

judicative proceeding. He also points out there is no claim made by Genuine Parts Company that it has already supplied such information to the Commission or that the production would constitute an undue burden. In view of these distinctions the hearing examiner ruled—rightly, we think—that the issues in the two matters are entirely different and that the disposition of the one will not affect the other. The pendency of the district court case gives Genuine Parts Company no justification for non-compliance with the subpoena issued against it in this proceeding.

Furthermore, Genuine Parts Company has failed to make a showing, as required by the Commission's rules under Section 3.35(b) (as well as under Section 3.23(a)), 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. Accordingly,

It is ordered, That respondent's application, treated as an appeal from the examiner's order denying its motion to quash, be, and it hereby is, denied.

UNIVERSE CHEMICALS, INC.

Docket 8752. Order and Opinion, April 2, 1969

Order remanding case to hearing examiner for trial of the issues *de novo*.

OPINION OF THE COMMISSION

I

Introduction

This matter is before the Commission upon the appeal of respondents, Universe Chemicals, Inc., and two individuals connected therewith, from an initial decision filed September 27, 1968. The complaint, issued December 5, 1967, charged respondents with the use of false, misleading and deceptive representations in the sale of water repellent paints and coatings, in violation of Section 5 of the Federal Trade Commission Act. Respondents' answer, filed January 10, 1968, admitted certain of the factual allegations but denied generally any violation of law.

Hearings were held in July, 1968 and the examiner handed down his decision in September, 1968 finding that respondents had misrepresented their affiliation with Union Carbide Company and the part played by that company in developing and testing

respondents' products; that respondents had misrepresented the nature of the guarantee covering products sold by respondents and the earnings which dealers can make by selling respondents' products and that respondents had misrepresented their policy on products not sold by their dealers and various product characteristics, such as the percentage of silicones, their waterproofing effectiveness and other uses and characteristics. The examiner concluded that respondents had violated Section 5 of the FTC Act, that the individual respondents were responsible for the illegal practices and that an order directing all respondents to cease and desist was necessary and appropriate.

Primarily, respondents are claiming that the examiner denied to them due process by law by directing that hearings should be held in more than one city.¹

During pretrial proceedings complaint counsel had requested, and the hearing examiner, after overruling respondents' objection, directed, that hearings in this case should be held in Chicago, Illinois; Evansville, Indiana; Omaha, Nebraska and Minneapolis, Minnesota. The examiner's ruling was upheld by the Commission on respondents' motion for an interlocutory appeal from the examiner's order scheduling the hearings.²

Respondents refused to participate in any of the hearings set

¹ Respondents' appeal is directed secondarily to the substantive findings and conclusions of the examiner. While adhering to their due process argument, respondents in their brief set forth their position with respect to each of the examiner's substantive findings; they contend that the findings of fact, conclusions and order entered by the hearing examiner are not supported by the evidence and propose a substitute order. Respondents' counsel explained at the oral argument that respondents wished to present their view of the record in case it becomes necessary to reach the merits of the case on appeal (Tr. 57-58). In view of our disposition of this matter, it is unnecessary to comment on this portion of respondents' appeal.

² Pursuant to the authority of Section 3.23(a) of the Commission's Rules of Practice, respondents filed an interlocutory appeal with the Commission from the order scheduling hearings. Respondent's Motion Requesting Permission to File an Interlocutory Appeal, Feb. 29, 1968. Acting thereon, the Commission first directed both parties to file supplemental affidavits more fully setting forth their arguments in support of their respective positions, Order directing filing of supplemental affidavits, March 13, 1968, and postponed the hearings, then scheduled to commence March 14 in Evansville, Indiana, until further order of the Commission. Order, March 14, 1968. Upon receipt and consideration of the affidavits, the Commission denied respondents' request for an appeal, Commissioner Elman dissenting.

down by the examiner, including the hearing held in Chicago, respondents' place of business. They stated that they declined to participate in the Chicago hearing in order to preserve their substantive position respecting due process (Transcript of Oral Argument on Appeal ["Tr."], 8-9).

