this order, file with the Commission, a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Commissioner Elman dissenting.

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IN THE MATTER OF

WILLIAM D. YARNELL doing business as NATIONAL ALUMINUM COMPANY

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-1076. Complaint, June 24, 1966—Decision, June 24, 1966*

Consent order requiring a Columbia, S.C., dealer in aluminum siding and related home improvement products to cease using fictitious pricing and savings claims, misrepresenting payment of commissions, source of products, business affiliation, and maintenance of such products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that William D. Yarnell, an individual trading and doing business as National Aluminum Company, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, William D. Yarnell, is an individual trading and doing business under the name of National Aluminum Company, with his principal place of business located at 2200 Main Street, in the city of Columbia, State of South Carolina.

PAR. 2. Respondent is now, and for some time last past been, engaged in the advertising, offering for sale, sale and distribution of aluminum siding and related home improvement products to the public.

PAR. 3. In the course and conduct of his business, respondent

now causes, and for some time last past has caused, his said products, when sold, to be shipped from his place of business in the State of South Carolina to purchasers thereof located in various other States of the United States and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of his business, and for the purpose of inducing the purchase or respondent's products, respondent's salesmen or representatives have represented, and now represent, directly or by implication, in oral solicitations to prospective purchasers that:

(1) Purchasers who allow materials installed by respondent to be used as models and for demonstration purposes will receive special or reduced prices for respondent's products and that savings will thereby be granted respondent's customers in reductions from respondent's established selling prices.

(2) Purchasers will receive a commission from respondent for each sale and installation of his materials made as a result of displaying or advertising their homes or as a result of referring other purchasers to respondent.

(3) Aluminum siding sold by respondent is manufactured by Reynolds Aluminum Company.

(4) Respondent is connected or affiliated with Reynolds Aluminum Company.

(5) Aluminum siding sold by respondent will never need any painting.

PAR. 5. In truth and in fact:

(1) For the reason that respondent does not sell his products at established selling prices, the prices represented as special or reduced prices at which respondent sells his products to purchasers who agree to have their homes used as models for demonstration purposes are not special or reduced prices and savings are not granted respondent's customers in reductions from any established selling price.

(2) Respondent does not in every instance display or advertise homes in accordance with its promises and representations; nor does it, in those instances in which sales are made as the result of the use of purchasers' homes for advertising or display purposes, pay commissions or other compensation to such purchasers. In the few instances where commissions are paid by respondent to purchasers for referring other purchasers to respondent, they are

not paid in accordance with respondent's promises and representations.

(3) Aluminum siding sold by respondent is not manufactured by Reynolds Aluminum Company.

(4) Respondent is not connected or affiliated with Reynolds Aluminum Company.

(5) Aluminum siding sold by respondent will require painting.

Therefore, the statements and representations set forth in Paragraph Four hereof are false, misleading and deceptive.

PAR. 6. In the conduct of his business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of aluminum siding and related home improvement products of the same general kind and nature as that sold by respondent.

PAR. 7. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

## DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set

forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent William D. Yarnell is an individual trading and doing business under the name of National Aluminum Company, with his principal place of business located at 2200 Main Street, in the city of Columbia, State of South Carolina.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

*It is ordered,* That respondent William D. Yarnell, an individual trading and doing business as National Aluminum Company, or trading and doing business under any other name or names, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, distribution or installation of aluminum siding or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. (a) Representing, directly or by implication, that any price for respondent's products is a special or reduced price unless such price constitutes a significant reduction from an established selling price at which such products have been sold in substantial quantities by respondent in the recent regular course of his business.

(b) Representing, directly or by implication, that purchasers will receive commissions or other compensation, unless respondent provides an opportunity or program whereby purchasers can qualify for such commissions or other compensation, and provides such commissions or other compensation, in every instance, to those qualifying therefor; misrepresenting, directly or by implication, that a home will be used for display or advertising purposes; or misrepresenting in any manner commissions or any other compensation to be received by respondent's purchasers.

(c) Representing, directly or by implication, that aluminum siding sold by respondent is manufactured by Reynolds Aluminum Company; or misrepresenting, in any manner, the identity of the manufacturer or the source of any of respondent's products.

(d) Representing, directly or by implication, that respondent is connected or affiliated with Reynolds Aluminum Company; or misrepresenting, in any manner, respondent's business connections or affiliations.

(e) Representing, directly or by implication, that aluminum siding sold by respondent will never need painting; or misrepresenting, in any manner, the painting or other maintenance required for respondent's products.

2. Misrepresenting, in any manner, the savings available to purchasers of respondent's products.

3. Supplying or placing in the hand of any distributor, dealer or salesman, brochures, sales manuals, charts, pamphlets or any other advertising material which are displayed or may be displayed, to the purchasing public which contain any of the false or misleading representations prohibited in Paragraphs 1 and 2 herein.

*It is further ordered,* That respondent deliver a copy of this order to every salesman or representative, now or at any time hereafter, engaged in selling or soliciting the sale of respondent's products.

*It is further ordered,* That the respondent herein shall, within sixty (60) days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with this order.

IN THE MATTER OF

# FURS BY VANITY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

*Docket C-1077. Complaint, June 24, 1966—Decision, June 24, 1966*

Consent order requiring a Philadelphia, Pa., retail furrier to cease misbranding and falsely invoicing its fur products.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Furs By Vanity, Inc., a corporation, and Sol Shane and Elizabeth Diaco, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Furs by Vanity, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania.

Respondents Sol Shane and Elizabeth Diaco are officers of the corporate respondent and formulate, direct and control the acts, practices and policies of the said corporate respondent including those hereinafter set forth.

Respondents are manufacturers and retailers of fur products with their office and principal place of business located at 3226 West Cheltenham Avenue, Philadelphia, Pennsylvania.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have manufactured for sale, sold, advertised, offered for sale, transported and

distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

PAR. 4. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder inasmuch as required item numbers were not set forth on labels, in violation of Rule 40 of said Rules and Regulations.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were not invoiced as required by Section 5(b) (1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed:

1. To show the true animal name of the fur used in the fur product.

2. To disclose that the fur contained in the fur product was bleached, dyed or otherwise artifically colored, when such was the fact.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured, in violation of Section 5(b) (2) of the Fur Products Labeling Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products which were invoiced as "Broadtail" thereby implying that the furs contained therein were entitled to the designation "Broadtail Lamb" when in truth and in fact they were not entitled to such designation.

PAR. 7. Certain of said fur products were falsely and deceptively invoiced in violation of the fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

1. Information required under Section 5(b(1) of the Fur products Labeling Act and the Rules and Regulations promulgated

thereunder was set forth on invoices in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

2. The term "Dyed Broadtail-processed Lamb" was not set forth on invoices in the manner required by law, in violation of Rule 10 of said Rules and Regulations.

3. The term "natural" was not used on invoices to describe fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

4. Required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Fur Products Labeling Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondents that the law has been violated as alleged in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having reason to believe that the respondents have violated the Federal Trade Commission Act and the Fur Products Labeling Act, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, accepts said agreement, makes the following jurisdictional findings and enters the following order:

1. Respondent Furs By Vanity, Inc., is a corporation organized,

existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 3226 West Cheltenham Avenue, Philadelphia, Pennsylvania.

Respondents Sol Shane and Elizabeth Diaco are officers of the corporate respondent and their address is the same as that of said corporate respondent.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

*It is ordered,* That respondent Furs By Vanity, Inc., a corporation, and its officers, and respondents Sol Shane and Elizabeth Diaco, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction into commerce, or the sale, advertising, or offering for sale in commerce, or transportation and distribution in commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation, or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce; as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Failing to affix labels to fur products showing in words and in figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

2. Failing to set forth on labels the item number or mark assigned to each such fur product.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices, as the term "invoice" is defined in the Fur Products Labeling Act, showing in words and figures plainly legible all the information required to be disclosed in each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

2. Setting forth on invoices pertaining to fur products any false or deceptive information with respect to the

name or designation of the animal or animals that produced the fur contained in such fur product.

3. Setting forth information required under Section 5(b) (1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

4. Failing to set forth the term "Dyed Broadtail-processed Lamb" in the manner required where an election is made to use that term instead of the words "Dyed Lamb."

5. Failing to set forth the term "Natural" as part of the information required to be disclosed on invoices under the Fur Products Labeling Act and Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

6. Failing to set forth on invoices the item number or mark assigned to each such fur product.

*It is further ordered,* That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

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IN THE MATTER OF

## GUILD MILLS CORPORATION ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE FLAMMABLE FABRICS ACTS

*Docket C-1078. Complaint, June 27, 1966—Decision, June 27, 1966*

Consent order requiring a Laconia, N.H., textile importer to cease importing or selling any highly flammable fabric dangerous to the individual wearer.

### COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, hav-

ing reason to believe that Guild Mills Corporation, a corporation, and Lawrence W. Guild, individually and as an officer of the said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts, and the Rules and Regulations promulgated under the Flammable Fabrics Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Guild Mills Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Hampshire. Respondent Lawrence W. Guild is the President and Treasurer of the said corporate respondent and he formulates, directs and controls the acts, practices and policies of said corporation.

The respondents are engaged in the sale and distribution of fabrics, with their offices and principal place of business located at 90 Mill Street, Laconia, New Hampshire.

PAR. 2. Respondents, subsequent to July 1, 1954, the effective date of the Flammable Fabrics Act, have sold and offered for sale, in commerce; have imported into the United States; and have introduced, delivered for introduction, transported, and caused to be transported, in commerce; and have transported and caused to be transported for the purpose of sale or delivery after sale, in commerce; as "commerce" is defined in the Flammable Fabrics Act, fabric, as that term is defined therein, which fabric was, under Section 4 of the Flammable Fabrics Act, as amended, so highly flammable as to be dangerous when worn by individuals.

PAR. 3. The aforesaid acts and practices of respondents were and are in violation of the Flammable Fabric Act and the Rules and Regulations promulgated thereunder, and as such constitutes unfair methods of competition and unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would

charge respondents with violation of the Federal Trade Commission Act and the Flammable Fabrics Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondents that the law has been violated as alleged in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having reason to believe that the respondents have violated said Acts, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, accepts said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Guild Mills Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Hampshire, with its office and principal place of business located at 90 Mill Street, Laconia, New Hampshire.

Respondent Lawrence W. Guild is an officer of said corporation and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

*It is ordered,* That respondents Guild Mills Corporation, and its officers, and Lawrence W. Guild, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device do forthwith cease and desist from:

(a) Importing into the United States; or

(b) Selling, offering for sale, introducing, delivering for introduction, transporting, or causing to be transported, in commerce, as "commerce" is defined in the Flammable Fabrics Act; or

(c) Transporting or causing to be transported, for the purpose of sale or delivery after sale in commerce,

any fabric which, under the provisions of Section 4 of the said Flammable Fabrics Act, as amended, is so highly flammable as to be dangerous when worn by individuals.

*It is further ordered,* That the respondents herein shall, within

sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

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IN THE MATTER OF

## DAVID PEYSER SPORTSWEAR, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION, THE WOOL PRODUCTS LABELING AND THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

*Docket C-1079. Complaint, June 30, 1966—Decision, June 30, 1966*

Consent order requiring a New York City seller of sport jackets and coats and its manufacturing subsidiary, to cease misbranding its wool and textile fiber products, and deceptively advertising and furnishing false guaranties on such products.

### COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Wool Products Labeling Act of 1939 and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that David Peyser Sportswear, Inc., and Jacana Sportswear Co., Inc., corporations, and Paul Peyser, individually and as an officer of said corporations, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939 and the Textile Fiber Products Identification Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent David Peyser Sportswear, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Its office and principal place of business is located at 142 Fifth Avenue, New York, New York. Said corporate respondent sells men's and boys' sport coats and jackets manufactured by its subsidiary corporation Jacana Sportswear Co., Inc.

Respondent Jacana Sportswear Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Its office and principal place of business is located at 142 Fifth Avenue, New York, New York.

Individual respondent Paul Peyser is an officer of the said corporations and formulates, directs and controls the acts, practices and policies of the said corporations. He manages the production of the products referred to herein. His office and principal place of business is the same as that of said corporations.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, respondents have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment, shipped, and offered for sale in commerce, as "commerce" is defined in said Act, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were jackets stamped, tagged, labeled, or otherwise identified by respondents as 80% Wool, 20% other fibers, whereas in truth and in fact, said products contained substantially different fibers and amounts of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, was a wool product with a label on or affixed thereto which failed to disclose the percentage of the total fiber weight of the said wool product, exclusive of ornamentation not exceeding 5% of the total fiber weight, of (1) wool; (2) reprocessed wool; (3) reused wool; (4) each fiber other than wool present in the wool product when said percentage by weight of such fiber was 5% or more; and (5) the aggregate of all other fibers.

PAR. 5. Certain of said wool products were misbranded in viola-

tion of the Wool Products Labeling Act of 1939 in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Wool products were offered or displayed for sale or sold to purchasers or the consuming public and the required stamp, tag, label and other mark of identification attached to the said wool product and the required information contained therein, was minimized, rendered obscure and inconspicuous, and placed so as likely to be unnoticed or unseen by purchasers and purchaser-consumers by reason of, among others, failure to use letters and numerals of equal size and conspicuousness, in violation of Rule 11 of the aforesaid Rules and Regulations.

(b) The respective percentages of fibers contained in the face and in the back of pile fabrics were not set out in such a manner as to give the ratio between the face and the back of such fabrics where an election was made to separately set out the fiber content of the face and back of wool products containing pile fabrics, in violation of Rule 26 of the aforesaid Rules and Regulations.

PAR. 6. The acts and practices of the respondents as set forth above were, and are in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission.

PAR. 7. Subsequent to the effective date of the Textile Fiber Products Identification Act on March 3, 1960, respondents have been and are now engaged in the introduction, delivery for introduction, manufacture for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and the importation into the United States, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, textile fiber products, which had been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, whether in their original state or contained in other textile fiber products; as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 8. Certain of said textile fiber products were misbranded by respondents in that they were not stamped, tagged, labeled or

otherwise identified as required under the provisions of Section 4(b) of the Textile Fiber Products Identification Act and in the manner and form as prescribed by the Rules and Regulations promulgated under said Acts.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products without labels and textile fiber products with labels which failed to show in words and figures plainly legible the correct generic name of the fibers present.

PAR. 9. Certain of said textile fiber products were misbranded in violation of the Textile Fiber Products Identification Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Samples, swatches, and specimens of textile fiber products subject to the aforesaid Act, which were used to promote or effect sales of such textile fiber products, were not labeled to show their respective fiber content and other information required by Section 4(b) of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, in violation of Rule 21(a) of the aforesaid Rules and Regulations.

(b) The fiber content of textile pile fabrics or products composed thereof was set forth in such segregated form as to show the fiber content of the face and of the back, without setting forth the percentages of respective fibers as they exist in the face and back in such a manner as to give the ratio between the face and back of the aforesaid fabrics or products, in violation of Rule 24 of the aforesaid Rules and Regulations.

PAR. 10. Certain of said textile fiber products were falsely and deceptively advertised in that respondents, in making disclosures or implications as to the fiber content of such textile fiber products in written advertisements used to aid, promote and assist, directly or indirectly, in the sale or offering for sale of said products, failed to set forth the required information as to fiber content as specified by Section 4(c) of the Textile Fiber Products Identification Act and in the manner and form prescribed by the Rules and Regulations promulgated under said Act.

Among such textile fiber products, but not limited thereto, were jackets which were falsely and deceptively advertised by means of brochures distributed by respondents throughout the United States in that fiber implying terms were used to describe such jackets and the true generic names of the fibers in such jackets were not set forth in immediate conjunction therewith.

PAR. 11. By mens of the aforesaid advertisements and others

of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised textile fiber products in violation of the Textile Fiber Products Identification Act in that said textile fiber products were not advertised in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Fiber trademarks were used in advertising textile fiber products containing more than one fiber, other than permissive ornamentation, and such fiber trademarks did not appear in the required fiber content information in immediate proximity and conjunction with the generic name of the fiber in plainly legible type or lettering of equal size and conspicuousness, in violation of Rule 41(b) of the aforesaid Rules and Regulations.

PAR. 12. Respondents have failed to maintain proper records showing the fiber content of the textile fiber products manufactured by them, in violation of Section 6(a) of the Textile Fiber Products Identification Act and Rule 39 of the Regulations promulgated thereunder.

PAR. 13. The respondents have furnished false guaranties that their textile fiber products were not misbranded or falsely and deceptively invoiced or advertised, in violation of Section 10(b) of the Textile Fiber Products Indentification Act.

PAR. 14. The acts and practices of respondents, as set forth in Paragraph Eight through Thirteen above were, and are, in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, and constituted, and now constitute unfair methods of competition and unfair and deceptive acts or practices, in commerce, under the Federal Trade Commission Act.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, the Wool Products Labeling Act of 1939 and the Textile Fiber Products Identification Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an ad-

mission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondents that the law has been violated as alleged in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having reason to believe that the respondents have violated said Acts, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, accepts said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent David Peyser Sportswear, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 142 Fifth Avenue, New York, New York.

Respondent Jacana Sportswear Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 142 Fifth Avenue, New York, New York.

Respondent Paul Peyser is an officer of the said corporations and his address is the same as that of the said corporations.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

*It is ordered,* That respondents David Peyser Sportswear, Inc., and Jacana Sportswear Co., Inc., corporations, and their officers, and Paul Peyser, individually and as an officer of said corporations, and respondents' respresentatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation, distribution or delivery for shipment or shipment in commerce, of wool jackets or other wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from:

A. Misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amount of the constituent fibers contained therein.

2. Failing to securely affix to, or place on, each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a) (2) of the Wool Products Labeling Act of 1939.

