

IN THE MATTER OF
AMREP CORPORATION

Docket 9018. Order, Feb. 24, 1976

Commission affirms administrative law judges's denial of respondent's motion to stay proceeding.

Appearances

For the Commission: *Perry W. Winston, Jon R. Calhoun and George E. Schulman.*

For the respondent: *Solomon Friend, Theodore Schaeier and I. David Parkoff, In-house General Counsel for Amrep Corporation, N.Y. Morton M. Maneker, Proskauer, Rose, Goetz & Mendelsohn, New York City.*

ORDER AFFIRMING ADMINISTRATIVE LAW JUDGE'S DENIAL OF
STAY

This matter is before us upon respondent's application for review of the administrative law judge's order of January 15, 1976, disposing of respondent's motion to stay this proceeding pending the trial of a criminal fraud case, *United States v. Amrep Corp.*, 75 Cr. 1023, scheduled to commence on October 5, 1976 in the United States District Court for the Southern District of New York. The law judge, after concluding that respondent's motion called chiefly for the exercise of administrative discretion and was, therefore, outside of his authority, see *Philip Morris, Inc.*, 79 F.T.C. 1023 (1971), certified the motion to the Commission with his recommendation that the motion be denied. Rules of Practice, Section 3.22(a). The law judge also ruled that, in the event that the motion should be treated as involving questions of law or judicial discretion and was, therefore, within the scope of his authority, the motion was denied. The judge granted respondent permission to take an immediate interlocutory appeal from the ruling. Rules of Practice, Section 3.23(b).¹

Since the basis of respondent's motion is that a stay is "necessary to protect respondent's right to due process and to safeguard its substantive right to defend itself" in both the criminal and administrative proceedings, Memorandum of Law in Support of Respondent's Motion to Stay Proceedings at 1, the Commission believes that the

¹ On January 15, 1976, the United States District Court for the Southern District of New York ordered a stay of the Commission proceeding after July 30, 1976, until one month after the entry of the jury's verdict in the criminal trial. On January 27, 1976, the United States Court of Appeals for the Second Circuit granted a stay of the Commission proceeding pending determination of Amrep's appeal from the portion of the district court's order permitting this proceeding to continue through July 30, 1976.

motion should be treated as involving questions of law and judicial discretion which are within the law judge's authority to decide. The Commission has also determined to permit respondent's appeal.

The Supreme Court has declared that "[i]t would stultify enforcement of federal law to require a governmental [regulatory] agency * * * to defer civil proceedings pending the outcome of a criminal trial." *United States v. Kordel*, 397 U.S. 1, 11 (1970); see also *Gordon v. Federal Deposit Insurance Corp.*, 427 F.2d 578, 580 (1970). When both civil and criminal proceedings are simultaneously pending, a stay should be granted only if it is necessary to assure that both proceedings will be fair. The Commission can find no error in the administrative law judge's conclusion that the pendency of the criminal action will not deprive respondent of a fair hearing in the instant administrative proceeding.²

The law judge reasonably found that respondent could adequately prepare its defenses in both the criminal and the administrative proceedings. The administrative complaint was issued on March 11, 1975, more than a year before the date now set by the law judge for trial (April 12, 1976). Three attorneys, Solomon H. Friend, Esq., Theodore R. Schreier, Esq., and David Parkoff, Esq., had made formal appearances for Amrep in this proceeding. Mr. Friend, Amrep's general counsel, was indicted on October 28, 1975, almost six months before the date now set for trial. The law judge twice postponed the trial date to enable Morton Maneker, Esq., the counsel appearing for Amrep on the instant motion, to familiarize himself with the case. Assuming, as respondent claims, that neither Messrs Schreier, Parkoff, or Maneker would be prepared to represent Amrep on the trial, respondent has not shown that it has been unable to retain counsel who could prepare for an April 12, 1976, trial date.³

The law judge also properly concluded that there had been an insufficient showing that the indictment of a number of Amrep's top executives would deprive Amrep of the only persons who can provide it the assistance necessary to respond to complaint counsel's discovery demands and to prepare cross-examination of complaint counsel's witnesses. Respondent argued that these executives would be unavailable to Amrep because their time must be largely devoted to preparing their own individual defenses in the criminal proceeding. Respondent also argues that these executives would be unavailable because they

² Nor does the Commission believe that the pendency of the instant proceeding will deprive Amrep or any of the individual criminal defendants of a fair trial in the criminal action.

