

Show Cause Order

111 F.T.C.

IN THE MATTER OF

R.J. REYNOLDS TOBACCO COMPANY

Docket 9206. Show Cause Order, March 24, 1989

SHOW CAUSE ORDER

On October 28, 1988, Chief Administrative Law Judge Montgomery Hyun certified to the Commission for enforcement a subpoena and a set of interrogatories that had been directed to the respondent, R.J. Reynolds Tobacco Company ("Reynolds").¹ Reynolds has declined to respond to the subpoena, to answer the interrogatories or to participate in the remainder of this proceeding before the administrative law judge on the ground that such participation would violate its First Amendment right to free speech. On September 20, 1988, complaint counsel moved that the judge impose sanctions on Reynolds in the form of adverse inferences drawn from the subpoena and interrogatories to which Reynolds has refused to respond and to permit complaint counsel to present evidence in support of the complaint. The judge declined and, on his own motion, certified the subpoena and interrogatories to the Commission for enforcement.

The issue before the Commission is whether to seek enforcement or to take other action. For the reasons below, the Commission has decided not to seek enforcement at this time but to direct the respondent to show cause why the Commission should not impose sanctions in the form of adverse inferences, as provided in the Rules of Practice.

A subpoena enforcement action would be advisable if we believed that it would promote expeditious completion of the administrative proceedings. *See UAW v. NLRB*, 459 F.2d 1329, 1339 (D.C. Cir. 1972) ("enforcement against a really intransigent party can be costly and time consuming, where the enforcement process is of necessity collateral to the main case"). Reynolds has stated that it intends to defend its refusal to comply with complaint counsel's discovery on the ground that the Commission lacks jurisdiction to conduct this proceeding. Although Reynolds would appear to prefer litigating this issue in the court of appeals without first proceeding in district court, and indeed opposes a subpoena enforcement action here as inefficient,

¹ Also included in the certification was a subpoena directed to a nonparty, Stanley H. Katz, Leber Katz

it has promised to argue its case vigorously in any district court subpoena enforcement proceeding, raising the question to higher courts, if necessary. Respondent's Memorandum Regarding Certification and Responding to Statement of Complaint Counsel at 10-11. This procedure, of course, is permissible, but not likely to facilitate or expedite this proceeding.

Generally, a question of agency authority or jurisdiction should be judicially reviewed only after agency action has been completed, and the courts will defer to agency expertise, permitting the agency to develop the necessary factual background on which decisions should be based. See, e.g., *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 214 (1946); *FTC v. Markin*, 532 F.2d 541, 543, (6th Cir. 1976), quoting *McKart v. United States*, 395 U.S. 185 (1965). See also *American Medical Ass'n*, 94 FTC 701, 1027-28 (1979), *aff'd*, 638 F.2d 443 (2d Cir. 1980), *aff'd per curiam by an equally divided Court*, 445 U.S. 676 (1982).²

The courts, however, have recognized several exceptions to the general rule favoring judicial review of jurisdiction only after final agency action. These exceptions, as we noted in *American Medical Ass'n*, apply in instances in which (1) the agency "has clearly violated a right secured by statute or agency regulation;" (2) the issue is "strictly legal . . . not involving the agency's expertise or any factual determinations;" or (3) "the issue cannot be raised upon judicial review of a later order of the agency." 94 FTC at 1028; see *FTC v. Miller*, 549 F.2d 452, 460 (7th Cir. 1977). The courts have also ruled on jurisdiction in enforcement proceedings when presented with agency action of an "unprecedented" nature. See e.g., *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir.) *cert. denied*, 454 U.S. 897 (1981).³

If we agreed that the case law supported Reynolds' position, we might conclude that it would be inappropriate to impose sanctions instead of attempting to secure court enforcement of the subpoena and interrogatories. *American Medical Ass'n*, 94 FTC at 1027. We are not persuaded, however, that any of the above exceptions applies in this proceeding. In addition, cases involving alleged deceptive

² This position is consistent with the action of the Court of Appeals for the District of Columbia Circuit in July, 1988, when it refused to rule on Reynolds' jurisdictional question until the Commission had taken final agency action in its adjudicatory proceeding. *R.J. Reynolds Tobacco Co. v. FTC*, No. 88-1355 (D.C. Cir. July 1, 1988, *reh. and reh. en banc denied*, July 15, 1988).

³ In ruling against the FEC in this case, the court distinguished what it considered the narrow scope of that agency's jurisdiction from the "broad duties" of the Federal Trade Commission to "gather and compile information and to conduct periodic investigations concerning business practices." *Id.* at 387.

advertising are hardly “unprecedented” at the FTC and are well within the agency’s statutory authority. Nor would seeking enforcement of the subpoena and interrogatories at this time be likely to result in a speedy resolution of the issues. For these reasons, we think it unwarranted to delay this proceeding with a discovery action.

