

Interlocutory Order

92 F.T.C.

IN THE MATTER OF

KELLOGG COMPANY, ET AL.

Docket 8883. Interlocutory Order, Dec. 8, 1978

This order remands this matter for appointment of a substitute ALJ to preside over further proceedings; directs the filing of briefs by all parties; dismisses as moot motions for disqualification of the Chairman from participation and the motion for evidentiary hearing or oral argument; denies motion for issuance of subpoenas; and terminates a stay of proceedings entered October 20, 1978.

ORDER

At the present time, the Commission has before it respondents' motions to disqualify the administrative law judge, Kellogg's motion for an evidentiary hearing, or, alternatively, for oral argument on its disqualification motion, Kellogg's motion (joined by General Mills) for the issuance of subpoenas *duces tecum*, complaint counsel's motion seeking the appointment of a substitute administrative law judge and an order directing that the proceedings be resumed "from the point at which Administrative Law Judge Harry R. Hinkes retired," and a motion for dismissal or other alternative relief filed by General Mills.

I.

After a careful review of the submissions of the parties and the pertinent legal authorities, the Commission has concluded that Judge Hinkes became "unavailable" within the meaning of 5 U.S.C. 554(d) upon his retirement on September 8, 1978. Because his reappointment on a contractual basis was not approved by the Civil Service Commission, see 5 U.S.C. 1305 and 3105, and Civil Service Commission regulations adopted pursuant thereto, his service subsequent to September 8, 1978, once objected to by respondents, *cf. United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952), was of questionable validity. Accordingly, and in view of the Chairman's determination not to seek Civil Service Commission approval of the existing contractual arrangement or any other employment arrangement with Judge Hinkes, the matter must be remanded for the appointment of a substitute ALJ to preside over further proceedings. Therefore, respondents' motions requesting Judge Hinkes' disqualification are dismissed as moot. Kellogg's motion for an evidentiary hearing, or, in the alternative, for oral argument is also dismissed as moot.

Complaint counsel have requested the Commission to include a

directive to the substitute ALJ to proceed to the conclusion of the hearings, to base his assessment of the need for *de novo* hearings on the proposed findings and the record, and to recall witnesses if he concludes "that observation of the demeanor of the particular witnesses is likely to be of material assistance in making findings of controlling facts." The parties have addressed the legal precedents regarding the extent, if any, to which retrial may be necessary.

The Commission agrees with the parties that the ALJ should decide in the first instance the issues associated with the future conduct of these proceedings and whether portions of the record or particular witnesses, if any, will need to be reheard. To facilitate the law judge's consideration of the questions raised here, as well as ultimate Commission review, the parties are ordered to submit to the substitute ALJ, within forty-five (45) days from this order, briefs responding to the following questions, as well as any other legal or factual matters that the submitting party may deem relevant to the issue of whether retrial is required and, if so, to what extent. In addressing these matters, consideration should be given to the application of principles enunciated in recent precedents such as *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978), and *New England Coalition on Nuclear Pollution v. NRC*, 582 F.2d 87 (1st Cir. 1978).

1. Identify the issues in the proceeding whose resolution depends upon an evaluation of credibility and with respect to which it is important to preserve demeanor evidence.

2. With respect to the issues identified in No. 1 above, identify each witness pertinent to each issue and the location in the record where demeanor evidence would materially assist in determining credibility. Indicate why the demeanor of such witness is crucial to resolution of the issue so identified.

3. Assuming that certain witnesses should be recalled, would it be sufficient to recall them merely for the purpose of cross-examination?

4. Assuming that certain witnesses should be recalled for purposes of direct testimony and cross-examination, could such further appearances be limited to certain aspects of their testimony?

Appropriate replies, if any, shall be within the discretion of the substitute ALJ.

In ordering such briefing, we do not intend to imply that the substitute ALJ is obliged to make definitive determinations before proceeding with the hearings concerning the extent to which, if at all, the recall of any particular witness is required or desirable. As

we have noted, all such issues are matters for the ALJ to address in the first instance.

In replying to complaint counsel, Kellogg has requested the Commission "to afford respondents a reasonable length of time following the ruling (e.g., 30 days) to file additional disqualification motions before the Commission * * * appoints a substitute judge * * *." To the extent that this request may be deemed an application for a stay, it is denied, and the stay of proceedings ordered by the Commission on October 20, 1978, is hereby terminated. To the extent that the motion filed by General Mills on November 29, 1978, is not disposed of by this order, it will be acted upon by the Commission subsequent to the expiration of the time for the filing of responses.

II.

By motion of September 22, 1978, Kellogg, joined by General Mills on September 27, 1978, requested the issuance of subpoenas *duces tecum* requiring the Federal Trade Commission and the Civil Service Commission to produce: "(1) documents referring or relating to the retirement of Administrative Law Judge Harry R. Hinkes and the retention of his services by the Federal Trade Commission thereafter, and (2) documents sufficient to show any rules, regulations, guidelines and policies concerning status of administrative law judges and the retention of the services of retired administrative law judges." On October 4, 1978, this motion was certified to the Commission.

