

IN THE MATTER OF
FOOD FAIR STORES, INC., ET AL.

Docket 8935. Interlocutory Order, Apr. 23, 1974

Order denying respondents' motion for reconsideration of Commission's Mar. 19, 1974 denial of their application for review of administrative law judge's order denying their motion to quash or limit certain subpoenas *duces tecum*.

Appearances

For the Commission: *Lewis F. Parker and Robert Fleishman.*

For the respondents: *Shipley, Akerman, Stein & Kaps, Wash., D.C.*
and *Stein & Rosen, New York City.*

ORDER DENYING MOTION FOR RECONSIDERATION

By order of Feb. 20, 1974, the administrative law judge in the above-captioned matter granted respondents leave to file an application for review of his order denying their motion to quash or limit certain subpoenas *duces tecum*. The order limited such review to the question of whether the subpoenas contravened the Commission's policy against "comprehensive postcomplaint investigations." By order issued Mar. 19, 1974, the Commission denied respondents' application for review on the ground that the internal policy guide against comprehensive post-complaint investigations is not a basis for quashing a subpoena *duces tecum*.

Respondents now move that the Commission reconsider this decision in order to resolve the alleged "state of confusion" which exists in the

law as to "what postcomplaint information complaint counsel are entitled to receive from respondents." If this motion is granted, respondents request that the Commission grant them permission to file briefs within five days after receipt of the Commission's order granting rehearing and that the Commission grant oral argument in the matter. Complaint counsel oppose this motion.

Despite repeated efforts by the Commission to clarify the meaning of its ruling in *All-State Industries of North Carolina, Inc.*, 72 F.T.C. 1020 (1967), the Commission has seen a proliferation of requests from both complaint counsel and respondents seeking guidance on the scope of discovery in the postcomplaint phase of litigation. Respondents Food Fair and Amterre's motion for reconsideration is founded entirely on an alleged lack of clarity in the Commission position on this subject.

In *All-State*, an administrative law judge issued an order granting complaint counsel access to respondent's files under Section 3.32 of the Rules of Practice and Procedure.¹ The respondent moved to quash the order, which motion was denied by the administrative law judge. In an interlocutory appeal to the Commission, respondent renewed its motion to quash, alleging as one of the grounds, that the order was "overly broad, basically investigative in nature and outside the scope of the Commission's intended discovery processes." 72 F.T.C. 1021.

In granting the motion to quash, the Commission drew a distinction between precomplaint investigations and postcomplaint discovery. The investigative phase of Commission inquiry was viewed as analogous to the role of a Grand Jury, "which does not depend on a case or controversy for power to get evidence, but can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not." *United States v. Morton Salt Co.*, 338 U.S. 632, 636 (1950). Such precomplaint investigative inquiries will be upheld as within the limits of fundamental fairness comporting with due process "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." 338 U.S. at 641.

The postcomplaint discovery phase was viewed differently. In an adjudicative proceeding, expeditious and fair hearings require that each side be fully apprised of the contentions and evidence of the other. Towards this end, both sides will be allowed discovery on each other as to matters placed in controversy by the Commission's complaint and the respondent's answer. Therefore, in any postcomplaint discovery, it is incumbent upon the moving party: 1) to justify the reasonableness of the scope of the discovery, 2) to demonstrate the relevance of the material

¹ This rule has since been rescinded by the Commission.

sought, and 3) to show that the inquiry is within the bounds of proper discovery.² The Commission viewed the order in *All-State* as an overly-broad investigative-type inquiry, inappropriate for the discovery phase. Complaint counsel had given neither the judge nor the Commission any justification for the broad language spelled out in the order,³ nor had they satisfactorily explained that the material sought could not have been obtained by a more narrowly drawn order or by a less burdensome means.