Rule 3.38(c) of the Commission’s Rules of Practice states that if a party fails to comply with a subpoena or to respond to an order requiring answers to interrogatories,⁴ “[i]t shall be the duty of parties to seek and Administrative Law Judges to grant such of the . . . means of relief [listed in § 3.38(b)] or other appropriate relief as may be sufficient to compensate for withheld testimony, documents or other evidence.” Only if the judge finds such compensatory measures “insufficient” does the rule direct him to certify the subpoena to the Commission for enforcement. The certification before the Commission does not persuade us that imposition of sanctions in the form of adverse inferences would be insufficient here. *See American Medical Ass’n*, 94 FTC 701, 1027–28 (1979), *aff’d*, 638 F.2d 443 (2d Cir. 1980), *aff’d per curiam by an equally divided Court*, 445 U.S. 676 (1982).⁵

After careful consideration, the Commission has decided to order sanctions against Reynolds under Rule 3.38(b)(1), 16 CFR 3.38(b)(1)(1988), in the form of the adverse inferences listed in Appendix A, unless Reynolds shows good cause why it should not do so.

The Commission believes it appropriate, before imposing these sanctions, to permit Reynolds a final opportunity to comply voluntarily with the subpoena and interrogatories outstanding against it. *See International Tel. & Tel. Corp.*, 104 FTC 280, 449–51 (1984). In addition, in *American Medical Ass’n*, the Commission stated that “[a]pplication of the adverse inference rule may only be made when the party’s failure to produce documentary or other evidence is not

⁴ Reynolds has waived its right, *inter alia*, to insist that before imposing sanctions, the administrative law judge issue orders directing a response to the interrogatories or that he issue subpoenas for any additional information sought by complaint counsel. Stipulation dated Aug. 22, 1988 at ¶ 5.

⁵ Most courts have held that administrative agencies may impose sanctions for failure of respondents to comply with discovery orders. *See, e.g., P.R. Mallory & Co. v. NLRB*, 400 F.2d 956, 959 (7th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969); *NLRB v. A.P.W. Products Co.*, 316 F.2d 899, 903–04 (2d Cir. 1963); *NLRB v. Wallick*, 198 F.2d 477, 483 (3d Cir. 1952); *NLRB v. Remington Rand, Inc.*, 94 F.2d 862, 868 (2d Cir.), *cert. denied*, 304 U.S. 576 (1938). *But see NLRB v. International Medication Systems, Ltd.*, 640 F.2d 1110, 1116 (9th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982) (rejecting agency’s use of sanctions before district court enforcement of subpoena but distinguishing use of adverse inference rule that does not turn on failure to obey subpoena). In addition, sanctions in the form of adverse inferences have been upheld as an appropriate response to subpoena noncompliance, even when the agency could have sought court enforcement of the subpoena, *UAW v. NLRB*, 459 F.2d 1329, 1339 (D.C. Cir. 1972).

adequately explained.” 94 FTC at 1027 (citations omitted). Reynolds is invited, therefore, in its response to this order to present any additional explanation of its position, including its views on the proposed adverse inferences. See 5 U.S.C. 554(c) and 555(e). Respondent also may want to address the proper weight to be accorded the proposed inferences under the standard in *American Medical Ass’n* that an inference “may be strong or weak, depending on the person’s conduct and the surrounding circumstances.” *Id.* at 1027 (citations omitted).

In the event that Reynolds does not respond to this order, the Commission will issue the attached sanctions and remand the matter to the administrative law judge for further proceedings, including the presentation of evidence. Accordingly,

It is hereby ordered, That Reynolds show cause in writing within 30 days from service of this order on its Washington, D.C. counsel why the Commission should not issue an order imposing sanctions on Reynolds in the form of the attached adverse inferences; and

It is further ordered, That complaint counsel may respond to any submission by Reynolds under this order within 20 days of the date on which Reynolds’ submission is served on them.

APPENDIX A

PROPOSED ADVERSE INFERENCES

1. The acts and practices of R. J. Reynolds Tobacco Company, Inc. (“Reynolds”) alleged in the Commission’s complaint have been in or affecting commerce, as commerce is defined in the Federal Trade Commission Act.

2. Reynolds designed the MR FIT message to address an important and material product attribute of cigarettes, the connection between cigarette smoking and coronary heart disease.

3. Reynolds designed the MR FIT message to address health concerns associated with smoking that are of concern to consumers, including smokers who are purchasers or potential purchasers of cigarettes manufactured and sold by Reynolds.

4. Reynolds conducted copy tests, focus groups or other types of market research to assess likely consumer perceptions from the MR FIT message.

5. The results of Reynolds’ market research were used to refine the MR FIT message and enhance its promotional message.

6. Reynolds designed the MR FIT message to provide consumers, including smokers of Reynolds' brands of cigarettes, with information purporting to refute the theory that smoking causes heart disease in order to cause or attempt to cause smokers to continue smoking and purchasing cigarettes including Reynolds' brands.

