MAREMONT CORPORATION

Docket 8763. Order and Opinion, Oct. 3, 1968

Order denying respondent's request to file an appeal from hearing examiner's denial of its motion to dismiss proceeding on grounds that Commission is currently conducting an industry-wide survey of the automotive parts industry.

OPINION OF THE COMMISSION

This matter is before the Commission upon respondent's request, filed September 11, 1968, for permission to file an interlocutory appeal from that part of the hearing examiner's order of August 26, 1968, denying its motion to dismiss the complaint or stay the proceeding. Complaint counsel filed a statement on September 17, 1968, opposing the request. Respondent, on September 23, 1968, filed a reply memorandum.

Respondent, on August 19, 1968, filed a motion, accompanied by a supporting memorandum, with the hearing examiner, requesting (a) that the complaint be dismissed or (b), in the alternative, that all proceedings be stayed until further direction of the Commission upon completion of an investigation into the acts and practices of companies manufacturing automotive parts, accessories and equipment pursuant to its resolution of May 14, 1968, and "the formulation of an appropriate Trade Regulation Rule or other objective standards of general applicability." The respondent, further in the alternative, requested the examiner to certify its motion to the Commission pursuant to § 3.22(a) and § 3.42(c)(9) of the Commission's rules if he concluded that the relief sought, as outlined above, was beyond his authority to grant. Complaint counsel, on August 21, 1968, filed a response opposing respondent's request. The hearing examiner, in his order dated August 26, 1968, denied respondent's motion in the respects here in controversy.[1]

Respondent argues first that the examiner erred in ruling on the motion, which it asserts to be beyond his jurisdiction, and, secondly, that its request is justified on the merits. We agree that the hearing examiner erroneously ruled on the request to dismiss the complaint or stay the proceeding. The motion clearly is addressed to the Commission's administrative discretion and does not concern adjudicative factfinding functions delegated to hearing examiners. *Graber Manufacturing Company, Inc.*, Docket No. 8038 (order issued October 15, 1964) [66 F.T.C. 1548]. The hearing examiner should properly have certified this part of re-

[1] Respondent, in its motion, also asked for an extension of time within which to answer. The hearing examiner, in his August 26, 1968, order, extended such time to September 11, 1968.

spondent's motion to the Commission for the Commission's determination and action. Nevertheless, in view of respondent's application for permission to file an interlocutory appeal, the matter is now before the Commission in the same posture as it would have been had the examiner certified it. Accordingly, while our holding is that the hearing examiner erred in failing to certify the motion, this in the circumstances was not to respondent's prejudice, and the motion will now be treated as though it had been properly certified. Since we are treating this as a certification, it is respondent's motion that, in effect, is before us, although our consideration will include respondent's request for permission to appeal.

The hearing examiner, in ruling on respondent's motion, construed its essence as follows:

> The basis of respondent's motion is, essentially, that (1) the Commission, having initiated an investigation of the automotive parts industry in May 1968, for the purpose of determining whether acquisitions made therein may be illegal, it was an arbitrary abuse of its discretion to issue a complaint against respondent in July 1968, without proceeding against other more important competitors, and (2) the problems of the industry, including the matter of acquisitions, can be dealt with more effectively through the issuance of a rule of general applicability. . . .

Respondent appears to agree that these are the issues presented. On page 2 of its request it observes that the basic grounds of its motion were (1) the preceeding against respondent is discriminatory and (2) the matter should be dealt with on an industry-wide basis.

Concerning the first point, it is clear that the Commission has a wide and essential discretion on the question of proceeding against an individual respondent. *Moog Industries* v. *Federal Trade Commission*, 355 U.S. 411 (1958); *Federal Trade Commission* v. *Universal Rundle Corp.*, 387 U.S. 244 (1967). Beyond that respondent has failed to show that the Commission has abused its discretion. If it is assumed, as respondent asserts, that one or more competitors of respondent engaged in actions similar to those which form the basis of the complaint against the respondent—that is, acquisitions of other concerns—this alone would not mean that the Commission has been unfair and discriminatory in issuing a complaint against respondent and not the others. Not every acquisition violates statutes administered by the Commission. Under Section 7 of the amended Clayton Act, for instance, there must be, among other things, a showing that the merger might substantially lessen competition. Thus, each case must be looked at on its own individual facts.

