

IN THE MATTER OF
INTERNATIONAL TELEPHONE & TELEGRAPH
CORPORATION, ET AL.

Docket 9000. Interlocutory Order, Jan. 21, 1981

Granting complaint counsel leave to withdraw and dismissing "Motion for Disciplinary Action."

ORDER

On October 15, 1980, complaint counsel in this matter filed a "Motion For Disciplinary Action," asking that the Commission take "appropriate steps" against respondent's counsel for allegedly improper conduct. They asked the Commission to direct Administrative Law Judge Miles J. Brown to make certain findings under Rule of Practice 4.1(e) in a show cause hearing, and they asked the Commission to defer any disciplinary action until it had the results of the ALJ's investigation. The ALJ earlier denied complaint counsel's motion that he conduct such a hearing.

Very briefly, the subject of the requested investigation and the alleged cause for disciplinary action is a sequence of events over the course of discovery in this matter from 1976 to 1980. Those events, described in some detail in the pleadings, generated questions by complaint counsel about a) the thoroughness of respondent's search for and production of documents responsive to a 1976 subpoena and b) the duty of respondent and its counsel to supplement that subpoena response with additional material that was either newly discovered or, as suggested, intentionally withheld.

On December 1, 1980, respondent's counsel filed their "Opposition," accompanied by an affidavit. They denied that there was any improper conduct or any basis for disciplinary action, and they explained the questioned circumstances in detail. They also indicated that they had been engaged in extensive discussions with Bureau of Competition attorneys since the October 15 motion was filed and that the information they had provided would lead complaint counsel to withdraw their motion for disciplinary action. Still, respondent's counsel alleged that charges contained in the motion were made without adequate investigation, that they were incorrect, and that they had received damaging publicity. Therefore, respondent's counsel request that the Commission issue a press release stating its reasons for dismissing complaint counsel's motion.

As respondent's counsel indicated, on December 1, 1980, complaint counsel filed a "Reply" to the "Opposition" in which they withdrew

their request for a hearing and their request for disciplinary action. In so doing, however, complaint counsel recommended that the Commission consider and adopt policy positions or rules regarding certain enumerated discovery issues. Furthermore, complaint counsel state that the matter before us is not mooted by their withdrawal, since there are still unfulfilled discovery duties incumbent upon respondent and its counsel.

A brief, general outline of the salient facts described in the pleadings is necessary. In 1974, the respondent produced certain documents in private litigation, some of which later appeared to relate to the same subject matter as an FTC subpoena. In 1976, respondent produced further documents in response to an FTC subpoena, *not* including at least one relevant document believed to have surfaced in the 1974 private litigation. Thus, this controversy concerned pre-existing documents responsive to the 1976 subpoena, not discovered in 1976 and only later discovered (in subsequent phases of the private discovery) and thereupon produced to the Commission. There is no question that respondent's counsel did come forward with the lately discovered information, although there were questions about the timing of that production, which have been resolved. Furthermore, a subsequent Commission subpoena in 1979 yielded other documents said to be responsive to the 1976 subpoena which existed in 1976 but were not previously discovered or produced.

While questions of ethical conduct arising from this sequence of events are no longer before us, complaint counsel separately assert that respondent had a continuing obligation after 1976 to go back to various document sources, including the document production in the private litigation, in order to search for and produce documents responsive to the 1976 subpoena. In fact, complaint counsel claim that respondent's counsel have still not searched the contents of twelve boxes of Continental Baking Company documents which are duplicates of those produced in the private litigation and likely to contain responsive documents. We note that, despite claims of prejudice to complaint counsel's case, the ALJ has reopened the record to allow introduction of the lately discovered and produced documents. Therefore, with complaint counsel's withdrawal of the request for Commission disciplinary action, complaint counsel's residual concern focuses on the lack of an analog to Federal Rules of Civil Procedure 26(e) in the Commission's Rules of Practice and the ambiguity of responsibility thus created.

