

In the Matter of FLOWERS INDUSTRIES, INC., a corporation

DOCKET NO. 9148

Federal Trade Commission

1982 FTC LEXIS 96

ORDER DENYING MOTIONS TO QUASH

March 19, 1982

ALJ: [*1]

James P. Timony, Administrative Law Judge

ORDER:

ORDER DENYING MOTIONS TO QUASH

The complaint in this case challenges the acquisition by Flowers Industries, Inc. of several bakeries scattered across

the Southern United States. n1 In an attempt to establish market facts, respondent obtained 133 subpoenas directed at bakeries selling in competition with it in those markets.

~~2. Although all respondents were invited, only Mrs. Baird's Delicias, Inc. and Waldensian Delicias, Inc.~~

(which later negotiated a settlement) appeared and argued.

The movants argue generally (1) that the information sought by the subpoenas is irrelevant to the issues raised in this proceeding; (2) that the information sought is confidential and that no adequate showing of need has been made; and (3) that the subpoenas' requests are excessively broad and unduly burdensome and that in the event that they are ordered to comply with the subpoenas, respondent should be required to pay their fees and expenses in that regard.

Relevancy

The test for the relevancy of an administrative subpoena is whether the information sought is "reasonably relevant" ~~and is not unduly burdensome.~~ *FTC v. Anderson*, 621 F.2d 741, 745 (D.C. Cir. 1979). ~~When it is established that the~~

Each of the movants argues that the documents requested need not be produced because they are "confidential." The fact that information sought by a subpoena may be confidential does not excuse compliance. It is well established that confidential information of the type sought enjoys no exemption from mandatory production in discovery.

proceedings before administrative [*7] agencies or courts. *Covey v. Continental Oil Co.*, 340 F.2d 993, 999 (10th Cir. 1965), cert. denied, 380 U.S. 964; *FTC v. Tuttle*, 244 F.2d 605, 607, 609, 616 (2d Cir. 1957), cert. denied, 354 U.S. 925. Where the provisions of the protective order prevent dissemination of confidential information to competitors and where

costs and profit and loss): United States v. American Optical Company, 39 F.R.D. ¶111,580 (N.D. Cal. 1966)

... One who opposes an agency's subpoena necessarily must bear a heavy burden. That burden is essentially the same even if the subpoena is directed to a third party not involved in adjudicative or other proceedings out of which the subpoena rose.

And, broadness alone is not a sufficient ground to bar enforcement of a subpoena. *FTC v. Rockefeller*, [*15] 591 F.2d 182, 190 (2d Cir. 1979); *Adams v. FTC*, 296 F.2d 861, 867 n.20 (8th Cir. 1961), cert. denied, 369 U.S. 864 (1961); *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977), cert. denied, 431 U.S. 974 (1977):

We emphasize that the question is whether the demand is unduly burdensome or unreasonably broad.

legitimate inquiry and the public interest. The burden of showing that the request is unreasonable is on the subpoenaed party.

This standard has been specifically applied in the context of upholding the enforcement against a non-party of an FTC subpoena issued in an adjudicative proceeding upon the application of a respondent charged with violating anti-merger provisions. *Dresser*, supra, 1977-1 Trade Cases at 71,492. It requires that the subpoena be enforced absent showing that compliance "would unduly disrupt or seriously threaten normal operations." *Id.*; accord, *FTC v. Rockefeller*, supra, 591 F.2d at 190.

Costs

Several movants have requested that their costs incurred in complying with the subpoenas be reimbursed. The law

n9 Part of these costs, however, are based on the mistaken assumption that the subpoena requires compilations rather than allowing that alternative at movant's choice.

Other Arguments Raised in the Motions to Quash

(a) Interstate Brands Corporation

Interstate Brands Corporation one of the four largest bread baking companies in the United States, has over 12,000 employees and total sales of about \$ 600 million for the fiscal year ending May 31, 1981.

Interstate argues that compliance with the subpoena will require a search of forty facilities including thirty-five bakery plants throughout the United States as well as regional headquarters offices, and that the search will cost \$ 15,000.

Respondent points out that [*19] substantially all of the information sought by the subpoena will be found at three of the Interstate facilities: its plant at Burmington, Alabama, the regional headquarters for that plant, and Interstate's

provides the option to do so in lieu of supplying the underlying documents. Respondent has made other attempts in the subpoena and in negotiation to alleviate any substantial burden [*22] on Mrs. Baird's without avail. By taking

Several of the movants, including Mrs. Baird's, argue that the records requested by some specifications are unavailable, either because they have been destroyed or because the company does not keep the information. Movants cannot of course produce records that do not exist nor can they compile reports which require information from records that have been destroyed. *Genuine Parts Co. v. FTC*, 313 F. Supp. 855, 857 (N.D. Ga. 1970), *aff'd*, 445 F.2d 1382 (5th Cir. 1971).

(c) American Bread Company of Alabama, Inc.