In its accompanying memorandum, Kellogg asserts that a statement by Judge Hinkes announcing his retirement and retention "inevitably raise[s] serious questions as to whether the present status of the Administrative Law Judge presiding in this matter is in conformance with statutes and regulations intended to ensure the independence of administrative law judges and is consistent with the requirements of due process. * * * Their resolution requires a clear understanding of the facts concerning Judge Hinkes' change in status." Kellogg further asserts that the requested subpoenas are "clearly relevant to the resolution of the question presented." However, in light of the Commission's disposition, *supra*, of the disqualification motions, the "question" concerning which Kellogg sought the subpoenas is no longer presented. Because the necessity and relevancy requirements of Rules of Practice 3.36 and 3.37 are not satisfied, the motion is denied.

Nevertheless, to clarify the record in this proceeding, appended hereto is a statement by Chairman Pertschuk, memorializing his role in the decisionmaking process that resulted in the contract. No

other Commissioner had any involvement with, or knowledge of, that process. Also appended, in their entirety, are three memoranda to or from Chairman Pertschuk or a member of his staff concerning the continued service of Judge Hinkes in the event he retired. There are no other such memoranda involving Chairman Pertschuk or any other Commissioner.

III.

It is ordered, That (1) this matter is remanded for appointment of a substitute ALJ to preside over further proceedings;

(2) the parties are directed to file the briefs described above within forty-five days with replies to be within the discretion of the ALJ;

(3) respondents' motions seeking disqualification and Kellogg's motion for an evidentiary hearing or oral argument are dismissed as moot;

(4) Kellogg's motion for issuance of subpoenas is denied; and

(5) the stay entered on October 20, 1978, is terminated.

Commissioner Pitofsky did not participate.

SEPARATE STATEMENT OF CHAIRMAN PERTSCHUK

I think it important that I set forth for the record the role that I played in approving the contractual arrangement with Judge Hinkes that is challenged by the motions before the Commission and my reasons for initially approving the arrangement.

As is apparent from Chief ALJ Hanscom's memorandum to me dated August 16, 1978, the full text of which is released today Judge Hinkes had indicated his intention to retire effective August 31, 1978, for personal reasons including the fact that the difference between his take home salary and the amount he would receive in retirement was not, in his opinion, sufficient to justify his continuing in regular service. Chief Judge Hanscom recommended that I authorize the offering to Judge Hinkes of an arrangement whereby Judge Hinkes would be retained under contract to complete the *Kellogg* case after his retirement. After being advised that the arrangement was legally permissible and had been cleared with the Civil Service Commission, I authorized Chief Judge Hanscom to extend the offer to Judge Hinkes, as is evidenced by the memorandum dated August 21, 1978, from my attorney advisor, William J. Baer, to Chief Judge Hanscom. That authorization involved an administrative decision within my authority as Chairman pursuant to Reorganization Plan No. 8 of 1950, 64 Stat. 1264, and did not require the participation of the full Commission. *The Hearst*

Corporation, Dkt. 8832, 81 F.T.C. 1028(1972). I did not seek approval of the other Commissioners, nor to my knowledge did any other Commissioner participate in the matter.

I also wish to note for the record that after the offer had been made to Judge Hinkes, my staff informed me that Judge Hinkes had requested that I personally communicate to him my authorization of the arrangement. I telephoned Judge Hinkes and in a very brief conversation indicated only that I hoped he would accept the contractual arrangement and complete the case. Judge Hinkes responded that he would consider the request. I did not discuss with Judge Hinkes the merits of the case, the manner in which he might proceed with the case, or anything else concerning the proceeding.

I authorized extension of the offer to Judge Hinkes for the following reasons: (1) he had presided over the *Kellogg* case since the complaint had been issued in April 1972, and was therefore familiar with the extensive record of the case; (2) appointment of a substitute was likely to have resulted in a substantial loss of time required by his review of the already extensive record in the case; and (3) with a substitute ALJ issues would likely arise concerning the extent to which, if at all, the new ALJ was obliged or might wish to rehear witnesses who had testified. These are the sole factors on which my decision was based. In no way was my decision influenced by a belief that Judge Hinkes had been or would be in some manner more favorable to one side than the other. Understanding as I did that the arrangement with Judge Hinkes presented no legal problems, I concluded that the potential benefit to all concerned in having the case concluded in a manner that did not entail significant delays and burdens on the parties justified that arrangement to retain the services of Judge Hinkes.

After reviewing the briefs of the parties, however, I have come to the conclusions that Judge Hinkes became "unavailable" within the meaning of 5 U.S.C. 554(d) upon his retirement on September 8, 1978, and that because his reappointment on a contractual basis was not approved by the Civil Service Commission, his service subsequent to September 8, 1978, once objected to by respondents, was of questionable validity. In light of the substantial legal questions now raised and the fact that none of the parties desires to have Judge Hinkes continue to preside and evidently all are willing to forgo the benefits of having him continue, *i.e.*, potential savings in costs and time, I have determined not to seek Civil Service Commission approval of the existing contractual arrangement or some other employment arrangement with Judge Hinkes.