Respondents contend on this appeal, as they contended to the examiner, that all hearings should have been held in Chicago, which was the location of the corporate respondent's headquarters and place of business. They argue that participation in out of town hearings would have been financially burdensome. Respondents further assert that the examiner's order scheduling the hearings outside Chicago "removed [the hearings] outside of the scope of respondents' effective opposition by a procedure which resulted in *ex parte* hearings (*id.*, 4), that the hearings "would be unduly burdensome to them, financially and otherwise" and "they would be put to great expense as a consequence of the distances between Chicago, Evansville, Omaha and Minneapolis (*id.*, 5). Finally, they urge that (*id.*, 7):

* * * [T]he Hearing Examiner failed to have "due regard for the convenience and necessity of the parties" in the administrative proceedings involved in this matter and therefore violated the Statute, the law, and the Rules, and in supporting his position, both he and the Commission acted arbitrarily, capriciously and oppressively.³

Commission counsel argued before the examiner, and reiterates his contention on this appeal, that the government's witnesses were small businessmen and holding the hearings at locations which were closer to their place of business avoided hardship to the dealer witnesses and extra expense to the Commission. Commission counsel also argues on appeal that holding the hearings in these four cities did not in fact delay the hear-

³ Respondents' assertion on this appeal that the scheduling of hearings in more than one place violated their rights under Section 5(a) of the Administrative Procedure Act (15 U.S.C. 554(a)) is without merit. Section 5(a) provides:

"* * * In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives."

Thus, the section imposes a "convenience and necessity" test for the fixing of hearing locales. It is well established that the "convenience and necessity" criterion applies to *all* of the parties in an administrative proceeding, including the agency as well as the respondent. Sen. Docket No. 248, 79th Cong., 2d Sess. (1946), p. 203; *Burnham Trucking Co. v. United States*, 215 F. Supp. 561, 564 (D. Mass. 1963). A review of the facts here and the cases under this provision demonstrates that respondents' rights under this section were not violated. See, e.g., *Tractor Training Service v. FTC*, 227 F. 2d 420, 424 (9th Cir. 1955), *cert. denied*, 350 U.S. 1005 (1956).

ings and therefore could not have been in violation of the Commission's rule (Tr. 32).

The Commission has already considered this issue and ruled on it. However, respondents argue on their appeal that the Commission's ruling is in conflict with an earlier decision by the Commission in another matter which, respondents contend, is indistinguishable from this case.⁴ Complaint counsel answers by relying on another Commission decision, which he claims to be the proper precedent governing the instant case.⁵ Although our own research has disclosed two other Commission decisions under Rule 3.41(b) raising this issue of separate hearings (*infra* pp. 1073-74), all four matters were disposed of with little discussion by the Commission of the standards which should be followed in applying the Rule. At issue here is the meaning of Section 3.41(b) of the Commission's Rules. The importance of resolving any real or apparent conflicts among earlier Commission decisions interpreting this rule and the need for an interpretation of the rule prompts us to consider respondents' argument *de novo* as it has been presented by the arguments of the parties to this appeal.

II

The Commission's Rule Section 3.41(b)

Section 3.41(b) of the Commission's Rules of Practice provides as follows:

(b) *Expedition*.—Hearings shall proceed with all reasonable expedition, and, insofar as practicable, shall be held at one place and shall continue without suspension until concluded. Consistent with the requirements of expedition, the hearing examiner shall have the authority to order brief intervals of the sort normally involved in judicial proceedings and, in unusual and exceptional circumstances for good cause stated on the record,

⁴ The case relied upon by respondents is *Wilmington Chemical Corp.*, Dkt. 8648, order of March 2, 1965 [67 F.T.C. 1356]. In that case complaint counsel, in arguing for hearings in several cities, showed that 21 small businessmen witnesses would have been compelled to travel to Chicago, allegedly causing them considerable inconvenience and expense. The Commission refused to authorize hearings in the various cities requested.

⁵ Complaint counsel does not attempt to distinguish the *Wilmington Chemical* case but urges the Commission to follow instead its more recent decision in *Thermochemical Products, Inc.*, Dkt. 8725, order of August 9, 1967 [72 F.T.C. 1001]. In that case respondent corporation was located in New York; hearings were scheduled for Los Angeles and San Francisco, California; Chicago, Illinois; Houston, Texas and Greensboro, North Carolina. We note, however, that the appeal to the Commission raised only the issue of timing; respondent did not object to the location of the hearings.

he shall have the authority to order hearings at more than one place and to order brief intervals to permit discovery necessarily deferred during the prehearing procedures. Otherwise, intervals shall not be ordered by the hearing examiner except as directed by the Commission upon his certificate of necessity therefor.

In order to resolve the issue presented on this appeal as to the proper standard which must be applied in interpreting the "unusual and exceptional" test laid down in the Rule, it will be helpful to review the origin of Rule 3.41(b).

