy complaint counsel's initial burden to introduce evidence of the buyer's

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[5] See, *e.g.*, *American Motors Corp. v. Federal Trade Commission*, 384 F. 2d 247 (6th Cir. 1967), *cert. denied*, April 9, 1968.

[6] Majority opinion, p. 1274, n. 3.

"guilty" state of mind. Similarly, in a murder case, the fact that the accused carefully pointed his gun at a third person and pulled the trigger would be evidence of an intent to kill. But could the prosecutor rest his case with such evidence? Certainly not. He would still have to present evidence that the intent to kill was consummated, that the shot did not go awry, and that the victim died as a result of the shot, *i.e.*, there was a *corpus delicti*. Absent such evidence the accused might be convicted of some other offense perhaps, but not murder. In a Section 2(f) case, too, mere evidence of guilty intent, although essential, is not sufficient. Where cost justification is put in issue, there must also be objective evidence that the price received was not in fact cost justified, for otherwise the price would be legal. The initial burden of coming forward with such evidence, as *Automatic Canteen* establishes, must be borne by complaint counsel.[7]

The *Fred Meyer* case [8] is not a precedent for the Commission's ruling in this case. In that case the respondent chose not to litigate the issue whether the prices it paid were not cost justified, defending instead on the ground that it had no knowledge, actual or constructive, of that fact.[9] Since (1) the large discount there involved, amounting to a price differential of as much as one third of the regular price, was granted Meyer in only one month of the year, (2) Meyer paid regular prices during the other eleven months although it purchased in somewhat larger quantities than its competitors, and (3) the suppliers offered no regular quantity discounts, the court held "not unwarranted" the inference drawn by the Commission that respondent "should have known that something was amiss." 359 F. 2d at 364.[10] The court did not, either expressly or by implication, undermine its earlier ruling in *Alhambra Motor Parts* v. *Federal Trade Commission* [11] that in a case where the buyer is shown to have been served by different methods from its disfavored competitors, "the burden [is] on the Commission

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[7] I repeat that the question of what evidence will suffice to carry complaint counsel's burden of persuasion is not before us, and that it is not argued by respondents or suggested by me that only a detailed cost study will carry that burden. Neither in 2(f) cases, nor in 2(a) cases, should the standards of proof on this question be so exacting. If unduly strict criteria have been erected by the Commission in Section 2(a) cases and if it is feared that complaint counsel cannot obtain evidence that satisfies such criteria, the answer lies not in withdrawing the burden from complaint counsel in cases brought under Section 2(f), but in revising the existing arbitrary standards of proof to comport more reasonably with marketing realities.

[8] *Fred Meyer, Inc.* v. *Federal Trade Commission*, 359 F. 2d 351 (9th Cir. 1966), *rev'd on other grounds*, 390 U.S. 341 (1968).

[9] The Court stated:

"The Commission relied on several factors in reaching its conclusion that Meyer had reason to believe [12] that its suppliers could have no cost justification defense.

[12] The inquiry here was devoted to ascertaining this fact, not to whether cost justification did or did not exist in fact. No cost studies were introduced by either party." (359 F. 2d at 364.)

[10] It is possible that proof of such an irregular and disproportionate discount might in itself support the inference that the discount was not cost justified.

[11] 309 F. 2d 213 (9th Cir. 1962).

to show that the cost saving could not be commensurate with the price differential." 309 F. 2d at 219.

In short, the *Fred Meyer* case deals only with the question of knowledge and is not at all concerned with the point here at issue. While the *Automatic Canteen* decision, which was followed in *Alhambra*, is dispositive of the question before us, the Commission does not follow the latter two cases. The Commission throws on respondent both the burden of coming forward with evidence showing cost justification and the burden of persuasion, despite the Supreme Court's holding that buyers should not be required or even permitted to ferret out such information and despite the manifest unfairness of requiring respondent to obtain evidence more readily available to the Commission. In addition, because cost data invoked to prove cost justification must, under existing Commission decisions, be comprehensive and meet unreasonably stringent standards of exactness, to prepare an adequate cost-justification defense respondent will have to engage in extensive discovery from the seller here involved—a procedure in which the seller (whom the Commission decided not to make a party to this proceeding) is unlikely to acquiesce—further complicating and prolonging this already protracted case.

II

I do not concur in the Commission's assertions that delays in this proceeding are attributable to "a misunderstanding on the part of the examiner as to the nature of the proof required to make a *prima facie* showing of the knowing inducement or receipt of an unlawful price discrimination" and that "the record does not indicate that complaint counsel must bear the responsibility for the seemingly interminable delay in bringing this matter to trial."

