KOPPERS COMPANY, INC.

Docket 8755. Order and Opinion, July 2, 1968

Order remanding to hearing examiner his order of April 23, 1968, denying respondent's application for leave to take depositions from officials of a third party.

OPINION OF THE COMMISSION

The Commission has before it respondent's appeal from the hearing examiner's order of April 23, 1968, denying respondent's application for leave to take depositions [1] of six named officials of United States Pipe and Foundry Company (hereafter U.S. Pipe). Complaint counsel has filed an answer opposing the appeal.

The ruling below is based upon the examiner's finding that:

*** all persons whose depositions are sought are expected to testify at formal hearings; taking of depositions will unduly delay the proceedings; and may circumvent the orderly presentation of evidence at formal hearings.

A brief review of the facts is necessary to place the examiner's ruling in its proper perspective. The complaint herein charges respondent, Koppers Company Inc., with developing and maintaining a monopolistic control of the market in Resorcinol. After setting out this charge in broad terms, the complaint goes on to allege that a meeting took place, in March of 1965, between officials of respondent and representatives of U.S. Pipe, at which

[1] Section 3.33 of the Commission's Rules of Practice provides, in pertinent part, as follows:

§ 3.33 Depositions.—(a) When justified.—At any time during the course of a proceeding, whether or not issue has been joined, the hearing examiner, in his discretion may order the taking of a deposition and the production of documents by the deponent. Such order may be entered upon a showing that the deposition is necessary for purposes of discovery, and that such discovery could not be accomplished by voluntary methods. Such order may also be entered in extraordinary circumstances to preserve relevant evidence upon a showing that there is substantial reason to believe that such evidence could not be presented through a witness at the hearing. Insofar as consistent with considerations of fairness and the requirements of due process and the rules in this part, a deposition should not be ordered when it appears that it will result in undue burden to any other party or in undue delay of the proceeding, and it should not be ordered to obtain evidence from a person relating to matters with regard to which he is expected to testify at the hearing, or to obtain evidence which there is reason to believe can be presented at a hearing without the need for deposition, or to circumvent the orderly presentation of evidence at the hearing.

officials of respondent urged that U.S. Pipe refrain from entering the Resorcinol market. The balance of the complaint deals with respondent's alleged reaction, by price cuts, restrictive agreements and long-term contracts, to U.S. Pipe's announcement that it was constructing a plant for the production of Resorcinol.

It will thus be observed that the entire thrust of the complaint is to respondent's dealings with and reactions to its alleged potential competitor, U.S. Pipe, the cumulative effect of which, it is alleged, caused U.S. Pipe to fail in its attempt to enter the Resorcinol market. The complaint mentions no other competitors, actual or potential, nor does it allege acts or practices directed against any other firm. Thus it is obvious that respondent, to answer these charges, must be prepared to meet the testimony of complaint counsel's prime witnesses, officials of U.S. Pipe.

Respondent's informal request to interview these officials met with polite refusal. Thereafter, respondent moved for leave to take their depositions, pursuant to Section 3.33 of the Commission's Rules of Practice. The denial of respondent's motion forms the basis of this appeal.

Section 3.33 provides that an order for taking of depositions may issue "at any time during the course of a proceeding" upon a showing that it is "necessary for purposes of discovery, and that such discovery could not be accomplished by voluntary methods." A deposition may also issue to "preserve relevant evidence," if it can be established that there is "substantial reason to believe that such evidence could not be presented through a witness at the hearing." Section 3.33(f)(2) controls the use of depositions taken to preserve evidence. Like Federal Rule 26(d)(3), it provides for the admission of depositions in evidence upon a finding that the witness is unable for reasons of age, infirmity, etc., to appear to give testimony.