7. Reynolds designed the MR FIT message to address a target audience of consumers, smokers of Reynolds' and other brands of cigarettes, and to promote the sale of such cigarettes to those consumers.

8. Reynolds designed the MR FIT message in textual format in order to increase the persuasiveness of the message to consumers, including smokers, and to add credibility to the claims contained in the message.

9. Reynolds included in the MR FIT message a description of the purpose and results of the Multiple Risk Factor Intervention Trial (MR FIT) to add credibility to its advertising claim that there is credible scientific evidence that smoking is not as hazardous as the public or the reader of the message had been led to believe.

10. Reynolds included in the MR FIT message a description of the purpose and results of the MR FIT study to add credibility to its advertising claim that the study refutes the theory that smoking causes coronary heart disease.

11. Reynolds' purpose in running the MR FIT message was to induce consumers, including smokers of Reynolds' brands of cigarettes, not to quit smoking or to purchase cigarettes including Reynolds' brands of cigarettes.

12. Reynolds designed the MR FIT message to convey the following affirmative messages to consumers:

(a) The Multiple Risk Factor Intervention Trial (the MR FIT study) was designed and performed to test whether cigarette smoking causes coronary heart disease,

(b) A major government study about smoking and coronary heart disease (the MR FIT study) provides credible scientific evidence that smoking is not as hazardous as the public or the reader has been led to believe,

(c) The MR FIT study, a major government study, tends to refute the theory that smoking causes coronary heart disease.

13. Reynolds, through its review of an article in the *Journal of the American Medical Association*, 248, 1465 (Sept. 24, 1982), about the results of the Multiple Risk Factor Intervention Trial and as a result of

consultation with experts in the field of coronary heart disease, was aware that its description of and representations about the MR FIT study and the claims based on that description contained in the MR FIT message were false, deceptive and misleading and could not be supported by the evidence.

SEPARATE STATEMENT OF CHAIRMAN DANIEL OLIVER

Whatever I may have posited on the merits of issuing the underlying complaint in this matter, I believe that Commission process, like a Commission order, must be obeyed. Consequently, I have voted to authorize the sanction of adverse inferences against respondent R.J. Reynolds Tobacco Company. Indeed, I would have preferred stronger action.

Respondent's conduct in this case constitutes deliberate disregard of Commission process. Should respondent persist in this course, the strongest sanctions that could be imposed would be an order finding respondent in contempt, or a judgment of conviction for violation of Section 10 of the Federal Trade Commission Act (15 U.S.C. 50). To procure such sanctions, the Commission must first apply to the district court for subpoena enforcement.

Moreover, court enforcement is the only means of obtaining discovery against the non-party witness whose refusal to comply with subpoenas is also before us, following certification from the ALJ. It is unfortunate that the Commission may not have the benefit of evidence from this source.

In view of the foregoing considerations, I favored seeking court enforcement of the subpoenas issued in this proceeding. However, this approach was not supported by a majority of Commissioners. In voting for the order to show cause, I have joined my colleagues in the conclusion that some action is better than none.

Modifying Order

111 F.T.C.

IN THE MATTER OF

CANADA CEMENT LAFARGE LTD., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SEC. 7 OF THE CLAYTON ACT

Docket C-3100. Consent Order, Dec. 21, 1982—Modifying Order, Apr. 4, 1989

This order reopens the proceeding and modifies Paragraph VIII of the Commission's consent order (100 FTC 563) by deleting the requirement for prior approval of acquisitions in the state of Florida. The modifying order is the result of the Commission granting in part and denying in part the respondents' requests for modifications of the terms of the original order.

ORDER GRANTING IN PART AND DENYING IN PART
REQUEST TO REOPEN AND MODIFY ORDER
ISSUED DECEMBER 21, 1982

On December 5, 1988, Lafarge Corporation ("Lafarge") filed a Supplemental Petition To Reopen And Modify Consent Order ("Supplemental Petition") and asked that its original Petition to Reopen and Modify Consent Order ("Petition") filed August 11, 1988, be deemed refiled. Under the order, Lafarge is the successor to Canada Cement Lafarge Ltd. ("CCL"). Pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice, the Supplemental Petition asks the Commission to reopen and modify the order in Docket No. C-3100. Lafarge requests that the order be modified by setting aside Paragraph VIII to relieve it of the need to obtain prior Commission approval for acquisitions of cement assets. The Petition and the Supplemental Petition were placed on the public record for thirty days, pursuant to Section 2.51 of the Commission's Rules. No comments were received.

The complaint in this case was issued under Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and alleged anticompetitive effects arising from the acquisition by CCL of General Portland Inc. ("GPI") in October 1981. 100 FTC 583 (1982). According to the complaint, the relevant geographic markets were the Inland Market and the Florida Market.