

IN THE MATTER OF
RSR CORPORATION

Docket 8959. Interlocutory Order, Dec. 2, 1976

Commission rules on motions and counter motions with respect to material contained in complaint counsel's reply brief; accords *in camera* treatment to certain information on pp. 19-25 of the reply brief; and restores the brief to the public record.

Appearances

For the Commission: *K. Keith Thurman, Annthalia Lingos, 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 DENYING MOTION TO STRIKE, ETC.

The initial decision of the administrative law judge in this matter was greeted with appeals by both sides. Pursuant to the Commission's Rules of Practice, each party was entitled to submit an Appeal Brief (in support of its appeal), an Answer Brief (in response to the other side's Appeal Brief), and a Reply Brief (in response to the other side's Answer Brief.) Each of these briefs, three for each side, three for each appeal, was duly prepared and submitted.

And there it might have ended, except that respondent subsequently filed a "Motion to Strike" pages 19-25 of complaint counsel's Reply Brief, arguing that it contained inaccurate and misleading statements. Complaint counsel struck back with the observation that respondent's Motion constituted nothing more than an unauthorized answer to their Reply Brief, expressly forbidden by Section 3.52(d) of the Rules of Practice. In case the Commission were inclined to consider this "Fourth Brief," however, complaint counsel appended a "Reply to Respondent's Unauthorized Answer." ("The Fifth Brief")

Not to be outdone, respondent thereupon filed for "Leave to Respond to 'Complaint Counsel's Reply to Respondent's Unauthorized Answer' ", appending thereto, "The Sixth Brief." Complaint counsel rejoined with what we might term, for ease of reference, their "Answer to Respondent's Answer to Complaint Counsel's Answer to Respondent's Unauthorized Answer to Complaint Counsel's Reply to Respondent's Answer to Complaint Counsel's Appeal Brief, etc." Therein complaint counsel observed that respondent had no right to "yet another unauthorized pleading" in this matter, and that the time for

briefing having long passed, complaint counsel would not declaim further, except to request the right to file a "Seventh Brief" if the Commission should decide to consider respondent's "Sixth Brief." Respondent has allowed these observations to go unanswered, and the various motions summarized above are thus before us for disposition.

The Law of the Last Word, like the Doctrine of Judicial Repose, is a mainstay of Anglo-American jurisprudence. Briefly, it prescribes that in any dispute between two parties, one of them must be allowed to have the Last Word, in order that both of them may stop talking. A corollary of the rule is that the Last Word is not always the Best Word, nor necessarily the Word that prevails.

Section 3.52 of the Commission's Rules of Practice makes clear that the Last Word in any matter on appeal belongs by right to the party with the burden of sustaining the appeal. In this case both sides were blessed with a Last Word as of right since each prosecuted an appeal, but complaint counsel were clearly entitled to the Last Word with respect to their appeal.

We agree with complaint counsel that Respondent's Motion to Strike is little more than a substantive answer to complaint counsel's Reply Brief. Although it seeks *in camera* treatment of pages 19-25 of complaint counsel's brief, the bulk is devoted simply to a recitation of arguments in opposition to those made by complaint counsel, and the *in camera* request could easily have been made without argument as to the substance of the Reply Brief arguments.

The Commission recognizes that there may be certain extraordinary circumstances in which an exception to Section 3.52 of its Rules is warranted. When a party believes such circumstances have arisen, the appropriate way to proceed is via a request that the Commission exercise its discretion to make an exception to Section 3.52 rather than via a ruse designed to circumvent the express mandates of the Rule. Although we thus do not believe that respondent's use of a Motion to Strike in this instance is appropriate, we have determined to treat it as a Motion to Waive Section 3.52(d) of the Rules in order to permit the lodging of a supplemental brief.

There is an extraordinary circumstance in this case which warrants the relief requested. The material to which respondent's argument is principally addressed concerns the financial status of RSR, details of which were the subject of *in camera* treatment by the ALJ. For this reason, counsel for respondent could not prudently have discussed this matter at oral argument, as Counsel in an ordinary case would be able to do were he or she to choose to address an opponent's reply brief in that forum. Under these circumstances, the Commission has determined to admit respondent's Motion, and complaint counsel's response

thereto, as supplements to the briefs in this case. However, the "Sixth Brief" is rejected since the Last Word still belongs to complaint counsel. [16 CFR §3.52(d)]

Respondent also requested in its Motion to Strike that certain portions of complaint counsel's Reply Brief be maintained *in camera* since they were derived from *in camera* exhibits in the record. By order of July 28, 1976 [p. 206, herein] the Commission temporarily placed pages 19-25 of complaint counsel's brief *in camera* pending receipt from respondent of specific indication of the portions which it believed merited such treatment. That response having been received, it appears that seven figures on pp. 19-25 are drawn from *in camera* exhibits and these figures will be accorded *in camera* treatment co-extensive with that previously ordered by the ALJ for the exhibit from which they are drawn. The rest of pp. 19-25 of complaint counsel's brief will be restored to the public record. Therefore,

It is ordered, That pp. 19-25 of complaint counsel's Reply Brief be, and they hereby are, restored to the public record, except that the below-referenced figures shall be accorded *in camera* treatment to the extent ordered by the ALJ for RX 111 from which they are drawn:

- P. 19, line 17, word 6
- P. 19, line 20, word 12
- P. 20, line 19, word 9
- P. 20, line 20, word 4
- P. 20, footnote, line 6, word 7
- P. 22, line 14, word 3
- P. 24, line 4, word 4

It is further ordered, That respondent's Motion to Strike pp. 19-25 of complaint counsel's Reply Brief be denied, and that respondent's "Request for Leave to Respond to 'Complaint Counsel's Reply to Respondent's Unauthorized Answer' " be denied, but that respondent's "Motion to Strike" and Complaint Counsel's Reply thereto shall be added to the briefs previously filed in this matter.

Complaint

88 F.T.C.

IN THE MATTER OF

RSR CORPORATION

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC.
7 OF THE CLAYTON ACT

Docket 8959. Complaint, Apr. 1, 1974 — Final Order, Dec. 2, 1976*

Order requiring a Dallas, Texas, producer of secondary lead products, among other things, to divest itself, within one (1) year, of the assets of Quemetco, Inc., excluding the acquired facility located in Seattle, Washington, and the capital derived from the sale of its acquired interest in the facility located in the Republic of Mexico. Further, the order prohibits respondent from acquiring any domestic lead producing company for a period of ten (10) years without prior F.T.C. approval.

Appearances

For the Commission: *K. Keith Thurman, Annthalia Lingos, 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.*

COMPLAINT

The Federal Trade Commission having reason to believe that RSR Corporation, a corporation subject to the jurisdiction of the Commission, has acquired the stock of Quemetco, Inc., a corporation, in violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18), hereby issues this complaint, pursuant to Section 11 of that Act (15 U.S.C. 21), stating its charges in that respect as follows:

I. DEFINITIONS

1. For the purpose of this complaint, the following definitions shall apply:

(a) "The U.S. lead market" consists of all primary lead and secondary lead produced in the United States and all imports of lead pigs and bars.

(b) "Secondary lead" is lead recovered from scrap sources, such as scrap lead-acid type batteries.

(c) "Primary lead" is refined lead and antimonial lead produced by the smelting and refining of ores and base bullion.

(d) "Refineries" include smelters in addition to refining facilities.

* Reported as corrected by Order of the Commission dated Jan. 7, 1977.