Thus, Section 3.33(a) provides for depositions "for purposes of discovery," and "to preserve relevant evidence," and Section 3.33(f)(2) controls the use of the latter type as evidence at the hearing. In conformity to this distinction, Section 3.33(a) further provides that

> Insofar as consistent with considerations of fairness and the requirements of due process and the rules in this part, a deposition should not be ordered *** *to obtain evidence* from a person relating to matters with regard to which he is expected to testify at the hearing, or *to obtain evidence* which there is reason to believe can be presented at a hearing without the need for deposition or to circumvent the orderly presentation of evidence at the hearing. (Emphasis supplied.)

Since, under subsection (f)(2), the contents of a deposition can

only constitute evidence in a narrow class of circumstances, it follows that subsection (a) prohibits the use of a deposition to preserve evidence when the would-be deponent is expected to present the same material testimonially, or the evidence can be presented at the hearing independently, without recourse to depositions. In both cases, depositions to preserve evidence would serve no useful purpose, since they would be inadmissable in evidence under subsection (f) (2). It is the purpose of this portion of subsection (a) to spare counsel and witnesses the harassment and delay of a "trial-by-deposition," whereby depositions are taken neither for purposes of discovery nor to preserve evidence, but are attempts to secure information that is often marginal, cumulative, already known to counsel or of no substantial value to him, all as a device to clog the record and burden opposing counsel and witnesses with the attendant delay and disruption at the pretrial stage.

In denying respondent's motion on the ground that "all persons whose depositions are sought are expected to testify at formal hearings" the hearing examiner has plainly applied the standards of subsection (a) relating to depositions intended for later use as evidence. However, it is clear that respondent does not seek the requested depositions "to obtain evidence," but "for purposes of discovery," more specifically, for use in cross-examination.[2]

If such depositions were to be unavailable merely because the persons whose depositions are sought are expected to testify, respondent plausibly argues that effective cross-examination would be impossible.[3] It is not the purpose of subsection (a) to deny to respondent advance knowledge of the testimony of complaint counsel's witnesses. The right to effective cross-examination is embodied in the Administrative Procedure Act,[4] and is customarily protected by the use of depositions. Although this discovery mechanism, like others, is susceptible to abuse, this possibility is not suggested by the facts before the Commission at this juncture. It would appear that the testimony of the witnesses whose depositions are sought may be of substantial importance.

In addition to the grounds previously mentioned, the hearing examiner premised his ruling upon his finding that the "taking of depositions will unduly delay the proceedings, and may circumvent the orderly presentation of evidence at formal hearings." There is no indication in the record now before us, however, that

[2] In its brief on appeal, respondent expresses as its chief concern the difficulty of preparing for cross-examination without advance knowledge of the testimony to be presented by complaint counsel's witnesses.

[3] R.B.A., p. 16.

[4] 60 Stat. 241 (1946), 5 U.S.C. § 556(d) (1967).

the granting of respondent's application would delay the opening of formal hearings. All the witnesses whose depositions are sought are located in the same city. Respondent asserts in its brief on appeal that all six could be deposed in a relatively few days. Formal hearings are not scheduled to begin for several weeks. Any possibility of delay might perhaps be avoided by the simple expedient of including in an order granting respondent's application a provision limiting its effect to such depositions as respondent is able to obtain by an agreed-upon date well in advance of formal hearings.[5]

In the circumstances, we believe that this matter should be returned to the hearing examiner for further consideration in the light of this opinion and the other opinions in the discovery matters decided in this case today. Any order granting respondent's application should limit the scope of inquiry to matters necessary to prepare a defense, and should also contain such safeguards as may be necessary to prevent improper disclosures of trade secrets or other privileged or confidential information.

Commissioner MacIntyre concurred in the result.

ORDER OF REMAND TO HEARING EXAMINER

Upon consideration of the appeal of respondent from the hearing examiner's ruling of April 23, 1968, and for the reasons stated in the accompanying opinion,

It is ordered, That the matter be remanded to the hearing examiner for further consideration.

Commissioner MacIntyre concurred in the result.

KOPPERS COMPANY, INC.

Docket 8755. Order and Opinion, July 2, 1968

Order denying appeal to produce certain documents and request for oral argument and remanding case to hearing examiner for further proceedings.