

INTERLOCUTORY, VACATING, AND MISCELLANEOUS ORDERS

SCHOOL SERVICES, INC., ET AL.

Docket 8729. Order, January 7, 1969

Order denying respondent's petition for reconsideration of Commission's order of October 10, 1968.

ORDER DENYING PETITION FOR RECONSIDERATION

The Commission issued its decision and order in this matter on October 10, 1968.* On November 27, 1968, respondents filed a petition for reconsideration of the decision herein, principally on the ground that it denies respondents due process of law. According to respondents, "[i]t does so by denying respondents' request for leave to submit a supplemental brief and by the reflection of bias and prejudgment in the special methods adopted for finding violation."

The Commission's Rules of Practice require that petitions for reconsideration be filed under Section 3.55, which in pertinent part provides that:

[a]ny petition filed under this subsection must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission.

Respondents' petition does not claim that the decision or final order raises any new questions. Nor do we believe that respondents were denied an opportunity to argue any and all issues before the Commission, as respondents allege. Respondents' contention that in an answering brief they are precluded from addressing issues not raised by the appeal brief is without merit. The Commission's Rules of Practice certainly do not so limit an answering brief. In fact, respondents in their answering brief should raise any and all pertinent issues germane to the Commission's consideration of the appeal, whether or not specifically referred to by complaint counsel. The time to raise these issues was when the matter was before the Commission, and every opportunity was accorded to respondents to do so. The fact that

*74 F.T.C. 920.

respondents did not take advantage of this opportunity does not now, at this late date, merit granting their petition for reconsideration. Accordingly,

It is ordered, That respondents' petition for reconsideration be, and it hereby is, denied.

Commissioner Elman dissented.

KOPPERS COMPANY, INC.

Docket 8755. Order and Opinion, January 15, 1969

Order denying third party's motion to modify or quash a subpoena.

OPINION OF THE COMMISSION

This matter is now before the Commission upon the appeal of United States Pipe and Foundry Company from the examiner's order modifying the subpoena and otherwise denying the motion to quash. U.S. Pipe bases its appeal upon twelve separate grounds which are stated at length in its brief and which, to some extent, overlap.

Considered broadly, the grounds for appeal advanced by U.S. Pipe are that the subpoena is void and unenforceable because respondent failed to pay the necessary witness fees and mileage in connection with the return on the previous subpoena; respondent has reopened the entire question of prehearing discovery and now seeks documents not heretofore contemplated by prior Commission opinions on interlocutory appeals in this case and for time periods not previously deemed relevant, including periods subsequent to the complaint; the subpoena seeks to compel production of confidential business information subject to legal privilege; the subpoena is too broad in the range of documents sought; the subpoena is improper because it calls for a document specifically excluded from production in the prior subpoena; it is unlikely that any protective order can be devised which would afford U.S. Pipe sufficient protection against probable abuse by respondent of cost and other confidential figures, and; the examiner has declined to order use of procedures whereby the respondent would obtain the information requested, but in a form which would soften some of the objectionable features of the present subpoena.

In his order denying the motion to quash, production of the documents called for by the subpoena was ordered on condition that the witness fees then in dispute and a witness fee and

travel fee be deposited with the Secretary of the Commission. Further, in the order it was made clear that all references to secret processes would be physically deleted and all documents produced would be held in confidence by counsel until within a specified time counsel for U.S. Pipe moved for a protective order. Following this order, U.S. Pipe filed its present appeal and on December 19, 1968, the Commission extended the return date on the subpoena until five business days following receipt by U.S. Pipe of the Commission's order and opinion on the appeal.

The question of this subpoena was carefully considered by the Commission in its Interlocutory Opinion and Order dated November 1, 1968 [74 F.T.C. 1621]. In that opinion, the Commission pointed out that U.S. Pipe's objections to disclosure of its cost, price, production and similar data were well taken, but that the often confidential nature of such material is not equivalent to an absolute privilege against its disclosure. A claim of privilege for such material cannot succeed if the need for its continued secrecy is found to be outweighed by its importance to the party seeking production in maintaining or refuting issues raised in litigation.

