

FOREMOST DAIRIES, INC.

Docket 7475. Order and Opinion, June 24, 1969

Order denying respondent's motion to quash the subpoena *duces tecum* of May 2, 1969.

OPINION OF THE COMMISSION

Foremost-McKesson, Inc. (formerly Foremost Dairies, Inc. and herein called Foremost) has filed a timely motion and memorandum in support thereof seeking "to quash and limit" the subpoena *duces tecum* served by the Commission on it on May 2, 1969, and requiring the production of various books and records.

The Commission's subpoena was served in connection with the Commission's investigation of possible violations by Foremost of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act and Section 5 of the Federal Trade Commission Act and also of the Order of the Federal Trade Commission dated May 23, 1963, entered in Docket 7475, the matter of *Foremost Dairies, Inc.* The subpoena requests documentary material with regard to Foremost's competitive activities, pricing practices, and its production and sales of fluid milk at four of its milk plants.¹

Foremost's challenge to the Commission's subpoena as urged in its motion is essentially that the Commission's subpoena is void and unconstitutional because according to Foremost three of the four milk plants as to which the information is sought are wholly engaged in intrastate commerce and hence beyond the Commission's jurisdiction and the scope of its order.² In support of its motion, Foremost filed affidavits from the managers of the plants and their suppliers, averring that all of the farms which supply milk to the plants' suppliers are within the respective states and all of the milk deliveries by the plants are within those states.

¹ The seven specifications of the subpoena as to which information is sought ask for documents relating to (1) competitive activity reports (Specification 1); (2) correspondence relating to production, sale and distribution of fluid milk (Specification 2); (3) discounts and rebates, discount and rebate schedules and cost justification studies (Specification 3); (4) respondent's annual dollar sales volume (Specification 6); and (5) annual sales volume of customers (Specification 7).

² The plants involved in the subpoena which are claimed to be wholly in intrastate commerce are Seattle, Shreveport and Phoenix plants. Information respecting its Mandan, North Dakota plant is not challenged since Foremost admits that it is engaged in interstate commerce.

Thus Foremost is resisting production of the substantive material requested until its jurisdictional contentions are ruled upon. This is plainly improper.

It is well established that an administrative agency is not required to determine the issue of jurisdiction before investigating the substantive issues involved in the alleged violations of law.³ As the Supreme Court stated in its decision in *Endicott Johnson Corp. v. Perkins*, 317 U.S. at 508-9:

This ruling [*i.e.*, the District Court's ruling that the Jurisdiction issue must be investigated and litigated first] would require the Secretary, [*i.e.*, the Secretary of Labor] in order to get evidence of violation, either to allege she had decided the issue of coverage before the hearing or to sever the issues for separate hearing and decision. The former would be of dubious propriety, and the latter of doubtful practicality. . . . On the admitted facts of the case, the District Court had no authority to control her procedure or to condition enforcement of her subpoenas upon her first reaching and announcing a decision on some of the issues in her administrative proceeding.

The plain intent and holding of these cases is that the Commission cannot be stopped at the threshold of an investigation by the raising of a jurisdictional issue.

But Foremost argues essentially that this rule cannot be applicable where the plain uncontested evidence demonstrates—as it believes its affidavits do in the instant case—that the milk which is processed at the three plants in question was purchased from local farmers and processed and sold within a single state (Respondent's Memorandum in Support of its Motion, page 4). Obviously even the jurisdictional issue raised by movant cannot be determined on the basis of affidavits alone. Foremost cannot rely on its own assertions to support its jurisdictional argument and at the same time seek to prevent the Commission from developing all of the relevant facts which will bear not only on the possible existence of violations but on the jurisdictional issue as well. The problem of determining the meaning of "commerce" as it applies not only to the order but to both Section 5 of the Federal Trade Commission Act and Section 2(a) of the Clayton Act does not rest on so simple a basis as determining where the

³ See, *e.g.*, *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 (see also opinion at 128 Fed. 2d 208); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (see also 147 F. 2d 658); *U.S. v. United Distillers Products Corp.*, 156 Fed. 2d 872; and *Cudahy Packing Co. v. Fleming*, 122 Fed. 2d 1005 reversed on other grounds at 62 S. Ct. 803; *FTC v. Crafts*, 355 U.S. 9 *rev'g* 244 F. 2d 882 (9th Cir. 1957); *NLRB v. Northern Trust Co.*, 148 F. 2d 24 (7th Cir. 1945); *Bland Lumber Co. v. NLRB*, 177 F. 2d 555 (5th Cir. 1949).

milk was originally purchased and then processed and sold.⁴ We have no way of knowing at this stage in the investigation what other indicia of interstate activity may exist with respect to the responsibility for pricing decisions, the purchase and sale of containers, whether the alleged intrastate sales involve interstate purchases taking formal delivery intrastate and the like.

We conclude therefore that for all of these reasons movant's challenge to the jurisdiction is certainly premature at this state in the investigation and must be denied. Accordingly respondent's motion to quash and limit the subpoena is denied.

Commissioner MacIntyre did not participate.

ORDER RULING ON RESPONDENT'S MOTION TO QUASH AND LIMIT SUBPOENA

Upon consideration of respondent's motion to quash and limit the subpoena *duces tecum* served by the Commission on it on May 2, 1969, and respondent's memorandum in support thereof, the Commission, for the reasons stated in the accompanying opinion, has determined that the motion to quash and limit should be denied. Accordingly,

It is ordered, That respondent's motion to quash and limit the subpoena be, and it hereby is, denied.

Commissioner MacIntyre not participating.

⁴ See, e.g., the Supreme Court's broad view of commerce which was reflected in its opinion in *Moore v. Mead's Fine Bread Co.* 348 U.S. 115, 119 (1954) when it stated in referring to "commerce" under the amended Clayton Act:

"We think that the practices in the present case are also included within the scope of the antitrust laws. We have here an interstate industry increasing its domain through outlawed competitive practices. [*i.e.*, price discrimination and sales below cost] The victim, to be sure, is only a local merchant; and *no interstate transactions are used to destroy him*. But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources which include not only respondent but also a group of interlocked companies engaged in the same line of business; and the prices on the interstate sales, both by respondent and by the other Mead companies, are kept high while the local prices are lowered. If this method of competition were approved, the pattern for growth of monopoly would be simple. As long as the price warfare was strictly intrastate, interstate business could grow and expand with impunity at the expense of local merchants * * * * The profits made in interstate activities would underwrite the losses of local price cutting campaigns." (Emphasis added)

A similar broad view of commerce was again taken more recently by Court in *Shreveport Macaroni Manufacturing Co. v. Federal Trade Commission*, 321 F. 2d 404 (5th Cir. 1963).