
IN THE MATTER OF
WINN-DIXIE STORES, INC.

Docket C-1110. Order and Opinion, May 30, 1973.

Order and opinion denying respondent's petition for reopening the proceeding and modification of the order to cease and desist. Dissenting statement by Commissioner Dennison.

DISSENTING STATEMENT

BY DENNISON, *Commissioner*:

I am constrained to dissent. On September 14, 1966, the Commission entered into this consent agreement and order which contained a most favored nation clause. Specifically, the provision provided that should the Commission issue an order "in any proceeding involving mergers or acquisitions by a grocery store chain" against respondent's competitors which is less restrictive, the Commission shall reopen and modify respondent's order in conformity therewith.

The respondent has persuasively argued that the order against the Kroger Company (Docket No. C-2067) is less restrictive than the order against it. This point notwithstanding, the majority would have us look behind the plain reading of the order to determine whether the *Winn-Dixie* and *Kroger* factual situations were substantially similar before invoking the most favored nation provision. Why it is necessary to create a "principle of conformity" and to look at the competitive circumstances giving rise to the respective orders, is unclear. The words employed in the provision are neither unclear nor ambiguous. The clause itself, taken as a whole, is clear in its meaning and its import is patent. Most favored nation provisions have always been strictly construed. *Kolopret v. Oregon*, 266 U.S. 187 (1961); *Lukrich v. Department of Labor and Industry*, 176 Wash. 221, 29 P.2d 288 (1934). However, such provisions have

always been construed from the four corners of the agreement. See, *Sanpovincenzo v. Eggan*, 284 U.S. 30 (1931); *Mentula v. State Land Board*, 244 Or. 299, 419 P.2d 581.

In the opinion denying modification, great significance is given to the fact that the respective orders were designed in response to entirely different circumstances. *Winn-Dixie* involved a geographic market extension-type merger, while *Kroger* was a straight horizontal acquisition. While this is certainly true, I question the relevancy of this fact and how it would change the outcome dictated by the original consent order.¹ A most favored nation provision requires the Commission to modify the Winn-Dixie order where there is a less restrictive order issued in any proceeding involving mergers or acquisitions by a grocery store chain. The provision is not limited to geographic market extension-type mergers nor did the Commission in any way reserve discretion in the matter.

Consent orders, agreed to by both the respondent and the Commission, are binding decrees. If the respondent is to be bound, usually at its detriment, then the Commission must likewise be bound; sometimes to its detriment. If the Commission wanted to limit the most favored nation treatment to only geographic market extension cases, it should have insisted upon this narrower language in the consent negotiations. It did not and must now live with the broader language. Therefore, I dissent.

OPINION OF THE COMMISSION

On May 3, 1972, Winn-Dixie Stores, Inc. ("Winn-Dixie"), filed a petition in accordance with Section 3.72(b)(2) of the Commission's Rules of Practice¹ requesting modification of a consent order and agreement of September 14, 1966, as subsequently modified by the Commission on June 24, 1968. By minute of October 31, 1972, the matter was set down for oral argument which was heard on March 28, 1973. Having considered all the arguments presented orally and in supporting memoranda the Commission has determined that the petition be denied.

The basis of Winn-Dixie's request is a provision in the consent agreement which, in pertinent part, provides:

¹ Apparently this distinction failed to impress the Commission at the time of the first modification of the *Winn-Dixie* order to conform to the *Grand Union* order. Docket C-1350, 73 F.T.C. 1050 (1968) The *Grand Union* case involved a *horizontal acquisition*.

¹ Rule 3.72 is a successor to Rule 3.28.

[I]n the event that the Federal Trade Commission issues any Order or Rule which is less restrictive than the provisions of this Order, in any proceeding involving mergers or acquisitions by a grocery store chain, then the Commission shall, upon the application of respondent, pursuant to Rule 3.28 of the Commission's Rules of Practice, reopen this proceeding in order to make whatever revisions, if any, are necessary to bring the restrictions imposed upon respondent herein into conformity with those imposed upon its competitors.

