
IN THE MATTER OF
LITTON INDUSTRIES, INC.

Docket 8778. Order, May 16, 1973.

Order reopening the proceeding solely for the purpose of re-examining the question of relief in its entirety; remanding the proceeding to an administrative law judge to conduct hearings on the question of relief; and denying respondent's request for oral argument on the petition for reconsideration. Commissioner Jones dissenting with statement.

DISSENTING STATEMENT

BY JONES; *Commissioner:*

Today, by its decision to remand the issue of relief to the administrative law judge, the Commission¹ has in effect reversed itself on its decision and order in the above-captioned case which held that Litton's acquisition of Triumph-Adler had violated Section 7 of the Clayton Act and ordered Litton to divest itself of Triumph-Adler. The Commission has taken this action in response to Litton's petition to the Commission for Reconsideration of the Order of Divestiture or Reopening of the Proceedings.

Under the Commission's Rules of Practice, Petition for Reconsideration filed under Rule 3.55 are required to be limited "to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission."²

¹ The Commission's decision was participated in by Commissioners Jones, Dixon and Dennison with Commissioner MacIntyre abstaining. Commissioner MacIntyre is participating in the current Commission action and is concurring with it.

² Petition for reopening are covered by Rule 3.72(b)(2) which may be granted upon issuance by the Commission of an order to show cause if the Commission determines that changed conditions of fact or law or the public interest requires such reopening.

Litton's arguments for reconsideration or reopening proceed on the following grounds:

1. The opinion was premised on an erroneous view of the law that divestiture was mandatory.

2. The Commission in ordering divestiture failed to consider substantial evidence in the record to the effect that IBM and SCM are growing stronger, that all other competitors in the market as a result of this competition, devaluation and IBM's single element typewriter, have been and are continuing to suffer, that Royal cannot survive without Triumph-Adler and that divestiture will further worsen the competitive situation (Brief pp. 19-31).

3. A variety of arguments to the effect that the opinion placed too much emphasis on the structure rather than the history of the typewriter industry; that incorrect measurements were made of the markets and industry concentration (Commissioner Dennison's opinion is cited as to these points); that analysis of the office typewriter market and specifically the office manual market is incorrect; that Litton's economic experts were ignored; and that divestiture will have adverse effects on the industry and typewriter dealers.

None of these arguments raise new issues of law or fact and each was in fact considered by the Commission before reaching its decision in this case. Nowhere in the opinion, for example, is there any suggestion that divestiture is a mandatory relief provision. All of the circumstances surrounding the market position of IBM and SCM were thoroughly argued and considered in both the Initial Decision and the Commission's Opinion and add absolutely nothing new for the Commission to consider. All of the other Litton arguments in this petition proceed again on Litton's view of the market which was rejected by the Commission in its opinion. All were fully discussed in this opinion and therefore in no way constitute grounds for reconsideration or reopening.

Litton attached to its petition and brief various affidavits of Litton's executive board of directors which add little to the record with two exceptions. The submitted material indicates that Xerox is apparently on the verge of entering the automatic typewriter market having purchased, in 1971, the automatic typewriter division of ITEL Corporation (*See* Berry affidavit, pp. 7-8; Spelhaug affidavit pp. 2-3). It also indicates that the worsening monetary crises has allegedly made foreign

typewriters less price competitive with IBM than before. (Mills affidavit p. 2). I see nothing in either of these "facts" which affect the Commission's order to divest Triumph-Adler. In fact, it could be argued that IBM's market position will now be challenged by Xerox thus lessening the need for Royal's survival which Litton contends is needed to challenge IBM.

I can find nothing in Litton's petition to reconsider which was not already considered by the Commission. Nor can I find anything in its petition demonstrating either that Triumph-Adler cannot be viably divested nor that some relief short of divestiture offers any possibility of redressing the competitive imbalance and restraint which the Commission found was the consequence of the merger and the basis for its illegality under Section 7. For this reason, I do not believe that the requisite showing has been made out under our rules to warrant the remand now ordered by the Commission.

ORDER REOPENING PROCEEDING TO RECONSIDER
THE ISSUE OF RELIEF

This matter is before the Commission upon respondent's Petition for Reconsideration of the Order of Divestiture or Reopening of Proceedings, filed with the Secretary of the Commission on April 9, 1973.

Upon consideration of all the papers before it, the Commission has determined that the above-captioned proceeding should be reopened solely for further consideration of the question of relief. Accordingly,

It is ordered, That the above-captioned proceeding be, and it hereby is, reopened solely for the purpose of re-examining the question of relief in its entirety.

It is further ordered, That the above-captioned proceeding be, and it hereby is, remanded to an administrative law judge to conduct hearings on the question of relief. In conducting this inquiry, the administrative law judge shall examine the question of appropriate relief in its entirety, and upon completion of the hearings, he shall furnish the Commission with his findings on the issue of relief and his recommendations.

It is further ordered, That respondent's request for oral argument before the Commission on the instant petition be, and it hereby is, denied.

Chairman Engman not participating, and Commissioner Jones voting in the negative.

Order

IN THE MATTER OF
AMERICAN HOME PRODUCTS CORPORATION, ET AL.*Docket 8918. Order, May 16, 1973.*

Order denying respondents' (1) petition for extraordinary review of the administrative law judge's orders denying respondents' motion for a more definite statement and refusing to make a determination allowing an immediate appeal, and (2) motion for stay of respondents' time to answer the complaint; and granting respondents' motion for stay of time to answer the complaint up to and including five days after service of the order.

ORDER DENYING PETITION FOR EXTRAORDINARY REVIEW,
APPLICATION FOR INTERLOCUTORY REVIEW AND RULING UPON
MOTION FOR STAY

On March 29, 1973, respondents filed with the administrative law judge a motion for a more definite statement of the allegations contained in the administrative complaint. By order filed on April 12, 1973, the administrative law judge denied respondents' motion. On April 18, 1973, respondents filed a request with the administrative law judge for a determination allowing an immediate appeal from his order of April 12, 1973, and for a stay of the proceedings. The administrative law judge denied both the application for a determination allowing an immediate appeal and the application for a stay by an order filed on April 20, 1973.

On April 25, 1973, respondents filed with the Commission (1) a petition for extraordinary review by the Commission, of the administrative law judge's orders denying respondents' motion for a more definite statement and refusing to make a determination allowing an immediate appeal; (2) an application for interlocutory review of the administrative law judge's order denying respondents' motion for a more definite statement; and (3) a motion for stay of respondents' time to answer the complaint. On May 2, 1973, complaint counsel filed a reply to the respondents' petition.

Upon consideration of the foregoing documents filed by respondents, the reply filed by complaint counsel and upon consideration of the administrative law judge's order filed on April 12, 1973, the Commission has determined that respondents have not made a sufficient showing for the granting of an interlocutory review or appeal under either Section 3.23(a) or Section 3.23(b) of the Commission's Rules of Practice. Accordingly,