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

OPINION OF THE COMMISSION

We have before us the appeal of United States Pipe and Foundry Company (hereafter referred to as U.S. Pipe), a corporation not a party to this proceeding, from the ruling of the hearing examiner embodied in orders filed respectively April 11, 1968, and April 15, 1968 (Prehearing Order No. 2 and an amendment

[6] In its reply memorandum on appeal, respondent has indicated its willingness to comply with "any reasonable order which would enable it to take these depositions and still ensure that no delay will come about." Respondent's Memorandum in Reply, p. 2.

thereto), which, among other things, denied in part and granted in part the motion of U.S. Pipe to limit or quash subpoena duces tecum issued on the application of counsel for respondent. Respondent, on April 29, 1968, filed a brief in opposition to the appeal.

The hearing examiner, in amended Prehearing Order No. 2, directed the production of the subpoenaed documents on April 22, 1968, under conditions set forth in such order. Under § 3.35 of the Commission's Rules of Practice it is provided that an appeal from a ruling such as that here involved shall not operate to suspend the hearing unless otherwise ordered by the hearing examiner or the Commission. U.S. Pipe, on or prior to April 22, 1968, made no motion to stay the matter pending the appeal, and made no appearance on April 22, 1968, in compliance with the examiner's order. Accordingly, the examiner, on April 23, 1968, certified to the Commission the failure of U.S. Pipe to comply with the subpoena. The examiner, in his certification, noted that no claim was made concerning the breadth of the disputed paragraph of the subpoena in the written motion submitted to him. Thereafter, on April 26, 1968, U.S. Pipe belatedly sought a stay of the subpoena pending decision by the Commission on the appeal. The examiner certified this request to the Commission on April 29, 1968, with a recommendation that the return date of the subpoena involved be extended to and including the tenth day after the decision of the Commission on the appeal, if the Commission sustains the examiner in the issuance of the subpoena as limited.

The portion of the subpoena in dispute reads as follows:

> 4. All documents including any graphs, charts, tables, tabulations, and compilations prepared by your company, any officer or employee of your company, or by any other person or organization:
>
> (a) which concern, discuss, study or project the contemplated entry of United States Pipe and Foundry Company into the business of production and sale of commercial resorcinol and resorcinol products including, among others, the following matters: (i) the costs of production, (ii) the contemplated volumes of production, (iii) any relationship of the cost of production with volume, (iv) and profitability of production, (v) price levels, and (vi) competition but specifically excluding references to specific actual customers;
>
> (b) those documents which reflect or relate to the actual implementation of the plans and studies for the entry of United States Pipe and Foundry Company into the market for resorcinol production and sale, including those matters referred to in Paragraph 4(a) above, but excluding specific sales to specific customers.

The hearing examiner, in amended Prehearing Order No. 2, included protective provisions dealt with hereinafter.

U.S. Pipe, on the merits of its appeal, makes three arguments:

first, that the documents sought are irrelevant; secondly, that the subpoena is too sweeping; and, finally, that the subpoena seeks trade secrets, the disclosure of which, it is contended, would be injurious to the public interest and to U.S. Pipe. On this last point U.S. Pipe additionally argues that the order of the hearing examiner does not afford it sufficient protection. The appellant finally requests oral argument on its appeal.

We are not persuaded that the hearing examiner has clearly abused his discretion, but our consideration of this matter leads us to believe that one of the three bases for objection advanced by U.S. Pipe, the protection of U.S. Pipe's trade secrets, may warrant reconsideration by him. Moreover, U.S. Pipe's objection to the breadth of the subpoena, the third basis cited in its appeal, has not been considered by the hearing examiner. Since we are remanding for reconsideration of the question of protection of trade secrets, he will have an opportunity to consider the question of breadth.

With regard to relevancy, we think the hearing examiner ruled properly. The allegations of the complaint with respect to the Respondent's alleged contacts with U.S. Pipe and the effects of Respondent's alleged activities to exclude U.S. Pipe may, or may not, have been a necessary concomitant to the charge of monopolization by Koppers, but the allegations in the complaint establish the relevancy of the documents sought in a discovery proceeding. The ultimate issues of the materiality and relevancy of material sought should be ruled upon at the time they are sought to be introduced. Any questions with respect to those rulings may be presented to the Commission upon review, if any is sought, of the entire record.

We feel constrained to point out that unless there is a clear showing of an abuse of discretion the Commission, in the absence of unusual circumstances, will not disturb a ruling of a hearing examiner in matters involving procedure and discovery. See *Topps Chewing Gum, Inc.*, Docket No. 8463 (order issued July 2, 1963) [63 F.T.C. 2196]; *Associated Merchandising Corporation*, Docket No. 8651 (order issued September 23, 1965 [68 F.T.C. 1175], and order issued November 13, 1967 [72 F.T.C. 1015]); and *American Brake Shoe*, Docket No. 8622 (order issued September 1, 1965) [68 F.T.C. 1169].

The second basis for U.S. Pipe's appeal is that the subpoena is too sweeping. We are not persuaded that U.S. Pipe's documents which "concern, discuss, study or project" its contemplated entry into the resorcinol market, *must necessarily* extend to the details

of U.S. Pipe's "costs of production," "contemplated volume of production," "relationship of the cost of production with volume," "profitability of production," or "price levels." If Koppers wishes to defend this law suit by showing that U.S. Pipe decided not to enter the market for reasons unrelated to any activities of Koppers, then it might be able to do so with the documents sought under Item 4(a) and (b) without the specific data enumerated in subparagraphs (i)–(v).

Obviously, it may be difficult to separate out some of this raw data which would fall into the area of trade secrets from memoranda and other documents which would relate to its reasons for not entering this market.