It is Winn-Dixie's contention that a final Commission consent order issued on October 26, 1971 against the Kroger Co. ("Kroger") and Federated Department Stores, Inc., is "less restrictive" than its own and that modifications are "necessary to bring the restrictions imposed upon respondent herein into those imposed upon its competitors." The determination of whether the principle of "conformity" requires any modification of the *Winn-Dixie* order rests, of necessity, upon a comparison of the factual circumstances.

WINN-DIXIE COMPLAINT AND ORDER

The activities giving rise to the original complaint in this matter were Winn-Dixie's acquisition of the 35-store Hill Grocery chain in 1962 which was operating in northern and central Alabama and Winn-Dixie's subsequent acquisition in 1963 of 9 grocery stores operated by Colonial Stores, Inc., in Birmingham, Alabama.² These acquisitions were charged as essentially geographic market extensions although they did have horizontal aspects.³ The complaint alleged that in one of the geographic areas affected by the acquisitions, Birmingham, Alabama, Winn-Dixie was able to enter a new market and shortly thereafter have a marketshare of 20 percent. The consent order which ultimately issued did not require divestiture of any of these stores. Rather, the consent order provided that for a ten-year period, Winn-Dixie was prohibited from making any acquisition of any retail food or grocery store without prior Commission approval.

By order of June 24, 1968, the Commission granted Winn-Dixie's petition to modify the above order to bring it into conformity with an order entered in the matter of *Grand Union*.⁴

² The factual background of the Winn-Dixie complaint and order and recited in the complaint which was officially published together with the consent order. *In the Matter of Winn-Dixie Stores, Inc.*, 70 F.T.C. 611 (1966). No issue has been raised as to the validity of the facts of Winn-Dixie's acquisitions.

³ Prior to Winn-Dixie's acquisition of the Hill Grocery chain, there were no Winn-Dixie stores in Birmingham, Alabama. Hill operated 23 of its 35 stores in Birmingham and was the leading grocery store company in that city. With the subsequent acquisition of the 9 Colonial Stores, Winn-Dixie controlled approximately 20 percent of the grocery store sales market in Birmingham. [See, Transcript Oral Argument (T.O.) p. 4]

⁴ Docket No. C-1350, June 21, 1968, (73 F.T.C. 1050)

As a result of this modification, Winn-Dixie was required to seek approval from the Commission only for mergers or acquisitions involving five or more retail food or grocery stores, annual grocery store sales of more than five million dollars or combined (respondent and the grocery stores to be acquired or merged) grocery store sales of more than 5 percent of total grocery or food store sales in any city or county in the United States.⁵ For any proposed merger or acquisition of a retail food or grocery store falling below these criteria, Winn-Dixie need only give the Commission 60 days prior notification.

KROGER COMPLAINT AND ORDER⁶

The Kroger complaint challenged Kroger's acquisition by lease of the food departments of 3 Gold Circle Stores in Dayton, Ohio, which were operated by Federated Department Stores, Inc. The acquisition was challenged as a horizontal acquisition which was alleged to have increased Kroger's share of the market by 2.5 percent. Prior to this acquisition, Kroger was alleged to have accounted for approximately 20 percent of the total food store sales in the Dayton marketing area. Under the order which issued, Kroger was required to divest itself of the leased stores. Kroger was also required to seek Commission approval of any merger or acquisition of any food store or any department in any non-food store which meet the "5, 5 and 5 criteria" and which took place in certain named geographic areas or in any other area in which Kroger was then operating a food store or food department in a non-food store. As to any mergers or acquisitions which do not fall within these criteria Kroger was required to provide the Commission with notification of their plans. In most instances Kroger must notify the Commission prior to the merger or acquisition. However, in narrowly circumscribed instances of small-scale mergers or acquisitions, notification may be subsequent to the merger or acquisition.⁷

⁵ These are often referred to as the "5, 5 and 5 criteria."

⁶ *In the Matter of the Kroger Company and Federated Department Stores, Inc.*, Dkt. No. C-206779 F.T.C. 636 (October 26, 1971). [See footnote one, *supra*.]