MEMORANDUM

DATE: August 16, 1978

REPLY TO

ATTN OF: Daniel H. Hanscom,

Chief Administrative Law Judge

SUBJECT: Retention of Administrative Law Judge
Harry R. Hinkes on Contract Basis

TO: Chairman Pertschuk

Judge Harry R. Hinkes has advised that he intends to retire as of August 31, 1978. His stated reason for retiring is age, length of service and to take advantage of the 4.9 percent cost-of-living bonus which will be given to employees who retire by that date. He is 68 years of age and the difference between the retirement he will receive and his present take home pay will be approximately \$3,500 per year for the first one and one-half years of his retirement when his retirement income will be tax free. He does not feel justified at his age in working for the next year and one-half for this small difference in take home pay.

Judge Hinkes joined the Federal government service on February 10, 1945. Thus, he is now in his thirty-third year of service. He first joined the FTC on August 23, 1959 as a Hearing Examiner. He was transferred to the NLRB on May 22, 1965, and returned to the FTC January 23, 1972.

Judge Hinkes is the presiding judge in the *Kellogg* case. He was assigned this matter on April 26, 1972, before I became Chief Administrative Law Judge. Because of extensive requirements for discovery in this case, complaint counsel were unable to begin trial until April 28, 1976. As the case now stands, the defense is approximately one-half completed, which will probably be followed by complaint counsel's rebuttal and defense surrebuttal. Judge Hinkes estimates that the trial will be completed early next year, and he anticipates filing an initial decision by the end of 1979 or early 1980.

The trial record now exceeds 36,000 pages, with approximately 10,000 additional pages remaining to be heard. Well over one hundred witnesses have already testified, including a number of economic experts. As you are aware, this is a highly complex proceeding. I believe we have no alternative but to retain Judge Hinkes to complete this case and file an initial decision. Assignment to a new law judge at this juncture could raise serious problems.

As I see it the only way to retain Judge Hinkes is to offer him a contract to complete the *Kellogg* case. While it has been suggested that Judge Hinkes might be retained as a rehired annuitant, the pay

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involved—the difference between his retirement pay and his normal salary would make no significant difference in his current “take-home” and is not sufficient to interest Judge Hinkes. Under a contract basis we would retain Judge Hinkes for \$150 per day. The total cost would be between \$25,000 and \$30,000. We believe Judge Hinkes would continue on the *Kellogg* case on this basis. The cost, in my opinion, is warranted under the circumstances.

Accordingly, we recommend and ask authorization to offer Judge Hinkes a contract according to the foregoing terms. Approval is needed by August 27, 1978 before Judge Hinkes retires.

Respectfully submitted,

/s/ Daniel H. Hanscom
Chief Administrative Law Judge

FTC 4-3

FEDERAL TRADE COMMISSION
OFFICE OF THE CHAIRMAN

TRANSMITTAL SLIP

TO:

Judge Hanscom

FROM:

Bill Baer BB

DATE: August 21, 1978

- ☐ Please prepare reply for
Chairman's Signature
- ☐ Please see me
- ☐ Approval
- ☐ Recommendation
- ☐ Information
- ☐ Necessary action
- ☐ Note and return
- ☐ File

REMARKS:

Mike says that, as usual, you recommend the most appropriate course. I thought you might want something more official for the record. Thus the attached.

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August 21, 1978

MEMORANDUM

TO: Daniel Hanscom
FROM: William J. Baer

The Chairman asked that I respond to your August 16, 1978 memo with respect to Judge Hinkes. We agree with your recommendation and hereby authorize you to extend Judge Hinkes a contract to complete the adjudicative matter over which he currently is presiding.

cc: ✓ Margery Waxman Smith
Micheal Sohn

FEDERAL TRADE COMMISSION
RECEIVED

AUG 22 1978

Asst. Dir. for
Fed. Enforcement

IN THE MATTER OF
HARNISCHFEGER CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS

Docket 9107. Complaint, March 10, 1978 — Decision, Dec. 8, 1978

This consent order, among other things, requires a Brookfield, Wis. manufacturer of lattice-boom cranes and the Northwest Engineering Company, a Green Bay, Wis. competitor, to provide the F.T.C. with evidence that all merger agreements between them have been terminated; and return all confidential documents exchanged during negotiations. The order prohibits respondents from acquiring any part of each other's lattice-boom business until July 31, 1981 without furnishing the Commission with 60 days' notice of such intention. Should the Commission issue a complaint challenging the transaction during this period, respondents are required to postpone the proposed merger or acquisition until administrative proceedings have been concluded. Additionally, the order limits sales between the two companies until July 31, 1981.

Appearances

For the Commission: *Peter E. Greene.*

For the respondents: *Alan I. Becker, Kirkland & Ellis, Chicago, Ill.*
for Harnischfeger Corporation and *William O. Fiffield, Sidley & Austin, Chicago, Ill.* for Northwest Engineering Company.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents, each subject to the jurisdiction of the Commission, have entered into a merger agreement which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, that said agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b), of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITION

PARAGRAPH 1. For the purpose of this complaint, the following definition shall apply: "lattice boom cranes" means cranes mounted either on crawlers or rubber tired vehicles, powered by one or more