The Commission added that the examiner was, of course, free to consider alternative methods whereby the conflicting considerations of secrecy on the one hand and disclosure on the other may be reconciled and, in that connection, made reference to the procedure whereby sensitive trade information could be submitted to an independent third party for analysis, as in *Mississippi River Fuel Corporation*, Docket No. 8657, [69 F.T.C. 1186 and 70 F.T.C. 1759] or to a procedure whereby the party seeking protection could be required to prepare a nonconfidential summary of the documents for inclusion in the record, or to a procedure whereby the examiner may conduct an *ex parte, in camera* examination of documents for the purpose of excising portions thereof before disclosure is made to the respondent. But the Commission went on to point out that:

Each of these proposed discovery techniques contains inherent drawbacks, however, and may in some instances impair substantially the value of information sought by respondent. The examiner must consider, in any given instance, whether the ends of justice would be better served by disclosure directly to the respondent, with such reasonable safeguards against misuse as have already been utilized in this proceeding with reference to *in camera* materials and the use of materials obtained by deposition.

In all of these situations it is important to remember that the adoption of no one of these techniques is mandatory and they are not intended to be a substitute for the exercise of the sound and responsible discretion of the examiner, who is in a

far better position than the Commission, because of his proximity to the case, to assess the multitude of variables and arrive at an informed decision as to the procedure best to use in the case before him. *Furr's, Inc.*, Docket No. 8581, Interlocutory Opinion, November 18, 1963 [63 F.T.C. 2225]; *Lehigh Portland Cement Company*, Docket No. 8680, Interlocutory Opinion, August 2, 1968 [74 F.T.C. 1585]. As the Commission observed in its *Furr's, Inc.*, opinion "Orderly procedure requires that matters so intimately connected with the conduct of hearings as the terms and conditions of production of documents be left very largely to the responsible judgment of the examiner." Further, as the Commission has previously ruled in this very same matter, unless there is a clear showing of an abuse of discretion the Commission, in the absence of unusual circumstances, will not disturb a ruling of a hearing examiner in matters involving procedure and discovery.

The Commission finds no such unusual circumstances nor any abuse of discretion here. On the contrary, it appears that the examiner has carefully observed the instructions contained in the prior Commission opinions and fashioned a protective order which in his judgment met the needs of the case before him at the same time as he ordered production of the documents and information to which he deemed respondent was entitled for the preparation of its defense. These are the matters which the Commission has directed him to consider and it seems then that U.S. Pipe's appeal is taken not from his failure to adopt any protective measures at all but rather from his failure to adopt other procedures which U.S. Pipe now urges would have been better suited to its needs. This is not a decision with which the Commission is now disposed to interfere.

With the exception of the question raised by controversy involving witness fees, which has been adequately resolved by the examiner's order, the issues raised in this appeal are not new as the subpoena involved has been in litigation for some time and has been the subject of at least two prior Commission opinions, during the course of which questions of scope and relevancy, as well as confidentiality, have been fully debated and carefully considered. While all elements of due process must be observed, if this proceeding is to be conducted with the speed and dispatch which the interests of the public demands, there must be a stage at which debate over this one procedural point ends and the hearings themselves begin. It would seem that the question of this subpoena has reached that stage.

Commissioner MacIntyre concurred in the result.

ORDER DENYING APPEAL FROM EXAMINER'S DENIAL OF MOTION
TO QUASH SUBPOENA

Upon consideration of the appeal dated December 9, 1968 by United States Pipe and Foundry Company from the examiner's order modifying the subpoena and otherwise denying the motion to quash, dated December 3, 1968, and for the reasons stated in the accompanying opinion,

It is ordered, That the appeal of the United States Pipe and Foundry Company from the hearing examiner's ruling be, and it hereby is, denied.

Commissioner MacIntyre concurring in the result.

KOPPERS COMPANY, INC.

Docket 8755. Order and Opinion, January 30, 1969

Order instructing hearing examiner to extend three weeks the time set for trial to commence.

OPINION OF THE COMMISSION

This matter is again before the Commission upon respondent's Application for Leave to File Interlocutory Appeal from Order of Hearing Examiner, filed January 2, 1969. The application was filed pursuant to Rule 3.23(a) of the Commission's Rules of Practice and seeks permission to appeal from the examiner's order, dated December 23, 1968, granting respondent's motion to cancel the trial date to the extent of rescheduling the same to commence January 28, 1969. Although not required to do so by the Rules, counsel supporting the complaint filed their opposition to this Application on January 14, 1969.