⁷ In pertinent part the notification provision of the Kroger order is as follows:

For a period of ten (10) years from the effective date of this Order, Kroger shall not merge with or acquire, directly or indirectly, through subsidiaries or in any other manner, any food store or food department in a non-food store for which prior approval is not required pursuant to subparagraphs (A) - (C) [in which prior approval is required] without providing sixty (60) days' prior notification to the Commission, or, when the time schedule does not permit such notification, without providing a letter to the Commission within ten (10) days after the agreement or understanding in principle is reached, stating that the time schedule does not permit sixty (60) days' prior notification and setting forth the reasons why such prior notification cannot be made; provided, however, that for mergers or acquisitions involving not more than four (4) food stores or food departments in non-food stores and representing annual food store or food department sales of not more than five million dollars (\$5,000,000), notification to the Commission shall be provided within thirty (30) days following the consummation of such merger or acquisition.

WINN-DIXIE'S PETITION FOR MODIFICATION

It is Winn-Dixie's contention that the *Kroger* order is "less restrictive" in three respects and that its order, by the terms of the consent agreement, must be modified to reflect the *Kroger* order. First, Winn-Dixie notes that Kroger's duty of seeking prior approval as to mergers or acquisitions is limited as to territories in which it operates a food store or department. Winn-Dixie argues that its order should be modified so as to limit it to territories in which it is presently doing business. Second, Winn-Dixie argues that its order must be modified to reflect the flexibility of the *Kroger* order as to the requirement of 60-days notification of mergers or acquisitions which fall below the "5, 5 and 5 criteria." Finally, Winn-Dixie requests that its order, like Kroger's, provide for post-acquisition notification of certain small-scale acquisitions instead of having to notify the Commission prior to any such acquisition.

The essence of Winn-Dixie's argument in support of its petition is that the plain language of its consent agreement requires the above modifications and that no other reasonable position can be taken if the Commission stays within the "four corners" of the consent agreement.⁸ Winn-Dixie also argues the Commission must recognize that "[t]he use of the term 'restrictive' [in the consent agreement] is carefully designed to operate *prospectively*" and that the provision of the *Kroger* order requiring divestiture should not bear upon the Commission's consideration of whether the Kroger order is presently "less restrictive." [Winn-Dixie Brief p. 8] [emphasis in original] Additionally, Winn-Dixie contends that if the modifications are not made it will be at a competitive disadvantage vis-a-vis Kroger if both companies seek to acquire a grocery store or department in which neither is doing business since, under these circumstances, Kroger, unlike Winn-Dixie, will never have to seek prior Commission approval of the proposed course of action. In the same vein, Winn-Dixie argues it is at a competitive disadvantage as a result of the flexible notification provisions which apply to Kroger. Finally, Winn-Dixie asserts that the modifications "will not substantially diminish the Commission's ability to attack any grocery store acquisition by Winn-Dixie if the agency believes it to be anticompetitive" since the notification provisions of the order as modified would provide the

⁸ See, *United States v. Armour & Co.*, 402 U.S. 673 (1971).

Commission with ample protection in this regard. [Winn-Dixie Brief p. 18]

In response to Winn-Dixie's petition and arguments, the Commission's Bureau of Competition argues that the *Kroger* order is neither "less restrictive" on its face nor "less restrictive" in its operative effect than the *Winn-Dixie* consent order. According to the Bureau, it is necessary to compare the orders in their entirety, including the provision of the *Kroger* order requiring divestiture. The Bureau argues that both orders apply equally to horizontal mergers. The fact that the *Kroger* order does not apply to market extension mergers cannot, according to the Bureau, be made a basis for comparison since only Winn-Dixie was alleged to have made this type of acquisition. The acquisitions challenged in the *Kroger* complaint involved horizontal mergers not market extension mergers. The challenged acquisitions giving rise to the *Winn-Dixie* complaint were essentially market extension mergers. Turning to the operative effects of the orders, the Bureau points out that both Kroger and Winn-Dixie must plan mergers or acquisitions in accordance with the Commission's *Enforcement Policy With Respect to Mergers in the Food Distribution Industries* (January 3, 1967). The policy is uniform and all parties know it will apply equally to both. Thus, Winn-Dixie's order cannot place it at a competitive disadvantage with respect to Kroger. As to the one difference between the orders of any arguable significance, prior approval of certain market extension mergers or acquisitions where neither firm operates, the Bureau contends that the fact of prior approval certainly does not create any significant disadvantage and that in any event, neither firm is actually competing in those areas and thus, in fact, there can be no *competitive* disadvantage. Accordingly, the Bureau opposes any modifications.

