

INTERLOCUTORY, VACATING, AND
MISCELLANEOUS ORDERS

ITT CONTINENTAL BAKING COMPANY

Docket 7880. Order, Aug. 1, 1972.

Order denying respondent's motion to set aside Show Cause Order and assigning case to hearing examiner to consider whether Commission's order of May 11, 1962 [60 F.T.C. 1183], should be modified and set aside.

ORDER DIRECTING HEARING FOR RECEIPT OF EVIDENCE

The Commission on April 27, 1972, issued a show cause order to the above-named corporation, as successor of Continental Baking Company, the original respondent to a final order issued in this matter on May 11, 1962 [60 F.T.C. 1183], in a proceeding brought under Section 7 of the Clayton Act. The show cause order directed the corporation to show cause why the proceeding should not be reopened for the purpose of modifying Section 3 of the order, which had prohibited respondent for a period of ten years from acquiring any concern engaged in the production and sale of bread and bread-type rolls without Commission approval, by extending the prohibition for an additional five years.

In the show cause order it was asserted, among other things, that industry-wide concentration in the production and sale of bread and bread-type rolls has increased since the issuance of the cease and desist order and that ITT Continental Baking Company (hereafter referred to as respondent) contributed to the increased concentration by reason of various asset acquisitions despite the Commission's order and citing the fact that a United States District Court found respondent's predecessor to have violated the order on two occasions.

Respondent has filed an "Answer and Motion to Set Aside Show Cause Order" and counsel supporting the Show Cause Order have filed a response to said Answer.

In its Answer, respondent argues that since the order of May 11, 1962, was a consent order, the Commission lacks authority to alter it without the consent of the other party. It also argues that since Section 3 of the order expired by its own terms on May 11, 1972, it cannot be reopened and extended.

We cannot agree. Section 11(b) of the Clayton Act authorizes the Commission to reopen and alter, modify or set aside in whole or in part an order issued under that Act whenever in the opinion of the Commission "conditions of fact or law have so changed as to require

such action or if the public interest shall so require." The parties' Agreement Containing the Consent Order in this matter states that the order entered "may be altered, modified or set aside in the manner provided for other orders." We do not believe that it can be seriously contested that the Commission has authority to reopen and extend a consent order where a proper showing of need thereof is made, just as a court may so extend the terms of an antitrust consent decree where good cause is shown by the Government. See *Chrysler Corp. v. United States*, 316 U.S. 556 (1942).

On the other hand, we cannot agree with Commission counsel's argument that "a violation of the final order prohibiting acquisitions is, in and of itself, * * * a sufficient basis for modification of the order." The proposed modification of the order in this matter, if adopted, is not to serve as a penalty but as a remedial measure to ensure that the purpose of the original order has been effectuated. In this connection, respondent has controverted a number of statements of fact asserted in the Show Cause Order in support of the need for, and public interest in, reopening and extending Section 3 of the order. The Commission is of the opinion that the public interest will be served by referring this matter to a hearing examiner, as provided in Section 3.72(b)(3) of its Rules of Practice, for evidentiary hearings on this issue. Accordingly,

It is ordered, That respondent's motion to set aside the Show Cause Order at this time, or in the alternative for a further hearing on matters of law set forth in its Answer, be and it hereby is, denied.

It is further ordered, That this matter be assigned to a hearing examiner, pursuant to Section 3.72(b)(3) of the Commission's Rules of Practice, for the purpose of receiving evidence in support of and in opposition to the question of whether the public interest requires that this proceeding be reopened and the Commission's order of May 11, 1962, be altered, modified, or set aside in accordance with the Commission's Order to Show Cause herein dated April 27, 1972.

Commissioner MacIntyre concurring in the result.

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Order

FOOD FAIR STORES, INC., ET AL. Docket 8786
H. C. BOHACK CO., INC., ET AL. Docket 8787
JEWEL COMPANIES, INC., ET AL. Docket 8788
BORMAN FOOD STORES, INC., ET AL. Docket 8789
FIRST NATIONAL STORES, INC., ET AL. Docket 8790
Order, August 1, 1972.
 Order vacating initial decisions in these cases and remanding matters to the hearing examiners for further proceedings.

ORDER VACATING INITIAL DECISIONS

All respondents, except P & R Brokerage Co. and Frank V. Condello, have filed with the Commission "motions" seeking to vacate and set aside the initial decisions issued by the hearing examiners in these matters.

The Commission's Rules of Practice do not provide for a motion to vacate an initial decision. Therefore, respondents' requests, in the form presented, have no procedural standing and are improper. The Commission, however, has decided to treat respondents' "motions" as appeals from the initial decisions, and its ruling will be on that basis. For this reason, it is unnecessary to rule on the pending requests by respondents in *Food Fair Stores, Inc. et al.* and *H. C. Bohack Co., Inc., et al.* for extensions of time to file appeal briefs.

The Commission is of the opinion that in the matters of *Jewel Companies, Inc., et al.*, *Borman Food Stores, Inc., et al.*, and *First National Food Stores, Inc., et al.* the hearing examiner's ruling that respondents are in default is proper, and the hearing examiner is commended for his action. The Commission believes that a very close question exists as to whether respondents were in default in the matters of *Food Fair Stores, Inc., et al.* and *H. C. Bohack Co., Inc., et al.*

However, these matters are not purely private controversies and there are involved serious considerations of public interest. Therefore, a full exploration of the factual background and questioned practices is desirable properly to protect the public interest. More importantly, although we discount the argument made by the three respondents based upon the alleged ambiguity in our rules, it is true that our rules are not categorically specific in the respect