Rule 26(e), FRCP, imposes upon parties and their lawyers a duty to amend a prior discovery response if they obtain new information

that indicates 1) that the response was incorrect when made or 2) that the response was correct when made but is no longer true *and* that failing to amend the response would be a knowing concealment. Complaint counsel contend that the duty to supplement prior responses to Commission discovery orders includes 1) the obligation to submit documents that were responsive to a prior discovery order and in the custody, control or knowledge of the party at the time production was made but that were not furnished at that time, as well as 2) the obligation to produce, under certain circumstances, newly acquired information or documents. They say that the lack of a Rule 26(e) analog in the Commission's Rules of Practice makes this duty ambiguous. Consequently, complaint counsel, in withdrawing their motion, recommend that the Commission "consider" certain enumerated issues arising from this ambiguity. Furthermore, they recommend that the Commission adopt certain policies regarding the duty to supplement prior discovery responses, by which we assume that complaint counsel recommend promulgation of corresponding changes in our Rules of Practice.

Our response must necessarily be limited, for contrary to complaint counsel's suggestion, we regard the instant controversy as moot with the withdrawal of the motion for disciplinary action, which we allow. As for complaint counsel's request that respondent's counsel search through the twelve boxes of documents assembled for the private litigation to find pre-existing documents responsive to the 1976 subpoena, we believe that this matter should be left to the administrative law judge. In fact, the matters suggested by complaint counsel as the subjects of specific rules changes, such as entitlement to a subsequent discovery order when there is reason to believe that documents responsive to a prior order have not been produced, are matters presently reposed in the authority and discretion of the administrative law judges. See Rules of Practice Section 3.38.

As for the recommendation that the Commission "consider" certain discovery-related issues, because of the mootness of the specific request before us, we decline the opportunity to discuss generally any reasons for or effects of the absence of an express analog to FRCP 26(e) in our Rules of Practice. Therefore,

It is hereby ordered, That we grant complaint counsel leave to withdraw, and we hereby dismiss the October 15, 1980, "Motion For Disciplinary Action." Accordingly, the requests for Commission action and the specific questions of ethical conduct raised therein are rendered moot. We think that the press release requested by respondent's counsel is unnecessary.

Interlocutory Order

97 F.T.C.

IN THE MATTER OF

E.I. DUPONT de NEMOURS & CO.

Docket 9108. Interlocutory Order, Jan. 21, 1981

ORDER EXTENDING IN CAMERA TREATMENT

On January 16, 1980, E.I. DuPont de Nemours and Company ("DuPont") requested a three year extension of *in camera* treatment for certain documents in the record of this proceeding. By order of October 20, 1980, the Commission ordered that *in camera* protection of all documents so designated should continue until certain questions on which the Commission requested additional information are resolved. Respondent has submitted its response to that order and the Commission is now prepared to rule on the requested extension.

The Commission's standards for *in camera* protection of exhibits in adjudicative proceedings are clearly expressed in *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184 (1961); *Bristol-Myers Company*, 90 F.T.C. 455 (1977); and *General Foods Corporation*, Docket No. 9085, Order of March 10, 1980. Despite respondent's arguments to the contrary, the provisions of the F.T.C. Improvements Act of 1980 (Pub Law 96-252) governing treatment of confidential information do not alter the long-established fact that Section 6(f) of the Federal Trade Commission Act does not absolutely bar disclosure of business data as evidence in our adjudicatory proceedings.¹

The standard for *in camera* treatment is one of "clearly defined, serious injury." *H.P. Hood & Sons, Inc.*, 58 F.T.C. at 1188. We pointed out in *Bristol-Myers Co.*, 90 F.T.C. at 457 and in our March 10 Order in *General Foods* that the secrecy and materiality of the business information sought to be protected comprise the two elements of the serious injury analysis. As aids in the determination of secrecy and materiality, the Commission in *Bristol-Myers* cited six factors mentioned in the Restatement of Torts. 90 F.T.C. at 457. Furthermore, we have acknowledged that the showing of serious injury does not necessarily require a specific demonstration of the manner in which other firms would use material to the disadvantage of the firm

¹ New Section 21(d)(2) of the FTC Act provides that

[a]ny disclosure of relevant and material information in adjudicative proceedings to which the Commission is a party shall be governed by the rules of the Commission for adjudicative proceedings . . . except that the rules of the Commission shall not be amended in a manner inconsistent with the purposes of this section.

Discussing what ultimately was enacted as Section 21(d)(2), the Senate Report on S.1991 stated specifically that the Commission should maintain the procedures in Rules 1.18(b) and 3.45 for granting *in camera* treatment. Senate Report No. 96-500 at pp. 27-28 (1979).