LEXSEE 1976 FTC LEXIS 68

In the Matter of KAISER ALUMINUM & CHEMICAL CORPORATION, a corporation.

DOCKET No. 9080

Federal Trade Commission

1976 FTC LEXIS 68

ORDER DENYING MOTIONS TO QUASH AND LIMITING SUBPOENAS DUCES TECUM

November 12, 1976

ALJ: [*1]

James P. Timony, Administrative Law Judge

ORDER:

The complaint in this proceeding challenges the acquisition by Kaiser Aluminum & Chemical Corporation [redacted]

subpoena may require a person to produce and permit the inspection and copying of nonprivileged documents, papers, or other physical exhibits which constitute or contain evidence relevant to the subject matter involved and which are in the possession, custody, or control of such persons."

[redacted]

documents but also for those which constitute or contain evidence.

The phrase "which constitute or contain evidence," as used in Rule 3.34(b)(2), apparently means no more than the word "relevant." Otherwise, while the Rule explicitly allows discovery subpoenas, only "evidence" could be gathered. "The process of interpretation... misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve." Markam v. Cabell, 326 U.S. 404, 409 (1945). Even if the wording of the Rule were apparent, that meaning will not be applied if it would lead to absurd results. FTC v.

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Movants are all competitors of respondent Kaiser in the production and sale of refractories. Information in the files of competing companies is frequently crucial in proceedings such as this one. In FTC v. [*7] Bowman, 149 F. Supp. 624, 628 (N.D. Ill. 1957), aff'd, 248 F.2d 456 (7th Cir.), the court emphasized the relevance of the kind of data sought here as follows:

> n3/ RS&S, a producer of refractories, argues that it does not produce basic refractories and does not supply refractories for use in furnaces in making steel. RS&S did, however, until two years ago advertise and sell a similar product, the ingredients for which it would obtain from other firms and "mix" for a customer. Similarly, one of Pfizer's divisions, "MPM," ceased producing refractories in 1972. Kaiser, however, is not limited in preparing its defense to the markets alleged in the complaint. And information concerning other refractories products is therefore relevant to the issues in this proceeding.

"In a proceeding under the anti-merger provisions of the Clayton Act, the share of the market affected by the merger and the effect on competitors engaged in the same line of commerce are crucial inquiries. The proceeding would be crippled if neither the Commission nor the party charged could produce by compulsory process the essential industry

n5/ General Refractories' assertion that the subpoena is unconstitutional in requiring the production of confidential commercial information is not persuasive. FTC v. Tuttle, 244 F.2d 605, 609 (2d Cir. 1957), $1cert. denied, 354 U.S. 925.

[redacted]

confidential business information and no further showing of "need" is necessary. See, e.g., FTC v. U.S. Pipe & Foundry Co., 304 F. Supp. 1254, 1256, 1259-60 (D.D.C. 1969); FTC v. Menzies, 145 F. Supp. 164, 170-71 (D. Md.), aff'd 242 F.2d 81 (4th Cir.), cert. denied, 353 U.S. 957 (1957). See also Olympic Refining Co. v. Carter, 332 F.2d 260 (9th Cir.

[redacted]

individual company data from a Mississippi River compilation using "subtractive techniques," the data on hand, and their general industry knowledge. Second, the economic evidence Kaiser intends to present in defense will require correlation of sales data, trends, profitability figures, **[*15]** plant capacity, and projections on an individual producer basis, and Mississippi River treatment would not provide a mechanism for such evidence.

Movants argue that they are not parties to the administrative proceeding and are being asked to disclose what they

n8/ RS&S argues the burdensomeness of the subpoena even though, of 16 refractories producers served with identical sixspecification subpoenas, only RS&S has moved to quash. See United States v. Aluminum Co. of America, supra. Further, five of the six specifications allow RS&S to provide schedules rather than documents and the sixth calls for all sales, advertising, promotional and instructional documents sent to customers concerning the applications of refractories products. That specification will be modified to require RS&S to provide representative examples of such documents.

The modifications of the specifications made in this order and memorandum should substantially reduce the burden described in the affidavits attached to the motions of Eltra and Pfizer.

Several movants have argued that the size and complexity of their businesses will result in large costs in complying with the subpoenas. In this regard, Judge Weinfeld noted in Application of Radio Corp. of America, 13 F.R.D. 167, 172 (S.D.N.Y. 1952):

"Inconvenience **[*20]** is relative to size. Any witness who is subpoenaed suffers inconvenience. An individual operating a small business, for example, or a corporation operated by a sole shareholder, may suffer, in like circumstances more inconvenience than [a major corporation] with... thousands of employees. But this inconvenience... is part of the price we pay to secure... the enforcement of our laws."

