In the Matter of

CERTAIN ATTACHE CASES

Investigation No. 337-TA-49

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UNITED STATES INTERNATIONAL TRADE COMMISSION

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COMMISSION DETERMINATION, ORDER, AND OPINIONS

Introduction

The United States International Trade Commission, pursuant to the authority of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337), conducted an investigation with respect to certain attache cases allegedly covered by claims 1-3, 5-14, 16, and 17 of U.S. Letters Patent 3,198,299 and by all claims of U.S. Letters Patent 3,828,899, which are owned by the complainant, Samsonite Corporation. The Commission investigated alleged unfair methods of competition and unfair acts in the importation of these attache cases into the United States, or in their sale by the owner, importer, consignee, or agent of either, the alleged effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States.

This Commission determination and order provide for the final disposition of investigation No. 337-TA-49 by the Commission. Such determination and order are based upon the Commission's decision, made in public session at the Commission meeting of February 14, 1979, that there is no violation of section 337.

The text of the Commission's determination and order appear immediately below and is followed by the Commissioners' opinions.

Determination

Having reviewed the record in this investigation, including the recommended determination of the presiding officer, the Commission 1/ on February 14, 1979, determined that, with respect to investigation No. 337-TA-49, there is no violation of section 337 of the Tariff Act of 1930, as amended, for the reason that the importation of the infringing articles does not have the effect or tendency to destroy or substantially injure the domestic industry.

Commission Order

Accordingly, it is hereby ordered--

1. That investigation No. 337-TA-49 is terminated by the issuance and publication of a notice of Commission determination and action in the Federal Register and by the issuance of this Commission determination, order, and opinions;

2. That this order shall be served upon each party of record in this investigation and upon the U.S. Department of Health, Education, and Welfare, the U.S. Department of Justice, and the Federal Trade Commission; and

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1/ Vice Chairman Alberger determined that the investigation should be declared more complicated and remanded to the presiding officer for further proceedings to permit the parties to augment the record on the issue of violation and the presiding officer should be required to file a recommended determination within 90 days.

3. That this order may be amended at any time.

By order of the Commission.

Kenneth R. Mason
Secretary

Issued: March 7, 1979.

OPINION OF CHAIRMAN PARKER AND COMMISSIONERS MOORE, BEDELL, AND STERN

Procedural history

The complaint in this matter was filed with the Commission on January 30, 1978, by Samsonite Corporation under section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337). The complaint alleged that unfair methods of competition and unfair acts exist in the importation of certain attache cases into the United States, or in their sale, by reason of the alleged coverage of such articles by claims 1-3, 5-14, 16 and 17 of U.S. Letters Patent 3,198,299 and by all the claims of U.S. Letters Patent 3,828,899, which are owned by the complainant. It was further alleged that the effect or tendency of the unfair methods and acts is to destroy or substantially injure an industry, efficiently and economically operated, in the United States.

On March 1, 1978, the Commission instituted an investigation based upon the allegations contained in the complaint. Notice of institution of the investigation was published in the Federal Register on March 7, 1978 (43 F.R. 9379). Four parties were named as respondents: C. Robert Shaffer, Buffalo, N.Y.; Tony E. Wallace, San Francisco, Calif.; Domex International Pty., Ltd., Victoria, Australia; and Ceno Times Company, Ltd., Taipei, Taiwan. No formal response complying with section 210.21(b) of the Commission's rules was filed by any of the four respondents.

On July 17, 1978, complainant filed a motion (motion docket No. 49-1) to amend the complaint by naming an additional 17 respondents from Taiwan which were alleged to be manufacturing or selling infringing attache cases. Complainant withdrew this motion on July 31, 1978.

On August 15, 1978, the presiding officer issued a notice of a prehearing conference and hearing. The prehearing conference was scheduled for September 27, 1978, and the hearing was scheduled to begin September 28, 1978. A notice canceling the prehearing conference and hearing was issued by the presiding officer on September 27, 1978. The notice of cancellation stated:

> No respondent has complied with the Prehearing Statement Order of August 15, 1978, nor otherwise indicated an intention to appear and contest the allegations of the complaint. Moreover, Complainant, in lieu of an appearance, intends to file by October 2, 1978, a motion for default judgment as to the respondents that will permit the Presiding Officer to make a ruling dispositive of this investigation. Accordingly, the prehearing conference and hearing will not be reset, and complainant and investigative attorney are relieved of the requirement of complying with the Prehearing Statement Order of August 15, 1978.