Less than a year after *All-State*, the Commission was again confronted with a similar factual situation in *Lehigh Portland Cement Company*, 74 F.T.C. 1589 (1968). There complaint counsel sought specific evidentiary market data concerning five acquisitions. In overruling respondent's motion to quash in that matter, the administrative law judge carefully scrutinized complaint counsel's subpoena and found the scope of the inquiry reasonable, the material sought relevant to the issues in the case, and the subpoena within the bounds of proper discovery. Respondent appealed to the Commission, citing *All-State* as a severe limitation on the scope of postcomplaint discovery. In overruling respondent's motion, the Commission concluded that its policy, articulated in *All-State*, "of requiring complaint counsel to have evidence sufficient to support a *prima facie* case before issuance of the complaint, is merely an internal 'housekeeping' matter. It is not a matter of concern to a respondent or the hearing examiner in dealing with a request for discovery after complaint." 74 F.T.C. at 1590-91.

Contemporaneous with *Lehigh*, the Commission felt compelled to issue a "Supplemental Clarifying Opinion of the Commission" in regard to the original *All-State* opinion. 74 F.T.C. 1591 (1968). In this latter opinion, the Commission made the point that nothing in the first *All-State* opinion was meant to allow a respondent to "put into litigation the adequacy of the precomplaint investigation conducted by the Commission or its staff." 74 F.T.C. at 1592. To the extent that the first *All-State* opinion spoke of precomplaint internal guidelines for investigations, it did not thereby confer upon respondents a legal right to question the standards by which the Commission seeks to guide its staff. Were it otherwise, both the Commission and the reviewing courts "would be confronted by the well-nigh impossible task of determining * * * whether the precomplaint investigation was proper or sufficient. The proceeding would become converted into a trial of the scope and adequacy of the precomplaint investigation. To introduce such collateral matters into the hearing would invite inexcusable delay." 74 F.T.C. at 1592.

² That is, that the things sought are properly subject to discovery, and not privileged, statutorily exempt etc. See also Section 3.34 of the Rules of Practice and Procedure.

³ Among other things, complaint counsel sought to inspect and copy "Records or files containing all correspondence relating to purchases, sales and advertising for the period January 1, 1965 to date." 72 F.T.C. at 1024-25.

The Commission further observed that its rules, like those of the Federal Rules of Civil Procedure, are designed to facilitate discovery "in the light of the issues raised by the complaint." Therefore, "A *discovery request* made by complaint counsel is not open to objection on the ground that the materials sought should have been in hand at the time of the issuance of the complaint." 74 F.T.C. at 1592 (emphasis added). The Commission drew no distinction between subpoenas and pretrial orders in making this declaration.

On July 27, 1973, the Commission issued an "Order Quashing Investigational Subpoena," in *Exxon Corporation, et al.*, Docket 8934 [83 F.T.C. 233]. There, respondents had moved to quash an investigational subpoena based on, among other grounds, the contention that *All-State* forbade investigational-type inquiry once adjudication had begun. While granting the motion to quash on other grounds,⁴ the Commission observed that "the *All-State* opinion is not a basis for quashing a subpoena." Whatever had been said in that opinion about the staff's gathering of evidence prior to issuance of the Commission complaint was "an internal administrative guideline between the Commission and its staff" and could not be used "in opposition to a subpoena which otherwise meets the requirements set forth in the Commission's Rules of Practice." *Exxon*, at 2 [83 F.T.C. 234]

Finally, on Mar. 19, 1974, in an "Order Denying Application for Review" in the instant proceeding, *Food Fair Stores, Inc., et al.*, Docket 8935 [p. 1401, herein], the Commission declined to review the administrative law judge's decision to overrule respondents' alleged *All-State* restriction against "comprehensive postcomplaint investigation."

In the "Order Denying Review," the Commission once again attempted to lay to rest the controversy surrounding interpretation of *All-State*. *All-State* was never intended to "add to the requirements of subpoenas under Part III of the Rules." *Food Fair*, at [p. 1402, herein]. On the contrary, *All-State* spelled out internal guidelines for the conduct of precomplaint investigations and postcomplaint discovery.

Respondents seek reconsideration of this ruling. Although we have addressed this matter before, the Commission will endeavor to restate herein its position with regard to the matter of precomplaint investigations vis-a-vis postcomplaint discovery:

Commission investigations may be undertaken over a very wide scope, circumscribed only by the statutory limits on Commission authority and a reasonable relation between the material sought and the practices being investigated. At the conclusion of such an investigation

⁴ On the grounds that the subpoena was issued under Part II of the rules, while the litigation had meanwhile passed from the Part II investigative phase to the Part III adjudicative phase.

the Commission will determine whether there is "reason to believe": 1) a violation of law has occurred, and 2) prosecution of the alleged violation would be to the interest of the public. 15 U.S.C. § 45(b). These are the *sole statutory* requirements for issuance of a Commission complaint. Other standards, determining the manner in which an investigation might be evaluated, are in the nature of internal guidelines between the Commission and the staff. The Commission alone, pursuant to statute, takes responsibility for the issuance of its complaints and the reasonable basis therefore.

