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November 9, 1972, respondents filed an additional request for a hearing and oral argument on their motion to dismiss. The Commission, recognizing that complaint counsel's application for review as untimely, considered the administrative law judge's order of September 29, 1972, upon its own motion, pursuant to Section 3.23(a) of the Commission's Rules of Practice. The Commission has determined that respondents' motion to dismiss the application for review and the related motions filed November 2, 1972, and November 9, 1972, have been rendered moot by the Commission's review of said order upon its own motion, and it is therefore unnecessary to consider said motions. Accordingly,

It is ordered, That respondents' motion to dismiss, filed October 25, 1972, be, and it hereby is, rejected.

It is further ordered, That respondents' request, filed November 2, 1972, that its motion of October 25, 1972, be considered prior to any consideration of complaint counsel's application for review, be, and it hereby is, rejected.

It is further ordered, That respondents' request, filed November 9, 1972, for a hearing and oral argument on its motion of October 25, 1972, be, and it hereby is, rejected. Commissioner Dennison not participating.

JAMES CARPETS, INC., ET AL.

Docket 8876. Order and opinion, Nov. 29, 1972.

Order and opinion granting complaint counsel's motion to amend complaint to include a charge that respondents have violated Sec. 8(b) of the Flammable Fabrics Act in that they have furnished false guaranties on products covered by the Act.

OPINION OF THE COMMISSION

This matter is before the Commission pursuant to the certification of September 26, 1972, by the administrative law judge of complaint counsel's motion of August 21, 1972, to amend the administrative complaint. The complaint charges respondents with violations of the Flammable Fabrics Act, 15 U.S.C. § 1191 *et seq.*, in that respondents have been engaged in the manufacturing for sale, sale and offering for sale, in commerce, and the introduction, delivery for introduction, and transportation, in commerce, of products which fail to conform to an applicable standard or regulation issued or amended under the provisions of the Flammable Fabrics Act.

Complaint counsel's motion of August 21, 1972, requests the amend-

ment of the administrative complaint to include a charge to the effect that respondents have violated Section 8(b) of the Flammable Fabrics Act, 15 U.S.C. § 1197, in that respondents have furnished false guaranties with respect to products covered by the Act. The proposed amendment to the administrative complaints provides as follows:

PARAGRAPH THREE: Respondents in violation of Section 8(b) of the Flammable Fabrics Act, as amended, have furnished false guaranties to the effect that reasonable and representative tests made in accordance with standards issued or amended under Section 4 of the Flammable Fabrics Act, as amended, show that products covered by such [guaranties] conform to an applicable flammability standard issued or amended under the provisions of Section 4 of the Act. There was reason for respondents to believe the products falsely guaranteed might be introduced, sold or transported in commerce.

Among the products falsely guaranteed were carpets subject to the Standard for Surface Flammability of Carpets and Rugs—
DOCF 1-70.

On September 1, 1972, respondents opposed the motion to amend the administrative complaint by arguing that "such an amendment would not facilitate determination of the merits of this controversy, and [that] the proposed amendment is not reasonably within the scope of the original complaint." Respondents argue, in essence, that the administrative law judge may allow an amendment to the administrative complaint only in limited instances in which the amendment does not raise new or different matters or practices. Citing Section 3.15 of the Commission's Rules of Practice, 16 C.F.R. § 3.15,¹ respondents suggest that complaint counsel must demonstrate that the allegations in the requested amendment to the complaint are "reasonably within the scope of the original complaint."

The administrative law judge concluded in his certification of September 26, 1972, that it did "not appear that the allegations of this new paragraph proposed as an amendment to the original complaint are reasonably within the scope of the original complaint." The judge therefore certified the motion to amend to the Commission in accord-

¹ Section 3.15 of the Commission's Rules of Practice provides, in pertinent part, as follows:

§ 3.15 *Amendments and supplemental pleadings.*—(a) *Amendments.*—(1) *By leave.*—If and whenever determination of a controversy on the merits will be facilitated thereby, the hearing examiner may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to pleadings or notice of hearing: *Provided, however,* That a motion for amendment of a complaint or notice may be allowed by the hearing examiner only if the amendment is reasonably within the scope of the original complaint or notice. Motions for other amendments of complaints or notices shall be certified to the Commission. [16 C.F.R. § 3.15.]

ance with Section 3.15 of the Rules of Practice. We find that the action of the judge in this regard was proper in all respects.²