3. Affixing or placing the stamp, tag, label or mark of identification required under the said Act or the information required by said Act and the Rules and Regulations promulgated thereunder on wool products in such a manner as to be minimized, rendered obscure or inconspicuous or so as to be unnoticed or unseen by purchasers and purchaser consumers, when said wool products are offered or displayed for sale or sold to purchasers or the consuming public.

4. Failing to set forth respective percentages of fibers contained in the face and back of pile fabrics in such a manner as to give the ratio between the face and back of each such fabric when an election is made to separately set out the fiber content of the face and back of pile fabrics containing wool or of pile fabrics incorporated in wool products.

*It is further ordered,* That respondents David Peyser Sportswear, Inc., and Jacana Sportswear Co., Inc., corporations, and their officers, and Paul Peyser, individually and as an officer of said corporations and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, delivery for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, of any textile fiber product, which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

A. Misbranding textile fiber products by:

1. Failing to affix labels to such textile fiber products showing in a clear, legible and conspicuous manner each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

2. Failing to affix labels showing the respective fiber content and other required information to samples, swatches and specimens of textile fiber products subject to the aforesaid Act which are used to promote or effect sales of such textile fiber products.

3. Failing to set forth percentages of the respective fibers as they exist in the face and back of pile fabrics in such a manner as to give the ratio between the face and back of each such fabric when an election is made to separately set out the fiber content of the face and back of such textile pile fabric or product composed thereof.

B. Falsely and deceptively advertising textile fiber products by:

1. Making any representations by disclosure or by implication of the fiber contents of any textile fiber product in any written advertisment which is used to aid, promote, or assist directly or indirectly in the sale or offering for sale of such textile fiber product unless the same information required to be shown on the stamp, tag, label or other means of identification under Section 4(b) (1) and (2) of the Textile Fiber Products Identification Act is contained in the said advertisement, except that the percentages of the fibers present in the textile fiber product need not be stated.

2. Using a fiber trademark in advertising textile fiber products containing more than one fiber without such fiber trademark appearing in the required fiber content information in immediate proximity and conjunction with the generic name of the fiber in plainly legible type or lettering of equal size and conspicuousness.

C. Furnishing false guaranties that textile fiber products are not misbranded or falsely invoiced under the provisions of the Textile Fiber Products Identification Act.

D. Failing to maintain records of fiber content of textile fiber products manufactured by them, as required by Section

6(a) of the Textile Fiber Products Identification Act and Rule 39 of the Regulations thereunder.

*It is further ordered,* That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

# INTERLOCUTORY, VACATING, AND MISCELLANEOUS ORDERS

## MODERN MARKETING SERVICE, INC., ET AL. C. H. ROBINSON COMPANY AND NASH-FINCH COMPANY

*Dockets 3783, 4589. Order and Opinion, Jan. 7, 1966*

Order denying respondents' request for a subpoena duces tecum directed to the Secretary of the Commission requiring him to produce intra-agency memoranda and other Commission and staff documents relating to attempted industrywide enforcement of Sec. 2(c) of the Clayton Act in the Fresh Fruit and Vegetable Industry.

### OPINION OF THE COMMISSION

This matter is before the Commission on the certification by the hearing examiner appointed to preside over the investigational hearings in the above-entitled proceedings of a request by respondent, Nash-Finch Company, submitted on November 19, 1965, for a subpoena duces tecum. The subpoena would require Joseph W. Shea, Secretary of the Commission, to appear and produce certain generally described intra-agency memoranda and other documents prepared by the Commission's staff, individual Commissioners and the Commission, including several Commission minutes, pertaining to Docket No. 3783 and Docket No. 4589, and certain other such writings pertaining to the Commission's activities in the area of its attempts to effectuate industrywide enforcement of Section 2(c) of the Clayton Act, as amended, in the Fresh Fruit and Vegetable Industry.

The Commission's order directing an investigation to determine whether respondents C. H. Robinson Company and Nash-Finch Company have violated the provisions of a cease-and-desist order entered under Section 2(c) of the amended Clayton Act, on January 6, 1947 [43 F.T.C. 297],[1] was issued on February 1,

[1] That order provides:

I. *It is ordered*, That the respondent C. H. Robinson Company and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the purchase of fruits, vegetables, and other commodities in commerce as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from—

1963 [62 F.T.C. 1486]. Following the termination of court proceedings in this matter,[2] Commission counsel moved the Commission to amend its order to include an investigation of respondent Nash-Finch's compliance with the provisions of a cease-and-desist order issued under Section 2(c) on September 8, 1943.[3] Respondent, Nash-Finch filed an answer in opposition to this motion and moved that this proceeding be terminated. On June 2, 1965, the motion of Commission counsel was granted, respondent's motion was denied, and the amended order issued.

Respondent contends that the documents specified in the subpoena are necessary for the presentation of its defense in two respects. First, respondent contends that the documents contain information relevant to its contention that the cease-and-desist orders in Dockets 4589 [43 F.T.C. 297] and 3783 [37 F.T.C 386] do not cover the practices challenged by Commission counsel. In this regard, respondent takes the position that the order in Docket No. 4589 deals solely with receipt of brokerage by Nash-Finch on its own purchases through C. H. Robinson Company, a North Dakota corporation owned by Nash-Finch. As to Docket

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1. Receiving or accepting from any seller, directly or indirectly, anything of value as a commission or brokerage, or any compensation, allowance, or discount in lieu thereof, on or in connection with purchases made by respondent Nash-Finch Company while acting under the control of and in fact for and on behalf of said respondent Nash-Finch Company.

2. Receiving or accepting from any seller, directly or indirectly, anything of value as a commission or brokerage, or any compensation, allowance, or discount in lieu thereof, on or in connection with purchases made for respondent's own account or while acting for or in behalf of a purchaser as an intermediary or agent or subject to the direct or indirect control of such purchaser.

3. Paying, transmitting, or delivering to or for the benefit of any purchaser, either directly in the form of money or credits or indirectly in the form of dividends, or otherwise, any commission or brokerage, or any compensation, allowance, or discount in lieu thereof, received from any seller while acting as an intermediary or agent for such purchaser or while subject to the direct or indirect control of such purchaser.

II. *It is further ordered,* That the respondent Nash-Finch Company and its officers, agents, representatives, and employees, directly or through any corporate or other device in connection with the purchase of fruits, vegetables, and other commodities in commerce as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from—

1. Receiving or accepting from any seller, directly or indirectly, anything of value as a commission or brokerage, or any compensation, allowance, or discount in lieu thereof, on or in connection with purchases made for respondent's own account, either directly or by or through respondent C. H. Robinson Company.

2. Receiving or accepting from respondent C. H. Robinson Company, either directly in the form of money or credits or indirectly in the form of dividends, or otherwise; any commission or brokerage, or any compensation, allowance, or discount in lieu thereof, received by said C. H. Robinson Company from any seller while acting for or in behalf of said respondent Nash-Finch Company as an intermediary or agent for said respondent or while subject to the direct or indirect control of said respondent.

[2] *Nash-Finch Co.* v. *Federal Trade Commission,* 233 F. Supp. 910 (D. Minn. 1964).

[3] By the terms of that order, respondent Nash-Finch Company and its officers, agents, representatives and employees, in connection with the purchase by such respondent of commodities in commerce, as commerce is defined in the Clayton Act, were ordered to cease and desist from—receiving or accepting from the sellers of such commodities, directly or indirectly, any brokerage fee, commission, or other compensation, or any allowance or discount in lieu thereof.

No. 3783, it is respondent's position that the order deals only with a group purchasing program, that Nash-Finch was named only as representative of a number of wholesalers who owned stock in the buying organization, and that, hence, the order has nothing to do with the individual acts of Nash-Finch. Respondent contends that none of the transactions as to which Commission counsel has introduced evidence in this investigational hearing relate to the practices prohibited by the two orders, as thus interpreted.

Second, respondent contends that the documents are necessary to support its asserted defense that the prosecution of this proceeding is not in the public interest inasmuch as "it involves the harassment of a single company when its competitors have been allowed to effect compliance with Section 2(c) through acceptance of industrywide rules promulgated by the Federal Trade Commission during the past year."

In his certification, the hearing examiner indicated a belief that the requested documents are not only confidential and privileged but have "no relevancy to the issues involved in whether the respondent violated the orders of the Commission proscribing respondent's acceptance of brokerage." He concluded that respondent had failed to show good cause in the application for the requested subpoena and recommended that it be denied.

The documents requested by the respondent include staff memoranda and recommendations, and Commission minutes, memoranda and directives as well as the writings of individual Commissioners, leading to the issuance of the complaints and orders in the two matters under investigation and to reports of compliance with the orders. All of these documents are classified as confidential under § 1.133 of the Commission's Rules of Practice. Under § 1.134 of the Rules, such documents can be made public only by the Commission and only upon a showing of good cause, due consideration being given to the public interest in allowing such disclosure. As we have stated in the *Macy* case, a request for confidential information made to a hearing examiner in the course of a litigated proceeding will be treated as an application under § 1.134.[4]

We first consider respondent's contention that certain of the documents are relevant to its defense that the transactions under investigation do not come within the scope of the two orders. Thus, it would appear that, in substance, respondent proposes

[4] *R. H. Macy & Co., Inc.*, Docket No. 8650, September 30, 1965, petition for declaratory judgment dismissed, Civil No. 2707-65 (D.D.C. Dec. 17, 1965).

to establish this defense by probing the deliberative processes of the Commission in formulating a proper order.

Of vital importance to an issue as to the scope of an order is the well-established principle that the Commission has wide discretion to formulate a remedy adequate to prevent repetitions of a violation.[5] Of particular significance here is the decision in the *Western Fruit Growers* case wherein the court, in sustaining a broad order issued under Section 2(c), relied upon the holding by the Supreme Court to the effect that the Commission is not limited to prohibiting an illegal practice in the precise form existing in the past but may fashion its relief to restrain other like or related unlawful acts.[6]

Turning to respondent's request for a subpoena, we find that other than its own assertions as to the scope of the orders, the only bases it has advanced in support of its request are an affidavit attached to its motion to terminate, filed on April 26, 1965, and certain compliance reports which it has introduced in evidence in this proceeding. The affidavit is that of an attorney who served as counsel for respondent in the proceeding in Docket No. 4589. Giving full credit to this affidavit, we find that it asserts only that in affiant's dealing with the staff, the staff was solely concerned with respondent's ownership of stock in C. H. Robinson and the possibility that respondent might be paid dividends from brokerage received by C. H. Robinson on respondent's purchases.

These assertions do not provide sufficient cause for releasing the requested documents. Obviously, the staff's primary concern would be "the illegal practice in the precise form" [7] in which it then existed, and not related practices not then before it. Moreover, it is well established that "The responsibility of decision is upon the Commission alone," [8] and that the staff's action would in no way bind the Commission as to the scope of the order.[9]

As to staff memoranda and correspondence relating to compliance reports and the receipt and filing thereof, it is obvious that these documents cannot serve to limit the scope of the orders as to practices not therein considered. Respondent does not contend that any of the transactions involved in this investigation were the subject of a compliance report accepted by the Commission.

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[5] *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608 (1946).
[6] *Western Fruit Growers Sales Co.* v. *Federal Trade Commission*, 322 F.2d 67 (9th Cir. 1963).
[7] *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470 (1952).
[8] *In the matter of Carpel Frosted Foods, Inc.*, Docket No. 5482, 48 F.T.C. 581 (1951).
[9] *P. Lorillard Co.* v. *Federal Trade Commission*, 186 F.2d 52 (4th Cir. 1950).

With respect to minutes, memoranda, directives, recommendations or other writings of the Commission or any individual Commissioner, these documents relate solely to the Commission's function in reaching a decision. In effect, by requesting these documents, respondent would inquire into the mental processes of the Commission in determining the scope of the orders under investigation. In denying the right to such inquiry, the Supreme Court in the *Morgan* case [10] has stated that "Such an examination of a judge would be destructive of judicial responsibility. * * * Just as a judge cannot be subjected to such a scrutiny, * * * so the integrity of the administrative process must be equally respected." In a case involving the National Labor Relations Board, the court had aptly pointed out that if information as to the deliberations of an administrative agency were made public "The function of deciding controversies might soon be overwhelmed by the duty of answering questions about them." [11]

Considering respondent's arguments and weighing them against the public interest in preserving the confidentiality of information dealing with internal agency operations, we conclude that respondent has failed to show good cause for the release of the documents requested in support of its defense as to the limited scope of the orders.

We turn next to respondent's contention that certain documents are needed to support its defense of "harassment." Specifically, respondent charges the Commission with "unequal enforcement" of the law and with having "arbitrarily singled out this respondent for prosecution, while allowing its competitors to effect voluntary compliance because of the industrywide nature of problems arising under Section 2(c)." In substance, respondent states that after promulgation of Trade Practice Rules for the Fresh Fruit and Vegetable Industry (April 15, 1965), the Commission forwarded cards to members of the industry requesting them to pledge that they would adhere to the rules. Respondent requests confidential documents from the Commission's files to support its belief that the Commission has closed investigations involving its competitors upon receipt of signed pledges from them, while refusing to terminate this proceeding after receiving a card executed by Nash-Finch.

We recently considered a request for confidential documents of a similar nature from a respondent to support its contention that the Commission had discriminated against it and in favor

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[10] *United States* v. *Morgan*, 313 U.S. 409 (1941).

[11] *National Labor Relations Board* v. *Botany Worsted Mills*, 106 F.2d 263 (3d Cir. 1939).

of its competitors in the enforcement of the Wool Products Labeling Act.[12] The alleged discrimination there involved related to the issuance of a complaint against the respondent.

In that case, we concluded that respondent had failed to show good cause and our position with respect to such matters was set forth, in part, as follows:

> All that the respondent is challenging in effect is the Commission's authority to exercise its discretion in the issuance of a complaint in this matter while administratively closing investigations in other matters with related charges. The Commission, however, is vested with discretion in bringing a complaint. *Moir* v. *Federal Trade Commission*, 12 F. 2d 22, 28 (1st Cir. 1926). It has the administrative discretion to decide whether or not to proceed against individual respondents or on an industry-wide basis, and it alone is "empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress." *Moog Industries* v. *Federal Trade Commission*, 355 U.S. 411, 413 (1958). Also, respondent has no "right" to the administrative treatment it here apparently seeks. *Coro, Inc.* v. *Federal Trade Commission*, 338 F. 2d 149 (1st Cir. 1964). Clearly, an assertion of a difference in treatment alone does not create an issue of the denial of due process.
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> Respondent's claim of alleged difference of treatment does not create or even suggest any inference or even a suspicion that the Commission's action was in any way the result of discrimination or bias, conscious or unconscious, intentional or unintentional. The mere assertion of such a plea, without more, cannot enable a respondent to interrogate Commission employees or to rummage through investigative reports and staff memoranda in the hope that something will turn up to support the claim.

The matter before us goes beyond the question of whether to issue a complaint. Respondent, Nash-Finch, is bound under two outstanding orders to cease and desist. The Commission has reason to believe that it may have violated the provisions of these orders and, pursuant to its authority and public duty, has ordered investigational hearings.

In substance, respondent's defense would have the Commission terminate a proceeding inquiring into its compliance with the actual prohibitions of two orders on the grounds that it, together with its competitors, has signed a card pledging to abide by a trade practice rule. However, respondent denies that the practices which are the subject of this inquiry are illegal. Moreover, it is to be noted that nowhere in its present request does respondent claim that the products covered by the trade practice rule are the only products involved in the transactions under investigation.

In support of its request, respondent quotes that part of a recent address by Commissioner Jones dealing with industry-

[12] *R. H. Macy & Co., Inc.*, Docket No. 8650, September 30, 1965, petition for declaratory judgment dismissed, Civil No. 2707-65 (D.D.C. Dec. 17, 1965).

wide enforcement. Under the facts before us, we think that the following is a more appropriate quote from that speech:

> The Commission's case-by-case technique of law enforcement is of major importance in stopping law violations and defining through its decisions the conduct which it regards as violative of the statutes. It is also an imperative in maintaining respect for those laws and in achieving voluntary compliance with them. Failure to enforce the law's prohibitions promptly and impartially can only breed disrespect and encourage disregard of the law's strictures. Moreover, for the great majority of business which keeps its conduct within the law, it is essential that law violations be promptly proceeded against as a simple matter of fairness if nothing more.[13]

We are of the opinion that respondent has failed to provide sufficient cause for the release of documents to support a defense of unequal treatment.

An appropriate order will be entered.

Commissioner Elman did not concur.

Commissioner MacIntyre did not participate.

ORDER RULING ON QUESTION CERTIFIED

This matter having come before the Commission on the certification by the hearing examiner appointed to preside over the investigational hearings in the above-entitled proceedings of the question as to the issuance of a subpoena duces tecum, and the Commission having determined that the subpoena should not be issued:

*It is ordered,* That the hearing examiner be, and he hereby is, instructed not to issue the subpoena duces tecum requested by respondent on November 19, 1965, requiring Joseph W. Shea to appear and to produce certain Commission documents.

Commissioner Elman not concurring and Commissioner MacIntyre not participating.

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## ASSOCIATED MERCHANDISING CORPORATION ET AL

*Docket 8651. Order and Opinion, Jan. 19, 1966*

Order directing General Counsel to prepare papers for transmittal to Attorney General requesting him to initiate civil enforcement proceedings against respondents requiring them to comply with hearing examiner's order of August 12, 1965.