This brings us to the third basis for appeal: the argument that the material sought by Koppers constitutes trade secrets which U.S. Pipe should not be compelled to disclose. The hearing examiner is in the best position to determine how this can best be accomplished. In his Prehearing Order No. 2 ordering the production of the subpoenaed documents the hearing examiner ordered protective provisions as follows:

> 3. The motion of United States Pipe and Foundry Company is granted to the extent that all papers called for by Paragraph 4 of said subpoena shall be produced at the prehearing conference to be held April 22, 1968, and shall be exhibited to and placed in the custody of William Simon and Paul d'Hedouville, counsel for respondent, provided, however, that said William Simon and Paul d'Hedouville as counsel for respondent shall first undertake and agree that all such documents shall be retained in their personal custody, shall not be copies or abstracted, and that no information contained in any of them shall be disclosed to any other person except on 10 days notice to Thad G. Long, counsel for intervenors, who may then arrange with all counsel and the hearing examiner for a suitable date to offer testimony and other evidence seeking *in camera* treatment in compliance with Rule 3.45 and may secure a ruling thereon by the hearing examiner before any disclosure may be made. And, on the further condition that said William Simon and Paul d'Hedouville further undertake and agree to return all such documents not admitted in evidence to said Thad G. Long at the conclusion of the testimony of witnesses from United States Pipe and Foundry Company.

We are still not wholly satisfied at this point that the protective provisions which he has proposed are adequate. At least we think that before adopting those provisions he should give consideration to the procedures adopted in *Mississippi River Fuel Corp.*, Docket No. 8657, Order June 8, 1966 [69 F.T.C. 1186]. Here again, however, he is closer to the case and is in a better position than the Commission to consider in the first instance what protective provisions would be most appropriate. He should be satisfied that Koppers have the material which is necessary, but, to the extent

possible, in a form which provides the adequate protection of the trade secrets of U.S. Pipe.

U.S. Pipe has requested permission to present oral argument to the Commission in this matter. We think in view of our disposition of the appeal that the oral argument should more properly be addressed to the hearing examiner.

Finally, U.S. Pipe having failed to make timely request and receive a stay in the effective date of the hearing examiner's order and having failed to comply with the subpoena as directed is now technically in violation of the examiner's order. The hearing examiner, in his second certification of April 29, 1968 (made upon receipt of U.S. Pipe's belated request for a stay), by recommending an extension of time for the return date of the subpoena, in the event the Commission denies the appeal, has apparently concluded that the failure to comply with his order was inadvertent and not willful. Accordingly, we will not press further on this deficiency.

An appropriate order is issued herewith.

Commissioner MacIntyre concurred in the result.

ORDER DENYING APPEAL FROM EXAMINER'S ORDER AND REQUEST FOR ORAL ARGUMENT AND REMANDING TO HEARING EXAMINER FOR FURTHER PROCEEDING

United States Pipe and Foundry Company appealed from the examiner's ruling requiring it to produce certain documents in response to a subpoena duces tecum issued upon the application of respondent herein and requested oral argument on the appeal; and

The Commission having determined for the reasons stated in the accompanying opinion that such appeal and request for oral argument should be denied and that this matter should be remanded to the hearing examiner for further proceedings in accordance with such opinion:

It is ordered, That the appeal of the United States Pipe and Foundry Company from the hearing examiner's ruling and its request for oral argument of its appeal is denied.

It is further ordered, That the hearing examiner's order of compliance with the subpoena duces tecum issued against United States Pipe and Foundry Company on March 12, 1968, be vacated and that the hearing examiner consider the arguments of the United States Pipe and Foundry Company and those of respondent in accordance with the accompanying opinion, make such determinations as the hearing examiner deems appropriate, and enter such further orders as may be justified and appropriate in light of such arguments.

Commissioner MacIntyre concurred in the result.

KOPPERS COMPANY, INC.

Docket 8755. Order, July 2, 1968

Order granting respondent's request to file interlocutory appeal and vacating hearing examiner's order directing hearings in more than one city by restricting hearings to Pittsburgh only.

ORDER GRANTING RESPONDENT'S INTERLOCTORY APPEAL AND VACATING EXAMINER'S ORDER FOR HEARINGS IN MORE THAN ONE PLACE

This matter having come before the Commission on the request by respondent Koppers Company, Inc., pursuant to Rule 3.23(a) for permission to file an interlocutory appeal from the order of the examiner dated May 17, 1968, granting the motion of complaint counsel to hold hearings in three cities, New York, Pittsburgh, and Birmingham, Alabama; and

The Commission having considered said request, the order of the examiner dated May 17, 1968, and all of the memoranda directed to the examiner by the parties including complaint counsel's motion of April 29 and affidavit of May 10 and respondent's opposition memorandum of May 6 and answer of May 16; and

The Commission believing that counsel supporting the complaint has clearly failed to carry the burden of establishing the presence of "unusual and exceptional circumstances" required to justify the holding of hearings in more than one place under Section 3.41(b) of the Commission's Rules in accordance with the Commission's order of April 9, 1968, in *Universe Chemicals*, Docket 8752 [73 F.T.C. 1259]:

It is ordered, That the respondent's interlocutory appeal be granted.

It is further ordered, That the hearing examiner's order granting complaint counsel's motion for hearings in more than one place be vacated and that the hearings be held only in Pittsburgh.

Commissioner MacIntyre did not concur.

KOPPERS COMPANY, INC.

Docket 8755. Order and Opinion, July 2, 1968

Order denying application of respondent for subpoena duces tecum and for the release of confidential information.