

warranted by the facts and that these paragraphs, as modified by the agreed order, will not effectively prevent a resumption of the practices they purport to cover. The agreed order therefore is deemed unacceptable.

The stipulation of facts upon which the initial decision is based was entered into subject to the acceptance by the Commission of the order agreed upon by counsel.

Accordingly, *It is ordered*, That the initial decision of the hearing examiner be, and it hereby is, vacated and set aside.

It is further ordered, That this matter be, and it hereby is, remanded to the hearing examiner for further proceedings.

Commissioner Elman not participating.

CCM: ARTS & CRAFTS, INC., ET AL.

Docket 8817. Order and Opinion, Oct. 15, 1970

Order denying respondents' request for permission to file interlocutory appeal from orders of the hearing examiner striking a portion of respondents' answer to the complaint and denying their motion for discovery of certain Commission documents; and returning the case to hearing examiner for further action.

OPINION AND ORDER DENYING RESPONDENTS' REQUESTS FOR PERMISSION
TO APPEAL AND REMANDING TO THE EXAMINER

This matter is before the Commission upon two requests by the respondents both filed September 23, 1970, for permission to file interlocutory appeal. The first seeks to pursue an appeal from the hearing examiner's order dated September 14, 1970, striking a portion of respondents' answer to the complaint. The second is a request for permission to appeal from the examiner's order of September 14, 1970, denying in part their motion for the discovery of certain Commission documents. Complaint counsel on September 30, 1970, filed in separate documents their statements opposing the requests of the respondents.

The examiner's order striking a part of respondents' answer resulted from a motion by complaint counsel requesting the examiner to strike three different portions of such pleading on the grounds that "the cited portion of respondents' answer are immaterial and impertinent, and, even if true, do not establish a legal defense to the charges contained in the complaint." The hearing examiner after receiving respondents' answer to such motion, and without stating his reasons therefor, granted in part complaint counsels' motion and ordered that a portion of Paragraph 4 of the answer be stricken, which portion reads as follows:

* * * which Order has obviously not been the subject of any effective enforcement proceedings, and but for such dereliction the instant proceeding would not have been instituted.¹

The second request to appeal relates to the order of the hearing examiner denying respondents' motion for the discovery of documents to the extent that they had requested "all Commission memoranda, correspondence and other documents relating to complaints, investigations or enforcement proceedings against Ramonts pursuant to the 1961 Federal Trade Commission Order in Docket 8217." In denying such part of the request the examiner apparently was concurring in the argument of complaint counsel which states in part: "To explore the happenings in the Ramonts matter would obfuscate the question before the examiner and would be of no probative value." and "The steps the Commission took to enforce the order against Ramonts do not bear upon the essential allegations contained in the complaint or provide a defense thereto." (Answer filed September 8, 1970 to respondents' motion for discovery) The hearing examiner in his order denying the stated portion of respondents' request for discovery gave no reasons for his action.

Respondents in their request for permission to appeal consider these two actions by the examiner to be related. They also construe his actions as meaning that he will not permit them to make one of their claimed defenses which is

that their supplier of wood fibre materials was under a Cease and Desist Order prohibiting the sale of untreated materials of this nature and that the failure effectively to enforce such Order was a contributing cause to the allegedly flammable materials being in respondents' hands. (Request to appeal from denial of discovery, pg. 2)

The examiner has the power to strike portions of pleadings and he may strike a claimed defense for the reason, among others, that it is clear under any of the facts to be proved such would not constitute a valid defense to the complaint. Sections 3.42(c), 3.15 and 3.21(a)(2)² We are of the view, however, that amending or striking a portion of a pleading so as to deny a party a defense requires in fairness that this action be explicit and unequivocal. In this instance, the examiner has not said that he is denying to respondents one of their defenses, and it is uncertain whether or not he did so even though the parties speculate that this is the effect of his actions. He has said nothing on what the

¹ Of the three portions of the answer requested stricken by complaint counsel the examiner struck only a part of one. His selective action creates doubt whether such order, by itself, amounts to a rejection of respondents' claimed defense, since other assertions, possibly involving this defense including a reference to the Ramonts order were not stricken.

² Cf. 12(f) of the Federal Rules of Civil Procedure which provides that the court may, upon the motion of a party, order stricken any pleading containing "any insufficient defense or any redundant, immaterial, impertinent or scandalous matter."