DISSENTING OPINION

BY ELMAN, *Commissioner:*

Assuming that the hearing examiner's order for production of

[13] Address by Commissioner Mary Gardiner Jones before the Bar Association of the District of Columbia, Washington, D.C. (February 25, 1965).

documents was within his discretion and should have been obeyed by respondents, it does not necessarily follow that the Commission should initiate a civil enforcement action pursuant to Section 9 of the Federal Trade Commission Act. Section 3.12 of the Commission's Rules of Practice provides that, in the case of refusals to comply with hearing examiners' directions, the matter shall promptly be certified by the examiner to the Commission, which will thereafter make such orders as the circumstances require. It is only after the Commission, upon due deliberation, enters an order of its own that Section 9 of the Federal Trade Commission Act comes into play. Before invoking Section 9 in such manner the Commission should weigh (1) the requirement of Section 6(a) of the Administrative Procedure Act that every agency "shall proceed with reasonable dispatch to conclude any matter presented to it", and (2) the representations made to it by staff counsel, in connection with the Commission's prior consideration of offers of settlement, concerning the scope and length of the litigation which would ensue if the offers were rejected.

The Commission's action today will bring this administrative proceeding to a halt for at least several years. The inevitable consequence will be that, if and when this case is finally decided on the merits, the record will be stale and the practices challenged in the complaint will have changed or disappeared. In the circumstances presented, this trip to court is neither necessary nor desirable. I would direct the hearing examiner to proceed with all dispatch in going forward with the proceeding.

## ORDER DIRECTING THE GENERAL COUNSEL TO PREPARE AND SUBMIT PAPERS TO THE COMMISSION REQUESTING THE ATTORNEY GENERAL TO INITIATE CIVIL ENFORCEMENT PROCEEDINGS

Upon consideration of the hearing examiner's certification filed December 10, 1965, of the motion of complaint counsel, the Commission has determined that the Attorney General of the United States should be requested to initiate a civil enforcement action pursuant to Section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49, against respondents Associated Merchandising Corporation, Aimcee Wholesale Corporation, and Federated Department Stores, Inc., in conformity with the stipulation of the parties and the order of November 18, 1965, of the United States District Court for the District of Columbia, in Civil Action No. 2701–65, to require compliance with the hearing examiner's order for production of documents issued August 12,

1965, and that the General Counsel should prepare and submit to the Commission for its consideration and approval the necessary papers for transmittal to the Attorney General of the United States in connection therewith, accordingly:

*It is ordered,* That the General Counsel be, and he hereby is, directed to prepare and submit to the Commission for its consideration and approval the necessary papers for transmittal by the Commission to the Attorney General of the United States requesting the latter to initiate civil enforcement proceedings under Section 9 of the Federal Trade Commission Act against the aforesaid respondents to require compliance with the hearing examiner's order of August 12, 1965, in conformity with the stipulation of the parties dated November 18, 1965, and the order of the United States District Court for the District of Columbia of the same date.

Commissioner Elman dissented and has filed a dissenting statement.

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## BEATRICE FOODS CO. AND THE KROGER CO., INC.

*Docket 8663. Order and Opinion, Jan 19, 1966*

Order modifying hearing examiner's order of Oct. 29, 1965, by striking therefrom the last sentence of numbered paragraphs 1 and 2 which constituted official notice of competitive injury; respondents' petition for rehearing of an interlocutory appeal denied.

### OPINION OF THE COMMISSION

This matter is before the Commission on the interlocutory appeal of respondent The Kroger Co., Inc. (hereinafter referred to as Kroger), from the hearing examiner's order granting in part complaint counsel's request for official notice, and on the petition of both respondents to rehear their request to file an interlocutory appeal from the examiner's orders of October 25 and 26, 1965, which request was denied by the Commission December 1, 1965. Complaint counsel has filed briefs in opposition to the appeal and to the request for rehearing.

#### *Kroger's Appeal*

Kroger argues (a) that the examiner's order violates the requirements of due process, the Administrative Procedure Act and the Commission's Rules of Practice, (b) that it is improper because it notices "facts" which are not the proper subject of

official notice, and (c) that the "facts" noticed are not relevant to the proceeding.

The statements noticed by the examiner are as follows:

1. The retail grocery business is a highly competitive one. Net profits are low; consequently cash discounts and other allowances are important. Price is a very important factor in enabling a food retailer to compete. A low price to some, but not to all, competing retail stores in a city would normally be expected to hinder competition between them.

2. Milk is a staple, highly standardized, food item sold by virtually all food retailers. Substantial and continuous discrimination in price of a major grocery product, such as milk, creates a probability of competitive injury.

I

On the first argument made by Kroger, that is, the alleged violation of due process, the claim is that the examiner's order will deprive Kroger of a fair hearing because (a) the order has the effect of improperly shifting the burden of proof to Kroger and (b) it denies Kroger the opportunity to test the validity of complaint counsel's case through cross-examination.

Neither point is persuasive. The Commission as an administrative body may take official notice of facts which are appropriate for such notice. Thus, it is entitled to rely on established general facts within the area of its expertise subject to a respondent's right to rebut. *Brite Manufacturing Co.* v. *Federal Trade Commission*, 347 F. 2d 477 (D.C. Cir. 1965). See also *Manco Watch Strap Co.*, 60 F.T.C. 495 (1962); *The Dayton Rubber Company*, Docket No. 7604 (final order issued August 5, 1964 [66 F.T.C. 423]; on appeal before Sixth Circuit Court of Appeals.) The taking of official notice is in no way inconsistent with the requirement of a fair hearing. A fair hearing is had where respondent is given adequate opportunity to rebut the facts noticed. A provision to this effect is contained in both the Administrative Procedure Act and the Commission's Rules of Practice.[1] Kroger, of course, will have such opportunity. *Ohio Bell Tel. Co.* v. *Public Utilities Commission*, 301 U.S. 292 (1937), cited by Kroger, is not apposite since there, among other things, the company was denied an opportunity to explain or rebut. By using official notice which does not require the presentation of witnesses, there necessarily is no opportunity for cross examination on the partic-

[1] See Administrative Procedure Act, § 7(d), 5 U.S.C. 1006(d): "Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary." Federal Trade Commission Rules of Practice, § 3.14(d): "When any decision of a hearing examiner or of the Commission rests, in whole or in part, upon the taking of official notice of a material fact not appearing in evidence of record, opportunity to disprove such noticed fact shall be granted any party making timely motion therefor."

ular item of evidence noticed. However, as indicated, Kroger's right to rebut or explain is fully protected and, thus, the requirement of due process is satisfied. Also, there is no shift in the burden of proof in the taking of official notice as claimed by Kroger; there is merely a change in the initiative in going forward with the evidence. See *Dayton Rubber Company, supra* (Slip Opinion, page 10) [66 F.T.C. 459].

II

The other two arguments raised on the appeal, that is, that the "facts" noticed are not the proper subject of official notice and that they are not relevant to the proceeding are related and will be disposed of together in the paragraphs below.

In contesting the official notice taken by the examiner, Kroger appears to be essentially concerned with (a) the last sentence in each of the two paragraphs noticed, which sentences are in the nature of conclusions as to probable competitive injury and (b) with the factual propositions set forth in the first paragraph which Kroger states suggest a judgment that price is a paramount factor in enabling a food retailer to compete. Kroger, so far as we can see, has not seriously contested the merits of the factual propositions noticed otherwise except to generally assert that markets are different and broad generalizations do not apply. The latter claim is the basis for Kroger's argument that the facts noticed are not relevant.

Taking first the argument referred to under (b) above, *i.e.*, the claim that the statements suggest that price is a "paramount factor" in enabling a food retailer to compete, we observe that no such fact is expressly noticed and we do not read into the statements any such meaning. It is noticed only that price is a "very important factor" in such connection.

Factual propositions of which notice has been taken, not including the conclusionary sentences, are that the retail grocery business is highly competitive; that net profits are low, consequently cash discounts and other allowances are important; that price is a very important factor in enabling a food retailer to compete; and that milk is a staple, highly standardized food item sold by virtually all food retailers. Findings to this effect have been made in a number of prior Commission cases dealing both with grocery products generally and the dairy line in particular. These, we believe, are established general facts within the area of the Commission's expertise.

In *Tri-Valley Packing Association,* 60 F.T.C. 1134, 1181 (1962),

the Commission found that the grocery business is highly competitive, that the markups at various levels of distribution are affected by competition and that the percentage of return on large volumes of sales is small. The Court of Appeals for the Ninth Circuit, in *Tri-Valley Packing Association* v. *Federal Trade Commission,* 329 F. 2d 694, 703 (9th Cir. 1964), in remanding the case to the Commission on other grounds, in part observed:

> . . . There was testimony that those engaged in the resale of such products operate on a very narrow margin—so narrow, in fact, that it is essential to take advantage of two per cent discounts for cash. The price discriminations, on the other hand, ranged from two per cent to ten per cent.
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> This would indicate that nonfavored retailers, and retailers who purchased from nonfavored wholesalers, were required to maintain retail prices at least two per cent higher than those of favored retailers in order to realize any appreciable profit on retail sales. In view of the highly competitive nature of the business, price disparities of this kind could well endanger the ability of these merchants to compete with favored retailers, or so the Commission could find.

In *United Biscuit Co. of America,* Docket No. 7817 (February 7, 1964) [64 F.T.C. 586], the Commission found that independent store owners testified generally as to the highly competitive nature of the retail food business and that net profits are low and cash discounts and other allowances are important. The Court of Appeals for the Seventh Circuit, in affirming the Commission decision in *United Biscuit Co. of America* v. *Federal Trade Commission,* 350 F. 2d 615 (7th Cir. 1965), specifically approved these findings. The Commission, in *Fruitvale Canning Company,* 52 F.T.C. 1504, 1514 (1956), agreed with the hearing examiner's finding that the grocery business is vigorously and highly competitive, that markups on fast-moving items such as canned fruits are low, and that price is the chief factor in making sales. In *Foremost Dairies, Inc.,* Docket No. 7475 (May 23, 1963) [62 F.T.C. 1344], the Commission adopted findings in the initial decision as to competitive effects, including those stating that milk is a staple, highly standardized food item sold by virtually all food retailers, that competition is keen among retailers and margins of profits and markups are small and that a lower price to some but not all competing retail stores in the market in question would normally be expected to hinder competition between them. In affirming, the Fifth Circuit Court of Appeals, in *Foremost Dairies, Inc.* v. *Federal Trade Commission,* 348 F. 2d 674, 679 (5th Cir. 1965), stated in part as follows:

There is also testimony from which the Commission could infer *what are well-known facts*—that profit margins in the sale of fluid milk are relatively low and that competition in the sale of milk at retail is quite lively. (Emphasis supplied.)

See also *Page Dairy Company,* 50 F.T.C. 395, 398 (1953) in which the Commission found that "In the sale of milk to the consuming public the gross margin of profit is very narrow. Therefore, any appreciable difference in price has the tendency to divert business from one seller to another."

The Commission in making its determination here additionally draws upon the experience and knowledge gained not only from the many other actions it has taken in the grocery and dairy industries but also from the general inquiries and studies it has made in both fields.

Kroger suggests, though mainly, it seems, as to the conclusionary statements on injury, that markets are different and that the general statements may not apply in the geographic market involved in the complaint, i.e., Charleston, West Virginia. The conclusionary statements will be considered below and as to the remaining statements the argument is rejected. The doctrine of notice, of course, recognizes the possibility of exceptions and that is why a respondent must be provided with the opportunity to rebut the noticed facts. Kroger will be provided that opportunity.

In the circumstances, we believe that we may take official notice of and rely upon the factual propositions mentioned (*i.e.,* all except the last sentence in each paragraph noticed) as established general facts within the area of the Commission's expertise, subject, of course, to respondents' right to rebut. *Brite Manufacturing Co.* v. *Federal Trade Commission, supra.*

## III

The last sentence in each of the paragraphs noticed are in a somewhat different category from the other statements because they appear to be as much conclusionary as factual. The first, which reads: "A low price to some, but not to all, competing retail stores in a city would normally be expected to hinder competition between them," appears to be drawn from a holding in a prior case. See Commission opinion in *Foremost Dairies, Inc.,* Docket No. 7475 (May 23, 1963) [62 F.T.C. 1344]. The statement, divorced from the factual circumstances in which a similar statement was made, is not sufficiently meaningful to warrant the taking of official notice.

Coming then to the last sentence, we observe that it states as follows: "Substantial and continuous discrimination in price of a major grocery product, such as milk, creates a probability of competitive injury." This statement appears to be a paraphrase of a conclusionary finding by the Commission in *Foremost Dairies, Inc., supra,* as follows: "The probability of competitive injury resulting from such a substantial and continuous discrimination in the price of a major grocery product is manifest." (Opinion, p. 1361.) It also follows closely, though not exactly, the test for competitive injury in a secondary line matter pronounced by the United States Supreme Court in *Federal Trade Commission* v. *Morton Salt Co.,* 334 U.S. 37, 50 (1948). There the Court said it believed it to be self-evident that there is a "reasonable possibility" that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This is precedent for the Commission in making its final determination, and specific official notice of such precedent is unnecessary. Moreover, this last sentence in the second paragraph is a statement which, if the conditions mentioned therein are found to exist, decides a major issue in the case, *i.e.,* the probability of competitive injury. In the circumstances here, we believe this determination should be made on the basis of the whole record upon the completion of the proceedings and not as a matter of official notice. Accordingly, on the last sentence in each of the two paragraphs of the official notice taken by the examiner Kroger's appeal is granted, and it is otherwise denied.

*Respondents' Request for Rehearing*

Respondents have filed a petition in this matter requesting a rehearing on the Commission's order of December 1, 1965 [68 F.T.C. 1231], denying their request for permission to file an interlocutory appeal from the examiner's orders of October 25 and 26, 1965. The examiner's orders granted complaint counsel's request for the production of documents and denied requests of respondents for an early trial and, alternatively, to dismiss the complaint. Respondents have presented no new arguments nor have they shown a change in circumstances to justify granting their request for a rehearing, and accordingly it will be denied.

An appropriate order will be entered.

Commissioner Elman dissented and has filed a dissenting statement.

DISSENTING OPINION

BY ELMAN, *Commissioner:*

If indeed it were the Commission's objective to stretch out this case as long as possible, no action would be better calculated to achieve that result than issuance of the present order. Instead of proceeding with reasonable dispatch to a conclusion of the case (see Section 6(a) of the Administrative Procedure Act), the Commission will now become embroiled in another protracted litigation over unimportant collateral issues. *Cf. Associated Merchandising Corporation,* Docket No. 8651 (Order issued January 19, 1966) [p. 1083 herein]. I agree with respondents that the Commission is improperly invoking the doctrine of official notice as a substitute for "adequate probative analysis" and "realistic appraisals of relevant competitive facts" (*F.T.C.* v. *Sun Oil Co.*, 371 U.S. 505, 527). But even if respondents are wrong and it should ultimately be held after years of litigation that these "facts" may be officially noticed, the game would not be worth the candle. If, as the Commission thinks, these are all "established general facts within the area of the Commission's expertise" and "self-evident," the burden of proving such facts would appear to be minimal. Does it serve the public interest for the Commission, in order to relieve complaint counsel of that burden, to make a big "federal case" out of the matter?

ORDER RULING ON INTERLOCUTORY APPEAL AND DENYING PETITION FOR REHEARING

This matter having come before the Commission upon the interlocutory appeal of respondent Kroger from the hearing examiner's order granting in part complaint counsel's request for official notice and upon a petition of both respondents to rehear their request to file an interlocutory appeal from the examiner's orders of October 25 and 26, 1965, and the Commission, in accordance with the accompanying opinion, having granted in part and denied in part the interlocutory appeal of respondent Kroger and having determined that the request for rehearing should be denied:

*It is ordered,* That the hearing examiner's order on official notice dated October 29, 1965, be, and it hereby is, modified by striking therefrom the last sentence in paragraph numbered 1 and the last sentence in paragraph numbered 2 of the statements of which he took official notice.

*It is further ordered,* That the petition of respondents filed

December 22, 1965, for rehearing of their request to file an interlocutory appeal be, and it hereby is, denied.

Commissioner Elman dissented and has filed a dissenting statement.

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## DEVCON CORPORATION ET AL.

*Docket C–607. Order and Opinion, Jan. 19, 1966*

Order denying suspension of show cause proceedings and granting respondents 10 days from date of service to answer the show cause order of October 25, 1965.

### OPINION OF THE COMMISSION

BY REILLY, *Commissioner:*

On October 11, 1963 [63 F.T.C. 1034], the Commission issued a consent order to cease and desist against respondents Devcon Corporation, Albert M. Creighton, Jr., and E. Leslie Hall, individually and as officers of said corporation, prohibiting in relevant part, in the sale of certain adhesive compound products, the use of words denoting metallic substances to describe products consisting of non-metallic ingredients and prohibiting the use of words denoting rubber substances to describe products consisting principally of non-rubber ingredients. As to each class of product however the order permits a statement of the percentage of metal or rubber actually present in the product.

As a result of further Commission consideration of the question herein involved and in light of the provisions of the Commission's Guides Against Deceptive Labeling and Advertising of Adhesive Compositions promulgated June 30, 1965, the Commission considered that the public interest would be best served by focussing the proscriptions in its order upon the applied properties of the products in question rather than upon their metal or rubber content.

Accordingly, on October 25, 1965, the Commission issued an order to respondents to show cause why the Commission's order of October 11, 1963, should not be amended to reflect this change in that portion of its order relating to metallic substances because it had been shown that those products lack the applied properties of metal and to set aside that portion of its order directed to rubber substances because there had been no showing that those products lack the properties of rubber.

Prior to the date on which answer to the Commission's order to show cause might have been filed, respondents filed a Motion to Suspend Show Cause Proceedings. We are of the opinion that the motion must be denied.