Complainant filed a motion for default under section 210.21(d) of the Commission's Rules of Practice and Procedure on October 4, 1978 (Docket No. 49-2). The motion was accompanied by a memorandum in support of the motion together with accompanying affidavits and exhibits. The Commission investigative attorney filed a response supporting complainant's motion for default on October 16, 1978.

On December 8, 1978, the presiding officer filed his recommended determination under sections 210.21(d) and 210.53(a) of the Commission's rules that there is no violation of Section 337.

The presiding officer recommended that --

> The Commission deny the complainant's motion for default judgment (Motion docket No. 49-2) as to all issues and parties, except to the extent that the named respondents are found in default, and determine that there is no violation of Section 337 in the unauthorized importation and sale in the United States of attache cases meeting claims 1-3, 5-14, 16 and 17 of United States Letters Patent 3,198,299, and/or all claims of United States Letters Patent 3,828,899.

The presiding officer's recommended determination of no violation was based upon his conclusion that --

> The complained of acts of patent infringement in the importation and sale of the subject attache cases do not have the effect or tendency to injure substantially or destroy the domestic industry.

Exceptions to the presiding officer's recommended determination were filed by the Commission investigative attorney on December 22, 1978, and by the complainant on December 27, 1978. The investigative attorney argued that --

> The Commission should: (1) affirm the granting of the motion for default and do so in its entirety by finding all the facts alleged in the complaint as being true or (2) remand the case back to the (presiding officer) for a full evidentiary trial allowing the complainant the opportunity to present evidence of injury or tendency to injure its industry, as well as any other elements it may deem necessary.

Complainant's exceptions requested the Commission to strike findings of fact 12-14 1/ in the presiding officer's recommended determination and to find for

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1/ 12. No importer is identified in the record as presently importing or willing to import in the future the accused cases.

13. Samsonite is suffering from no adverse trends in sales, production, profits, or inventories of the subject cases.

14. The only consumption entry of the accused cases was in 1977. Respondent Wallace, the importer of record, has shown no indication of an intent to import further or an intent to trade in the accused case.

the complainant in accordance with its motion for default. Citing Commission rule 210.21(d), complainant argues that "a default judgment must be based solely on a finding of facts as alleged in the complaint and notice of investigation."

On January 10, 1979, the Commission issued its notice of the hearing on the presiding officer's recommendation and on relief, bonding, and the public interest. The scheduled hearing was held on February 1, 1979, with only the complainant's attorney and the Commission investigative attorney appearing. Persons wishing to file written submissions were given until close of business February 12, 1979, and only the Commission investigative attorney filed a written submission.

No violation of section 337

Upon consideration of the presiding officer's recommended determination and the record in this proceeding, we have determined that there is no violation of section 337 of the Tariff Act of 1930, as amended, for the reason that the importation of the infringing articles does not have the effect or tendency to destroy or substantially injure the domestic industry. In so determining, we adopt the findings of fact and conclusions of law of the presiding officer.

The record in this investigation does not support a determination of an effect or tendency to destroy or substantially injure a domestic industry.

First, the facts with respect to the injury are not in dispute. Complainant admits that the only known imports of infringing attache cases

were in 1977 and amounted to 300 units (transcript, p. 27). These 300 cases were imported by an individual on a one-time basis, and there is no showing that he previously or since has imported or sold attache cases. Complainant Samsonite is a leading manufacturer of luggage and attache cases. The record indicates that complainant's production and sales of attache cases are rising and there are no adverse trends in terms of the Commission's other traditional criteria of injury (transcript pp. 30-32).

Second, complainant's counsel conceded at the Commission hearing on February 1, 1979, that the facts do not support a finding that the unfair act had the effect of destroying or substantially injuring the domestic industry (transcript, pp. 12 and 33). In response to questions about additional evidence on injury, which complainant would submit at a subsequent evidentiary hearing, counsel admitted that no direct evidence of injury existed and that complainant's evidence was limited to tendency for injury in the future (transcript pp. 12-14, 24-27, and 33).

Finally, complainant's exhibits, which were attached to the default motion for the purpose of showing foreign capacity, do not support a finding of tendency to injure. In Certain Combination Locks Investigation No. 337-TA-45, the Commission stated that "evidence of foreign capacity even if coupled with a large U.S. market does not show tendency to injure absent a strong showing that foreign manufacturers intend to direct their capacity toward penetrating the U.S. market." 1/

1/ Certain Combination Locks, Investigation No. 337-TA-45, at 11.

