

rules, we are nonetheless making it public in order to allay any conceivable doubts as to the regularity of the handling of this case by the Commission and its staff. This memorandum to the Commission dated December 1, 1969, and attachments are set out in the Appendix to this opinion.*

The Commission having now made available to respondents all that they are entitled to, and more, we believe that the public interest as well as that of respondents will be well served if this matter proceeds immediately to a hearing on the merits. And appropriate order will be issued.

Commissioner MacIntyre did not participate.

ORDER GRANTING MOTION TO QUASH SUBPOENAS DUCES TECUM

The hearing examiner on February 18 and March 4, 1970, having issued subpoenas to Donald K. Tenney, a member of the staff of the Federal Trade Commission, and to Joseph W. Shea, Secretary of the Federal Trade Commission, respectively; and

Complaint counsel, having, on March 16, 1970, filed an appeal from the hearing examiner's ruling of March 4, refusing to limit or quash said subpoenas; and

Respondent, having, on March 25, 1970, filed an answer to the appeal of complaint counsel; and

The Commission having considered the matter on the pleadings before it and having made public the documents which respondent is entitled to;

It is ordered, That the motion to quash the aforesaid subpoenas be, and it hereby is, granted.

It is further ordered, That respondent's motion for leave to present oral argument is denied.

Commissioner MacIntyre did not participate.

EASTERN DETECTIVE ACADEMY, INC., ET AL.

Docket 8793. Order and Opinion, May 13, 1970

Order denying respondent's motion to dismiss complaint and re-instating the previously vacated initial decision.

ORDER AND OPINION RULING ON CERTIFICATION OF APPLICATION TO DISMISS COMPLAINT

This matter is before the Commission upon the hearing examiner's certification on May 1, 1970, of respondents' application to dismiss the

*The Appendix is not reproduced. However, it is available for examination and copying at the principal office of the Commission in Washington, D.C.

complaint. The basis of the request for such dismissal appears to be respondents' claim that they have not received a fair hearing because of their lack of counsel due to their financial inability to pay for counsel and because of certain of the examiner's rulings relating to their request to file proposed findings and conclusions.

The Commission, by order issued April 6, 1970, vacated the initial decision herein and returned the matter to the hearing examiner with the direction, *inter alia*, that respondents be granted an additional opportunity to establish their need for the assignment of counsel and to submit their proposed findings and conclusions. The hearing examiner, on April 9, 1970, issued his order granting respondents until May 1, 1970, within which to apply for an assignment of counsel and, alternatively, if respondents elected not to request such assignment, to file their proposed findings and conclusions. The hearing examiner emphasized that respondents were not required to retain an accountant to prepare a financial statement and that if in fact no financial statement exists none need be filed. He stated, however, that respondents should attach their 1968 and 1969 Federal income tax returns to their application.

In their response filed April 27, 1970, respondents allege in part that they believe the time allowed them for the filing of proposed findings and conclusions was inadequate. They further assert that the examiner is biased against them, although the grounds for such assertion are not clear. On that the only specific detail mentioned is the claim that complaint counsel were allotted about 60 days within which to file their submissions whereas respondents were given only 17 days for filing the same documents.¹

Respondents, in their aforementioned answer to the hearing examiner's order, make no further claim regarding the assignment of counsel, the principal purpose for the return of the proceeding to the examiner, although they were given ample opportunity to do so. Instead, they have seemed to shift their argument and now mainly charge that under Hearing Examiner Lewis they cannot receive a fair hearing because of alleged bias. They state that they see "no point or benefit gained from proceeding further with Mr. John Lewis in any activity, written or verbal, * * *" ²

¹ The hearing examiner states in his certification that all parties, including respondents, were originally granted a full 60 days for the filing of proposed findings and conclusions. The time which the hearing examiner recently granted to the respondents, that is, from April 9, 1970, to May 1, 1970, was in addition to all other time allowed for such purpose. Although respondents suggest this additional time was inadequate, they do not indicate that their submissions would be filed if more time were granted and, in fact, have failed to ask for any further extension. Actually, because of their bias contention, it is clear that respondents do not intend to file more documents with the examiner, whatever time he might allow. The additional time granted seems to have been adequate in any event, since respondents stated in their earlier letter of February 10, 1970, that they needed only 10 days for the preparation of their proposed findings and conclusions.

² See section 3.42(g) of the Commission's Rules of Practice regarding procedure where a party deems the hearing examiner for any reason to be disqualified to preside.

So far as we have been able to determine, there is no record foundation whatever for respondents' charge of bias against the examiner. Nevertheless, especially since respondents are not represented by counsel, careful consideration of this allegation is justified.