In support of their motion respondents state in essence that promulgation by the Commission on June 30, 1965, of its Guides Against Deceptive Labeling and Advertising of Adhesive Compositions indicates a Commission intention to deal with the matters involved herein on an industrywide voluntary compliance basis and that it would be inequitable to insist upon placing respondents alone under an order before determining whether the industry guides are successful in procuring compliance by respondents.

Restated, this argument is to the effect that once having decided to cope with industrywide problems by issuance of guides, all members of the industry should be placed on a par by being subject only to the guides and not to the more rigorous strictures of an order to cease and desist.

A short answer to this is that guides and other methods of procuring compliance are not mutually exclusive and are not in any sense a substitute for, but rather a supplement to, the Commission's principal enforcement instrument, the order to cease and desist.

Furthermore, respondent is not alone. Other orders outstanding against members of this industry, while they may not relate to products of the exact description as respondents', nevertheless address themselves to similar practices covering similar products, Docket 8575, *Miracle Adhesives Corporation* [65 F.T.C. 524]; Docket C–610, *Kristee Products Company* [63 F.T.C. 1065]. The fact is that Devcon and others in the industry are under orders while the Commission seeks to further its efforts in this industry through the promulgation of guides.

In discharging its duties in the public interest the Commission would be justified in substituting a less stringent remedy only if it thereby more effectively brings about compliance with the laws it administers. Such is not the case here. The Commission has no reason to believe that respondents would be more responsive to guides than to an order.

Guides are designed to inform. They are persuasive or compulsive only according to the subjective response of industry members. They are not injunctive and are not of themselves an adequate instrument for procuring compliance with the statutes administered by the Commission.

To establish trade practice rules, guides or other methods of voluntary compliance as a total substitute for injunctive remedies would, human nature being what it is, be the end of effective enforcement. To adopt respondents' argument would mean that once guides are issued all orders in that industry should be vacated so that all might have a sporting chance. We do not agree.

Finally, the argument raised in respondents' reply memorandum relating to the applicability of our order to brand names does not call for comment here. This argument more properly belongs in respondents' answer to the order to show cause. Suffice it to say respondents have not offered adequate justification for suspension of show cause proceeding.

An appropriate order will issue.

Commissioner Elman dissented.

Commissioner MacIntyre did not participate.

ORDER DENYING MOTION TO SUSPEND

The Commission on October 11, 1963 [63 F.T.C. 1034], having issued its order to cease and desist against respondents prohibiting words denoting metallic or rubber substances to describe products consisting of non-metallic or non-rubber ingredients but permitting as to each class of product a statement of the percentage of metal or rubber actually present, and

On October 25, 1965, the Commission, being of the opinion that the public interest would be best served by focussing the proscriptions of its order upon the applied properties of the products in question rather than upon their metal or rubber content, having directed to respondents its order to show cause why its order of October 11, 1963, should not be amended to reflect this change, and the respondents having by counsel filed with the Commission on November 24, 1965, a Motion to Suspend Show Cause Proceedings, and,

The Commission having considered respondents' motion, the answer thereto filed by Commission counsel dated December 2, 1965, and the reply of respondents filed December 17, 1965, and for the reasons set forth in the attached opinion, having decided that its order to show cause should not be set aside,

*It is ordered,* That the motion of respondents to suspend show cause proceedings be, and it hereby is, denied.

*It is further ordered,* That respondents shall have ten (10) days from the date of service upon them of this order to answer our order to show cause dated October 25, 1965.

Commissioner Elman dissenting, and Commissioner MacIntyre not participating.

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## LAKELAND NURSERIES SALES CORP. ET AL.

*Docket 8670. Order and Opinion, Feb. 3, 1966*

Order denying respondents' motion to dismiss complaint on the grounds that many of the issues here in dispute have been litigated in a previous order, Docket 6666, 53 F.T.C. 1189, against the same respondents.

### OPINION OF THE COMMISSION

This matter is before the Commission upon the respondents' motion requesting permission to file an interlocutory appeal from the hearing examiner's order filed January 13, 1966, denying their motion to dismiss the complaint. Complaint counsel has filed an answer opposing the request, and respondents have filed a reply to the answer.

Section 3.20 of the Commission's Rules of Practice provides, with exceptions not here pertinent, that an interlocutory appeal from a ruling of the hearing examiner may be filed only after permission is first obtained from the Commission and that such permission will not be granted except in extraordinary circumstances where an immediate decision by the Commission is clearly necessary to prevent detriment to the public interest.

Respondents' position here is that under § 3.28 (b) (1) of the Commission's Rules of Practice, the Commission should proceed by way of reopening the prior proceeding in which a consent order was issued against these respondents and others (Lakeland-Deering Nurseries Sales, Docket No. 6666, order issued June 25, 1957 [53 F.T.C. 1189]) rather than by the issuance of a new complaint. They claim that extraordinary circumstances justify an appeal because if they are right in asserting that the new complaint seeks to modify the prior cease and desist order and their position is vindicated after trial, all of the time, effort and expenses will be in vain. They further assert that they will be greatly prejudiced and suffer irreparable harm if permission to appeal is not granted, although they have not set forth the precise ways in which such alleged effects will occur.

The instant proceeding is essentially, if not entirely, a different case from the old one. The examiner held in his order denying

respondents' motion to dismiss that although some minor overlapping between the two matters was suggested, the issues raised by the new complaint are essentially different from those in the old. There is, in fact, no similarity between the matters except, of course, that some of the named respondents are, or appear to be, the same.*

The complaint in Docket No. 6666, the prior matter, was very narrowly drawn and brought into issue matters relating to only two plants, namely, the Shasta Daisy (Chrysanthemum Maximum) and the Lythrum Morden Gleam, and only on the latter were representations as to physical characteristics challenged. The order there is equally narrow in scope; its prohibitions are confined to representations concerning only the two plants named in the complaint and it prohibits representations as to physical characteristics (in issue as to other plants in the instant case) only as to Lythrum Morden Gleam. The present complaint, on the other hand, while it alleges misrepresentation as to the physical characteristics of plants, is limited in such connection to the Nearly Wild rose plant, the Scarlet Showers rose plant, the Wilson's Climbing Doctor rose plant, the Azaleamum chrysanthemum plant, and the Fragramum chrysanthemum plant. The two complaints are otherwise completely different as to the practices charged.

Respondents significantly do not claim in their motion that any issue in the complaint proper was previously litigated. The only specific connection asserted other than the common identity of certain respondents is that the proposed order, apparently broader in scope than the old as to misrepresentations of physical characteristics, overlaps to some extent the prior order. However, it is clearly speculative to argue that this creates a conflict or inconsistency. The proposed order here was included with the complaint as a form of order which the Commission had reason to believe should issue if the facts are found to be as alleged (§ 3.3 (3) of the Commissions' Rules of Practice). It is not necessarily the final order, even if the allegations are proved. Respondents will have ample opportunity to argue as to any asserted inappropriateness of the order. Furthermore, if a prohibi-

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*The prior complaint named the following parties: Lakeland-Deering Nurseries Sales, a corporation, and Henry L. Hoffman, Chester Carity, Lillian Zogheb and Allen Lekus, individually and as officers of said corporation. The present complaint does not include the individual respondents Lillian Zogheb and Allen Lekus. As to the differences in the corporate names, respondents, in a footnote in their motion, state:

"Lakeland-Deering Nursery Sales Corp. is the same corporation named in the instant proceeding as Lakeland Nurseries Sales Corp., the name 'Lakeland-Deering Nursery Sales Corp.' having been changed to Lakeland Nurseries Sales Corp. in 1957."

tory order issues here and there is a conflict as claimed, the remedy might be (1) a change in the proposed order (*i.e.*, to exclude the Lythrum Morden Gleam plant) or (2) a reopening and modification of the prior order as to Lythrum Morden Gleam. Nevertheless, this proceeding has not reached the point where a determination should be made on the form of the order. This will come later. Clearly, the possibility of a relatively minor overlap between the proposed tentative order and the prior order is not an extraordinary circumstance requiring an immediate decision by the Commission.

*Elmo Division of Drive-X Company, Inc.* v. *Dixon,* 348 F. 2d 342 (D.C. Cir. 1965), the principal case relied on by the respondents, is not controlling in this matter since that holding was based upon a showing of the incorporation of a Commission Rule into the consent order which "vested" that respondent with the right to a reopening hearing. No such situation exists here. In addition, in *Drive-X* the court concluded that if it should appear the practices complained of varied significantly from those governed by the consent settlement, Drive-X could not object to a new complaint directed at new conduct. Likewise, the respondents here cannot object to a new complaint covering new conduct. See also *Federal Trade Commission* v. *Motion Picture Ad. Service Co., Inc.,* 344 U.S. 392, 397–398 (1953); *Exposition Press, Inc.* v. *Federal Trade Commission,* 295 F. 2d 869, 872 (2d Cir. 1961).

In view of the above discussion, we conclude that respondents have not shown that they will be prejudiced in any way by the trial of this proceeding and that they have not shown the extraordinary circumstances which would require an immediate decision by the Commission to prevent detriment to the public interest.

An appropriate order will be entered.

ORDER DENYING REQUEST FOR PERMISSION TO FILE INTERLOCUTORY APPEAL

This matter having come on to be heard upon the respondents' motion requesting permission to file an interlocutory appeal from the hearing examiner's order filed January 13, 1966, denying their motion to dismiss the complaint, and the Commission having determined, for the reasons stated in the accompanying opinion, that the request should be denied:

*It is ordered,* That respondents' request for permission to file an interlocutory appeal from the aforesaid order of the hearing examiner be, and it hereby is, denied.

## DEVCON CORPORATION ET AL.

*Docket C-607. Order, Feb. 8, 1966*

Order denying for the second time respondents' motion to suspend show cause proceedings and ordering respondent to answer the show cause order.

### ORDER DENYING MOTION

The respondents by counsel having filed with the Commission under date of November 24, 1965, a Motion to Suspend Show Cause Proceedings, and

The Commission on January 19, 1966, having issued its order denying said motion and ordering that respondents shall have ten (10) days from the date of service upon them of the order to answer its order to show cause dated October 25, 1965, and

Respondents by counsel having thereafter filed with the Commission on January 24, 1966, a letter, herein treated as a motion, renewing its request to the Commission to be heard either formally or informally on its motion of November 24, 1965, and

The Commission now having considered the latter motion of January 24, 1966,

*It is ordered,* That said motion be, and it hereby is, denied.

*It is further ordered,* That respondents shall have ten (10) days from the date of service upon them of this order to answer our show cause order dated October 25, 1965.

Commissioner Elman dissents and would grant respondents' request to be heard.

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## DIAMOND ALKALI COMPANY

*Docket 8572. Order and Opinion, March 4, 1966*

Order denying respondent's petition for reconsideration and its motion to reopen the record and supplement additional evidence.

### OPINION OF THE COMMISSION

Respondent on December 9, 1965, filed a Petition for Reconsideration under § 3.25 of the Commission's Rules and a Motion to Supplement or Reopen the Record for Purposes of Receiving Evidence. We are of the opinion that both petitions must be denied.

Since the objective of both motions is the same, that is, to

secure further consideration of this matter by the Commission, the two will be treated herein together. The petition for reconsideration cites two grounds, namely, (1) under the Commission's interpretation of the Supreme Court's ruling in *Tampa Electric Company* v. *Nashville Coal Company*, 365 U.S. 320 (1961), the evidence supports respondent's position with regard to relevant section of the country and (2) the Commission was wrong in using only shipment figures as a basis for determining market shares; it should have used both shipment figures and the unused capacity of the mills shipping to destinations within the 23 county area.

The motion to reopen and supplement is grounded upon asserted new evidence which demonstrates a post-acquisition change in market structure materially affecting the questions of relevant market, competitive effect and remedy.

In its first asserted ground for reconsideration respondent takes the position that the Commission interpreted *Tampa* as imposing a burden upon respondent to show that the suppliers to the 23 county area were "eager" to ship elsewhere and that those firms shipping substantial quantities of cement into the 23 county area were shipping elsewhere to a significant degree; and notwithstanding the inequity of the Commission's imposing this burden, it has been sustained by the respondent.

Apart from the merit of this contention, we must first determine whether respondent has met the threshhold requirements of § 3.25 of the Commission's Rules which states that the petition "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."

We are of the opinion that even had the Commission so interpreted *Tampa* this would not present a new question within the meaning of Rule 3.25. The question of relevant market was thoroughly briefed and argued and the interpretation ascribed to the Commission by respondent is in no sense a new question as to which respondent has had no opportunity to argue.

Nevertheless, since respondent has chosen to interpret the Commission's interpretation of *Tampa*, we think it necessary in the interests of clarity to dispose of the substance of respondent's contention.

The language which prompts respondent's motion appears at page 6 [68 F.T.C. 1204, 1208] of the Commission opinion:

> In *Tampa*, record evidence was found that the coal companies supplying Tampa were "eager" to ship outside the Georgia and Florida area. And

according to the Supreme Court, "By far the bulk of the overwhelming tonnage marketed from the same producing area as serves Tampa is sold outside of Georgia and Florida." We infer from this language that respondent here at least has the burden of coming forward with some evidence meeting the criteria implicit in the court's statement. But from our examination of the record, there is no evidence that the suppliers to the 23 county area were "eager" to ship elsewhere or that those firms shipping substantial quantities of cement into the area were shipping elsewhere to any significant degree. . . .

It was not our intention that the comparison between this case and *Tampa* should begin and end with the interpretation of the word "eager," nor that the decision in this case turn on that word alone or even on *Tampa* alone.

In *Tampa* the Supreme Court held that the area of effective competition is determined by (1) the area in which the seller operates and (2) the area to which the purchaser can practicably turn for supplies. 365 U.S. 320, 327 (1961). Respondent emphasizes the first of these considerations at the expense of the second. The Commission found it necessary to weigh the two. Because of the peculiarities of cement distribution, the second of these two considerations becomes of substantial importance. In short, as was stated in *U.S.* v. *Philadelphia National Bank,* 374 U.S. 321, 357 (1963), the proper area is that where ". . . the effect of the merger on competition will be direct and immediate." In this case as in *Tampa* that area is, as outlined above, that in which the seller operates and to which the purchaser can practicably turn for supplies.

In *Tampa* the Court was satisfied that the relevant market embraced the 700 coal producers to whom the purchaser could practicably turn for supplies, that is, those firms who could serve the same market, *i.e.,* peninsula Florida. Their eagerness to sell elsewhere throughout the broad seven state area established that it was this broad area in which they were interested and that foreclosure from Tampa made no significant difference to them.

In the present case the Commission is convinced from the evidence that purchasers in the 23 county area can practicably turn for supplies only to those firms shipping substantial quantities of cement into the area. To them what happens in the 23 county area makes a significant difference as demonstrated by the fact of their shipping substantial quantities there and their concomitant disinterest in shipping substantial quantities elsewhere. Thus, the area in which 100% of the acquiring company's "standard" brand cement is sold and 66% of the acquired company's sales were made secured 90% of its needs from companies with plants and terminals located therein. These companies make

75% of their total shipments to that area. Thus, it was this 23 county area to which the firms supplying substantial amounts were eager to sell and to which they did sell in substantial quantities as is amply demonstrated by the record.

Complaint counsel sustained his burden that this is the relevant section of the country. The burden of proof was never placed upon respondent as alleged in its petition for reconsideration. However, if it wanted to undermine the *prima facie* showing of complaint counsel, it had the obligation of going forward with evidence that the substantial suppliers were in fact not substantial suppliers or that this 23 county area did not make a significant difference to them and that they looked elsewhere, eagerly if you will, for sales or that the purchasers could practicably turn for supplies to a much broader area. Respondent had no burden in this regard initially of course and the Commission did not interpret *Tampa* as imposing such a burden. As was stated in the Commission's opinion, respondent had a duty to show, if it wanted to rebut complaint counsel's case, that the substantial shippers to the 23 county area were eager to ship elsewhere or that they were shipping elsewhere to a significant degree.

Respondent did not do this and does not propose to do it now. It proposes to show that those firms accounting for a minor fraction of total shipments into the 23 county area were eager to ship elsewhere. This is a logical inference from the fact that they ship most of their cement elsewhere. But it does not overcome the problem that the eagerness to ship elsewhere and the exigencies of cement distribution disqualify these firms in the first instance because they establish clearly that the purchasers in the 23 county area could not practicably turn to these firms for supplies.

This question was briefed and argued at all stages of this proceeding and was thoroughly considered by the Commission and adequately disposed of in the Commission's opinion. Respondent has not raised a new question under § 3.25 and its petition must be denied.

Moreover, respondent's contention that the substantial shippers into the 23 county area were shipping elsewhere to a significant degree does not warrant extensive consideration here. This is simply the assertion of a conclusion contrary to that reached by the Commission after its examination of the whole record. It is in no sense a new question.

The second asserted ground for reconsideration is that in calculating market share the Commission should have considered

shipments plus unused standby capacity rather than shipments alone.

Here again respondent fails to satisfy the requirements of § 3.25. This question was also briefed and argued and specifically adverted to in the Commission's opinion, and thus no new question is raised. We are satisfied that *Crown Zellerbach Corporation* v. *F.T.C.*, 296 F. 2d 800 (1961), and *Permanente Cement Co.*, D. 7939, April 24, 1964 [65 F.T.C. 410], were not misapplied and that on the record of this case in this industry sales or shipment figures rather than production or capacity figures, used or unused, are more significant in calculating market sales.

By its Motion to Reopen and Supplement also filed December 9, 1965, respondent seeks to have admitted into evidence a number of exhibits, two of which, it alleges, were cited in the Commission's opinion in this case and should therefore be admitted in evidence, while the others are affidavits attesting to post-acquisition structural changes in the market warranting admission into the record and consideration by the Commission.

