

IN THE MATTER OF

KELLOGG COMPANY, ET AL.*Docket 8883. Interlocutory Order, June 8, 1981*

Denial of respondents' motions to reconsider order of May 15, 1981.

ORDER

Kellogg and General Mills have filed objections to our Order of May 15, 1981. We have reviewed these objections and we find them to be without merit.

Kellogg argues that the statutory requirement for the Office of Personnel Management ("OPM") to appoint an Administrative Law Judge ("ALJ")—that is, that the Commission be "occasionally or temporarily * * * insufficiently staffed with administrative law judges," see 5 U.S.C. 3344—has not been met. Kellogg does not specify the relief it seeks based upon this objection. After ALJ Berman withdrew from the supplementary proceedings on November 21, 1979, then-Chief Judge Hanscom, in lieu of appointing another ALJ under Rules of Practice Section 3.42(b), filed a "Certification to Commission of Matter of Appointment of Official to Conduct Proceeding to Supplement Record" on November 27, 1979. Chief Judge Hanscom recited that Judge Berman withdrew because he "concluded that his impartiality might reasonably be questioned and that rulings, findings or conclusions he might make could be subject to the contention that they were influenced by the relative degree of his friendship with [Judge Hanscom], Judge Barnes and Judge Hinkes." Judge Hanscom further reported that, although ordinarily he would appoint a substitute ALJ, "in this instance the factors cited by Judge Berman motivating his withdrawal apply to all the remaining law judges in this office." Kellogg would apparently have us go behind this assertion of the Chief Law Judge and canvass each ALJ individually. We believe, however, that Judge Hanscom's certification is an entirely sufficient record basis for the Commission's conclusion that it is "occasionally or temporarily * * * insufficiently staffed" with ALJ's.

Moreover, Kellogg itself urged the course of action it now challenges. It contended

Additionally, for the reasons stated in Chief Judge Hanscom's memorandum of November 26, 1979, Kellogg contends that no ALJ currently employed by the Commission can properly preside over any further proceedings to supplement the record.

Accordingly, Kellogg recommends that the Commission appoint an ALJ from outside the agency * * *. [Memorandum of Respondent Kellogg Company in Response to the Commission's Order of March 4, 1980, filed Apr. 3, 1980 at 70.]

In addition, our February 13 Order gave notice of our intention to seek the appointment of an outside ALJ. Not only did Kellogg not object, but it filed detailed recommendations on the procedures to be followed. It has given no explanation either for its sudden reversal of position or for its untimely objection, and we perceive none.

Kellogg also objects that under the Commission's Order of May 15, 1981, the new ALJ will file a recommended rather than an initial decision. It misapprehends the nature of the supplementary proceedings we have ordered in this matter. Those proceedings are intended to assure the integrity of the Commission's procedures in this case. The Commission has been, and continues to be, therefore, itself the fact-finder, as is evidenced by the prior orders entered in this collateral inquiry (see, *e.g.*, Orders of November 30, 1979, July 31, 1980, October 9, 1980). Moreover, the factual issues have now been narrowed to one remaining question: "[W]hat actions did any employee of the Bureau of Competition take in the process leading to the contract with former ALJ Hinkes?" (Order of May 15, 1981, at 7.) The recommended decision procedure, expressly authorized by 5 U.S.C. 557, is ideally suited to the role that the Commission has reserved for itself, and we therefore adhere to our earlier determination to utilize that procedure.¹

Third, Kellogg asks that it be afforded a ten-day period to comment upon and challenge any OPM selection. Insofar as this request asks us to make such a recommendation to OPM as the appointing authority, we decline to do so. The notification and objection procedure that Kellogg now urges is similar, although not identical, to the procedure it proposed for the appointment of an ALJ in its submission in response to our February 13 Order. Under that proposal, we would have requested OPM to prepare a list of up to ten eligible ALJ's, and the parties would have had ten days to object to up to four of the ten ALJ's listed by OPM. We rejected that proposal because it appeared "cumbersome and burdensome for OPM, the Commission and the parties, and could well lead to a substantial delay in the appointment of an ALJ." Order of May 15, 1981, at 3. Procedures already in place assure that proper grounds for disqualification of an ALJ can be heard.²

¹ Kellogg also urges that OPM should not appoint an ALJ because of this determination. Our exercise of procedural discretion will ultimately be subject to review in a court of appeals if an order adverse to Kellogg issues in this proceeding. In our view, this determination is not a relevant factor in OPM's appointment of an ALJ pursuant to 5 U.S.C. 3344.