In its motion, respondent urges two principal grounds for seeking an appeal. First, respondent alleges that it has not yet had the benefit of the discovery to which it is entitled prior to trial in that United States Pipe and Foundry Company has not yet responded to the subpoena as modified by the examiner on December 3, 1968 and because officials of U.S. Pipe allegedly failed to respond to 80 percent of the questions asked of them at the depositions held on December 11, 1968. Second, respondent contends that an extension should be granted because its counsel is already obligated to try another case before a Commission hearing examiner on January 27, 1969. Respondent then urges that the Commission remand this matter to a new and different

examiner because of the present examiner's alleged refusal to follow the mandate of prior Commission orders with regard to respondent's rights.

In the order in question, the examiner granted the respondent's motion to cancel the trial date of January 13, 1969, to the extent of rescheduling the trial to commence on January 28, 1969, without prejudice to respondent's right to file a new motion to cancel the January 28th trial date in the event of actual commencement of formal hearings in the other case. At that time, the examiner was aware of U.S. Pipe's failure to respond to the subpoena and of respondent's allegations with respect to the depositions. Still it was his view that while some postponement was required, it did not follow that an indefinite postponement should be made. On the other hand, if respondent's counsel did proceed to trial in the other case on January 27th and if there had by that time been no decision by the Commission on the then pending matters before it and no order of enforcement of the subpoena, then further postponement would be necessary. Failing that, the examiner felt that the case should proceed to trial as ordered and that respondent was protected by the reservation that it may move for a delay for purposes of further discovery at the conclusion of complaint counsel's case.

At the time of this action by the examiner, he could not have been aware of the fact that on December 24, 1968 the Commission extended the return date on the subpoena until five business days following receipt by U.S. Pipe of the Commission's order and opinion on the appeal from the examiner's order modifying the subpoena and otherwise denying the motion to quash. He further, obviously, was not aware of the fact that on January 15, 1969, the Commission would issue its order denying the appeal, thus, under its previous order, leaving U.S. Pipe with five business days following receipt of the order within which to respond.

Upon its review of the entire record to date, including the contentions of all the parties, the Commission is of the opinion that no adequate grounds exist under the Rules for granting respondent's application for leave to file an appeal on the points now at issue. The Commission can see little to be gained by the time which would be consumed in the filing of extensive briefs and further consideration of matters which can be disposed of just as well at this time. Such a procedure can only result in further involving the Commission in the details of procedure which are better left to the discretion of the examiner, who, as

the Commission observed in its January 15th opinion, is carefully observing the instructions contained in prior Commission opinions and is attempting to conduct the proceedings in accordance therewith. Hence, the Commission does not regard as deserving of further consideration respondent's contention that this case should be remanded to a new and different examiner for the reasons advanced by respondent.

On the other hand, the Commission wishes to reiterate, for the benefit of the parties and the examiner, its firm policy against piecemeal hearings or hearings held at intervals. In almost all cases, the interests of fairness and speed in adjudication will be served by refining the issues and permitting full discovery in advance of hearings and then holding continuous hearings. Deviations from these general rules should be permitted only in rare and unusual circumstances and the need for such deviations should be fully set out in the record. At the same time, the examiner has available ample authority to see that the Commission's discovery procedures are not abused and to prevent their utilization solely for purposes of delay.

While denying respondent's application for leave to appeal, the Commission is also of the opinion that events outside the examiner's control, which are obvious to the Commission upon its review of the record, dictate the need for some extension of time before the hearings actually commence. Thus the Commission's opinion denying U.S. Pipe's motion to quash the subpoenas was not rendered until January 15, 1969, and actual service upon U.S. Pipe was not effected until a later date, following which the Company had five additional business days within which to respond. This fact plus the approaching trial date in the other case in question have resulted in a telescoping of events into a period too close to the trial date of January 28, 1969 set by the examiner. For this reason, the Commission is returning this matter to the examiner with instructions to grant an extension of three weeks from the date now set for the trial to commence, or such further time as he might within his discretion deem necessary in light of his own evaluation of all the factors involved.

Commissioner MacIntyre concurred in the result.

ORDER DENYING APPLICATION FOR LEAVE TO FILE
INTERLOCUTORY APPEAL

Upon consideration of respondent's Application For Leave To File Interlocutory Appeal, filed January 2, 1969, and for the reasons stated in the accompanying opinion,