The basis for respondent's motion as to the first two exhibits, RX 94 and 95, is apparently a reference in the Commission's opinion to the sale of Plant B after the filing of the initial decision in this matter [1] and a reference to the ". . . competitive huffing and puffing of firms such as U.S. Steel, Pittsburgh Plate Glass. . . ." [2] These references derive from statements in an affidavit of respondent's witness L. T. Welshans, RX 94, submitted to the hearing examiner, with a motion filed by respondent to supplement the record filed September 22, 1964, after the filing of the initial decision. This motion was never ruled upon.

It is apparent from the context of the Commission's opinion that these references do not affect the result and were in no way crucial to the Commission's consideration of this matter. Therefore, since respondent itself advised us of these facts it cannot now be heard to say that it was prejudiced by these references. We see no reason for reopening the record on the basis of this claim of respondent.

Exhibit RX 95 was an affidavit of one Henry G. Hohorst. It does not appear that any material from this affidavit was used in the Commission's opinion.

In regard to the other affidavits which respondent seeks to have admitted in evidence, it can be said that they contain data

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[1] Commission Opinion, p. 2, footnote 2 [68 F.T.C. 1205], and p. 12 [68 F.T.C. 1213].
[2] Commission Opinion, p. 10 [68 F.T.C. 1211].

relating to changes in the post-acquisition market structure in the 23 county area.

Judging from their number, one might infer substantial post-acquisition changes. Examination shows, however, little more than the ebb and flow of competitive activity with minor changes in market composition and share. The material does not suggest the sort of radical change in market structure which warrants reconsideration of post-acquisition evidence.

An appropriate order will issue.

Commissioner MacIntyre did not concur.

## ORDER DENYING PETITION FOR RECONSIDERATION AND MOTION TO REOPEN AND SUPPLEMENT THE RECORD

The Commission on October 22, 1965 [68 F.T.C. 1204], having rendered its decision in this proceeding affirming the findings of fact contained in the initial decision of the hearing examiner, and issuing its order upon complaint counsel to file a proposed form of order and supporting memorandum within 30 days of service of the Commission's order and requiring respondent within 30 days of service of complaint counsel's proposed order to file its own alternative form of order and supporting memorandum, and

Respondent on December 9, 1965, having filed its Petition for Reconsideration and Motion to Reopen and Supplement the Record and the Commission having considered said motions and the answers in opposition thereto filed by complaint counsel,

*It is ordered,* That respondent's Petition for Reconsideration and Motion to Reopen and Supplement the Record be, and they hereby are, denied.

*It is further ordered,* That within ten (10) days of service of this order complaint counsel shall file a proposed form of final order in this matter accompanied by a supporting memorandum. Within ten (10) days of service of complaint counsel's proposed order respondent shall file its alternative form of order and supporting memorandum. Upon consideration of all material submitted, the Commission will enter its final order.

Commissioner MacIntyre not concurring.

# VIVIANO MACARONI COMPANY

*Docket 8666. Order and Opinion, March 9, 1966*

Order denying request of respondent for access to confidential Commission documents pertaining to certain investigations.

## OPINION OF THE COMMISSION

This matter is before the Commission on the certification of the hearing examiner of a portion of the application of respondent's counsel, filed March 1, 1966, requesting the inspection and copying of documents in the Commission's confidential files pertaining to investigations made by the Commission. Complaint counsel, on March 4, 1966, filed a memorandum stating their position as to the examiner's certification.

The respondent's request for documents to the hearing examiner was as follows:

2. . . .

(a) All letters written to the Federal Trade Commission by all of the persons listed in Appendix A hereto which have been identified to the respondent as prospective Commission witnesses or any additional Commission witnesses not yet identified and also copies of all letters sent by the Commission to said persons;

(b) All written statements given by the persons listed in paragraph 2(a) above;

(c) All memoranda of meetings, interviews and/or telephone conversations made by Commission personnel with all of the persons listed in paragraph 2(a) above.

At the commencement of the hearings on March 2, 1966, agreement was reached satisfactory to the parties which in substance provides that the documents called for by subparagraphs 2(a) and 2(b) will be made available to respondent if they contain a statement or statements pertinent to the witnesses' testimony or the issues involved in the proceeding. Such documents will be first turned over to the hearing examiner for his inspection.

Accordingly, the certification concerns solely the request under 2(c), above, which is for all memoranda of meetings, interviews, and/or telephone conversations made by Commission personnel with prospective witnesses.

Documents of this kind, if any such exist, would be contained in the confidential files of the Commission and these generally can be obtained only under the provisions of § 1.134 of the Commission's Rules of Practice. The cases dealing with this question have made clear that a request during the course of a hearing for confidential information in the Commission's files

will be treated as an application under § 1.134 of the Commission's Rules. The hearing examiner, in such a case, is required to certify the matter to the Commission with his recommendation. See *L. G. Balfour Company,* Docket No. 8435, orders issued October 5, 1962 [61 F.T.C. 1491] and May 10, 1963 [62 F.T.C. 1541]; *R. H. Macy & Co., Inc.,* Docket No. 8650, order issued September 30, 1965 [68 F.T.C. 1179]. Under § 1.134 the Commission may direct that confidential documents be disclosed to an applicant upon a showing of good cause therefor.

Respondent's position is that it is not required to meet the standard of "good cause" under § 1.134 because the documents requested are relevant and necessary for its defense and, accordingly, the material should be released under the exception in § 1.133 of the Commission's Rules. Section 1.133 broadly declares that records and files of the Commission and specified documents and information are confidential, and it provides the following exception:

> . . . Except to the extent that the disclosure of such material or information is specifically authorized by the Commission or to the extent that its use may become necessary in connection with adjudicative proceedings, they may be disclosed, divulged, or produced for inspection or copying only under the procedure set forth in § 1.134.

The exception in § 1.133 referred to clearly does not, during the course of a proceeding, so change the requirements for the release of confidential information that a discovery type request prior to the trial on an assertion showing only a possible general helpfulness to a respondent in the preparation of its defense is sufficient to override the requirements of Rule 1.134. The exception in pertinent part relates to material and information which may be necessary for use in connection with an adjudicative proceeding and this, in general, includes that which complaint counsel must use in the presentation of his case and other vital documents such as Jencks type statements. See *Ernest Mark High,* 56 F.T.C. 625 (1959); *Sun Oil Company,* Docket No. 6934, order issued September 15, 1958. It is not a general authorization for pretrial discovery bypassing the Commission's requirements in § 1.134 governing the release of confidential data. Commission cases prior and subsequent to the adoption of the present Rule 1.133 have stressed that confidential material requested in the course of a hearing ordinarily cannot be obtained except by application to the Commission. *Postal Life and Casualty Insurance Company,* Docket No. 6276, 52 F.T.C. 651 (1956); *Thomasville Chair Company,* Docket No. 7273, 56 F.T.C. 1651 (1959); *Giant*

*Food, Inc.*, Docket No. 7773, 58 F.T.C. 1193 (1961); *Shell Oil Company*, Docket No. 8537, order issued February 1, 1963 [62 F.T.C. 1488]; *L. G. Balfour Company, supra; R. H Macy & Co., Inc., supra; Modern Marketing Service, Inc.*, Docket No. 3783, order issued January 7, 1966 [p. 1077 herein].

We turn then to the question of whether respondent has shown good cause as required by § 1.134. To qualify under this rule there must be a showing of real or actual need. *Postal Life and Casualty Insurance Company, supra; Thomasville Chair Company, supra; Shell Oil Company, supra; Giant Food, Inc., supra; R. H. Macy & Co., Inc., supra; Graber Manufacturing Company, Inc.*, Docket No. 8038, order issued December 13, 1965 [68 F.T.C. 1235]; *cf. Texas Industries, Inc.*, Docket No. 8656, order issued May 18, 1965 [67 F.T.C. 1378].

Here respondent has made no showing as required under Rule 1.134. In its application filed on March 1, 1966, respondent makes only the unsupported claim that the documents are necessary for its defense. In his argument before the examiner on March 2, 1966, according to the examiner, respondent's counsel urged that a "number of the prospective witnesses are hostile to the respondent and that, if he can obtain the documents called for and if they demonstrate this hostility, he will be able, if not to attack the credibility of the witnesses, at least diminish the weight that should be given to their testimony."

It should be stressed that respondent is not, in this connection, seeking prior verbatim statements of the prospective witnesses, which documents will be available pursuant to the agreement to supply the items listed under subparagraphs 2(a) and 2(b) of the request; rather, what it seeks are the summary reports by agents as contained in interview reports. These reports would be the impressions of a third party as to what was said in a particular conversation. This, of course, would be inappropriate for impeachment purposes since such a report is not necessarily the statement of the prospective witness. For this reason the Commission has previously ruled that interview reports which are merely agents' summarizations are not to be produced. *Ernest Mark High, supra.* As indicated in *Ernest Mark High,* the Commission, in connection with the statements of a Government witness to an agent of the Government, will follow the substance of the Jencks Act. (18 U.S.C. § 3500.) If there is any question whether or not the report is a statement within the scope of Section (e) of that statute, the examiner may inspect the document and make a determination. But that would not occur until

after the witness takes the stand. The Jencks Act is strictly limited in its application to uses for impeachment. *Palermo* v. *United States,* 360 U.S. 343, 349 (1959); *United States* v. *Berry,* 277 F. 2d 826 (7th Cir. 1960). It is not to be used for general discovery.

Moreover, the documents involved would come within the rule protecting an attorney's work product. See *Hickman* v. *Taylor,* 329 U.S. 495 (1947). As the Court there stated:

> . . . Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney. (*Id.* at 510.)

The Court continued:

> . . . This work [preparation of a client's case] is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served. (*Id.* at 511.)

The claim here that there might be hostile witnesses in the group of prospective witnesses to be called by complaint counsel is clearly insufficient to justify production of documents within the category of an attorney's work product as defined in *Hickman* v. *Taylor.* See also *Graber Manufacturing Company, Inc.,* Docket No. 8038, order issued December 13, 1965 (pages 6 and 7 of slip opinion) [68 F.T.C. 1235, 1239–1240].

The examiner has recommended in his certification that because respondent has failed to show good cause for the release of the material requested under subparagraph 2(c) of its application that such request should be denied. We are in agreement with his recommendation. An appropriate order will be issued.

Commissioner Elman did not concur.

ORDER RULING ON QUESTION CERTIFIED

This matter having come before the Commission upon the certification of the hearing examiner of respondent's application

filed March 1, 1966, requesting access to documents in the confidential files of the Commission, and the Commission having determined, for the reasons set forth in the accompanying opinion, that the respondent's request should be denied:

*It is ordered,* That respondent's request for access to confidential documents in the Commission's files be, and it hereby is, denied.

Commissioner Elman did not concur.

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## R. H. MACY & CO., INC.

*Docket 8650. Order, March 10, 1966*

Order remanding case to hearing examiner with instructions to grant respondent counsel access to certain parts of five interview reports relative to sweaters which are exhibits in this case.

### ORDER REMANDING TO HEARING EXAMINER FOR FURTHER PROCEEDINGS

The examiner in this matter has certified his ruling made January 18, 1966, denying respondent requested access to certain interview or investigational reports, the examiner stating in effect that the evidence is crucial in the proceeding and that his ruling should be passed on by the Commission at this time to allow appropriate steps for correction, if necessary.

A Commission investigator testified for the complaint on direct that he purchased certain sweaters from stores of the respondent. Four of such sweaters were received in evidence. The examiner states that it is upon these four exhibits that complaint counsel rely to support the charge of misbranding in violation of the Wool Products Labeling Act. The examiner further states that he is satisfied that the investigator based his identification of the specific sweaters upon his recollection as refreshed, not by reports to the Commission and other notes, but by a pin ticket with handwritten notes which he attached to each sweater after its purchase. On cross-examination it was revealed that the investigator's recollection was aided by an examination he made the night before he testified, of a file which included copies of his typewritten reports to the Commission and some of his handwritten notes relating to the investigation.

Respondent's counsel asked to examine the records referred to for the purpose of cross-examination. The examiner made a

distinction in the material requested. He asked for the indicated file from complaint counsel and upon receiving it he extracted therefrom the handwritten notes. These notes were then turned over, without objection, to the respondent. As to the interview reports, however, the examiner indicated his view that such reports to the Commission were confidential, and he ruled specifically that for the purpose requested it was unnecessary for them to be made available.

The investigator testified that he had made five interview reports as to the sweaters identified and that he had signed these five reports (tr. 197, 202).

While Commission proceedings are not expressly governed by the terms of the Jencks Act (18 U.S.C. § 3500), which statute is limited to criminal prosecutions brought by the United States, the Commission has indicated it will follow the substance of this statute in appropriate circumstances. *Ernest Mark High*, 56 F.T.C. 625, 632 (1959). Reports of Government agents called as witnesses by the United States have been held to be subject to the requirements of the Jencks Act. *Clancy* v. *United States*, 365 U.S. 312 (1961); *Burke* v. *United States*, 279 F. 2d 824 (8th Cir. 1960), and cases cited therein at pages 825 and 826.

Therefore, where the investigator witness testifies, as here, on direct examination at the instance of complaint counsel and it develops during his testimony that he has made reports on the subject about which he testified and such reports are requested for cross-examination, it would be proper for the examiner to order the production of these documents. Complaint counsel is authorized to make them available.* Upon receiving the order to produce, however, complaint counsel may, under the procedure of the Jencks Act, elect not to comply with the order. If there is such a failure to produce the documents by complaint counsel, the examiner should strike the testimony involved. This procedure, it should be stressed, applies only the Jencks Act type statements.

The access request in this instance, it appears, is confined to the five interview reports to which reference has been made. The hearing examiner may order these produced and, if requested, he should, before turning them over, inspect the reports *in camera* and excise the portions not covered in the testimony.

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*Jencks Act type statements are clearly within the exception in § 1.133 of the Commission's Rules, as documents whose "use may become necessary in connection with adjudicative proceedings." Thus, complaint counsel has the general authority to release such documents during the course of a trial, and it is not necessary that he make a special request for the release of confidential information under § 1.134.

Here the witness testified as to the purchase of the sweaters in evidence, their identification and other closely related matters. Only such portions of the reports may be turned over to respondent. (See procedure for excision as set forth in paragraph (c) of the Jencks Act.) Accordingly,

*It is ordered,* That this matter be, and it hereby is, remanded to the hearing examiner for further proceedings consistent with this order.

Commissioner Elman did not concur.

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## SHIP'n SHORE, INC., ET AL.

*Docket 8161. Order, March 11, 1966*

Order reopening case for the purpose of receiving evidence on the questions of (1) whether the order should be modified and (2) whether the order should be set aside as to the individual respondent.

### ORDER DIRECTING HEARINGS

Respondents, by petition filed January 7, 1966, have requested that this proceeding be reopened and the order to cease and desist set aside. In the alternative, respondents request that they be granted a hearing on this request pursuant to § 3.28(b)(3) of the Rules of Practice. Additionally, the individual respondent requests that the order be set aside as to him in his individual capacity. The Director, Bureau of Deceptive Practices, has filed an answer in opposition to the petition.

The Commission's decision, which issued on May 16, 1961 [58 F.T.C. 757], is based on an agreement containing a consent order. By the terms thereof, respondents agreed to cease and desist from:

Using the word "madras" or any simulation thereof, either alone or in connection with other words to designate, describe, or refer to any fabric or other textile product which is not in fact made of fine cotton, handloomed and imported from India, and if the cloth is other than natural in color, has not been dyed with bleeding vegetable dyes.

In the petition before us, respondents contend that factual conditions have changed so that the public no longer understands the term "madras" to have the meaning ascribed in the order. Specifically, respondents allege that among the purchasing public it is now commonly accepted that the word "madras" is applied to the plaid design scheme of fabric, regardless of whether the fabric is domestic or imported, colorfast or bleeding.

The individual respondent contends that the facts are such that he should not have been included in the order in his individual capacity, under the Commission's decision in *The Lovable Company,* Docket No. 8620 (June 29, 1965) [67 F.T.C. 1326].

The Commission has considered the grounds advanced by respondents in support of their requests and has concluded that the pleadings raise substantial factual issues. Therefore, the Commission has determined that respondents' alternate request for a hearing on the issues presented in their petition should be granted. Accordingly,

*It is ordered,* That this matter be assigned to a hearing examiner for the purpose of receiving evidence in support of and in opposition to respondents' allegations that a change of law or fact, or the public interest, requires (1) that the order to cease and desist be altered, modified or set aside and (2) that the order be set aside as to the individual respondent.

*It is further ordered,* That the hearings be conducted in accordance with Part 3, Subparts C, D, E and F of the Rules of Practice.

*It is further ordered,* That the hearing examiner, upon the conclusion of the hearings, certify the record, together with his recommendations, to the Commission, and that, in the circumstances of this matter, his recommended disposition be treated in the same manner as if it were an initial decision under § 3.21 of the Rules of Practice.

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## LAKELAND NURSERIES SALES CORP. ET AL.

*Docket 8670. Order, April 1, 1966*

Order suspending proceedings in this case pending the outcome of respondents' motion for a preliminary injunction in the District Court for the District of Columbia.

### ORDER SUSPENDING PROCEEDINGS

Upon consideration of the hearing examiner's certification filed March 24, 1966, of the request of complaint counsel for a stay in the proceedings herein in consideration of a stipulation to suspend proceedings filed with the United States District Court for the District of Columbia in *Lakeland Nurseries Sales Corp., et al.* v. *Paul Rand Dixon, et al.,* Civil Action No. 419–66:

*It is ordered,* That proceedings, including discovery proceed-

ings, in this matter be, and they hereby are, suspended pending a determination by the District Court for the District of Columbia in Civil Action No. 419–66 of a motion for preliminary injunction filed in that court by the respondents.

