

KNOLL ASSOCIATES, INC.

Docket 8549. Order, April 8, 1969

Order requiring filing of briefs relative to the question whether the evidence minus that excepted by the 7th Circuit Court of Appeals supports issuance of an order.

ORDER REQUIRING FILING OF BRIEFS

The Commission's order in this matter having been set aside on June 18, 1968, by the Seventh Circuit Court of Appeals and the cause remanded to the Commission for reconsideration of the record of the proceeding, excepting therefrom all evidence and testimony given or produced by or through the witness Herbert Prosser, and

The Commission being of the opinion that it should hear the views of respondent and complaint counsel as to whether the record of this proceeding, minus the evidence and testimony given or produced by the witness Prosser supports the entry of a cease and desist order;

It is ordered, That respondent and complaint counsel, within 30 days after service of this order, file briefs with the Commission setting forth their views as to whether the record of this proceeding, minus the evidence excepted by the Seventh Circuit Court of Appeals, supports issuance of an order to cease and desist.

Commissioner Elman not concurring.

LEHIGH PORTLAND CEMENT COMPANY

Docket 8680. Order, April 11, 1969

Order denying respondent's request to withdraw proceeding from adjudication in order to negotiate a consent order.

ORDER DENYING MOTION TO WITHDRAW FROM ADJUDICATION

This matter is before the Commission upon the respondent's February 13, 1969, request that the case be withdrawn from adjudication for the purpose of negotiating a settlement by the entry of a consent order. On February 26, 1969, complaint counsel filed their opposition to the request and on March 7, 1969, respondent filed a reply.

Respondent's request was filed directly with the Commission

pursuant to Section 2.34(d) of the Commission's Rules of Practice, which provides that "in exceptional and unusual circumstances, the Commission may, upon request and for good cause shown, withdraw a matter from adjudication for the purpose of negotiating a settlement by the entry of a consent order."

Respondent's request sets out three basic reasons why the Commission should make a finding of exceptional and unusual circumstances warranting withdrawal of the matter from adjudication: (1) "respondent never had the opportunity prior to the issuance of the formal complaint to submit a settlement offer to the Commission covering all acquisitions attacked in this proceeding;"¹ (2) settlement would "avoid further costly and unnecessary litigation, both on the merits and on significant collateral matters. . . .;"² and (3) "respondent believes that the staff's attitude toward settlement of this case may not accurately reflect the Commission's current policies with regard to consent settlement in merger cases. . . ."³

The facts in support of the allegation that respondent has not had an adequate opportunity to present a proposed settlement covering all acquisitions to the Commission do not constitute anything unusual or exceptional.⁴ Respondent had from December 15, 1965, until April 1, 1966, to utilize the Commission's consent order procedures. This period included extensions of time granted for that purpose. Furthermore, during this four-month period, the staff discovered additional acquisitions had been made by respondent. Respondent, therefore, was notified by a letter from the Commission on February 17, 1966, that any consent proposal should also include consideration of the newly discovered acquisitions. Respondent refused to include these acquisitions in its consent proposals. On February 28, 1966, the consent proposal was rejected as inadequate. An amended complaint was then issued on April 1, 1966. The fact that respondent declined to include these acquisitions in its 1966 proposals but now desires to do so does not, by any stretch of the imagination, constitute the unusual or exceptional circumstances contemplated by Section 2.34.

It is quite true, of course, that an immediate settlement of this case would save time and money. There is nothing unusual

¹ *Memorandum in Support of Respondent's Proposed Agreement Containing Consent Order*, p.2 (February 13, 1969).

² *Id.* at p.6.

³ *Id.* at p.5.

⁴ See, *The Stanley Works*, Docket No. 8760, Order Denying Motion to Withdraw From Adjudication (February 24, 1969) p. 1062 herein.

or exceptional about this conclusion. Similar conclusions may be reached in almost any Commission case in which a formal complaint ultimately issues. If the Commission is to establish a policy of accepting routine assertions such as this respondent has made as sufficient reason to withdraw a case from adjudication, then the powerful incentives for early settlement which are provided by the precomplaint consent settlement rules would be completely vitiated.

For these reasons, and in the absence of exceptional and unusual circumstances and the requisite showing of good cause, respondent's request to withdraw the case from adjudication will be denied. Denial of this request does not, of course, preclude respondent from seeking the settlement of this case by regular adjudicatory process through the filing of an admission answer or submission of the case to the examiner on a stipulation of facts and an agreed-upon order. Accordingly,

It is ordered, That Lehigh Portland Cement Company's request to withdraw the proceeding from adjudication for the purpose of negotiating a settlement by the entry of a consent order, and for oral presentation on respondent's settlement proposal be, and it hereby is, denied.

Commissioner MacIntyre not participating.

Commissioner Elman does not concur. He believes that the Commission, before acting on respondent's request to withdraw this matter from adjudication for the purpose of negotiating a settlement by the entry of a consent order, should have obtained the recommendation of the hearing examiner.

KOPPERS COMPANY, INC.

Docket 8755. Order and Opinion, May 6, 1969

Order denying respondent's request to subpoena certain officers of the U.S. Pipe & Foundry Company.

OPINION OF THE COMMISSION

This matter is again before the Commission upon respondent's application dated March 7, 1969, for leave to appeal from the examiner's order denying respondent's motion to compel answers. The record shows that respondent originally filed its motion on April 10, 1968, for leave to take depositions of certain officials of U.S. Pipe and Foundry Company and for subpoenas *ad testificandum*. By order dated April 23, 1968, respondent's

motion was denied by the examiner because the persons whose depositions were sought were expected to testify at the hearings. By our order dated July 2, 1968, the Commission remanded the matter for further consideration because of its conclusion that the taking of depositions could not be denied merely because the persons whose depositions were sought were expected to testify when it was clear the depositions were sought for purposes of cross-examination.