It is fair to note, to begin with, that respondents, in their letter to the hearing examiner dated January 26, 1970, which was before the filing of the initial decision, stated that the hearing examiner was "as considerate as possible in my behalf to the limits of your function as Hearing Examiner." The record affirmatively shows that the hearing examiner, aware of respondents' lack of counsel, intervened on a number of occasions to assure that respondents would not be disadvantaged by the lack of counsel.³

If, in fact, respondents are asserting bias or prejudice because of the examiner's views as expressed in his initial decision filed February 20, 1970, such an assertion would not be adequate ground for disqualification of the examiner. *National Labor Relations Board v. Donnelly Garment Co.*, 330 U.S. 219, 236-237 (1947). Moreover, there is no indication in the record of personal bias or animosity which would disqualify the examiner or invalidate his findings and conclusions. *Cf. In the Matter of Carter Products Inc.*, 52 F.T.C. 314, 319 (1955).

This matter was returned to the examiner not because there had been any showing that the respondents were deprived of a fair hearing; rather, such action was taken to remove any possible doubt, in light of respondents' claims, concerning their opportunity for an assignment of counsel and for the filing of their findings and conclusions. The examiner's order of April 9, 1970, gave respondents this additional opportunity and they declined to take advantage of it.

³ "While respondent Earl Leven was not an attorney, he appeared to be a reasonably intelligent man, capable of representing himself and his corporation. The examiner nevertheless made every effort to assure that respondents would have a fair trial. The answer which they had filed failed to deny a number of the allegations of the complaint. Despite the fact the Rules of Practice provide that a failure to deny allegations of the complaint constitutes an admission thereof, and over objection of complaint counsel, the examiner permitted respondents to orally amend their answer at the pretrial conference. At the examiner's direction, respondents were supplied by complaint counsel with a list of Government witnesses and with copies of proposed documentary evidence. The examiner informed respondents of their right to cross-examine Government witnesses, to interview them in advance of hearing, and to call witnesses on their own behalf. Respondents did, in fact, cross-examine Government witnesses and call their own witnesses.

"During the course of the proceeding complaint counsel served upon respondents a request for admission of certain facts. Despite the fact that the examiner had advised respondent Leven, in a telephonic inquiry from the latter, that his failure to file a proper response would constitute an admission of such facts, respondents failed to file a timely response. Nevertheless, the examiner permitted respondent Leven, during the latter phase of the hearings, to file a written response to the request for admissions, and to explain such statement in his sworn testimony. This was done over objection of complaint counsel that they had been proceeding with their evidence on the assumption that their requested factual admissions had been theretofore admitted by respondents' failure to deny * * * " (p. 2, hearing examiner's response filed March 18, 1970.)

In summary, there is no evidence supporting respondents' charge that the hearing examiner was biased against them, or their claim that they have not received a full and fair hearing. We therefore reject their arguments in these respects and their request for the dismissal of the complaint.

The hearing examiner states in his certification that he could not recommend any disposition of this proceeding other than that made in his initial decision vacated by the Commission. We believe it would be a useless act to return the matter to the examiner solely for the formal refile of such decision, and therefore adopt the hearing examiner's suggestion that his former initial decision be reinstated. To specifically give the parties the full time permitted under the Commission's rules for the filing of appeals, notices or other briefs, if any, pursuant to Section 3.52 of the Commission's Rules of Practice, such initial decision will be considered as having been filed on the date of the completion of the service of this order upon the parties.⁴ Accordingly,

It is ordered, That respondents' motion to dismiss the complaint herein be, and it hereby is, denied.

It is further ordered, That the Commission order of April 6, 1970, insofar as it vacates the initial decision of the hearing examiner, filed February 20, 1970, be, and it hereby is, vacated and set aside, and that such initial decision be, and it hereby is, reinstated and considered as having been filed on the date of the completion of the service of this order.

NATIONAL TEA CO.

Docket 7453. Order and Opinion, June 1, 1970

Order denying respondent's request that Commission's order of March 4, 1966, be modified to allow acquisition of certain grocery stores without prior Commission approval.

OPINION OF THE COMMISSION

Respondents, National Tea Co., by petition filed April 3, 1970, requests modification of the final order issued in this matter on March 4,

⁴ It is noted that respondents, on April 2, 1970, prior to the Commission's order vacating the hearing examiner's initial decision, filed a brief on appeal from such initial decision. Respondents, in the circumstances, may rest on that appeal brief or they may file a new or an amended brief, if they so desire, subject to the provisions of section 3.52 of the Commission's rules. Such new or amended appeal brief, if any, must be filed within thirty (30) days after the completion of the service of this order. Complaint counsel may file their answering brief within sixty (60) days after the completion of the service of this order. A reply brief may be filed by respondents as provided for in section 3.52(d). If no other appeal brief is filed by respondents, their brief filed April 2, 1970, will be considered respondents' appeal from the initial decision.