The examiner has correctly followed and applied the Supreme Court's decision in *Automatic Canteen*. On the other hand, more than two-and-a-half years after complaint issued, and despite extensive and prolonged post-complaint discovery by complaint counsel, they are not yet prepared to prove their *prima facie* case. This intolerable delay would not have occurred if the Commission, before issuing the complaint, had required complaint counsel to have in hand all evidence relevant to their case-in-chief. In view of the Commission's ample power to investigate before issuance of complaint, both the extensive post-complaint discovery here undertaken and the unusual procrastination that characterizes this proceeding could and should have been avoided.

Delay is the bane of the administrative process, abhorred and deplored by all the members of the Commission. The majority's action in this case is therefore both sad and paradoxical. It guarantees that despite our common concern to avoid unnecessary delay, disposition of

this case will take at least four or five more years before it is finally concluded. Moreover, far from clarifying the requirements of Section 2(f), the present ruling obscures them by departing from the clear guidelines laid down by the Supreme Court in *Automatic Canteen*. There will probably be no judicial review of the Commission's present order until the administrative proceedings culminate in a cease and desist order some years hence. If, as seems inevitable, a reviewing court determines that the Commission was incorrect in allocating the burden of proof on the crucial cost-justification issue, this case, and any other Section 2(f) case that may be brought in the interim, will have to be retried or dismissed. We have, in short, created a litigant's paradise. We can be sure that from now on all respondents in Section 2(f) cases will request an order concerning allocation of the burden of proof, and will then appeal to the Commission the examiner's decision against them, all in the interests of making a record before this agency and exhausting their administrative remedies. If, as a practical result, Section 2(f) becomes largely a dead letter and if the cancer of delay infects the Commission's proceedings under the Robinson-Patman Act, it will not be because the courts have imposed unreasonable evidentiary burdens on the Commission, or because the statute is inartfully drafted, but because the Commission, by giving the Robinson-Patman Act an interpretation which is unreasonable and in disregard of legal precedents and economic realities, has accommodated the litigious by providing grist for their mill.

ORDER RULING ON INTERLOCUTORY APPEAL AND CERTIFICATIONS

This matter having come on for a hearing on the interlocutory appeal of complaint counsel from the hearing examiner's order of October 20, 1967, striking an amendment to complaint counsel's trial brief and respondent's answer thereto, and upon the examiner's certification of complaint counsel's motion to postpone commencement of formal hearings and their request for subpoenas; and

The Commission, for the reasons set forth in the accompanying opinion, having determined that the appeal of complaint counsel should be granted and that the matter should be remanded to the hearing examiner:

It is ordered, That complaint counsel's interlocutory appeal from the hearing examiner's order of October 20, 1967, be, and it hereby is, granted.

It is further ordered, That the hearing examiner be, and he hereby is, directed to receive complaint counsel's amended trial brief.

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

Commissioner Elman dissenting.

UNIVERSE CHEMICALS, INC., ET AL.

Docket 8752. Order, June 7, 1968

Order denying respondents' request to file answer to complaint counsel's affidavit regarding holding hearings in more than one place.

ORDER DENYING MOTION FOR LEAVE TO FILE REPLY AND SUPPLEMENTAL MOTION FOR 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 to the extent relevant herein 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.

In order to facilitate its consideration of this matter the Commission by order dated March 13, 1968 [p. 1241 herein], directed that complaint counsel file an affidavit specifying the cost or difficulty which would be involved in holding the hearings in only one place and including a description of any unusual or exceptional circumstances justifying the hearing examiner's order. Respondents were directed to file an affidavit specifying in detail the nature and extent of the alleged financial and other burdens upon them should the hearing examiner's order be upheld.

Following consideration of the affidavits submitted in compliance with the foregoing order, the Commission by order dated April 9, 1968 [p. 1259 herein], Commissioner Elman dissenting, denied respondents' motion for permission to file interlocutory appeal.

On June 3, 1968, respondents filed with the Secretary of the Commission their Motion for Leave to File Reply to Allegations of New Matter Contained in Supplemental Affidavit Filed by Complaint Counsel and a Supplemental Motion for Permission to File Interlocutory Appeal. This motion supplemented a telegram from respondents' counsel dated March 22, 1968, requesting leave to reply to new matter contained in complaint counsel's affidavit.

The burden of these submissions is to the effect that respondents should be permitted to reply to averments as to gross business, extent of interstate commerce, and number of salesmen made in the affidavit of complaint counsel submitted pursuant to the Commission's order of March 13, 1968 [p. 1241 herein], and to complaint counsel's further averments in its affidavit, the general tenor of which was that having created an interstate enterprise and having engaged in the practices giving rise to the litigation, respondents had no standing to complain against hearings in multiple locations.