Prior to 1961, the Commission's rules relating to the time and location of its administrative hearings provided simply that (Rule 3.16(d) (1960)):

(d) *Expedition.* The taking of evidence and subsequent proceedings shall proceed with all reasonable expedition.

In 1961 the rules were changed to provide that hearings should be all held in one place unless the Commission otherwise ordered upon a certificate of necessity of the examiner. Thus, the new rule stated (Section 4.14(d) (1961)):

(d) *Expedition.* Hearings shall proceed with all reasonable expedition. Unless the Commission otherwise orders upon a certificate of necessity therefor filed by the hearing examiner, all hearings will be held at one place and will continue without suspension until concluded * * *

No criteria or standards were contained in the 1961 amendment to guide the examiner or the Commission as to the circumstances where the one locale of hearing principle could be deviated from.

In applying the 1961 amended rule, the Commission was confronted several times with certificates of necessity from hearing examiners certifying the holding of hearings in more than one place. These certificates were based principally on assertions of counsel that this was necessary for the convenience and necessity of witnesses and to reduce the government's expense.

In two of these cases decided under the 1961 amended rule, the Commission refused to order multiple hearings despite examiners' certificates of necessity.⁶ In *Wilmington Chemical*

⁶ During this period multiple hearings were ordered only once. *House of Lords, Inc.*, Dkt. 8631, order of October 26, 1964. In that matter the scheduling was unopposed, and the Commission did not discuss the appropriate standard to be followed. The certificate related assertions of complaint counsel that some of the witnesses were representatives of small retail stores who would suffer serious hardship if they were required to leave their places of business around Washington, D. C. and Cleveland, Ohio and travel to New York City, particularly as hearings were scheduled during the pre-Christmas season.

(*supra* p. 1072, n. 4) the Commission found that upon the facts stated in the certificate, granting the order would be inconsistent with the purposes and policy of the rule. In contrast, the Commission's ruling in *Frito-Lay Inc.* (Docket 8606, Order of March 13, 1964 [64 F.T.C. 1447]) was based on its conclusion that the certification presented an insufficient basis upon which to make an informed determination,⁷ and the Commission accordingly returned the matter to the hearing examiner for reconsideration. In the *Frito-Lay* opinion, the Commission observed that the rule was not intended to be inflexible and stated its continued belief that hearings might be allowed in more than one place where the public interest would be better served.

In 1967, the Commission again amended its rules, including its rule of expedition, incorporating into that rule a standard on which decisions respecting the locale of hearings should be based. (Rule Section 3.41(b), *supra* p. 1072). At the same time, the Commission delegated the implementation of this rule to the hearing examiner. Thus, in its 1967 amendment the Commission provided that the examiner could order hearings in more than one place "in unusual and exceptional circumstances for good cause stated on the record."⁸ The clear language of the rule shows that this power to deviate from the requirement of a single place of hearings is not a liberal discretionary authority but rather a limited grant to enable examiners to make necessary accommodations for special situations.

The Commission's Rule respecting the locale of its hearings has always been designed to go further than the *forum conveniens* provision contained in Section 5(a) of the Administrative Procedure Act (*supra* p. 1071, n. 3). While that provision is designed primarily to require a balancing of interests and con-

⁷ In *Frito-Lay*, a proceeding under Section 7 of the Clayton Act, the hearing examiner had shown that the case involved three lines of commerce and 8 acquisitions affecting 17 separate marketing areas, and that the witnesses' convenience and expenses of the government and respondent would be lessened by holding hearings in cities ranging from Boston, Massachusetts to San Francisco, California.

⁸ Since under the new revision the examiner himself makes the determination whether hearings shall be held in several places, the Commission, of course, has no opportunity to rule upon such determinations in the absence of an appeal by one of the parties. Only one interlocutory appeal has come before the Commission involving the rule as revised in 1967, *Thermochemical Products Inc.*, *supra* p. 1072, n. 5, order of August 9, 1967. There, respondents' request for leave to file an interlocutory appeal did not raise the question of multiple locations of hearings but only of the allegedly insufficient travel intervals allowed between the various locations.

venience between the parties in fixing the locale of hearings, the Commission's Rule Section 3.41(b) was directed at a different problem. It is a rule which is primarily concerned with eliminating delays in administrative proceedings. The Commission chose to accomplish this objective by encouraging the holding of hearings in one place and permitting deviation from that principle only in unusual and exceptional circumstances.

It is clear from both the 1961 and 1967 rule changes that the Commission envisaged that there would be some circumstances under which the general requirement of hearings in one place can be modified. The Commission's decisions under the 1961 amendment illustrate this premise, although the standard to be followed was expressed simply in the general terms of considerations of the public interest (see *Frito-Lay, Inc.*, *supra* p. 1074).