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## THE SPERRY AND HUTCHINSON COMPANY

*Docket 8671. Order and Opinion, April 15, 1966*

Order denying respondent's request for access to confidential and other Commission files relating to the trading stamp industry.

### OPINION OF THE COMMISSION

This matter is before the Commission upon the certification of the hearing examiner of respondent's motion dated January 11, 1966, requesting access to documents in the confidential files of the Commission.

The request for production made by the respondent includes, among other things, all written statements, communications, or other documents received by the Commission from September 1962 to the present from third parties, including retailers, trading stamp exchanges and trading stamp companies, responsive to inquiries made by the Commission, relevant to allegations in the complaint; the inquiries by the Commission to which the communications were responsive; depositions taken by the Commission in the same period relating to any of the matters covered by the first request; and, finally, all preliminary, interim, and final studies and reports made by the Bureau of Economics of the Commission for the period September 1962 to the present, relating to such things as the effects or lack of effects on prices and price structures of the use or discontinuance of the use by retailers of bonus, double or multiple stamps.

The examiner recommends partial production under the request, that is, all documents requested in the first item not produced pursuant to his Prehearing Order No. 2 that constitute complaints or explanations by customers of the third party producing the record "in the nature of verbal acts evidencing the existence or effect of the alleged conspiracy, records kept in the ordinary course of business, and documents showing on their face that they constitute prior recollection recorded which evidence the existence or effect of the alleged conspiracy" and such portions of documents described in the second item of respondent's request

"necessary to limit or identify and thus make admissible the documents to be produced in compliance with paragraph 1 hereof."

The examiner has correctly certified the respondent's request for confidential data to the Commission with his recommendations. *L. G. Balfour Company,* Docket No. 8435, orders issued October 5, 1962 [61 F.T.C. 1491], and May 10, 1963 [62 F.T.C. 1541]; *R. H. Macy & Co., Inc.,* Docket No. 8650, order issued September 30, 1965 [68 F.T.C. 1179]; *Viviano Macaroni Company,* Docket No. 8666, order issued March 9, 1966 [69 F.T.C. 1104]. Under the procedure set forth in these cases a request made during the course of a hearing for confidential information in the Commission's files will be treated as an application under § 1.134 of the Commission's Rules of Practice. Section 1.134 provides that the Commission may direct that confidential documents be disclosed to an applicant upon a showing of good cause therefor, and that the Commission, in considering the action to take upon a request for such documents, will give due regard to statutory restrictions, its rules and the public interest.

The documents requested by respondent, to the extent that such are in the possession of complaint counsel or the Commission, are highly confidential. The persons and businesses who supply the kind of information concerned are frequently reluctant to have their affairs made public and they expect, in providing this information to the Commission, that its confidentiality will be maintained wherever possible. In this proceeding the sensitive nature of information received by the Commission is illustrated by the fact that certain nonparties have moved to have material submitted by them be given *in camera* treatment.[1] This consideration, although alone not sufficient to foreclose production if required in the interest of justice and fairness, is significant in weighing respondent's showing of need. Moreover, much of the kind of documentation requested seems to come within the work product category and the Commission has stated that such documents will not be released without a strong showing of special circumstances, good cause or necessity. *Graber Manufacturing Company, Inc.,* Docket No. 8038, order issued December 13, 1965 [68 F.T.C. 1235].

We will consider at this point whether or not respondent has shown good cause. Good cause under § 1.134 of the Commission's Rules has been construed as requiring a showing of real or actual

[1] Motion for leave to intervene and to request *in camera* treatment filed by Merchants Green Stamp Trading Co., January 20, 1966; motion for leave to intervene and to request *in camera* treatment of information filed by Premium Service Corporation, January 28, 1966.

need. See *Viviano Macaroni Company, supra,* and cases therein cited.

Respondent makes two general claims that it has established good cause. The first concerns its specific request for production of certain economic studies. Respondent apparently is of the view that complaint counsel intends to introduce the testimony of an expert witness concerning the effects on prices or price levels of its policy regarding the issuance of one S & H trading stamp for each 10 cents of goods and services. Respondent states, therefore, that if, as it believes, the Bureau of Economics has an economic analysis of the impact of the use of trading stamps on retail prices, such a study is relevant to the charges in the complaint and should be made available to respondent "both for its possible evidentiary value and for use in cross examination of the expert witness upon whom complaint counsel expect to rely." The present prehearing procedure, however, calls for the production of proposed statistical proof with underlying documents in advance of the trial. Thus, respondent will have access to any such study used in ample time to prepare its defense. Internal documents of this kind, if not used, will ordinarily be privileged against disclosure. See *R. H. Macy & Co., Inc., supra.*

Respondent secondly claims that there is good cause for allowing respondent to examine all documents falling within the scope of its motion. It asserts that the three counts in the complaint each alleges practices which respondent denies but that respondent is beset with the practical difficulty of investigating activities, covering many years, of 70,000 retail licensees and some 400 trading stamp companies. Respondent therefore avers that if it is able to examine the relevant documents sought by its motion there will be enormous practical advantages accruing to both the respondent and the Commission. It claims that the time required for investigation and preparation of the defense will be materially shortened, the hearing may commence at an earlier date and proof at trial will be facilitated.

These unsupported assertions are all too general to meet the test of need as required under § 1.134. Respondent has failed to show in any specific way that the documents requested are necessary for its defense. By the hearing examiner's Prehearing Order No. 2, it will receive from complaint counsel substantially all the documents such counsel intend to offer.[2] By the same order,

[2] The examiner states the substance of this part of his order as follows:

"By Prehearing Order No. 2, counsel supporting the complaint will submit on or before March 1, 1966, all documents they intend to offer except underlying documents for statistical proof, statistical studies not yet completed and documents to be used for impeachment or the refreshment of witnesses' recollection. . . ."

provision is made for the submission of the names of witnesses in advance. In addition, statistical proof will be made available in advance of its offer, together with underlying data. The examiner states that in effect complete discovery of the case his adversary expects to present will be made to both parties before the trial of this proceeding.

Since respondent will have pretrial production of the substance of its opponent's case, the production of documents mainly in issue must be those which will fall outside of the records affected by Prehearing Order No. 2. It appears, therefore, that respondent's chief purpose is not to seek specific documents or documents respecting a specific defense which upon analysis might demonstrate good cause. Rather, as the phrasing of its request indicates, it is asking for general access to the Commission's confidential investigational files merely to see whether something useful to its defense may turn up. This is clearly an insufficient ground for the production of such records. Respondent has made no showing of any kind which would constitute good cause for the requested access.

Respondent will be under no disadvantage by a denial of its motion. The examiner has pointed out that both sides will have complete discovery of the case of his adversary and for the respondent this will include access to some, and perhaps most, of the documents involved in its request. Respondent also has available to it appropriate means to conduct its own inquiry.

Considering all the factors, we conclude that respondent's request should be denied in its entirety. An appropriate order will be issued herewith.

Commissioner Elman dissented and has filed a dissenting statement.

## DISSENTING OPINION

BY ELMAN, *Commissioner:*

The refusal to give respondent access to the Bureau of Economics' report on trading stamps is inconsistent with a fundamental and paramount function of the Commission. One of the main purposes for which this agency was established was to conduct economic inquiries of the kind which that report reflects, and to make the results of such inquiries available to the public. In the words of President Wilson, it was expected that the Commission would serve as a reservoir of economic data, "an indispensable instrument of information and publicity," "a clearing house for the facts" by which both the public and businessmen

would be guided. To conclude, as does the Commission, that such studies should be sheltered from public scrutiny, and be considered internal memoranda or mere tools to be used in the Commission's investigative and prosecutorial functions, distorts, if it does not destroy, this important role which the Commission was expected to play.

Nor can the Commission's refusal to order production of the report be justified on the grounds that such confidentiality is necessary to maintain a free flow of information between the Commission and its staff or that such reports are "work-products" prepared for litigation. Such justifications misconceive the nature and function of economic inquiries into industry practices conducted by the Division of Industry Analysis of the Commission's Bureau of Economics. The Division's staff consists of professional economists whose obligation is to report data objectively and impartially, letting the chips fall where they may, whether the result is to support or to weaken a position taken by Commission complaint counsel in some adjudicative proceeding. To justify confidentiality on the ground that our economists would not otherwise feel free to submit such factual and impartial reports is to demean their professional status. To keep a report confidential because it conflicts with a position being taken by the Bureau of Restraint of Trade in an adjudicative proceeding would be clearly arbitrary. Such a justification would violate the fundamental principle of justice and fairness which prohibits a Government agency from suppressing documents which may be critical to a respondent in making his defense. See *Brady* v. *Maryland*, 373 U.S. 83, 86–88; *Jencks* v. *United States*, 353 U.S. 657, 667–71; *Roviaro* v. *United States*, 353 U.S. 53, 60–61.

The public interest in disseminating the facts contained in the Bureau of Economics' report on trading stamps, as well as respondent's special need for the report in preparing its defense, require that production be ordered.

ORDER RULING ON QUESTION CERTIFIED

This matter having come before the Commission upon the certification of the hearing examiner of respondent's motion filed January 11, 1966, requesting access to documents in the confidential files of the Commission, and the Commission having determined, for the reasons set forth in the accompanying opinion, that the respondent's request should be denied:

*It is ordered*, That respondent's request for access to confidential documents in the Commission's files be, and it hereby is, denied.

Commissioner Elman dissented and has filed a dissenting statement.

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## MISSISSIPPI RIVER FUEL CORPORATION

*Docket 8657. Order, April 20, 1966*

Order denying respondent's request to appeal from hearing examiner's order denying its motion to dismiss complaint as to Richter Concrete Corporation.

### ORDER DENYING REQUEST FOR PERMISSION TO FILE INTERLOCUTORY APPEAL

This matter is before the Commission upon the request of the respondent for permission to file under § 3.20 of the Commission's Rules of Practice an interlocutory appeal from the hearing examiner's order, filed March 23, 1966, denying its motion to dismiss the complaint as to Richter Concrete Corporation (Richter), and upon the answer thereto filed by complaint counsel.

Permission to file an interlocutory appeal under § 3.20 "will not be granted except in extraordinary circumstances where an immediate decision by the Commission is clearly necessary to prevent detriment to the public interest."

The argument which respondent states it would make if it were granted permission to appeal and which it made to the examiner is that Richter (which the complaint alleges was acquired in violation of Section 7 of the Clayton Act, as amended) was not and is not engaged in "commerce" as that term is defined by the Clayton Act, as amended, and that the ready-mixed concrete manufacturing business in Cincinnatti, Ohio, is not a "line of commerce" within the purview of the Clayton Act, as amended. It would argue that as a matter of law these elements of "commerce" must be involved for the Commission to exercise jurisdiction and that since they are not and the Commission is thus lacking in jurisdiction, its proceeding as to Richter would be useless, futile and expensive.

The issues raised here are highly controverted. This is apparent both from the arguments made to the examiner and those now made to the Commission. The parties disagree on the applicability and the significance of cases which relate to the issues, such as *Foremost Dairies, Inc.*, 60 F.T.C. 944 (1962), and *Lone Star Cement Corporation* v. *Federal Trade Commission*, 339 F. 2d

505 (9th Cir. 1964). Moreover, it is not altogether clear that there is agreement on what the record will show as to the facts when it is completed. Respondent itself recognizes that the factual circumstances may be crucial since it suggests that the court in *Lone Star Cement Corporation* v. *Federal Trade Commission, supra,* which rejected, in similar circumstances, the asserted proposition that the Commission was without jurisdiction, would have reached a different result on somewhat different facts. Presumably it would argue that such different facts are here present. Finally, we note that in ruling upon respondent's motion the hearing examiner held that its stipulation discloses that Richter is engaged in commerce within the meaning of Section 7 of the Clayton Act.

In the situation, we believe it would be inappropriate to decide such basic issues as have been presented on a fragmented or partial record. It is in no way a useless or futile act to continue a proceeding so that fundamental issues may be disposed of in light of all the facts. See also *Lone Star Cement Corporation* v. *Federal Trade Commission, supra.*

Respondent has not justified its request to file an interlocutory appeal as required by § 3.20. Accordingly,

*It is ordered,* That respondent's request for permission to file an interlocutory appeal from the hearing examiner's order issued March 23, 1966, denying its motion to dismiss as to Richter Concrete Corporation, be, and it hereby is, denied.

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## L. G. BALFOUR COMPANY

*Docket 8435. Order and Opinions, April 22, 1966*

Order vacating hearing examiner's order of Sept. 29, 1965, and remanding the case for further consideration of whether certain parts of the witness interview reports should be made available to respondent's counsel pursuant to the Jencks Act.

### OPINION OF THE COMMISSION

This matter is before the Commission on the interlocutory appeal of complaint counsel from a ruling of the hearing examiner on September 29, 1965, allowing respondents access to certain interview reports from the Commission's files. The appeal and respondents' answer raise important issues concerning the requirements of the Jencks Act [1] insofar as Commission proceed-

[1] 18 U.S.C. § 3500 (1958).

ings are concerned and the hearing examiner's role in determining whether confidential reports from the Commission's files should be produced for impeachment purposes.

The events leading up to the appeal may briefly be summarized as follows: The complaint issued on June 16, 1961. In the ensuing period the case-in-chief was presented and the defense rested its case on August 17, 1965. Rebuttal hearings were held the following September. Subsequently, on September 14, 1965, the respondents moved for an order striking from the record the testimony of five Commission witnesses, namely, Messrs. Tanner, Pollock, Buchroeder, Pennington, and Murray, on the ground that complaint counsel had failed to produce written statements, letters, or other writings by these witnesses covering the subject matter of their testimony in the case-in-chief.

On September 29, 1965, complaint counsel produced for the hearing examiner's *in camera* inspection correspondence signed by the witnesses in question as well as reports of interview with four of the witnesses, namely, Tanner, Pollock, Buchroeder, and Pennington. Complaint counsel requested the hearing examiner to examine the interview reports and certain of the Buchroeder correspondence for relevancy and to determine whether these documents should be produced for purposes of cross-examination. Complaint counsel further suggested that respondents be permitted to recall at Government expense any of the five witnesses for additional cross-examination on the basis of such documents as the hearing examiner might decide should be made available to the respondents for the purpose of impeachment.

The examiner, after inspecting the documents in question, turned all of the records over to respondents despite complaint counsel's objections. After respondents' counsel had briefly inspected these records in the hearing room, the documents were returned to complaint counsel for the purpose of having copies made for respondents. Complaint counsel, on October 6, 1965, filed a request for permission to file an interlocutory appeal from the hearing examiner's ruling ordering the field reports turned over to respondents. On October 22, 1965, the Commission granted permission to file the interlocutory appeal. Copies of the correspondence signed by the five witnesses were apparently turned over to respondents on October 26, 1965.

The Commission has ruled that it will follow the substance of the Jencks statute in those instances involving a request for production of documents in the Commission's files for the purpose of impeaching witnesses who have testified. (See *Ernest Mark*

*High,* Docket 6940 (1959) [56 F.T.C. 625].) Accordingly, it is this statute and the decisions construing its requirements which will govern our disposition of this appeal.

In essence complaint counsel's appeal charges that the examiner erred in failing to make a proper determination as to whether the field reports in question were statements of the witnesses within the scope of the Act as defined by subsection (e) of the statute. Complaint counsel further charges that the hearing examiner erred in failing to excise those portions of the interview reports which do not relate to the testimony of the witnesses or which on their face are not properly producible for purposes of impeachment. Complaint counsel also contends that with respect to Commission witnesses Tanner, Pollock and Murray, respondents had failed to make timely motion for the production of the interview reports with those witnesses.

Ordinarily, the question of whether a proper foundation has been laid and whether a timely motion for the production of documents has been made for impeachment purposes under the Jencks Act is a crucial consideration. Under the circumstances presented by this appeal, however, we will not explore that issue. In effect, complaint counsel waived that objection in the hearing of September 29, 1965.[2] As a result, the examiner did not have before him the question of whether respondents had made timely motion for the production of the field reports in question. Accordingly, our ruling on the interlocutory appeal is limited to the question of whether all or any part of the interview reports should have been produced for impeachment purposes and whether the hearing examiner made proper findings of fact on that issue.

Basic to any discussion of the application of the Jencks Act is a recognition that the purpose of the statute is restricted to facilitating impeachment. *Palermo* v. *United States,* 360 U.S. 343, 349 (1959); *United States* v. *Berry,* 277 F. 2d 826 (7th Cir. 1960), and that it is not to be used as a vehicle for general discovery. It is for that reason that the statute is limited to statements of the witnesses which are precisely defined by this legislation for the purposes of the application of the Act.

Section (e) of the statute limits production of documents to statements coming within the following categories:

1. a written statement made by said witness and signed or otherwise adopted or approved by him; or

2. a stenographic, mechanical, electrical or other recording, or transcription thereof, which is a substantially verbatim recital of an oral state-

[2] Tr. 5794–95.

ment made by said witness to an agent of the Government and recorded contemporaneously, with the making of such oral statement.