Motion for default

The granting of a motion for default pursuant to Section 210.21(d) 1/ does not automatically result in a finding of violation even if the presiding officer does find the facts to be as alleged in the complaint and notice of investigation. 2/ Section 210.53 of the rules indicates that when the presiding officer makes his findings of fact and draws his conclusions of law, they constitute merely a recommendation. This recommendation under the Administrative Procedure Act (to which sec. 337 proceedings are subject) must be based upon "reliable, probative, and substantial evidence." 5 U.S.C. 556(d).

Section 210.53 provides that a recommended determination shall be filed with the Commission within 30 days after a finding that a party is in default. Under section 210.52, on proposed findings and conclusions, when it is found that a party is in default "any party may file proposed findings of fact and conclusions of law, together with reasons therefor and, when appropriate, briefs in support thereof with the presiding officer for his

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1/ Default. Failure of a respondent to file a response within the time provided for in subsection (a) of this section may be deemed to constitute a waiver of its right to appear and contest the allegations of the complaint and of the notice of investigations, and to authorize the presiding officer, without further notice to that respoindent, to find the facts to be as alleged in the complaint and notice of investigation and to enter a recommended determination (or a determination if the Commission is the presiding officer) containing such findings.

2/ See the Commission's Notice of and Orders for Terminating Certain Respondents and Action Regarding Recommended Determination of the Presiding Officer in investigation No. 337-TA-42, on certain electric slow cookers issued February 9, 1979.

consideration." Therefore, the effect of a finding of default is to authorize the presiding officer to create certain procedural disabilities for the defaulting party and to entertain, without opposition, proposed findings and conclusions, based upon substantial, reliable, and probative evidence, which would support a recommended determination.

However, the presiding officer's recommended determination in a default situation is not required to be affirmative, nor is any complainant required by the rules to rely solely upon the allegations of its complaint to support an affirmative determination. Complainant in this case did not rely exclusively upon the allegations of the complaint to support the motion for default, choosing instead to submit additional supporting information with the motion. Notwithstanding the failure of a respondent to participate, an affirmative order of this agency will not issue except when the Commission determines that there is a violation of the statute, which is supported by reliable, probative, and substantial evidence.

Request for remand

Complainant and the investigative attorney requested at the Commission hearing on February 1, 1979, that the investigation be remanded to the presiding officer for a hearing if the Commission does not render an affirmative determination. We believe that remanding the investigation to the presiding officer for an evidentiary hearing on the issue of injury is not necessary where the facts are not disputed. Complainant stated at the Commission hearing that he would make an offer of proof at an evidentiary hearing as to foreign capacity through additional witnesses (transcript pp.

13-15). Such evidence would be merely repetitious (Rule 210.42(b)) of evidence already in the record. See text accompanying fn. on p. 8, supra. Case law establishes that no evidentiary hearing is required where there is no dispute on facts and the agency proceeding involves only questions of law. See Citizens for Allegan County, Inc. v. F.P.C., 414 F.2d 1125 (D.C. Cir. 1969). Even when a statute mandates an adjudicatory proceeding, neither that statute nor due process requires an agency to conduct a meaningless evidentiary hearing when the facts are undisputed. U.S. v. Cheramie Bo-Truc No. 5, Inc., 538 F.2d 696 (5 Cir. 1976).

Despite complainant's after-the-fact denial of its intention to waive an evidentiary hearing, it is clear that complainant did waive the opportunity for the hearing. The presiding officer scheduled a prehearing conference and a hearing for September 27 and 28, 1978, but canceled them in a notice issued September 27, 1978, because "complainant, in lieu of an appearance, intends to file by October 2, 1978, a motion for default judgment as to the respondents that will permit the Presiding Officer to make a ruling dispositive of this investigation." Complainant's waiver of an evidentiary hearing and willingness to have the case decided on the present record is also demonstrated by its failure to take timely exception to the lack of an evidentiary hearing within 10 days after the recommended determination as required by section 210.54 of the rules, or to request in the alternative, as did the investigative attorney, a remand of the case to the presiding officer for an evidentiary hearing. In response to questioning by the Commission, complainant's counsel conceded that he did not reserve any opportunity for a

hearing in the event his motion for default was denied (transcript p. 11). Further, he conceded that he did not file any exceptions to the recommended determination requesting remand to the presiding officer or otherwise requesting permission to make additional submissions (transcript p. 12).