Obviously, only a limited number of factors could, under any standard and however expressed, be relevant to the question of whether a hearing should be held at one place or at several. They would be limited essentially to such factors as the location of the principal place of business of the respondent, the locations, business occupations and any personal hardships or burdens of witnesses and the location of essential corporate files to be relied upon in the course of testimony.

It seems obvious, also, that the intent of both the 1961 and 1967 rule amendments was to require, as support for a request for hearings in more than one place, something in addition to a mere showing that witnesses to be called were in different places or that it would be more convenient for these witnesses or for a respondent's officials to testify in different places. On the contrary, the 1961 amendment and even more so the 1967 amendment to Rule Section 3.41(b) was designed to impose an obligation on the requesting party to demonstrate clearly and convincingly that the need for hearings in more than one place was compelling and indeed virtually required in the public interest.

In short, such factors as the number and location of witnesses and the need for reliance on active or voluminous files will be *relevant* to a determination of the need for multiple hearing places but will not be determinative. The rule requires more than circumstances of convenience to support a request.

Consideration of actual hardship and genuine burden which might result for a respondent or a witness if he were required to appear at a place too distant from his home or at multiple hearing places, and considerations of serious and actual interferences with the conduct of a respondent's business if its of-

ficials and/or files were required to leave their home base, would in our judgment constitute the type of unusual and extraordinary circumstances contemplated by the rule. Thus, for example, actual individual hardship—whether arising from professional or business reasons or from personal circumstances—would, we believe, constitute the type of unusual circumstances contemplated by Section 3.41(b).⁹ Similarly, corporate hardship arising from the need to transport active, voluminous and essential files or from the demonstrated need for the on-the-spot presence of essential corporate personnel could in a proper case also operate to involve the exceptional provisions of Section 3.41(b).¹⁰ Financial hardship for a corporate respondent must also be included as one of the factors which might also activate the Rule's exception.

Only after the unusual and exceptional circumstances have been demonstrated would any need arise to balance relative hardships and conveniences. In this situation, the determinative factor might well be the extent to which the multiple location hearings will in fact delay the proceedings.

III

The Hearings in this Proceeding

In our earlier opinion denying respondents' motion for leave to file on interlocutory appeal, we pointed out that matters such

⁹ For example, such hardship could arise if a witness were physically disabled or if his presence as close to home as possible were essential as might be the case with doctors or other technical experts unable to leave their patients or laboratories or with family members unable to be away from convalescents or, perhaps, minor children.

Similarly, the need to have witnesses who are sole proprietors, widely scattered geographically and who could not without financial sacrifice leave their place of business for any length of time, could also be relevant to the fixing of hearings at more than one place.

The same need might be asserted in the case of professional or expert witnesses who cannot leave their place of business without serious hardship to their work.

¹⁰ Thus a respondent headquartered in Los Angeles charged with price discrimination in two of its regional divisions in the east and southeast might argue that the hearings must be held in both divisions because of its need to have access to its files during the hearing or because of its need to rely on its executives and salesmen in each of the two divisions who must be able to continue to perform their duties during the period of the hearings or who must be instantly available at their places of business to make decisions and the like.

as the scheduling of hearings in more than one place are "best left to the sound discretion of the hearing examiner." We also concluded, after examining the parties' affidavits in support of their respective positions, that the examiner had not abused his discretion in scheduling the hearings in four cities.

In the ordinary situation, we would not be inclined to disturb the examiner's exercise of discretion, especially where, as here, we have already considered the matter on interlocutory appeal. However, in the instant case a review of our earlier decisions applying Rule Section 3.41(b) demonstrates that the Commission has never discussed the standard which it has incorporated into the rule for determining when multiple hearing places may properly be scheduled. Moreover, we are concerned that our prior decision in this matter may be in direct conflict with our earlier decision in *Wilmington Chemical Corporation* (Docket 8648, *supra* p. 1072, n. 4), where the Commission rejected a request for multiple hearing locales on the basis of substantially similar facts. Respondents have not only persisted in their view that our decision in *Wilmington Chemical* is the correct one but, in order to dramatize their disagreement with our decision denying their interlocutory appeal, have gone to the length of refusing to attend any of the hearings in this matter, even including the hearings which were held in Chicago, respondents' place of business and their choice of locale for the entire hearing.