It is, of course, well-established that the Commission may grant a motion to amend an administrative complaint. *Forster Manufacturing Co., Inc. v. Federal Trade Commission*, 335 F. 2d 47 (1st Cir. 1964). Further, the Commission itself is not restricted to granting such a motion "only if the amendment is reasonably within the scope of the original complaint or notice." In *Exquisite Form Brassiere, Inc. v. Federal Trade Commission*, 301 F. 2d 499 (D.C. Cir. 1961), the court affirmed the amending of the complaint to include a second count after evidence adduced at trial formed a basis for such count. The court found no error since ample time had been given for answer and preparation of a defense, and concluded that "[a]mendments to conform pleadings to proof are commonplace in judicial proceedings, and the action here, in an adjudicatory, or quasi-judicial, proceeding, was of that general character." *Id.* at 501. Indeed, the *James Carpets* matter before the Commission is *a fortiori* to *Exquisite Form Brassiere* in that the amendment in the latter case was allowed *after* complaint counsel had completed his case-in-chief with regard to the original charge in the complaint. Conversely, the *James Carpets* matter is at the pre-trial stage.

In *Vacu-Matic Carburetor Co. v. Federal Trade Commission*, 157 F. 2d 711 (7th Cir. 1946), the court rejected the contention that petitioner therein had been denied a fair hearing due to the amendment of the administrative complaint by the Commission after considerable testimony had been taken under the original complaint. The court affirmed the action of the Commission notwithstanding the fact "that the Commission by its amended complaint changed its theory and confronted petitioner with a different issue from that contained in the original complaint." *Id.* at 713. Thus, respondents' argument to the effect that the amendment to the complaint "would add [to the original complaint] an entirely new and unrelated count"³ is unpersuasive at the Commission level when considered in light of *Vacu-Matic Carburetor* as well as *Exquisite Form Brassiere*.

² Respondents have failed to perceive the genuine issue before the Commission with regard to complaint counsel's motion to amend the complaint. Respondents rely on *Standard Camera Corp.*, 63 F.T.C. 1238 (1963), *Capitol Records Distrib. Corp.*, 58 F.T.C. 1170 (1961), and *Food Fair Stores, Inc.*, 53 F.T.C. 1274 (1957), to demonstrate the limitation on the administrative law judge's authority to allow amendment of the administrative complaint. However, since the judge did not allow such amendment, but rather certified the matter to the Commission pursuant to Section 3.15 of the Rules of Practice, 16 C.F.R. § 3.15, the judge's authority to allow amendment of the complaint is not in question here, and the above-cited precedents are, accordingly, inapposite.

³ See Rejoinder to Reply to Opposition to Amend Complaint, at 3, filed by respondents on September 21, 1972.

Respondents here will be adequately apprised of the charges laid against them and will not be surprised by the amendment to the administrative complaint. It does not appear to us that the amending of the complaint at this stage of the proceeding will deprive respondents of the opportunity to answer the charges therein or to present a defense thereto. Thus, the requirements of a fair hearing will be fully satisfied. See *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 349-50 (1938); *Colgate-Palmolive Co. v. Federal Trade Commission*, 310 F.2d 89, 91-92 (1st Cir. 1962). We note that the extension to respondents of these procedural safeguards is facilitated by the fact that the *James Carpets* matter is, as previously noted, presently at the pre-trial stage.

Accordingly, we grant complaint counsel's motion to amend the complaint filed on August 21, 1972. Our order granting said motion is issuing herewith.

ORDER GRANTING MOTION TO AMEND COMPLAINT

This matter is before the Commission pursuant to the certification of September 26, 1972, by the administrative law judge of complaint counsel's motion of August 21, 1972, to amend the administrative complaint. The complaint charges respondents with violations of the Flammable Fabrics Act, 15 U.S.C. § 1191 *et seq.*, in that respondents have been engaged in the manufacturing for sale, sale and offering for sale, in commerce, and the introduction, delivery for introduction, and transportation, in commerce, of products which fail to conform to an applicable standard or regulation issued or amended under the provisions of the Flammable Fabrics Act.

Complaint counsel's motion of August 21, 1972, requests the amendment of the administrative complaint to include a charge to the effect that respondents have violated Section 8(b) of the Flammable Fabrics Act, 15 U.S.C. § 1197, in that respondents have furnished false guaranties with respect to products covered by the Act.

