

Interlocutory Order

IN THE MATTER OF

HERBERT R. GIBSON, SR., ET AL.

Docket 9016. Interlocutory Order, May 18, 1978

Request for subpoena enforcement denied without prejudice to renew.

ORDER DENYING REQUEST FOR SUBPOENA ENFORCEMENT
WITHOUT PREJUDICE TO RENEW

On April 20, 1978, the administrative law judge, pursuant to Commission Rule 3.22 certified complaint counsel's Request for Court Enforcement of the Subpoena Served on Commission Witness Nix. For the reasons discussed below, we deny complaint counsel's request without prejudice to renewal at a later date.

The subpoena in question was dated March 16, 1978, served on Mr. Nix on March 22, 1978, with a return date of April 11, 1978. On April 10, 1978, complaint counsel received a letter from Mr. Nix indicating that he would not be able to comply with the subpoena because of illness. Attached to his letter is a statement to that effect from his physician, Dr. William deVlaming. Additionally, Mr. Nix indicated that he could not remember much of the information about which he spoke with complaint counsel and remarked on the fact that complaint counsel had previously indicated that he would not be called to testify.

Complaint counsel takes issue with each of Mr. Nix's assertions and points out that "failing memory is not a valid basis for failing to appear." Moreover, complaint counsel argues that the testimony of Mr. Nix

is crucial for several reasons. He is one of the few witnesses that will testify as to the issues raised under Count III of the Complaint. His testimony is expected to directly contradict the testimony previously presented by respondent, Gerald P. Gibson. His testimony is finally expected to link respondents, H.R. Gibson Sr., H.R. Gibson, Jr. and Gerald P. Gibson, to payments and receipt of illegal brokerage.

Nevertheless, the administrative law judge has recommended that the request be denied because of the length of time that may be involved in an enforcement proceeding and because of the likelihood that no substantive evidence will be elicited if Mr. Nix cannot recall the events in question. At the same time, the administrative law judge notes that Mr. Nix could possibly be a "crucial witness on whom complaint counsel placed considerable reliance."

We have determined that the best way to reconcile the needs of all parties is to deny without prejudice, complaint counsel's request with instructions that the administrative law judge and the parties consider the procedures of Commission Rule 3.33. Rule 3.33(a) provides that:

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At any time during the course of a proceeding . . . the Administrative Law Judge, in his discretion, may order the taking of a deposition and the production of documents by the deponent.

Furthermore, Section 3.33(f) provides for the introduction into evidence of a deposition if the administrative law judge finds "that the deponent is unable to attend or testify because of age, sickness, infirmity or imprisonment."

In this way, Mr. Nix will not be removed from the care and supervision of his doctor, or otherwise inconvenienced to the possible detriment of his health.¹ Moreover, complaint counsel will have the benefit of whatever recollection Mr. Nix can bring to bear on the situation, and Mr. Nix's memory lapses will be duly noted on the record under oath.

By its action today, the Commission should not be seen as invalidating the outstanding subpoena against Mr. Nix. The procedure suggested is an alternative to lengthy enforcement proceedings and at the same time adheres to the needs of Mr. Nix. Whether enforcement proceedings will ultimately be required as to the presently outstanding subpoena we have no way of knowing. Nevertheless, complaint counsel will not be prejudiced in renewing the request if it is determined that Section 3.33 is not feasible or if Mr. Nix again refuses to comply. Accordingly,

It is ordered, That complaint counsel's Request for Court Enforcement of the Subpoena Served on Commission Witness Nix be, and the same hereby is, denied without prejudice to renewal at a later date;

It is further ordered, That the parties and the administrative law judge consider proceedings pursuant to Commission Rule 3.33.

¹ Apparently, Mr. Nix is not completely incapacitated by his illness as we note that on April 7th he was said to be

Complaint

IN THE MATTER OF
SAFeway STORES, INCORPORATEDCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT*Docket 9053. Complaint, Sept. 3, 1975—Decision, May 18, 1978*

This consent order, among other things, requires an Oakland, Calif. retail food store chain to cease over-pricemarking and failing to sell advertised items at or below advertised prices. Further, food stores are required to conspicuously post advertisements and notices encouraging customers to check prices of advertised items. The order additionally obligates the firm to maintain business records for a period of three years, and to establish a surveillance program designed to ensure compliance with the terms of the order.

Appearances

For the Commission: *Robert Eliot Easton, Sr.* and *James J. Angelone.*

For the respondent: *James F. Rill, Collier, Shannon, Rill, Edwards & Scott*, Washington, D.C.

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 Safeway Stores, 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 violations of Section 5 of the Federal Trade Commission Act.)

PARAGRAPH 1. Respondent, Safeway Stores, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland with its office and principal place of business located at 4th and Jackson Sts., Oakland, California.

PAR. 2. Respondent is engaged in the operation of a chain of retail food stores, operating approximately 1950 stores in 27 states and the District of Columbia. Its volume of business is substantial, totalling approximately 6.77 billion dollars in retail food sales in 1973. In the operation of its retail food stores, respondent offers and sells to its customers an extensive line of groceries and other merchandise,