THE PRINCIPLE OF CONFORMITY

The focal issue before the Commission is whether the *Winn-Dixie* order requires any modifications in order to ensure that it is not more restrictive than the *Kroger* order. Winn-Dixie recognizes that in order to determine this question, they are not arguing that conformity is synonymous with identity. As stated in their brief,

There are, of course, certain * * * differences between the *Kroger* and *Winn-Dixie* orders [other than the ones requiring modification]. The agreement upon which

this petition is based, however, cannot rationally be read as requiring exact identity of prohibitory language without rendering it a nullity. No two cases are ever exactly alike, particularly in the antitrust field where the interplay of complex economic and legal issues often produces some variances in rationale and remedy. [at p. 8]

Within this framework it is evident that none of the requested modifications are required in order to ensure that the *Winn-Dixie* order is not more restrictive than *Kroger's*. Were the Commission to accept Winn-Dixie's arguments, the carefully designed *Winn-Dixie* order would become a nullity. The crux of the required similarity between the two orders is predicated on the presence in both orders of the "5, 5 and 5 criteria." It is the application of these criteria to the Winn-Dixie acquisitions which serves to assure Winn-Dixie competitive parity with Kroger. Winn-Dixie cannot avoid the inescapable fact that its order was designed in response to circumstances entirely different from those present in the *Kroger* matter. If we were to accept the Winn-Dixie argument and make the requested modifications, Winn-Dixie by virtue of a modified order would be free to engage in the very market extension acquisitions and mergers which gave rise to the Commission's original complaint against it. Certainly the provision in the consent order providing for competitive parity does not require such a result.

Reading the two orders in their entirety and considering only those facts essential to an understanding of these orders,⁹ the Winn-Dixie petition must be denied.

ORDER DENYING PETITION FOR MODIFICATION OF FINAL ORDER

This matter having come before the Commission upon respondent's petition, filed May 3, 1972, requesting that this proceeding be reopened and that the order issued on September 14, 1966, be modified; and

The Commission, for the reasons stated in the accompanying opinion, having determined that the petition should be denied:

It is ordered, That respondent's petition, filed May 3, 1972, be, and it hereby is, denied.

Commissioner Dennison dissenting.

⁹ See footnotes 2 and 6, *supra*.

Complaint

IN THE MATTER OF

SALES MARKETING SERVICES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF SECTION 2 (C) OF THE CLAYTON ACT*Docket C-2411. Complaint, May 31, 1973—Decision, May 31, 1973.*

Consent order prohibiting a broker of nonfood grocery products and a wholesaler of these items in New Orleans, La., from receiving unlawful brokerage payments.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly described, have been and are violating the provisions of subsection (c) of Section 2 of the Clayton Act, as amended (15 U.S.C. Section 13) hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Sales Marketing Services, Inc., hereinafter sometimes referred as "SMS," is a corporation organized, existing and doing business under and by virtue of the laws of the State of Louisiana with its office and principal place of business located at 4500 Melpomene Street, New Orleans, Louisiana.

Respondents Nat Friedler and Richard B. Kaufman, Sr., individuals, are president and secretary respectively of corporate respondent SMS. They own and, at all times mentioned herein have owned, all or substantially all of the stock of SMS, and they formulate, direct, and control the acts, practices and policies of SMS, including the acts and practices hereinafter described.

PAR. 2. Respondent SMS has been and is now engaged in business as a broker, effecting purchases of nonfood grocery products by wholesalers, department stores and headquarter chain groups in Louisiana, Mississippi, Arkansas, and Alabama, from sellers located in the various States of the United States other than the States of Louisiana, Mississippi, Arkansas, and Alabama. In such capacity, respondent has demanded and received commissions, brokerage or other compensation from sellers in connection with effecting purchases of nonfood products. The annual volume of business of SMS, in its capacity as a broker in effecting purchases and sales of nonfood products,