Conclusions

It is noted that the Administrative Procedure Act requires only the opportunity for a hearing, and not an actual hearing. 1/ Clearly, the complainant had an opportunity for a hearing, but the record of the investigation indicates complainant's intention to submit its case on the basis of written submissions. We believe that complainant has been given an adequate opportunity to present evidence of a violation of section 337. If complainant believes that it has evidence of injury not previously presented, a new petition based upon infringement of either or both of the patents which are the subject of this investigation can be filed at any time during the life of the patents. 2/ Lacking any indication whatsoever of further evidence of injury, it is our opinion that we have provided more than adequate opportunities for complainant to present its case. Remanding the case would merely prolong a case devoid of evidence of injury.

1/ 5 U.S.C. 554(c) provides: "The agency shall give all interested parties opportunity for . . . hearing."

2/ Chairman Parker and Commissioner Moore note that the complainant has the privilege of seeking reconsideration if it believes it has competent, relevant, and probative evidence to offer.

Opinion of Vice Chairman Alberger

I concur with the other Commissioners' views (1) that the Commission is not required by our default rule to make an affirmative determination of violation of section 337 merely because no formal response was filed by any respondent, and (2) that the present record in this investigation does not establish that there is even a tendency to injure the domestic industry. However, I believe substantial justice would be better served by declaring this investigation more complicated, remanding it to the presiding officer for further proceedings to permit the parties to augment the record on the issue of violation, and requiring the presiding officer to file a new recommended determination within 90 days.

Remanding the case is preferable, in my judgment, due to confusion about the meaning of the Commission's default rule, which both the complainant and the Commission investigative attorney apparently interpreted to mean that an affirmative determination results whenever all named respondents are found in default. Indeed, until February 9, 1979, when the Commission issued its notice in investigation No. 337-TA-42 on Certain Electric Slow Cookers, remanding that case to the presiding officer so that the record can be augmented on the issue of violation, the Commission has never been required to render a determination after a default. It is regrettable that complainant failed to (1) file the motion for default early enough to allow a hearing if the motion were denied; (2) include in its exceptions to the presiding officer's recommended determination a

request for an evidentiary hearing if an affirmative determination did not issue; or (3) file a motion or written submission after the Commission's February 1, 1979, hearing requesting that the case be declared more complicated and remanded to the presiding officer for an evidentiary hearing. However, considerations of fairness and consistency with the Commission's action in investigation No. 337-TA-42 convince me that this case should not be terminated at this time with a finding of no violation.

At the public hearing, counsel for complainant indicated that he would favor a remand to the judge and declaration by the Commission that this was a more complicated investigation (transcript, p.39). He was not asked to submit any motions to effect such action. It may be that complainant relied on the Commission's action in 337-TA-42 on Certain Electric Slow Cookers, taken without any motion by any of the parties. Complainant may have assumed that the Commission would act on its own in this case as well. Apparently the majority has decided to pursue a different course in this case.

My colleagues have also found that complainant waived an evidentiary hearing. I do not so construe the facts and/or public statements. In my view, complainant had more than ample justification for expecting a certain result from his motion for default. While I agree with my colleagues' interpretation of the Commission's default rule, we must recognize that our own investigative staff, employees of our agency, were counseling a different interpretation of this rule. The fact that complainant relied on that interpretation to his detriment should offset the strict construction

of our rules by my colleagues in claiming complainant waived a hearing.

Counsel for complainant also indicated at the public hearing that he would, if an evidentiary hearing were granted, try to submit additional evidence showing a tendency to substantially injure his client, and would submit customs data on imports (transcript, p.39). He also indicated he would, if accorded the opportunity, make the record more complete in an evidentiary hearing (transcript, pp.39 - 40.). My colleagues' claim that "remanding . . . for an evidentiary hearing on the issue of injury is not necessary where the facts are not disputed." It was apparently their judgment that it was not a meaningless exercise in 337-TA-42, and I fail to see that this circumstance is measurably different. It may be, as my colleagues have apparently concluded, that no evidence can be offered to show the requisite degree of injury, but I would not preclude the opportunity for complainant to submit such evidence.

I would therefore deem this investigation "more complicated" for the identical reasons set forth by the Commission in Certain Electric Slow Cookers 1/, and allow further proceedings as in that case.

1/ Commission notice issued February 9, 1979 on investigation No. 337-TA-42, Certain Electric Slow Cookers.

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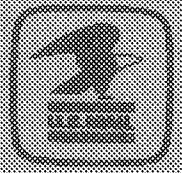

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