Even where there is more than one alleged violator among competitors the circumstances do not in every case dictate simultaneous and similar actions. The Court, in *Moog Industries* v. *Federal Trade Commission, supra,* touched on the administrative problems involved in correcting industrywide unlawful practices. It stated that there must be a determination as to whether and to what extent there is a relevant "industry" within which the particular respondent competes and "whether or not the nature of that competition is such as to indicate identical treatment of the entire industry. . . ." The Court added that although an allegedly illegal practice may appear to be operative throughout an industry, whether such appearances reflect that fact, and whether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment are questions that call for discretionary determination by the administrative agency (355 U.S. 413).

Furthermore, respondent itself states that it was served with an order to file a special report pursuant to a Commission resolution of May 14, 1968, authorizing an investigation of the market structure, sale and distribution of automotive parts, accessories and equipment for use in determining whether the acquisition of any company by any other company manufacturing automotive parts and equipment may be in violation of Section 7 of the amended Clayton Act or any other statute administered by the Federal Trade Commission. Complaint counsel, in their opposition briefs, concede that a merger investigation is now pending specifically against another firm in the industry—Genuine Parts Company. This matter, they point out, has become public as a result of a declaratory judgment action filed in the Northern District of Georgia on August 14, 1968 (*Genuine Parts Company* v. *Federal Trade Commission, et al.,* Civ. No. 12030). Such public disclosures, while they do not indicate one way or the other that the Commission will in the future issue a complaint or take any kind of administrative action against any competitor of respondent, suggest at least general consideration by the Commission of the automotive replacement parts field.

Finally, the complaint was issued in this proceeding because the Commission had reason to believe that the law as charged had been violated. Some of the points which respondent raises appear to go to the merits of the charges in the complaint. Certain others possibly concern matters bearing on the remedy, if any. It is our belief that in the circumstances the proper time to raise such arguments and issues is at the trial in this proceeding —not on a motion to dismiss.

Respondent's further point that the Commission deal with the matter on an industrywide basis is rejected. Respondent has made no substantial showing that the practice with which it is charged is an industrywide problem or that, assuming it is industrywide, the best course of action would be by the promulgation of rules of general applicability. *Cf. Lehigh Portland Cement Company*, Docket No. 8680 (order issued February 6, 1967) [71 F.T.C. 1618], and *General Transmissions Corporation of Washington*, Docket No. 8713 (order issued December 1, 1966) [70 F.T.C. 1833]. General rules would not afford a remedy for past acquisitions if the charges in the complaint are sustained. *Cf. Texas Industries, Inc.*, Docket No. 8656 (order issued April 14, 1965) [67 F.T.C. 1363].

Accordingly, respondent's request for permission to file an interlocutory appeal and motion to dismiss the complaint or stay proceedings will be denied. An appropriate order will be entered.

Commissioner Elman did not concur.

ORDER DENYING RESPONDENT'S REQUEST TO FILE INTERLOCUTORY APPEAL AND MOTION TO DISMISS THE COMPLAINT OR STAY PROCEEDING

Upon consideration of respondent's request for permission to file interlocutory appeal filed September 11, 1968, and its motion to dismiss the complaint or stay the proceeding, filed August 19, 1968, treated as a motion certified, and for the reasons stated in the accompanying opinion:

It is ordered, That respondent's request for permission to file an interlocutory appeal filed September 11, 1968, and its motion to dismiss the complaint or stay the proceeding, treated as certified, be, and they hereby are, denied.

Commissioner Elman not concurring.

SAV-COTE CHEMICAL LABORATORIES, INC., ET AL.

Docket C–716. Order, Oct. 25, 1968

Order denying respondent's request to modify decision and order.

ORDER DENYING PETITION TO MODIFY DECISION AND ORDER

This matter is before the Commission upon respondents' petition to modify decision and order, filed September 6, 1968, and complaint counsel's answer in opposition thereto, filed October 4,