Having considered respondents' Motion for Leave to File Reply to Allegations of New Matter Contained in Supplemental Affidavit Filed by Complaint Counsel and a Supplemental Motion for Permission to File Interlocutory Appeal filed June 3, 1968, and being of the opinion that it does not raise questions not previously considered by the Commission in disposition of respondents' earlier motion for permission to file interlocutory appeal and therefore reconsideration of its denial by order date April 9, 1968 [p. 1259 herein], of respondents' request for permission to file interlocutory appeal is not warranted.

It is ordered, That respondents' Motion for Leave to File Reply to Allegations of New Matter Contained in Supplemental Affidavit Filed by Complaint Counsel and a Supplemental Motion for Permission to File Interlocutory Appeal filed June 3, 1968, be, and it hereby is, denied.

LEHIGH PORTLAND CEMENT COMPANY

Docket 8680. Order, June 14, 1968

Order granting several third parties permission to file one consolidated brief involving subpoenas directed to them.

ORDER GRANTING EXTENSION OF TIME TO FILE CONSOLIDATED BRIEF

On June 10, 1968, respondent filed an appeal from the hearing examiner's order dated May 29, 1968, in the above matter "Modifying Subpoenas Duces Tecum, In Respondent's Behalf, Directed Against Third Party Concrete Companies." Pursuant to § 3.35 of the rules of practice, fourteen third party concrete companies also determined to file an appeal from the same order. Since the third party appeals and respondent's appeal involve common issues of fact and law, the third parties have requested (1) permission to file one consolidated brief which will consist of both their appeal brief and their answering brief to respondent's appeal and (2) an extension of time to file such consolidated brief. For good cause shown:

It is ordered, That M. E. Rinker, president of Rinker Materials Corp.; J. D. Monroe, comptroller of MPS Industries, Inc.; D. W. Reading, president of Oolite Industries, Inc.; Thomas N. Kearns, president of Meekins, Inc.; S. Howard Banaszak, president of Banaszak Concrete Corporation; W. L. Currie, president of Central Concrete Co., Inc.; James F. Dawson, owner of Mobile Ready Mix; A. L. Sattee, executive vice president of Maule Industries, Inc.; Louis C. Schilling, president of I. E. Schilling Co.; Carl H. Moritz, general manager of Burnup & Sims, Inc.; Roy B. Loughlin, president of Dixie Concrete, Inc.; Kenneth D. Buzard, president of Powermix, Inc.; Douglas A. Brooks, vice president of Erwin Concrete Corporation;

and Murray S. Simpson, president of Super Concrete Corporation be, and they hereby are, granted (1) permission to file one consolidated brief which will consist of both an appeal brief and an answering brief to respondent's appeal and (2) an extension of time to and including July 1, 1968, within which to file such consolidated brief.

Commissioner MacIntyre not participating.

LENOX, INCORPORATED

Docket 8718. Order, June 21, 1968

Order denying respondent's request for reconsideration and alteration of final order.

ORDER DENYING PETITION FOR RECONSIDERATION

The Commission issued its decision in this matter on April 9, 1968 [p. 578 herein]. On May 16, 1968, respondent, pursuant to § 3.55 of the Commission's Rules of Practice, requested the Commission to reconsider and alter the Final Order contained in that decision in the following manner:

1. By eliminating paragraph 9 of said Order, which temporarily bars respondent from entering into fair trade contracts, since a prohibition on fair trade contracts does not remedy unlawful agreements found to have been made in fair trade states. On the contrary, the making of fair trade contracts remedies such illegality.

2. By changing paragraphs 5 and 6 of said Order, which temporarily bar the use of retail price lists, to provide that price charts may be offered to dealers provided such charts clearly and prominently state that they are for the dealer's convenience only and that he is under no obligation or agreement, express or implied, to follow the particular prices calculated on the charts. Such a statement would effectively eliminate any implied price agreements found to have been made with dealers. The present complete bar on the use of such charts prevents respondent from offering an important merchandising service which china dealers expect from all manufacturers and particularly from respondent who sells more than 70 china patterns.

On May 21, 1968, complaint counsel filed their answer in opposition thereto.

The pertinent part of § 3.55 of the Commission's Rules of Practice provides that

[a]ny petition filed under this subsection must 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.

In its petition respondent does not allege that the decision or final order raises any new questions and that respondent did not have the opportunity to argue these before the Commission. Indeed, a review of the record in this proceeding discloses that the two modifications of the final order urged by respondent are not the result of new questions raised by the decision and final order but were amply briefed and

argued by respondent at each step of the proceeding. Accordingly,

It is ordered, That respondent's petition for reconsideration be, and it hereby is, denied.

Commissioner Nicholson did not participate for the reason that oral argument was heard prior to his appointment to the Commission.