³ The affidavit of Edward B. Winslow, Esq., asserting that three law firms declined to represent Amrep in the Commission proceeding, falls far short of showing that counsel could not have been retained after Mr. Friend's indictment, or could not now be retained, who would be willing and able to prepare for the April 12, 1976, trial date. It should be noted that even if, as respondent claims, Messrs. Schreier and Parkoff would be unable to represent Amrep as lead counsel, they would be available to assist in the preparation of Amrep's defense.

must be concerned that information they provided for use in the administrative proceeding would be construed as a waiver of their Fifth Amendment right against self-incrimination. However, respondent has not shown that there are no present or former company employees who can respond to discovery requests without the possibility of compulsory self-incrimination or who can assist respondent in preparing its defense. See *Kordel, supra*, at 9.

Finally, respondent claims that trial of this proceeding would circumvent the policy of limiting pretrial criminal discovery embodied in the Federal Rules of Criminal Procedure. A civil proceeding should be stayed, however, only upon a showing that the "government has initiated or promoted [the proceeding] for the purpose of circumventing the Federal Rules of Criminal Procedure or any constitutional right." *United States v. Simon*, 373 F.2d 649, 652 (2nd Cir.), *cert. granted sub nom. Simon v. Wharton*, 386 U.S. 1030, *vacated as moot*, 389 U.S. 425 (1967); see also *Kordel, supra*, at 11-12.⁴ Accordingly,

It is ordered, That the aforesaid order of the administrative law judge be, and it hereby is, affirmed.⁵

⁴ Respondent has also objected that, under the law judge's discovery schedule,

[t]he only discovery it will receive is a witness and exhibit list a month before the hearings commence. Since complaint counsel have stated that they plan to call 150 witnesses, Amrep will have a scant 30 days to try to interview these 150 people, who are presumably scattered across the country, in order to prepare for cross-examination.

This is a matter within the sound discretion of the administrative law judge. We expect that the law judge would modify the schedule upon a showing that respondent required more than 30 days to prepare for cross-examination.

⁵ Respondent's request for oral argument is denied.

Complaint

87 F.T.C.

IN THE MATTER OF
MAYFAIR SUPER MARKETS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2796. Complaint, Feb. 24, 1976—Decision, Feb. 24, 1976

Consent order requiring a Union, N.J., chain of retail food stores trading under the name Foodtown, among other things to cease failing to have items advertised as being on sale readily available. Further, the order requires that items customarily price-marked be marked with the advertised prices; respondent provide customers with rainchecks for unavailable merchandise; and that respondent post at each store's public entrances (1) a copy of sale ads, (2) a list of those items unavailable, and (3) a notice that rainchecks will be issued.

Appearances

For the Commission: *Myer S. Tulkoff.*

For the respondent: *Ravin & Davis*, Edison, N.J.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Mayfair Super Markets, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

COUNT I

Alleging violation of Sections 5 and 12 of the Federal Trade Commission Act (15 U.S.C. §§45;52).

PARAGRAPH 1. Respondent Mayfair Super Markets, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1441 Morris Ave., Union, New Jersey.

PAR. 2. Respondent has been and is now operating a chain of retail food stores in the State of New Jersey under the trade name Foodtown. In the operation of its retail food stores, respondent offers to its customers an extensive line of products, including food, as that term is defined in the Federal Trade Commission Act, groceries and other products.

Respondent is the largest member and a part owner of Twin County