

ORDER DENYING PETITION FOR REOPENING

Respondent, by petition filed August 6, 1969, having requested the Commission to reopen the proceeding for the purpose of further modifying the cease and desist order issued herein on November 24, 1958, and subsequently modified by Commission order of October 28, 1968, and the Bureau of Deceptive Practices having filed an answer in opposition thereto; and

The Commission having considered said petition and, for the reasons stated in the accompanying opinion, having determined that respondent's request should be denied:

It is ordered, That respondent's petition for reopening be, and it hereby is, denied.

UNIVERSE CHEMICALS, INC., ET AL.

Docket 8752. Opinion and Order, Sept. 19, 1969

Order denying respondent's request for interlocutory appeal from hearing examiner's denial of respondent's motion for mistrial and remanding for further hearings.

ORDER AND OPINION DENYING REQUEST TO FILE
INTERLOCUTORY APPEAL

This matter is before the Commission upon respondents' motion, filed August 18, 1969, for permission to file an interlocutory appeal from the ruling of the hearing examiner, of August 11, 1969, denying their motion for mistrial, and complaint counsel's answer thereto, filed August 19, 1969.

Respondents moved for a mistrial on the ground that the Commission's order of April 2, 1969, directing a trial *de novo*, was violated because the proceeding allegedly was being conducted on the basis of the complaint amended in the prior hearing.

The hearing examiner denied respondents' motion for a mistrial because of his belief that the complaint had been amended in this proceeding without objection from the respondents (Tr. 555, 580-581). The examiner, however, had not been advised, and he was apparently not sure, of his exact ruling on the issue. He stated at one point: "My recollection is that I discussed this matter during the pre-hearing conference, and at that time I indicated that there was no need to amend the complaint further, it had already been amended. And I think in connection

with it, there was no disagreement at the time" (Tr. 556). The examiner also observed elsewhere as follows: "I want to state, I regard this as a matter which should have been brought up at the time I first mentioned the fact I was ruling on the basis of the amended complaint. There was no statement made at that time" (Tr. 568).

The transcript shows that on the occasion of the prehearing conference of June 23, 1969, the hearing examiner expressly dealt with and ruled on the issue of the amendment of the pleadings. We quote in part from the transcript as follows:

HEARING EXAMINER BENNETT: It was helpful to the Hearing Examiner to have the discussion.

Next, it was decided that there was no desire to amend the pleadings, but this amendment which has heretofore been made, of course, stands.

There was an order, and I take it there is no objection with respect to that?

MR. LAZARUS: No objection.

HEARING EXAMINER BENNETT: Because quite obviously I would probably issue an amendment, so there is no point in our concerning ourselves. (Tr. 531.)

It thus appears, though we make no finding or conclusion on the merits of the question, that the examiner did raise and dispose of the issue of the complaint amendment without any objection from respondents. In other words, at this point in the new proceeding, respondents' counsel, as we understand the transcript, accepted without objection the prior order which amended the complaint.

In view of this, we conclude that no issue is presented justifying an appeal to the Commission. Respondents' contentions, if any, which they may have with respect to the hearing examiner's prehearing ruling of June 23, 1969, should be presented to the examiner. No claim is made that the amendment of the complaint involved was an amendment beyond the authority of the hearing examiner to make. The amendment issue and the hearing examiner's handling of it suggest to us that the essential issues are of a procedural nature and within the examiner's general authority to pass on in the normal conduct of the trial.

The Commission's Rule 3.23 (a) states that permission to file an interlocutory appeal will not be granted except upon a showing "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." Respondents have raised no such

substantial question as would justify an appeal under this rule. Accordingly,

It is ordered, That respondents' request to file an interlocutory appeal be, and it hereby is, denied.

It is further ordered. That this matter be remanded to the hearing examiner for resumption of hearings at the earliest possible date.

THE PAPERCRAFT CORPORATION

Docket 8779. Order, Sept. 30, 1969

Order denying respondent's request to file interlocutory appeal seeking "applicant" material requested by respondent.

ORDER DENYING REQUEST FOR INTERLOCUTORY APPEAL

This matter is before the Commission upon respondent's request of September 4, 1969, for permission to file an interlocutory appeal from the examiner's ruling upon respondent's motion to produce pursuant to Section 3.23(a) of the Rules of Practice. On September 15, 1969, complaint counsel filed their opposition to this request.

The ruling from which an appeal is sought upholds complaint counsel's position that respondent is not entitled to the so-called "applicant" material which respondent requested in its motion to produce. The Commission's Rules of Practice state that

It has been and now is Commission policy not to publish or divulge the name of an applicant or complaining party, except as required by law. (Section 2.2(d).)

It is respondent's position that this is an instance in which "the production of such information is a requirement of the law as we know it." We are unable to agree, nor does respondent cite any authority for its position.

Respondent further contends that since a Commission proceeding is accusatory and punitive in nature, elementary principles of fairness and justice, as well as the right of cross-examination, require the production of this information. In addition, respondent seeks to demonstrate the need for this material by referring to the allegation in the complaint as to the size of the relevant market. Respondent contends that "no effort was made by the Commission to study the size of this market, and that to a very con-

siderable degree this crucial allegation in the complaint is based solely upon whatever information was contained in the applicant's submissions to the Commission."

We fail to see how these contentions are in any way connected with "applicant" material. With respect to the complaint allegation as to the size of the market, it is sufficient to point out that during the course of this proceeding complaint counsel will have to introduce evidence in support of this allegation. At that time respondent will have every opportunity to address itself to the validity of this allegation. As to respondent's contention that it needs this material for the purpose of preparing its defense, we note that complaint counsel have been ordered by the examiner to turn over to respondent a list of witnesses and copies of *all* documents they intend to introduce at least 30 days prior to the beginning of hearings. Knowledge of the identity of the applicant would neither add to nor detract from respondent's ability to prepare a knowledgeable and effective defense. The desirability of protecting the applicant in this instance far outweighs any reasons respondent has advanced for disclosure of this material.

Finally, respondent takes exception to the examiner's ruling on its request for production of "any written report, or any portion thereof, which reflects in a substantially verbatim manner any oral statement made by any third parties to a Commission attorney or employee * * *." In view of complaint counsel's assertion that they do not have any substantially verbatim reports, this issue is left to the examiner for his determination.

Section 3.23 of the Commission's Rules of Practice sets out the conditions for the filing of an interlocutory appeal.

* * * Permission will not be granted except upon a showing 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.

We conclude that respondent has not met these conditions. Accordingly,

It is ordered, That respondent's request of September 4, 1969 for permission to file an interlocutory appeal be, and it hereby is, denied.