Once a complaint is issued, and the discovery period commences, it is expected that requests for pretrial orders and subpoenas will define the reasonableness of the scope of the inquiry and set out the relevance of the material sought to the issues raised in the pleadings. Further, the things sought by means of discovery must be within the bounds of proper discovery. In making these determinations the administrative law judge has wide discretion.⁵

It shall not be a grounds to challenge complaint counsel's discovery to argue that the precomplaint investigation was the proper time to obtain the information sought, if such information is relevant to the issues raised in the pleadings. This is the holding of *All-State*, and reflects the position of the Commission. To the extent that *All-State* is in seeming conflict with the above, it is held confined to its own facts and not further controlling.⁶

We feel this interpretation of *All-State* has also been taken by the federal courts, in an appeal arising from the *Lehigh* case, *infra*. In *F.T.C. v. Browning*, 435 F.2d 96 (1970), the United States Circuit Court of Appeals for the District of Columbia denied that a challenge to postcomplaint discovery could be predicated on the alleged inadequacies of precomplaint investigation. The adequacy of a discovery request is determined by whether the request is reasonable in scope, the material relevant to the issues of the case, and the things sought within the proper bounds of discovery. The court upheld the issuance of the discovery subpoena in question.

In the instant proceeding, respondent attempts to obtain reconsideration of a denial for review of a Motion to Quash overruled by the

⁵ "The Commission recognizes that in the abstract, the meaning of 'discovery' is necessarily vague." *All-State Industries of North Carolina, Inc.*, 72 F.T.C. 1024 (1967). We believe it is initially within the administrative law judge's realm of expertise to make the necessary determinations of what is, or is not, proper discovery. His determinations will not be overturned absent a showing of a clear abuse of his discretion. *Warner-Lambert Co.*, Docket No. 8891 (Interlocutory Order, Sept. 18, 1973) [83 F.T.C. 485]; *Lehigh Portland Cement Company*, 74 F.T.C. 1589, 1590 (1968).

⁶ Nor is *Curtiss-Wright Corporation*, 72 F.T.C. 1027 (1967) good authority for a contrary proposition. There the Commission remanded a subpoena issued under Section 3.34 of the rules in order to seek assurance that the administrative law judge had considered the requirements of 3.34 in light of the newly issued *All-State* ruling. Despite the dictum in that opinion, we are persuaded that the subsequent history of that case demonstrates that the *sole relevant* inquiry in authorizing discovery subpoenas lies within the language of 3.34. See 73 F.T.C. 1235 (1968).

administrative law judge. The judge had held that the Commission's policy against comprehensive postcomplaint investigations was not contravened by a discovery subpoena which specifically indicated the material to be produced and stated the relevancy of that material to the litigation, as well as the reasonableness of the scope of the subpoena. We declined review of this ruling on Mar. 19, 1974.⁷ Respondent has raised no new issues in its motion for reconsideration, and merely refers to an alleged "state of confusion" in the law regarding the permissible scope of complaint counsel's discovery.

We note this recurrent theme in filings before the Commission despite our repeated efforts to guide counsel away from challenges to discovery procedures predicated on the alleged inadequacies of pre-complaint investigation. While in the case now before us, we have no reason to suspect the misuse of the appeal process to delay adjudication, we are hopeful that henceforth counsel will think again before recourse to the *All-State* tactic. Accordingly,

It is ordered, That respondents' motion for reconsideration, including their request for briefing and oral argument, be, and it hereby is, denied with prejudice.

IN THE MATTER OF

EDU-CARDS CORPORATION

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT

Docket 8924. Complaint, Apr. 13, 1973—Decision, Apr. 24, 1974

Consent order requiring a Commack, N.Y., manufacturer of toy, gift and hobby products,