² See Rules of Practice Section 3.42(g)(2). Commission determinations of such disqualification motions are of course subject to judicial review, as described in footnote 1, *supra*.

General Mills objects to the appointment process because we did not follow its suggestion that the Commission request OPM to appoint an ALJ of at least five years' experience in presiding over proceedings under rules similar to those of the Commission. Our letter to OPM of May 15, 1981, expressly advised that agency of the nature of the proceeding and the position of respondents in this respect. We see no reason to alter our May 15 determination.

Accordingly, treating the filings of Kellogg and General Mills as motions to reconsider our Order of May 15, 1981, we find them without merit and deny them. *It is so ordered.* The Secretary shall transmit a copy of this order to the Director of OPM.

Commissioner Pertschuk did not participate.

ADVISORY OPINION

Whether any of the laws enforced by the Commission would be violated if a member of UAW served as a director of American Motors Corporation at the same time that another UAW member was a director of Chrysler Corporation. [*United Auto Workers, May 1, 1981*]

Advisory Opinion Letter

May 1, 1981

Dear Mr. Fillion:

On October 9, 1980, on behalf of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW"), and pursuant to Sections 1.1-1.4 of the Commission's Rules of Practice, you requested advice with respect to whether any of the laws enforced by the Commission would be violated if a member of the UAW served as a director of American Motors Corporation ("AMC") at the same time that another UAW member was a director of Chrysler Corporation ("Chrysler"). In considering this request for an advisory opinion, the Commission has reviewed the memoranda submitted by the UAW and AMC.

1. Factual Background¹

The UAW is a labor union that represents employees of automobile manufacturers, including Chrysler and AMC. Pursuant to an agreement between the UAW and Chrysler, Douglas A. Fraser, President of the UAW, was nominated to serve on Chrysler's board of directors and has been a director of Chrysler since May 1980. During 1980 contract negotiations between the UAW and AMC, the UAW presented a demand for participation on AMC's board of directors through a member other than Mr. Fraser. AMC agreed to nominate a UAW member other than Mr. Fraser as a director at its next regular stockholders' meeting. This agreement, however, is contingent upon determinations of "legal acceptability" by the Federal Trade Commission, the Department of Justice, and the Department of Labor.

¹ The facts discussed in this opinion are based upon the materials supplied by the UAW and AMC.

2. Section 8 of the Clayton Act

Section 8 of the Clayton Act prohibits interlocking directorates between competing corporations. In pertinent part, the statute provides that

no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus and undivided profits aggregating more than \$1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers . . . , if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

The Congressional intent underlying Section 8 was clearly summarized in one of the first cases to be brought under the statute:

[A] fair reading of the legislative debates leaves little room for doubt that, in its efforts to strengthen the antitrust laws, what Congress intended by § 8 was to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates.

United States v. Sears, Roebuck & Co., 111 F.Supp. 614, 616 (S.D.N.Y. 1953).²

It has been recognized that "there is no need to assess the nature of the industry or to look at mitigating circumstances. It [Section 8] is a *per se* statute." *Perpetual Fed. Sav. & Loan Ass'n*, 90 F.T.C. 608, 619 (1977) (Initial Decision), *order withdrawn on other grounds*, 94 F.T.C. 401 (1979).

It appears that Chrysler and AMC are competitors, that they satisfy the size requirement contained in Section 8, and that they engage in interstate commerce. Thus, some elements of a violation are present, and the law would be violated if the same person were a director of both companies and if no exemption from the antitrust laws were applicable. This letter, therefore, focuses on the issue of whether the UAW is a "person" within the meaning of Section 8 and, if so, whether it would be a "director" of AMC and Chrysler in the circumstances described in the materials submitted to us and the related issue of whether the labor feature of the arrangement renders Section 8 inapplicable.

Section 1 of the Clayton Act, 15 U.S.C. 12 (1976), defines the term "person" to include corporations and associations. This language is identical to the definition found in the Sherman Act, under which unions have been held to be persons. *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 390-92 (1922). There is no case prece-

²See also H.R. Rep. No. 627, 63d Cong., 2d Sess. 20 (1914).

dent holding that the same construction is or is not appropriate under the Clayton Act, but it is conceivable that the UAW could be a person within the meaning of Section 8.

The next question is whether the UAW would, for purposes of Section 8, be a director of both Chrysler and AMC in the factual situation presented to us. Specifically, the question is whether Section 8 would be violated since, technically, different individuals would be elected as directors of the two companies and since, in the labor-management context, the concerns to which Section 8 is addressed might not arise.

