

Order

88 F.T.C.

IN THE MATTER OF
RSR CORPORATION

Docket 8959. Interlocutory Order, Nov. 2, 1976

In Camera treatment of listed information withdrawn to the extent that it may appear in publicly available portion of any decision the Commission may issue in this matter.

Appearances

For the Commission: *Annthalia Lingos, K. Keith Thurman, and James C. Egan, Jr.*

For the respondent: *Robert L. Wald, Wald, Harkrader & Ross, Washington, D.C.; and Merrill L. Hartman, Hewett, Johnson, Swanson & Barbee, Dallas, Tex.*

ORDER WITHDRAWING *In Camera* TREATMENT

On July 28, 1976, the Commission ordered the parties to show cause why certain information to which the administrative law judge (ALJ) had accorded *in camera* treatment at the trial of this matter should not be placed on the public record [88 F.T.C. 206]. This information included market share figures for RSR and Quemetco in 1971 and 1972, lead production figures for RSR and Quemetco in 1971 and 1972, and information concerning the distances to which various RSR and Quemetco plants shipped their output during 1971 and 1972.

By response of August 12, 1976, respondent has indicated that it would not object to publication of market share figures or production figures, but it would object to the making public

the second sentence of *in camera* finding 217, the second sentence of *in camera* finding 218, and shipping distance figures derived from CX 69-77 and CX 79 showing average plant shipping distance, percentage of plant production shipped to various states, and percentage of plant production shipped various distances, on the ground that disclosure of such data may assist competitors in determining the identity of some of RSR's customers.

One reason for the requirement that proceedings of this sort be decided "on the record" is to permit the public to evaluate the fairness and wisdom with which the decisions of public agencies have been made, and to permit affected parties to draw guidance from those decisions in determining their future conduct. This consideration mandates that to the maximum extent possible, information of relevance to the Commission's determination be made part of the record available for public inspection. At the same time, *in camera* treatment of certain relevant information may be appropriate where

the prospective injury from disclosure outweighs the public interest in full knowledge. In the course of a trial an administrative law judge may be required to balance these competing interests on scores of occasions, as the parties seek *in camera* treatment for various exhibits. The granting of such treatment, however, cannot bind the Commission to withhold information from the public record indefinitely where no justification therefor exists.

In this case, we have concluded that the public interest requires that certain of the information accorded *in camera* treatment by the ALJ be made part of the public record. As to some of this, *e.g.*, market shares of the competing parties, surely the most fundamental sort of information in any merger case, respondent does not object.

With respect to shipping distance information, we note that in their presentation of this case both sides devoted extensive discussion to the issue of how far secondary lead recyclers can and do ship their output to customers. Respondent contended that this question is of great importance in the definition of an appropriate market within which to evaluate the challenged merger, and the ALJ devoted numerous findings to the issue. The Commission has determined that disclosure of certain aggregated data revealing average plant shipping distances, percentages of plant production shipped to certain states, and percentages of the production of various plants shipped various distances is important to a full public understanding of the points at issue between the parties in this case and before the Commission for resolution.

The Commission has further concluded that disclosure of such information is most unlikely to result in injury of the slightest sort to respondent, in view of its age (4-5 years), and in view of its aggregated character which would render extremely speculative any inferences to be drawn therefrom by competitors as to the customers of RSR. The Commission further notes that the public transcript already contains numerous references to identified customers of respondent, and respondent has not objected to public disclosure of the ALJ's *in camera* finding I.D. 223, which mentions numerous particular customers and plants to which RSR and Quemetco did or did not ship lead in 1971 and 1972. In light of this it does not appear that respondent itself anticipates any real injury from the proposed disclosure.

Under the circumstances, the Commission has determined that the public interest weighs overwhelmingly in favor of disclosure of the aforementioned information to the extent it is relevant to the Commission's decision in this matter.

Accordingly, the Commission hereby affords notice to the parties that, effective ten days from the date of service of this order, *in camera* treatment of the indicated information will be withdrawn, to the

extent that it may appear in the publicly available portion of any decision the Commission issues in this matter. Therefore:

It is ordered, That, effective ten days from the date of service of this order, *in camera* treatment of the following information be, and it hereby is, withdrawn, to the extent that it may appear in the publicly available portion of any decision the Commission may issue in this matter:

(1) Information contained in *in camera* findings of the ALJ Nos. 246-248, 256-258, including tonnage figures for RSR and Quem-etco derived from CX 64, but not tonnage figures for other companies;

(2) Information contained in *in camera* findings of the ALJ 217-218 and 223, as well as other aggregated shipping distance figures derivable from CX 65, 69-77, 79, including average plant shipping distance, percentage of plant production shipped to various states, and percentage of plant production shipped various distances, stated in terms of ranges, *e.g.*, (0-100 miles).

Commissioner Dole did not participate by reason of absence.

IN THE MATTER OF

HERBERT R. GIBSON, SR., D/B/A THE GIBSON TRADE
SHOW, ET AL.

Docket 9016. Interlocutory Order, Nov. 2, 1976

Denial of petition for reconsideration of Commission's order denying motion to withdraw matter from adjudication for settlement purposes.

Appearances

For the Commission: *John J. Hemrick* and *Andre Trawick, Jr.*

For the respondents: *Bardwell D. Odum*, Dallas, Tex., *David A. Donohoe*, *Akin, Gump, Strauss, Hauer & Feld*, Wash., D.C., and *John M. Gillis*, *Gillis, Rogers & Taylor*, Dallas, Tex.

ORDER DENYING PETITION FOR RECONSIDERATION

Respondents Herbert R. Gibson, Sr. and Belva Gibson petition for reconsideration of the Commission's order of September 21, 1976, denying their motion to withdraw this matter from adjudication for settlement purposes. They ask that the Commission await a decision by the administrative law judge on their Motion to Recommend Commission Acceptance of the Proposed Consent Order before determining whether there is a sufficient likelihood of settlement to warrant a withdrawal from adjudication.

The instant petition must be denied since it does not set forth "new questions raised by the decision * * * upon which the petitioner had no opportunity to argue before the Commission" as required by Section 3.55 of the Rules of Practice. The Commission has, however, reviewed respondents' Motion to Recommend, the accompanying memorandum, and complaint counsel's answer and adheres to its view that there is not a "likelihood of settlement." Rules of Practice, Section 3.25(b).

In their September 29 answering memorandum, complaint counsel argue that a combination of remedies consisting of "the Gibson Trade Show being required to go out of business or operate non-profit * * * is essential to adequately protect the public interest." The Commission would be willing to consider alternative consensual relief to those remedies, if it can be devised, in view of respondents' representations in their June 24 memorandum that they are willing to agree to "a guarantee (under pain of substantial monetary penalties) that there will be a high, impenetrable wall between the business of respondent