Pursuant to this order, the examiner, on July 9, 1968, ordered the depositions taken and issued the subpoenas, with leave for U.S. Pipe to move for a protective order. Following motions from both parties, the examiner, on July 18, 1968, issued an order modifying the July 9th order in certain respects, including a paragraph limiting the depositions to those matters alleged in the complaint concerning which the witnesses were expected to testify. Inquiry into the details of the processes used or to be used and into privileged matters was also prohibited.

Respondent appealed this order and the Commission, on August 14, 1968, after expressly upholding the limiting provision above, remanded the matter to fashion a more flexible form of order pertaining to attorney-client discussions, which was given effect by the examiner's order dated September 17, 1968. Respondent's appeal from this order was denied November 1, 1968. Following further prehearing conferences concerning other discovery motions, including a subpoena *duces tecum* addressed to U.S. Pipe, the examiner, on December 4, 1968, fixed the date for commencement of the taking of depositions for December 11, 1968. No subpoenas *ad testificandum* were requested or issued following this order.

U.S. Pipe failed to make its return on the subpoena *duces tecum* on the specified date and this default was duly certified to the Commission. Respondent then sought to delay the commencement of the depositions, which motion was denied by the examiner on December 10, 1968. Respondent took no appeal from this order, but commenced the taking of depositions on December 11th.

In the meantime, the Commission entertained an appeal by U.S. Pipe from the examiner's denial of its motion to extend the time to respond to the subpoena and, for reasons stated in its order and opinion dated December 24, 1968, extended the time until five days following its decision on the appeal. The appeal was denied on January 15, 1969. U.S. Pipe again failed to respond and the examiner certified the default to the Commission.

Against this background, respondent, on January 15, 1969, filed its Motion To Compel Answers, in which it alleged that counsel for U.S. Pipe had frustrated the purposes of the depositions by taking the position that the appearance of the witnesses was purely voluntary, since no valid subpoena compelled their attendance, and by instructing the witnesses not to answer certain of the questions propounded. Respondent terminated the taking of depositions following the completion of the testimony of three of the six witnesses who had appeared.

In its opposition to this motion, U.S. Pipe defended its position that the witnesses had appeared voluntarily and not in response to a valid subpoena, its argument being that the subpoenas issued pursuant to the examiner's order dated July 9, 1968, were no longer valid in view of subsequent developments. Instead, U.S. Pipe argued that new subpoenas should have been obtained under the order dated September 17, 1968. Despite this alleged defect, U.S. Pipe argues that its officials appeared for voluntary interviews and did not refuse to answer any questions which were properly put to them under the terms of the examiner's order of September 17, 1968.

In the order which is the subject of this appeal the examiner stated he had read the depositions in their entirety and found they were conducted as interviews rather than as depositions because counsel for deponents properly insisted that the failure of respondent to serve new subpoenas constituted a fatal omission. He further determined that such interviews gave ample opportunity to respondent to secure information by way of discovery of what the persons present would testify to on behalf of complaint counsel and that the need for additional depositions or for compelling answers to the particular questions where answers were not given should not be ordered in light of the greatly expanded discovery granted in connection with the new subpoena duces tecum. He also concluded that an order for the taking of further depositions or further answers would provoke further delay without real benefit to respondent and might well constitute undue harassment to the witnesses in view of the numerous postponements and in view of the fact that counsel for respondent failed to take advantage of their previous availability for interview.

Respondent now seeks leave to appeal from this order and the Commission has concluded that its application to that end should be denied. Initially, it should be observed that the Commission is not inclined at this stage to undertake to resolve the controversy

surrounding the validity at the time of the depositions or interviews of the subpoenas issued pursuant to the examiner's July 9, 1968, order. Suffice it to say that even if it were conceded that new subpoenas should have been sought pursuant to the examiner's September 17th order, the Commission would not permit respondent to be deprived of discovery to which it was entitled simply because its counsel made a mistake as to the law. The substantive rights of the parties should not be made dependent upon procedural questions.

In the Commission's view, the problem goes deeper than that. Indeed, respondent itself appeared to be aware of that fact when in its January 15th Motion To Compel Answers it argued to the examiner that it is of no real significance whether the witnesses were appearing for a deposition voluntarily or under compulsion of a subpoena if they did in fact appear and answer questions. Respondent at that point elected to proceed and, in fact, did question three of the six witnesses at some length. Then respondent itself decided to terminate the proceedings because, in its view, the witnesses were not being as cooperative as respondent thought they should have been. The remaining three witnesses were not questioned at all even though respondent could not at that juncture have foretold with accuracy how much additional information could have been secured from them, thus obviating to some extent the need for further discovery.

Having then unilaterally chosen to break off the engagement, respondent would now have the Commission order the witnesses back into the field. This the Commission is unwilling to do. Further, the Commission experiences some difficulty in visualizing just what type of order respondent would have it issue. Even if we assume the witnesses were there under legal compulsion, it does not follow that they are thereby compelled to answer each and every question asked without regard to the scope of the depositions and questions of relevancy and confidentiality. These are questions which must be resolved by the examiner and he had found no dereliction here. The Commission is not inclined to substitute its judgment for his on a question such as this, when he had read the transcript in its entirety and concluded that the interviews gave respondent ample opportunity to secure information by way of discovery to which they were entitled.

The accompanying order will therefore deny respondent's application for leave to appeal. Further, the Commission is not inclined to devote a great deal of attention to the motion filed