In those instances where there is a question of whether a document comes within the terms of Section (e) of the Act the Supreme Court has specifically ruled: "we approve the practice of having the Government submit the statement to the trial judge for an in camera determination. Indeed, any other procedure would be destructive of the statutory purpose." *Palermo* v. *United States, supra,* at 354. The reasons for an *in camera* inspection by the trier of fact when there is a dispute as to the nature of the document are obvious, for "[i]t would indeed defeat this design to hold that the defense may see statements in order to argue whether it should be allowed to see them." *Id.* In other words, in the federal court system the trial judge has the fact finding function of determining in disputed cases whether a document comes within the terms of Section (e) of the Act. In our procedures the hearing examiner is in the position of the trial judge and has the same function. This is a function which the trial judge must perform thoroughly and with care in order to ensure fairness to the respondent and to ensure at the same time that "[t]he Act's major concern . . . with limiting and regulating defense access to government papers, and to deny access to those statements which do not satisfy the requirements of Section (e)" is effectuated. *Id.*

In this case, the hearing examiner has failed to fulfill that function. He made no findings of fact as far as we can determine from the transcript of the hearing of September 29 as to whether the interview reports in question fell within the ambit of Section (e) of the Act and therefore should be produced. Rather, he orderd the documents produced on a generalized finding of relevancy to the proceeding. It is evident that the hearing examiner finally examined the documents only with the greatest reluctance. At the outset of the hearing, he declared categorically: "I have no intention of reviewing the documents at all." (Tr. 5796.) In effect, the examiner strongly indicated that he did not intend to go into the question.[3] Although repeatedly asked to make a determination as to whether or not the field reports in question were verbatim

[3] Illustrative of his approach to the problem is the following statement:

". . . I have no intention—I don't know what court it was that filed the procedure of being an advocate in questioning the witness with respect to the documents and so on, but I have no intention of following that, nor at the moment as I told Mr. Barnes, without your comments, do I have any intention of examining these documents, and making a judgment before counsel for the respondent has an opportunity to examine them, that his case can be helped or hindered by the use of the documents and therefore deny him the right to put in his case as he sees fit to do." (Tr. 5806.)

recitals of the witnesses within the scope of Section (e) (2) of that Act, the Examiner evidently held to his position that he did not intend to explore this issue. For example, subsequently, in the hearing, the examiner stated that with respect to the four field reports the purpose of his examination, to which he finally consented, was:

> . . . solely for the purpose of determining whether or not the material contained in the documents is relevant to the issues in the proceeding or relevant to the proceeding, that he [the examiner] then make a judgment and if he finds so he should turn them over to [respondents]. . . . (Tr. 5851-52.)

In short, the examiner failed to make adequate findings of fact on the threshold issue, namely, were the interview reports in question statements of the witnesses producible under the terms of the Jencks Act.

The need for careful findings of fact on this point in order to protect a Government witness from unfair attack has been stated numerous times by the courts. Ordinarily it would not be necessary to elaborate on this point. Under the circumstances presented by this appeal, however, a reference to one of the more recent statements on this issue should be helpful to all concerned. In this connection the Second Circuit held:

> . . . Congress intended to restrict defense access to statements of government witnesses, for purposes of impeachment, to those statements for which the witness and not the government agent is responsible, so as to avoid the unfairness that results from the use of distorted and inaccurate material. Palermo v. United States, supra, at 350. . . . Where a claimed past contradictory, written or recorded statement of a witness is to be used to impeach and discredit him, it should be his own statement and not someone else's interpretation of what the witness said or what he thought the witness said. *United States* v. *Lamma*, 349 F. 2d 338, 340 (2d Cir. 1965).

Since the hearing examiner failed to make adequate findings on this crucial issue, the findings he did make as to relevancy are based on an erroneous interpretation of the law. His findings, as a result, are not binding. *United States* v. *Aviles*, 337 F. 2d 552, 557 (2d Cir. 1964), *cert. denied*, 380 U.S. 906, 918 (1965), and the case will be remanded for proper findings on this issue.

It may be helpful to outline for the examiner's guidance, as well as for the benefit of counsel, the considerations pertinent to such a determination. In most cases the answer as to whether the document is within the scope of Section (e) of the Act is plain from the statement itself without the aid of extrinsic evidence. *Palermo* v. *United States, supra*, at 355; *United States* v. *Lamma, supra*, at 340. Whether there is a need for evidence extrinsic to

the statement to make such a determination should be decided by the trial judge in the light of the circumstances of the particular case. *Palermo* v. *United States, supra,* at 354, 355. As the Second Circuit has held, the procedure to be employed for determining whether or not a "statement" is involved, rests within the sound discretion of the trial judge. *United States* v. *Lamma, supra,* at 340.

The crucial determination here seems to be the question of whether the reports are within the scope of Section (e) (2).[4] The question has been before the courts numerous times and there are a number of cases affording guidance. One of the more recent decisions in point is *Dennis* v. *United States,* 346 F. 2d 10, 20 (10th Cir. 1965), *cert. granted,* 34 U.S.L. Week 3171 (1965). The court found in that case that "The withheld documents were couched in the vernacular of 'Informant stated', 'Informant advised' or 'Informant related', but none we have examined can be said to be a verbatim recital within the meaning of § 3500(e) (2). We think they were properly withheld." Or, as the Second Circuit ruled, "a very restrictive standard is to govern —only continuous, narrative statements made by the witness, recorded verbatim or nearly so qualify." *United States* v. *Lamma, supra,* at 340. It should be noted that the interview reports in the Commission's files ordinarily are agents' summarizations. *Ernest Mark High, supra.* In such cases, the examiner, if he orders an interview report produced, has the obligation of making concrete findings that the prerequisites of Section (e) of the Jencks Act have been met.

In this case, we note that the reports in question are to a considerable extent distinguished by phrases such as "informant stated." There were also included a few isolated direct quotations in these reports, set apart from the remainder of the reports by quotation marks. These should be produced as coming within the scope of Section (e) (2) unless the examiner finds that such quotations have been cited out of context or that they do not accurately reflect the witness's statement for other reasons. As the Supreme Court has ruled, "Distortion can be a product of selectivity as well as the conscious or inadvertent infusion of the recorder's opinions or impressions." *Palermo* v. *United States, supra,* at 352. The citation of such isolated quotations suggests another question to which the examiner should address himself, namely, do they indicate an intention to distinguish between what

[4] There seems to be no serious contention that the reports are within the scope of Section (e) (1). The cross-examination of the witnesses gives no indication that they had adopted or affirmed the interview reports in issue or the notes underlying such reports.

the interviewee said and summarizations of the results of the interviews and interpretative comment by the individual preparing the report?

Should the hearing examiner decide that he needs evidence extrinsic to the documents to determine whether they are statements within the meaning of Section (e) (2), he may then make such further inquiry as he feels appropriate to get information on that point. For example, he may interrogate the witness or the attorney who prepared the report. See *Saunders* v. *United States,* 316 F. 2d 346, 350 (D.C. Cir. 1963).

In this connection, respondents, during the course of the hearing of September 29, requested that the notes from which the interview reports were prepared be also produced for inspection by the hearing examiner.[5] Complaint counsel, during the course of the hearing, advised that the interview notes were either not in existence or not in the Commission's files. In view of respondents' motion, the hearing examiner is authorized to make further inquiry as to the disposition of such notes, if necessary, by examining the Commission attorneys who interviewed the witnesses in question. Assuming the notes are in existence and there is a dispute as to whether or not they are statements of the witnesses within the scope of Section (e) (2), then the examiner should, as in the case of the interview reports, examine these documents *in camera.* If he deems extrinsic evidence necessary for a proper determination, the examiner may question the Commission attorneys preparing the notes as to whether or not they were verbatim recordings of the witnesses' statements or whether they were a mere summarization of the results of the interviews.

Should the examiner examine the interview notes underlying the reports in question to determine whether or not they are within the category of Section (e) (2) statements, a number of court decisions will afford him guidance. For example, when notes are fragmentary and do not indicate that they conform to the language of the interviewee rather than of the Government attorney, where they contain interpolations of the interviewer and do not record a continuous narrative, there is no need to conduct a hearing to determine whether they are producible under Section (e) (2). *United States* v. *Lamma, supra,* at 341. The District of Columbia Circuit, in *Saunders* v. *United States, supra,* at 350, held if the Government attorney has recorded his own

[5] Tr. 5814, 5845, 5854. Respondents made these motions apparently on the theory that the hearing examiner had to compare the notes underlying the report with the report to determine whether it came within Section (e) (2) and that primary evidence of the nature of the interview reports were necessarily the interview notes.

thoughts in his interview notes, then the notes are within the work product immunity doctrine and not the statutory definition of a statement. Similarly, where notes contain omissions from the interview or additions from other sources, it would be unfair to confront the witness with the notes as if they were his own statements. *Aviles* v. *United States, supra,* at 558–559. If the examiner, however, finds that the notes constitute a substantially verbatim recital of the respondents' statements within the meaning of Section (e) (2), then they should be produced. See *Ogden* v. *United States,* 303 F. 2d 724, 737 (9th Cir. 1962); *Saunders* v. *United States, supra,* at 350. "If the notes contain both verbatim remarks of the witness and personal observations of the attorney [making the notes] then paragraph (c) of the act requires that the district judge inspect the statement and excise the protected material, if this is possible." *Saunders* v. *United States, supra,* at 350.

If the notes are not available, then the trier of fact must make a determination whether the notes were destroyed in good faith in the course of normal procedure. Furthermore, if the examiner finds that portions of the notes or the entire notes were producible statements within Section (e) (2), then the requirements of the Act are satisfied if a subsequent report accurately records the producible statements originally set forth in the notes. See *Ogden* v. *United States,* 323 F. 2d 818, 821 (9th Cir. 1963), *cert. denied,* 376 U.S. 973 (1964).

Finally, depending on the circumstances, the examiner may be in a position to determine from the face of the interview reports whether the underlying notes come within the scope of Section (e) (2). For example, the Tenth Circuit, in one case, inferred from the nature of the interview reports that the underlying notes were not verbatim recitals of oral statements of the witness but rather that the reports indicated quite clearly that the notes were not producible. As a result, the court held their destruction would not give rise to sanctions under subsection (d) of the Act. *Dennis* v. *United States, supra,* at 21.

Respondents, to rebut complaint counsel's argument that the interview reports were not producible because on their face they are mere summarizations, seem to rely on the holding of the Supreme Court in its second *Campbell* decision [6] (*Campbell II*). There the Court held that the district judge was entitled to infer that an agent of the FBI with considerable experience would

[6] *Campbell* v. *United States,* 373 U.S. 487 (1963).

record a potential witness's statement with sufficient accuracy so as to obviate any need for the court to consider whether it would be grossly unfair to allow the defense to use the statements to impeach the witness, which could not be fairly said to be the witness's own. That holding, however, must be confined to the facts of that case. First, it must be noted that *Campbell II* involved a witness's statement under Section (e) (1) of the Act. In short, the interview notes became the witness's statements because he approved their content after they were read back to him. The Court did not rule that without such approval the notes would have been producible as a statement of the witness merely because the interview was summarized accurately. The Court, in *Campbell II,* on the facts of that case, merely held that once there is evidence that a witness has approved or adopted an agent's notes or report within the meaning of Section (e) (1) so as to make it a statement of the witness as that term is contemplated by the Jencks Act, then the courts may infer that the notes or other (e) (1) statement of the witness will be accurately transcribed in the subsequent interview report. In short, the Court held merely that a transcription of a summary of a witness's statement is producible, assuming that the witness has adopted the summary of his statement in accordance with the terms of Section (e) (1). The Court did not hold that any and all summarizations of a witness's statements or records of such summarizations are producible merely because it is reasonable to infer the Government agent was competent to record the gist of an interview with accuracy.

In this connection, of course, it is important to note as far as interview notes are concerned, that determination of whether or not they are within the scope of Section (e) (2) depends not only on the accuracy of the interviewing Government agent but also upon his intent in making the notes, namely, was it his purpose to provide a complete record of the witness's story or, on the other hand, was it merely the purpose of the notes and the subsequent report to serve as a future guide for interrogating the witness. See *United States* v. *Aviles, supra,* at 559. In the latter case, neither the notes nor the subsequent report would come within the scope of Section (e) (2) nor would either the notes or the report come within the scope of Section (e) (1) unless the witness had adopted or approved them.

In this case, as far as we can determine, the record thus far does not indicate that the witnesses in question either adopted or affirmed the interview notes underlying the reports in issue here or the reports themselves. Respondents' counsel did not raise

that issue in his answer to complaint counsel's interlocutory appeal. That testimony on cross-examination bearing on the point apparently indicated to the contrary. Under Section (e) (1) it is generally incumbent on the defendant to explore the issue of whether there has been an approval or adoption, within the meaning of Section (e) (1). Absent other indications that approval or adoption has taken place,[7] it is not incumbent on the court or trier of fact to make such a determination on his own motion. *United States* v. *Lamma, supra,* at 341. The examiner, of course, is not foreclosed from going into that question should it prove desirable in the light of further facts developed on remand.

In their appeal, complaint counsel also urge that the hearing examiner erred in failing to excise passages in the interview reports which on their face did not relate to summarizations or characterizations of what the witness said during the interview. The question will assume importance if the examiner subsequently finds that the interview reports contain statements producible under the Jencks Act. Upon our examination of the interview reports we have determined that the hearing examiner erred in refusing to excise those portions of the reports under consideration which on their face cannot be construed as a summary or characterization of what the witness said, let alone as a statement of the witness. For example, those passages in the reports which are clearly comments of the Commission attorney concerning the administrative detail of the investigation are not producible under any circumstances. By no stretch of the imagination could these passages be considered statements of the witness within Section (e). Further, we agree with complaint counsel's argument that those passages in the reports on their face reflecting the Commission attorney's own comments and observations on documents obtained during the interview, as well as the related exhibit lists themselves should not be produced. Such passages obviously cannot be used for the purpose of impeaching the witness nor do they have even the most tenuous relationship with a statement of the witness as contemplated by Section (e) of the Act. Further, we agree that those portions of the interview reports relating to the alleged statements of persons who did not testify in this proceeding should not be made available for impeachment purposes. Where the interview report is a record of an interview with a number of persons, only one of whom testified, then the statements of the nonwitness cannot be used as a basis for impeaching the individual who took the stand.

Material of this nature can, and should, be excised. As the

[7] *E.g.,* on the documents under consideration.

Ninth Circuit has stated, if an interview report includes the statement of a witness within the scope of the Jencks Act but also includes other nonproducible material, this neither precludes production of the "statement" of the witness nor requires delivery of the entire report to the defendant. *Ogden* v. *United States, supra,* 303 F. 2d, at 735. See also *West* v. *United States,* 274 F. 2d 885, 890 (6th Cir. 1960), *cert. denied,* 365 U.S. 811, 819 (1961).

Excision of such clearly extraneous matters from documents purporting to contain a Jencks Act statement of the witness is necessary for the protection of the witness and to achieve the other purpose of the Act, namely, to preclude " 'the broad or blind fishing expedition' [into the Government's files] which the Supreme Court has condemned." *Sells* v. *United States,* 262 F. 2d 815, 823 (10th Cir. 1959), *cert. denied,* 360 U.S. 913 (1959).

In short, if, on remand, the examiner finds that any part of the interview reports should be produced as a statement within the scope of the Jencks Act, he is then directed to excise those passages in the reports referred to above and described with more particularity in complaint counsel's appeal which are clearly extraneous to any comments the witness may have made to the attorney interviewing him.

The proceeding will be remanded to the examiner for further appropriate action in accordance with the views expressed in this opinion.

Commissioner Elman dissented and has filed a dissenting opinion.

Commissioner MacIntyre concurred and has filed a separate concurring statement.

## DISSENTING OPINION*

APRIL 22, 1966

BY ELMAN, *Commissioner:*

### I

While insisting that it fully accepts the rule established by the Supreme Court in *Jencks* v. *United States,* 353 U.S. 657, the Commission has largely made that rule a dead letter as applied to F.T.C. proceedings.

In its actual application to F.T.C. proceedings, the *Jencks* rule will henceforth extend only to:

*Consolidated dissenting opinion *In the Matter of L. G. Balfour Co.*, Docket No. 8435 and *In the Matter of Inter-State Builders, Inc., et al.*, Docket No. 8624, p. 1152 herein.

(1) Prior written statements of witnesses to Commission attorney-investigators, where such statements have been prepared, signed, adopted, or approved by the witness. Such written statements by witnesses are rarely submitted by them to the Commission.

(2) Prior oral statements made by witnesses to Commission attorney investigators, where such statements have been recorded "substantially verbatim" in reports which constitute "contemporaneously recorded" transcriptions of the witness' "own words." The Commission holds that it will not "extend" the *Jencks* rule to include interview reports which *summarize* the witness' statements.

The Commission's decision means, in practical terms, that F.T.C. interview reports will no longer qualify for production under the *Jencks* rule. As the Commission recognizes in the *Balfour* opinion, pp. 1118, 1123 herein, "the interview reports in the Commission's files ordinarily are agent's summarizations." They are not usually cast in the form of "substantially verbatim," "contemporaneously recorded" transcriptions of witnesses' oral statements. And it is safe to presume that, after today's rulings by the Commission, interview reports are not likely to be cast in that form in the future.

The Commission emphasizes its concern that the *Jencks* rule "not be indiscriminately extended to require production of agents' summaries of interviews regardless of their character or completeness." (*Inter-State Builders,* pp. 1152, 1155 herein.) Accordingly, the Commission will exclude "anything which is merely an agent's summary of a witness' words." (*Id.,* p. 1155.) The Commission instructs its hearing examiners that, in applying the *Jencks* rule, they "must be careful * * * so as to require production of what can fairly be said to reflect a witness' own words and to avoid production of what is in fact an attorney's summary of a witness' remarks." (*Id.,* p. 1162.) Statements of the witness "couched in the vernacular of 'Informant stated,' 'Informant advised' or 'Informant related' " will be withheld, because "a very restrictive standard is to govern—only continuous, narrative statements made by the witness, recorded verbatim or nearly so qualify." (*Balfour,* p. 1123 herein.) Even "direct quotations in these reports, set apart from the remainder of the reports by quotation marks" should not be produced if "the examiner finds that such quotations have been cited out of context or that they do not accurately reflect the witness' statement for other reasons." (*Id.,* p. 1123.)