The basic purposes of Section 8 are to avoid the opportunity for coordination of business decisions by competitors and to prevent the exchange of commercially sensitive information among competitors. The potential harm prohibited by Section 8 has been said to be likely if two individual directors serving on the boards of competing companies are both representatives of a third party. See V.P. Areeda & D. Turner, *Antitrust Law* 374-75 (1980); see also *United States v. Cleveland Trust Co.*, 392 F.Supp. 699 (W.D. Ohio 1974), in which the government took the position that a corporation sat on the boards of competing corporations through representatives or deputies. Although the Department of Justice advanced the deputization theory nearly eight years ago, the *Cleveland Trust* case was settled and there are no decided cases adopting or endorsing that theory.

Because of the absence of decided cases, our views concerning the "deputization theory" must be somewhat tentative. Nevertheless, we believe that a corporation or association may violate Section 8 of the Clayton Act if it has representatives or deputies serving simultaneously on the boards of two competing corporations. However, we do not believe Section 8 was intended to reach interlocking directorates formed through "representatives" of a common labor union. Such a construction of Section 8 would extend its reach beyond the situations which Congress intended to be *per se* unlawful and might preclude particular labor-management relationships which may not present the risk of competitive harm at which Section 8 was aimed. Consequently, we do not believe that Section 8 should be construed to make unlawful the type of labor-management experiment at issue here.

Further, the UAW has made clear in its submission that it intends that the director on the AMC board will function independently and will refrain from sharing confidential commercial information with other union officials, including the UAW director on the Chrysler board. The proposed arrangement arises in the novel context of worker involvement in the affairs of corporate management with expressed aims that do not raise Section 8 concerns. On those facts (and

we believe we are bound to accept the UAW's assertions as factually correct) we do not believe a "representative" relationship for purposes of Section 8 is present.

By direction of the Commission, Commissioner Bailey dissenting.

/s/ Carol M. Thomas

Secretary

Letter of Request

October 9, 1980

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) hereby requests the Commission for advice or interpretation pursuant to Title 16 C.F.R. Part 1, Sub-part A, Section 1.1 through Section 1.4.

Question Presented

1. Whether a UAW member on the board of directors of American Motors Corporation (AMC) violates applicable United States Antitrust Laws under the jurisdiction of the Federal Trade Commission, when a separate UAW member is on the board of directors of the Chrysler Corporation, a competitor of American Motors.

Statutes under Which the Question Arises

The question arises under the following statutes of the United States:

1. Section 8 of the Clayton Act, 15 U.S.C. 19 (1976);
2. Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(d)(1);
3. Section 1 of the Sherman Antitrust Act, 15 U.S.C. 1.

Statement of Material Facts

The UAW is a labor union that represents auto workers employed, among others, by Chrysler Corporation and by the American Motors Corporation. Since May of 1980, Douglas A. Fraser, a member of the UAW, has been a director of Chrysler. During the 1980 contract negotiations with AMC, AMC agreed to nominate a UAW member as a director at its next regular stockholders' meeting (February,

1981) upon determinations of "legal acceptability" by the Department of Labor, the Department of Justice and the Federal Trade Commission, as set forth in a letter from American Motors Corporation to the UAW attached hereto and made a part hereof as Exhibit A.*

As a consequence, and because of the agreement with the American Motors Corporation, the UAW is requesting appropriate advisory opinions of the agencies set forth in the letter of agreement. The anti-trust aspects of the matter for which the UAW seeks advice or interpretation involve substantial and novel questions of fact and law, and there is no clear Commission or court precedent. In addition, the subject matter of the request and subsequent publication of Commission advice on this matter is of significant public interest.

In order to assist the Commission in its consideration of this request, the UAW submits the attached Memorandum of Fact and Law in Support of the Nomination of a UAW Member To Serve on the Board of Directors of the American Motors Corporation.*

Copies of this letter, Exhibit A, Exhibit B,* the request to the Justice Department,* and the UAW's Memorandum of Fact and Law are being sent to Richard MacCracken, Vice President, Industrial Relations, American Motors Corporation, 14250 Plymouth Road, Detroit, Michigan 48232.

Respectfully Submitted,

INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW)

/s/ John A. Fillion
General Counsel

Philip W. Moore
Law Offices of Philip W. Moore

* Not reproduced herein for reasons of economy.

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