See also United States v. IBM, 62 F.R.D. 507, 510 (S.D.N.Y. 1974); Blank v. Talley Indus., Inc., 54 F.R.D. 627 (S.D.N.Y. 1972).

Several movants have requested that their costs incurred in complying with the subpoenas be reimbursed. Kaiser has agreed to inspect the documents at the place of business of the movant and to bear the cost of copying. Courts have required reimbursement of the costs for search in civil suits between private companies where a third party was complying with the subpoena. Celanese Corp. v. E. I. duPont de Nemours & Co., 58 F.R.D. 606, 612 (D. Del. 1973; Collins and Aikman Corp. v. v. J. P. Stevens & Co., 51 F.R.D. 219, 221 (D.S.C. 1971). Where the public interest is involved, however, and where the movant is in the industry in which alleged **[*21]** acts occurred, the movant has an

accommodate the [*23] subpoenaed companies as to their manner of record keeping, in order to minimize the burden of complying with the subpoena. United States v. American Optical Co., 39 F.R.D. 580, 587 (N.D. Cal. 1966). Pfizer, of course, cannot produce records if they do not exist. Nor can it compile reports which require data from records which do not exist. Genuine Parts v. FTC, 313 F. Supp. 855, 857 (N.D. Ga. 1970), aff'd, 445 F.2d 1382 (5th Cir. 1971). On

the other hand, the absence of compilations of information does not excuse the production of underlying records which would provide the requested information. United States v. IBM, 66 F.R.D. 187, 188 (S.D.N.Y. 1974).

Specification 2

Specification 2 of the subpoenas provides as follows:
"2. * Provide documents sufficient to indicate separately for each basic refractories product sold by you the volume and dollar amount of your sales for each year beginning with 1967 and for the first six months of 1976."

Specification 2 seeks detailed information on movants' sales of "basic" refractories, the refractories alleged by the complaint to constitute the product market in which the effects of the acquisition are [*24] to be considered. Pfizer

argues that since the colplaint alleges that "basic" refractories constitute a relevant product market, information regarding individual products within that market is irrelevant. Kaiser has not admitted that "basic" refractories constitute a relevant product market, and Kaiser is entitled to obtain data to test that allegation as well as the

protective order.

Specification 6

Specification 6 of the subpoenas provides as follows:

comment and free discussion by those engaged in the business and by others interested are aids. Opinions oppressed may be unsound; predictions may be unfounded; but there is nothing in the Sherman Law which should limit freedom of discussion, even among traders."

American Column & Lumber Co. v. United States, 257 U.S. 377 (1921) (Brandeis, J. dissenting). See also

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340 (1969).

Movants also argue that the studies in their files are opinions for which they paid experts a great deal of money, and Kaiser should not have this information without paying for it. "To clothe all such expert testimony with privilege solely on the basis that the expert 'owns' his knowledge [or has sold it to the subpoenaed firm] would be to seal off too much evidence important to the just determination of disputes." Kaufman v. Edelstein, CCH 1976-1 Trade Cases P60,841, p. 68,672 (S.D.N.Y. April 20, 1976). Such opinions, previously formed, can be subpoenaed. Carter-Wallace, Inc. v. Otte, 474 F.2d 529, 536 (2d Cir. 1972), cert. denied, 412 U.S. 929 (1973).

Specification 11

Specification 11 of the subpoenas provides as follows:

[redacted]

competition. These specifications do not seek every "document" in the movants' files relating to research and

matters. Such documents are relevant to the subject matter of this proceeding.

Specifications 16, 17, 18, and 19

Specifications 16, 17, 18, and 19 of the subpoenas provide as follows:

n13/ In complying with Specification 22 movants may provide summaries or tabulations in accordance with Instruction 3 of the subpoenas. **[*38]**

Kaiser alleges that the purchasing power of the steel industry insures competitive performance of the refractories industry. The information sought by these specifications is relevant to the development of Kaiser's defense. United States v. Hughes Tool Co., CCH 1976-2 Trade Cases P61,046, at p. 69,698 (C.D. Cal. 1976); United States v. Black & Decker Co., CCH 1976-2 Trade Cases P61,033, at p. 69,582 (D. Md. 1976); F. Scherer, Industrial Market Structure and

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Specification 23

[redacted]