Therefore, we believe that we should reconsider our earlier opinion in this matter. Applying the general principles discussed above to the case at hand, we are persuaded that we were in error in our earlier decision sustaining the examiner's order scheduling hearings in four cities. A review of the papers and consideration of the arguments presented on this appeal convinces us that complaint counsel has not sustained the burden of establishing that the circumstances here were so unusual and exceptional as to constitute good cause to hold hearings in more than one place.¹¹

We do not agree that the mere assertion that "many if not all" of the witnesses were small businessmen for whom travel to Chicago would have been a distinct hardship is a sufficiently

¹¹ In particular, we reject as wholly irrelevant counsel's argument that since respondents saw fit to go to distant places to make sales they should be likewise prepared to go to those locations to defend against allegations of misrepresentations. (Tr. 36-37, 43-44.) We believe that such an argument treads dangerously close to a suggestion that respondents are civilly guilty until proven innocent.

unusual circumstance by itself to warrant multiple hearings.¹² At the least, this factor would have to be buttressed by a further showing that a clerk or assistant could not have been substituted for the witnesses at their places of business for a day or two or that for some reason the distance required to be traveled if hearings were all held in one place would have taken the witnesses away from their jobs for substantially longer periods than were required under the multiple location order. The naked fact that the witnesses in this case would have had to travel greater distances if hearings had been set in one place than they did for the hearings that were set in several places does not, standing alone, constitute the type of unusual and exceptional circumstances which the Commission had in mind in drafting Rule Section 3.41(b).

Nor in our judgment is the allegedly greater cost to the government of witnesses' travel expenses—at least absent some special circumstances not present here—a relevant factor in determining whether multiple locations for hearings should be directed, unless, conceivably, it could be demonstrated that all parties were willing and that no delay would ensue from holding multiple hearings.¹³

We are aware that respondent made no showing that hearings in more than one place would or might substantially delay the proceedings and that it appears that no extra delay was occasioned in fact by the nonadherence to the rule's requirements. While our rule suggests a presumption of delay flowing from hearings in multiple locations, some specific showing on this issue—which, after all, is the primary objective of this part of the rule—would have been relevant and material where the facts were as close as they are here. We do not believe, however, that the absence of delay, brought up now as a matter of

¹² On this appeal complaint counsel alleged that in Omaha, Evansville or Minneapolis, some witnesses could testify in a few hours, whereas for them to travel to Chicago would have necessitated their absence from their businesses for a minimum of one night or a maximum of three or four days. (Tr., 34-35; Ans. Br. of Counsel Supporting the Complaint, 5.) This allegation was not supported by any affidavits or other matter to indicate what real burden of hardship, if any, would have been caused by the witnesses' spending an extra two or three days away.

¹³ We are not considering here the corollary question of unusual financial hardship to the corporate respondent in having to defend in cities outside Chicago since respondent on oral argument on this appeal made it clear that they were not relying on company poverty but simply on the absence of circumstances satisfying the requirements of the rule. (Tr. 64.)

hindsight (Tr. 26-28, 32) can be relied upon as justifying the departure from the rule which, we have concluded, has occurred.

IV

Conclusion

We conclude that complaint counsel's showing of the circumstances of the present proceeding—consisting as it does simply of unsubstantiated assertions of hardship to witnesses and added governmental expense—was insufficient to demonstrate that the circumstances were unusual and exceptional within the meaning of Section 3.41(b) of the Commission's Rules of Practice. We therefore find that scheduling hearings at more than one place in this case violated that section. This ruling is, of course, limited to the facts before us. We do not here hold that under no circumstances would the sheer numbers and/or grave inconvenience of witnesses in themselves justify the conclusion that hearings ought to be scheduled in more than one place. The facts of each individual proceeding will be determinative.

Accordingly, we are remanding the case to the examiner with directions to proceed *de novo*, with all hearings to be held at a single location determined with due regard for the convenience of the parties.

Chairman Dixon and Commissioner MacIntyre not concurring in the result.

ORDER REMANDING PROCEEDINGS TO HEARING EXAMINER

This matter having been heard by the Commission upon the respondents' appeal from the hearing examiner's initial decision and upon briefs and oral argument in support of and in opposition to said appeal; and

The Commission having determined that the schedule of hearings in these proceedings violated Section 3.41(b) of the Rules of Practice of the Commission,

It is ordered, That the initial decision be, and it hereby is, vacated and set aside.

It is further ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner for a trial *de novo* in conformity with the views expressed in the accompanying opinion of the Commission.

Chairman Dixon and Commissioner MacIntyre not concurring in the result.