The Commission has determined that the amendment to the administrative complaint sought by complaint counsel would be appropriate for the reasons stated in the accompanying opinion. Accordingly,

It is ordered, That complaint counsel's motion to amend the administrative complaint in the above-styled matter be, and it hereby is, granted.

It is further ordered, That the administrative complaint be amended by redesignating Paragraph Three as Paragraph Four, and by adding to the complaint a new Paragraph Three to read as follows:

PARAGRAPH THREE: Respondents in violation of Section

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8(b) of the Flammable Fabrics Act, as amended, have furnished false guaranties to the effect that reasonable and representative tests made in accordance with standards issued or amended under Section 4 of the Flammable Fabrics Act, as amended, show that products covered by such guaranties conform to an applicable flammability standard issued or amended under the provisions of Section 4 of the Act. There was reason for respondents to believe the products falsely guaranteed might be introduced, sold or transported in commerce.

Among the products falsely guaranteed were carpets subject to the Standard for Surface Flammability of Carpets and Rugs—DOC FF 1-70.

Commissioner MacIntyre not concurring.

PEPSICO, INC.

Docket 8903. Order, Dec. 1, 1972.

Order withdrawing case from adjudication, until further action as the Commission may deem appropriate, for purpose of negotiating a consent settlement.

SEPARATE DISSENTING STATEMENT

By JONES, *Commissioner*:

I dissent from the Commission's decision to withdraw this matter from adjudication for the purpose of considering a proposed settlement offer submitted to us by respondent.

I dissent because the Commission's action was made *ex parte* without permitting complaint counsel to file a response to the respondent's application. In effect, respondent's request is a motion presented to us under Rule 2.34(d). Under the usual practice of the Commission, withdrawals of matters from adjudication are never acted upon until the Commission has heard from the other party to the law suit—in this case complaint counsel—on the record as to their position with respect to the request.

The views of both parties in an adjudicatory proceeding on the issues raised in a motion presented by one of them is a fundamental prerequisite for rational decision making.

Here the issue presented by respondent's request is whether under our rules as interpreted by our practice, respondent's settlement offer presented a sufficient basis for settlement to constitute the exceptional and unusual circumstances required by the rule in order to support a request to withdraw a matter from adjudication. Nothing under our rules prevents the parties from discussing settlement of a case. Indeed,

the recently announced Georgia-Pacific settlement proffer was negotiated entirely while the matter was in adjudication. The only reason, therefore, to withdraw a matter from adjudication is when the settlement proposal presented to the Commission for consideration is either sufficiently close to the notice order or has been recommended by both parties to warrant the Commission's consideration of it. There is no suggestion that the PepsiCo proposal is in that status. Indeed the Commission expressly disavows taking this view of the proposal.

So far as I am aware, there were no special time pressures which compelled the Commission to act with such haste and deprive complaint counsel of its right to respond to respondent's motion and to deprive itself of the views of the other party to this case as to whether there was any basis or compelling reason to take this matter out of adjudication at this time. I am, therefore, compelled to dissent from the Commission's action in directing such withdrawal.

ORDER WITHDRAWING MATTER FROM ADJUDICATION

The Commission has before it a letter, dated November 22, 1972, from the attorneys for PepsiCo, Inc., requesting either (1) that this matter be withdrawn from adjudication pursuant to Section 2.34(d) of the Commission's Rules of Practice for the purpose of negotiating a settlement by the entry of a consent order or (2) that the Commission accept a hold separate proposal by PepsiCo pending final disposition of the matter.

Prior to formal issuance of the complaint on November 15, 1972, PepsiCo was not given the usual notice pursuant to Section 2.31 of the Commission's rules of the Commission's intention to issue the complaint and was denied the opportunity, therefore, to dispose of the proceeding through the negotiation under Part II of a consent order. At that point, the time, the nature of the proceeding and the public interest, a majority of the Commission decided, warranted the immediate issuance of the complaint under Part III of the Commission's Rules of Practice in order to permit the Commission to seek an order under the All Writs Act to protect the existence of the Rheingold Corp. as an independent competitor and to prohibit PepsiCo from interfering with the business activity of Rheingold.

Immediately after the Part III complaint was issued, however, a proposal was made to the Commission by PepsiCo that the company would take no steps to assume or exercise actual control of Rheingold or to make any change in the corporate structure, board of directors or management of Rheingold before December 4, 1972; PepsiCo further proposed that after December 4, 1972, it would give the Commission