

to the hearing examiner in order that he may set a new date for compliance with the subpoenas and for such other proceedings as may be appropriate.

Commissioner MacIntyre not participating.

MISSOURI PORTLAND CEMENT COMPANY

Docket 8783. Order, Sept. 8, 1970

Order denying respondent's appeal from a hearing examiner's denial of request for subpoena and application for disclosure of Commission documents.

ORDER DENYING APPEAL RE EXAMINER'S RULING ON DISCLOSURE OF COMMISSION DOCUMENTS

This matter is before the Commission upon respondent's appeal, filed July 29, 1970, from the hearing examiner's order denying request for subpoena and application for disclosure of Commission documents. On August 5, 1970, complaint counsel filed their answer in opposition thereto. The documents sought by respondent form the basis for the Staff Report on Mergers and Vertical Integration in the Cement Industry, dated April 1966 (Cement Report). Two reasons are advanced by respondent: (1) the instant proceeding involves a Section 7 of the amended Clayton Act complaint challenging an acquisition in the cement industry by respondent, and the underlying material to the Cement Report is directly relevant to the proof or disproof of specific allegations in the present complaint as well as being relevant to potential defenses available to respondent; (2) the Cement Report has been relied upon in a previous Commission opinion in similar litigation upholding a challenge to a vertical acquisition in the cement industry.¹ These documents are sought pursuant to the provisions of Section 3.36(b) of the Rules of Practice and under the Freedom of Information Act. The appeal from the examiner's ruling denying respondent's request for disclosure of these documents is made pursuant to Section 3.36(d).

Respondent's appeal will be denied. The examiner is charged with primary responsibility of conducting adjudicative proceedings and absent unusual circumstances or a clear abuse of discretion his rulings on procedural issues will not be disturbed. No circumstances in the instant proceeding warrant our interference. We have carefully re-

¹ By way of clarification, the opinion referred to was issued in *Marquette Cement Mfg. Company*, Docket No. 8685, January 7, 1969 [75 F.T.C. 32]. In that opinion the Cement Report was "relied" upon only in a most general way for industrial background information.

viewed the authorities cited by respondent in support of its position but find them not controlling in this instance. It is also noted that to the extent respondent's request is grounded on the supposition that the Commission, in ultimately considering the merits of this matter, will reply upon the conclusions contained in the Cement Report it is premature. At this juncture there is nothing to indicate that the Commission will rely for any of its findings upon anything other than the evidence of record in this case. For the foregoing reasons respondent's appeal will be denied. Accordingly,

It is ordered, That respondent's appeal from the hearing examiner's order denying request for subpoena and application for disclosure of Commission documents be, and it hereby is, denied.

Commissioner Elman not participating.

ASH GROVE CEMENT CO.

Docket 8785. Order and Opinion, Sept. 18, 1970

Order denying respondent's appeal from hearing examiner's order granting in part and denying in part applications for third-party subpoenas *duces tecum*.

ORDER AND OPINION DENYING INTERLOCUTORY APPEAL

This matter is before the Commission upon respondent's appeal filed August 27, 1970, from the hearing examiner's order of August 19, 1970, granting in part and denying in part respondent's applications for third party subpoenas *duces tecum*. Respondent has appealed from such order to the extent that its applications were denied. Complaint counsel on September 3, 1970, filed an answer opposing the appeal.

The specifications rejected by the hearing examiner fall generally into four categories: Those calling for information relating to effects of mergers, if any, outside of the Kansas City area (rejected by the examiner for his stated reason that as to such information no proof was being offered by complaint counsel needful of a defense thereto); those requesting information dealing with certain construction products not specified in the complaint as constituting relevant lines of commerce (rejected for the examiner's reason in part that such information did not show that portland cement and ready-mix concrete were not separate relevant lines of commerce as alleged); those asking for certain statistical information submitted to the Bureau of Mines by various companies to whom subpoenas are directed (rejected for the examiner's reason in part that because, as introduced into evidence, complaint counsel's tabulations show market structure only in over-

all, general terms and contain no reference to acquisitions or their competitive impact on any geographic market area, and because the underlying information would only be partial); and finally those seeking statistical information relating to the year 1969 and parts of 1970 (rejected for the examiner's reason that specifications otherwise granted calling for data ending in 1968 were deemed amply sufficient for respondent's purposes as to any proposed presentation of post-acquisition data).

Respondent argues that the partial rejection "arbitrarily and erroneously limits the scope of Respondent's discovery" and claims that this prejudices its ability to present its defense.

Respondent has made no showing, as required by Section 3.55(b) of the Commission's Rules of Practice, that the ruling complained of involves substantial rights and will materially affect the final decision, and that a determination of its correctness before the conclusion of the hearing is essential to serve the interests of justice. Moreover, the disposing of applications for subpoenas in pretrial discovery proceedings is an area in which the hearing examiner has broad discretion. as we have stated many times including in an order herein,¹ the Commission will not disturb examiner's rulings in matters such as this involving the conduct of the hearing short of unusual circumstances or a clear abuse of discretion. Neither has been shown here. The record in fact shows that the hearing examiner considered the substance of respondent's requests and heard substantial arguments thereon in pretrial proceedings and his order suggests a careful weighing of the interests in the matter.

We stress that we are not deciding here on the correctness of his order one way or the other; only that he did not abuse his discretion and that the matter is not one which will be reviewed by the Commission at this stage.

It should be added that the partial rejection of respondent's applications is not necessarily a final disposition of the matter by the hearing examiner. Respondent is not foreclosed from again raising the issue at the close of complaint counsel's case-in-chief if at that time it believes in light of the evidence adduced that it has been denied needed discovery.

In the circumstances, we will deny respondent's appeal. Accordingly,

It is ordered, That respondent's appeal from the hearing examiner's order of August 19, 1970, granting in part and denying in part respondent's applications for third party subpoenas *duces tecum* be, and it hereby is, denied.

¹ Order Denying Appeal From Examiner's Order Re Subpoena *Duces Tecum* issued July 15, 1970 [76 F.T.C. 1076] in this proceeding.