1966 [69 F.T.C. 226]. That order prohibits respondent from acquiring the whole or any part of the stock or assets of any firm, partnership or corporation engaged in the retail sale of food products for a period of ten years without the prior approval of the Commission.

Respondent had previously, on March 26, 1969, requested an order modification that would have allowed it to make acquisitions without prior Commission approval if the merger or acquisition was of grocery food stores with limited dollar volume of sales, and market shares. We denied the motion because it had been found, in the litigation of this matter, that the retail food industry was highly concentrated and was becoming more so, due in large part to the acquisitions by National Tea. We concluded that "under these circumstances, even minor increases in concentration as a result of acquisitions by this respondent should be carefully examined."

Respondent now requests that we modify the order so that the Commission's prior approval would not be required when acquisitions are made:

of no more than two retail food stores where bankruptcy proceedings, debtor relief proceedings under the Bankruptcy Act, receivership proceedings, or out-of-court creditors' arrangements (including, but not limited to, assignments for the benefit of creditors) have been initiated with respect to the firm, partnership, or corporation which has hitherto been operating such stores; provided that in the event National Tea Co. already has a retail food store within one and one-half ($1\frac{1}{2}$) miles of either of the stores in question, National Tea Co. shall dispose of such older store within nine (9) months of the date of the acquisition of the applicable new store; provided, further that in no event shall National Tea Co. acquire the whole or any part of the assets of more than a total of ten (10) retail food stores in any calendar year during the remainder of the ten (10) year period of this Order; and provided, further, that in any event National Tea Co. shall report any such acquisition to the Federal Trade Commission within sixty (60) days of the effective date thereof.

Respondent contends that it is necessary to have the order modified in this fashion for the reason that if it is to successfully acquire firms through debtor proceedings, it is necessary to act quickly and to make an unconditional offer, and this is not possible when prior Commission approval is required.

With one exception, respondent has not attempted to show changed conditions of fact¹ or law, but, instead, contends that the acquisitions exempted by its proposed modification of the order cannot be anti-competitive. Respondent maintains that because the acquired firm will be in financial difficulty, and other firms may outbid it, increased

¹ Respondent, in its Reply, maintains that "the current down-turn of the economy and of the retail food segment of the economy" constitute a relevant factual change. We fail to see how the present state of the economy bears on respondent's requested order modification except in one negative respect. A depressed economy may mean an increase in the number of bankrupt food retailers with significant market shares. The requested modified order is thus particularly objectionable at the present time.

concentration will not be possible. We are not persuaded by this reasoning. The acquisition by respondent of a failing firm may, of course, increase concentration or prevent deconcentration in the relevant market. As an example, such an acquisition by respondent may preclude another firm from gaining entry by acquisition of the failing company, or, if such other firm is already in the market, from increasing its competitive strength there. Further, it may increase respondent's market share in an already concentrated market. We are not persuaded that the proviso in the requested modified order effectively neutralizes this possibility. Under the proviso, respondent would sell any existing store it owns if the acquired firm is located within 1½ miles. We doubt that respondent would be willing to dispose of an older store unless its acquisition of the new store would increase, or would likely increase, its existing market share.

The failing company defense alluded to by respondent does not advance its contention that the acquisitions described in the modified order will have no anticompetitive effect. Whether the defense immunizes an acquisition or its only to be a factor in determining whether the acquisition is in the public interest, it clearly does not rest upon the proposition that the acquisition of a bankrupt firm cannot adversely affect competition. *U.S. Steel Corp. v. Federal Trade Commission*, 426 F. 2d 592 (6th Cir. 1970). Moreover, under the "present narrow scope" of that defense, there must minimally be shown not only that there is a "grave probability of a business failure," but that there is "no other prospective purchaser" and that the prospect of the acquired company emerging from a receivership or bankruptcy proceeding as a reorganized competitive unit is "dim or non-existent." *Citizen Publishing Co. v. United States*, 394 U.S. 131, 137-139 (1969); *U.S. Steel Corp. v. Federal Trade Commission*, *supra*. The requested modified order, in addition to precluding an evaluation of any anticompetitive effects of the acquisitions, would not permit adequate examination of the failing-company-defense criteria as delineated by the courts.

Accordingly, respondent's request for modification of the order will be denied.

ORDER DENYING PETITION TO MODIFY FINAL ORDER

This matter having come before the Commission upon respondent's petition, filed April 3, 1970, requesting modification of the final order; and

The Commission having considered said petition, the answer of the Director, Bureau of Restraint of Trade, in opposition to said peti-