In justification of its exclusion of "summary" interview reports from the *Jencks* rule, the Commission states that "There is little doubt that any attorney's summaries of interviews which he conducts will inevitably, by the very fact of selection, omission and emphasis, reflect the attorney's own state of knowledge at the time of the interview and also his own thoughts and subjective impressions of what he is being told influenced as well by the type and form of the questions which he posed during the interview. To this extent, his summary may more accurately reflect his own views of the case and state of knowledge of the issues at the time of the interview than it will of the witnesses' state of knowledge." (*Inter-State Builders,* p. 1164 herein.)

While interview reports, as "agent's summarizations," will not be made available to respondents under the *Jencks* rule, they will undoubtedly continue, for every other purpose, to be treated by the Commission and its staff as accurate and reliable documents used in our day-to-day work. To those of us who work within the Commission, an interview report is a familiar document. It is the basic raw material of F.T.C. investigations. As the Commission points out, "Commission attorneys almost always interview industry members, customers, suppliers and the like in the course of their investigations of whether violations of law have taken place. The attorney's investigating reports based on these interviews and on documents and other pertinent data are basic to the evaluation of the case which must be made, first by his superiors, and ultimately by the Commission." (*Inter-State Builders,* p. 1163 herein.)

If agents' interview reports are not accurate and dependable, the work of the Commission breaks down. For that fundamental reason, the methods and procedures followed by Commission attorney-investigators in preparing interview reports, as well as the format and style of the reports, are standard and routine. While the reports are not expected to be anything other than "mere summaries," it is expected that they be entirely factual, objective, and accurate. Attorney-investigators are specifically instructed that the function of an interview report is to record the *witness'* statements, not the agent's subjective impressions or reactions. I do not know where the Commission finds any basis in fact for its assertion that interview reports "inevitably" contain, or are infused by, the agent's "opinions," "views," or "interpretations." On the contrary, our attorney-investigators are specifically discouraged from expressing in the interview report any judgment or evaluation of the witness' statements. They are in-

structed that the appropriate place for stating their opinions, comments, and recommendations is in the final report prepared when the investigation is completed.

As a general rule, therefore, F.T.C. interview reports faithfully and objectively report statements of witnesses. They are regarded by the members and the staff of the Commission as sufficiently accurate and reliable reports of witnesses' statements to be used for determining whether a complaint should issue, or the case be closed, or an assurance of voluntary compliance be accepted, etc. But the Commission today holds that, because they are mere "summaries," they are not sufficiently accurate and reliable reports of witnesses' statements to be used by respondent's counsel for purposes of impeaching or discrediting the witnesses. Under the *Jencks* rule as now interpreted by the Commission, such reports will no longer be available to respondents in Commission proceedings for use in cross-examination.

The result is a paradox: Despite the Commission's insistence that it accepts the rule of the *Jencks* case, that rule will no longer play any significant role in F.T.C. proceedings or afford any real protection to respondents in adversary proceedings where they are charged by the Commission with having violated the law.

## II

"The history of liberty," as Mr. Justice Frankfurter stated in *McNabb* v. *United States,* 318 U.S. 332, 347, "has largely been the history of observance of procedural safeguards." Elsewhere he pointed out that "the standards of what is fair and just set by courts * * * are perhaps the single most powerful influence in promoting the spirit of law throughout government. These standards also help shape the dominant civic habits and attitudes which ultimately determine the ethos of a society." (*Of Law and Men,* p. 29.) In the history of liberty, and of judicial evolution of standards of fairness and justice, a place of honor is held by the Supreme Court's decision of June 3, 1957, in *Jencks* v. *United States.*

The issue presented for decision in *Jencks* went to the heart of the right of cross-examination in an accusatory proceeding initiated by the United States. The question is this: Where a witness is called by the prosecution to testify against the defendant, and the Government has in its possession reports containing prior statements made by the witness which relate to

the subject-matter of his testimony, must these reports be made available to defense counsel so that he may decide whether and how to use them in cross-examination for purposes of impeaching or discrediting the witness? The answer given by the Court was an unqualified and unequivocal Yes.

It could have been argued in opposition to *Jencks,* and indeed it was, that such reports, being hearsay and inadmissible in evidence, should not be made available to the defense; that papers in the Government's possession should be treated as strictly "confidential" and privileged against disclosure; and that Government attorneys, like their brothers in private practice, should be entitled to work in privacy, free from intrusion by opposing parties and their counsel. The Supreme Court recognized the force of these arguments and concerns; but it held that they must yield to even more persuasive arguments based upon more weighty concerns.

Two overriding considerations coalesced in, and formed the basis and rationale of, the rule established by the Supreme Court in the *Jencks* case: (1) the crucial importance of the right of cross-examination in an accusatory proceeding; and (2) the special status of the Government as a litigant, and the particular obligation of fair and honorable treatment which rests upon the Government when it brings a proceeding charging a citizen with violation of one of its laws.

The right of cross-examination is, of course, a fundamental protection to accused persons. In another landmark case, *Greene* v. *McElroy,* 360 U.S. 474, the Supreme Court, in an opinion by the Chief Justice, quoted with approval Wigmore's "incisive summary statement" of the critical importance of cross-examination in an adversary proceeding: "For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience." (360 U.S. at 497.)

The Chief Justice pointedly added that the Court "has been zealous to protect these rights [confrontation and cross-examination] from erosion * * * not only in criminal cases, * * * but also in all types of cases where administrative and regulatory actions were under scrutiny." (*Ibid.*)

In *Jencks* the Supreme Court recognized that to deny a defendant access to Government reports of prior statements of an adverse witness which may be useful in impeaching or discrediting his testimony has the practical effect of limiting and impairing the value of the right of cross-examination. The Court pointed out that these documents may be of crucial importance to the defendant:

> Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness's testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contract in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony. * * * Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less. (353 U.S. at 667, 668–69.)

The second basic principle reflected in *Jencks* is found in the standards of fairness and decency applicable to the Government in relation to its citizens whenever it seeks to impose upon them the penalties, sanctions, or restraints of the law. The principle is simple and straightforward. It is proudly inscribed on the entrance to the office of the Attorney General of the United States: "The United States wins its point whenever justice is done its citizens in the courts."

A Government lawyer is not a private litigant; he is a public officer, for whom public office is as much a public trust as it is for any other official. Standards fashioned for private litigants are not the measure of the standards of honor and decency appropriate for those who represent the United States in its courts. A Government lawyer is an advocate for a client whose interest is not so much to win a case as to do justice.[1] And it is not just and not fair for the Government to withhold a document in its possession which, if made available to the accused, could exculpate him or assist him in making his defense.[2]

Thus, in *Jencks* the Court quoted with approval the statements in *United States* v. *Reynolds,* 345 U.S. 1, 12, and *United States* v. *Andolschek,* 142 F. 2d 503, 506 (2d Cir. 1944), that "since the Government which prosecutes an accused also has the duty

[1] *Brady* v. *Maryland,* 373 U.S. 83, 86–88; *Berger* v. *United States,* 295 U. S. 78, 88.

[2] *Brady* v. *Maryland, supra; Mooney* v. *Holohan,* 294 U.S. 103; *Roviaro* v. *United States,* 353 U.S. 53, 60–61; *Reynolds* v. *United States,* 345 U.S. 1; *United States* v. *Andolschek,* 142 F. 2d 503, 506 (2d Cir. 1944).

to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. * * * [T]he prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully." (353 U.S. at 671.)

The liberating principles which converged in the *Jencks* rule are fundamental. They should be construed and applied, not in a niggling, grudging fashion, but in harmony with the basic values involved.

The *Jencks* rule, as established by the Supreme Court, is forthright and free of fuzzy ambiguities. With no "ifs" or "buts," the Court directed the Government to produce "all reports" in its possession containing the prior oral statements of the witnesses. (353 U.S. at 668.) Does it make any difference under *Jencks* that the report sought to be produced is "confidential"? No. Does it make any difference that it is "hearsay" and inadmissible in evidence? No. Does it make any difference that it is the "work product" of Government attorneys? No. Does it make any difference whether the report is a "summary," "substantially verbatim recital," "continuous narrative statement," or "contemporaneous transcription"? No. One searches the Court's opinion in vain for any such distinctions or refinements. Does it make any difference that, in the opinion of the Government or the court, the report is not "relevant" in the sense of being useful or helpful to the defense? No. Whether and how the report is to be used in cross-examination, and whether or not it will help the defense, is for the accused and his counsel to determine, not the prosecutor or the judge.

The essence of the *Jencks* rule is that, whatever the form or style of the report, if it contains or reports statements of the witness relating to the subject-matter of his testimony, the *defendant* "is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. *Justice requires no less.*" (353 U.S. at 668–69; emphasis added.)

The use of an interview report for purpose of cross-examination

is, as the Court recognized, a matter wholly separate from and broader than that of its admissibility in evidence. An interview report summarizing a witness' oral statements, or reporting them only in part, may be as useful to the defense in impeaching or discrediting his testimony as a signed affidavit or "substantially verbatim" recording. As Mr. Justice Brennan has pointed out (*Palermo* v. *United States,* 360 U.S. 343, 365 (concurring opinion)), "a statement can be most useful for impeachment even though it does not exhaust all that was said upon the occasion. We must not forget that when confronted with his prior statement upon cross-examination the witness always has the opportunity to offer an explanation."

The purpose of the *Jencks* rule is not to shield a Government witness from embarrassment, discomfiture, or even the inconvenience of having to explain or justify alleged inconsistencies between his testimony and prior statements contained in an interview report. If it transpires that there are in fact no inconsistencies, because the report is incomplete or inaccurate or for some other reason, the net result will be to bolster his testimony. In any event, whether in the end his testimony is strengthened or weakened thereby, the *Jencks* rule is designed to subject it to the rigorous test of cross-examination—and by this the Court meant effective cross-examination conducted not in the dark but in the light of prior statements of the witness contained in reports in the Government's possession.

This, then, is the *Jencks* rule as declared by the Supreme Court on June 3, 1957. If there be any question as to the scope or limits of that rule, it will ultimately be determined by the Supreme Court, not this Commission. The question, going as it does to the fundamental nature and protection of the right of cross-examiation in accusatory proceedings brought by the Government, does not involve the exercise of agency "expertise" to which deference is owed the Federal Trade Commission, either by the Supreme Court or any other reviewing authority.

## III

As I read its opinions in these cases, the Commission agrees that the rule established by the Supreme Court in the *Jencks* case is a rule of fundamental fairness and justice whose application cannot be confined to criminal prosecutions. The Commission recognizes that the rationale of the *Jencks* rule, and the considerations of policy underlying it, are no less applicable to administrative proceedings, accusatory and adversary in nature,

where an agency of the United States charges a person with having committed a violation of law and seeks to impose a legal sanction or restraint upon him.[3]

The Commission does not suggest that the rule laid down by the Supreme Court in the *Jencks* case can, or should, be abridged or modified by action of this Commission. It does not assert that our views should prevail over the Court's as to how the various competing interests here should be balanced. The Commission seems to recognize that, like it or not, the *Jencks* rule is the "law of the land" which we are not free to restrict or change, and which it is our duty to apply to Commission proceedings fairly and conscientiously, neither nullifying nor diluting its fundamental protections.

Thus, the Commission proceeds here on a premise which appears to be neither challenged nor disputed: the full and unqualified applicability to these proceedings of the rule of *Jencks* v. *United States*. What is challenged and disputed—and this is the crux of my disagreement with the majority—is whether the restrictive provisions of 18 U.S.C. 3500, the so-called "Jencks Act," limiting the production of interview reports in criminal cases to witnesses' statements which are recorded "contemporaneously" and "substantially verbatim," are a part of the Supreme Court's *Jencks* rule. It is the Commission's view that the Act "codifies" the *Jencks* rule, merely making explicit what was already implicit in the Court's opinion. I disagree.

However, one thing should be wholly clear: The difference between the *Jencks* rule, as I understand its formulation by the Supreme Court, and the *Jencks* rule, as now "restated" by the Commission, is the difference between day and night. It is not a difference in semantics. It is a difference of a fundamental character, vitally affecting the rights of respondents in Commission proceedings. In Commission proceedings, it is the difference between whether a respondent will, or will not, have access to

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[3] There can be no question as to the accusatory character of Commission proceedings such as these. When the Federal Trade Commission issues a formal complaint charging a person with a violation of law, the adjudicative proceeding that follows is wholly adversary in nature. Evidence is presented, and testimony is adduced, before the hearing examiner in much the same manner as in a trial before a judge. The burden of proving the alleged violation of law rest upon the charging party (*i.e.*, Commission complaint counsel). The decision must be based upon the record. Findings of fact must be supported by reliable, probative, and substantial evidence. And, most pertinent here, the respondent has the full and unqualified right of cross-examination. In Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 1006(c), Congress expressly provided that a party "shall have the right * * * to conduct such cross-examination as may be required for a full and true disclosure of the facts." To the same effect, Section 3.16(b) of the Commission's Rules of Practice provides that a respondent "shall have the right of * * * cross-examination * * * and all other rights essential to a fair hearing."

F.T.C. interview reports, for use in cross-examining adverse witnesses, where such reports—as they customarily do—summarize the witness' oral statements and do not quote them verbatim and in full.

Let us take a simple example. Suppose that an interview report in the possession of the Commission reads in toto as follows: "I interviewed the witness for two hours. Without going into details, the sum and substance of what he said was that respondent *never* made any representations to him of any kind." Suppose further that the Commission brings a proceeding charging the respondent with having made false and misleading representations, in violation of the F.T.C. Act. The witness is called by Commission counsel, and testifies that respondent made various fraudulent representations to him.

Under the rule of the *Jencks* case as expressed by the Supreme Court, it is clear that withholding the report from respondent's counsel would impair his right of cross-examination and be inconsistent with the basic standards of fairness and decency applicable to the Government. Although it is a summary, and not signed or adopted by the witness or a "substantially verbatim" recital, the report could be of great value in impeaching or discrediting his testimony. Indeed, in the view of Mr. Justice Brennan, who wrote the Court's opinion in *Jencks*, a refusal to produce such a report would present a "constitutional question close to the surface of our holding in *Jencks*." (*Palermo* v. *United States*, 360 U.S. 343, 361–62, 364–65.)

This does not seem to give the Commission any concern. It holds today that the *Jencks* rule "should not be extended" so as to require production of "any summaries of such [oral] statements" made by the witness to a Commission attorney or investigator. (*Inter-State Builders, Inc.*, p. 1165 herein.)

## IV

At the root of the Commission's error in these cases is its misunderstanding of what the *Jencks* rule is. To me, the *Jencks* rule is the rule declared by the Supreme Court in *Jencks* v. *United States*, decided June 3, 1957, and reported in Volume 353 of the U.S. Reports at page 657. To the other members of the Commission, however, the *Jencks* rule is to be found in a criminal statute enacted by Congress on September 2, 1957, as an amendment of Title 18 U.S.C., the Penal Code, captioned "Crimes and Criminal Procedure": the so-called "Jencks Act." According to the Commission, the Act is merely a codification or restatement,

in statutory form, of the rule declared by the Supreme Court in the *Jencks* case. This may come as a surprise to the Department of Justice, which moved so quickly after the *Jencks* case to obtain legislative delimitation of its impact on criminal cases; to the members of Congress, who enacted the law to avoid what they feared would be the calamitous effects of the *Jencks* decision in the prosecution of criminal cases; and to the Supreme Court and other federal courts, which have been endeavoring since September 2, 1957, to reconcile the restrictive provisions of the Jencks Act with the requirements of due process in criminal cases. Indeed, in the first case arising under the Jencks Act, the Supreme Court accepted as a working premise that the Act "restrictively" defined producible statements; the Court recognized that prior to the Act "other statements, *e.g.*, non-verbatim, non-contemporaneous records of oral statements" were producible "under pre-existing rules of procedure." (*Palermo* v. *United States, supra,* at 349.)

It does not denigrate the Jencks Act to observe what its legislative history and provisions make indisputable: that while accepting the "basic principle" of the *Jencks* case that the interest in maintaining "confidentiality" of Government files must yield to the requirements of fundamental fairness and justice, Congress decided that some restriction of the *Jencks* rule was appropriate in its application to criminal cases tried in the federal courts. But the Jencks Act is a criminal statute, and only a criminal statute.

One need not consider here the extent of the constitutional power of Congress in regard to the trial of criminal cases in federal courts. It remains to be seen whether, as a result of the need for construing the statute so as to avoid constitutional doubts, the area of divergence, in criminal cases, between the Jencks Act and the *Jencks* rule will eventually be reduced or even eliminated. *Cf. Campbell* v. *United States,* 373 U.S. 487. That is for the Supreme Court to determine, not this Commission. What does concern us here is whether, in applying the Supreme Court's *Jencks* rule to administrative proceedings, the Commission may substitute the restrictive definition of "statements" contained in the Jencks Act, a criminal statute.

To me, the short of the matter is that Congress, in the Jencks Act, was *explicit* in limiting its application to criminal cases tried in the federal courts. The Jencks Act bears that name only because its enactment was triggered by the Supreme Court's decision in the *Jencks* case. To a layman, it might seem that, be-

cause the Court's decision and the Act of Congress both bear the name of "Jencks," the two are identical. But to lawyers it would certainly be a novel approach to statutory construction to have the scope of an Act of Congress determined by its popular name. Nothing in this Commission's "expertise" authorizes us to convert the Jencks Act into a statute of general application whose provisions apply not only to criminal cases, as specified in the Act, but to every other kind of non-criminal proceeding. If we follow here the usual process of statutory construction, we cannot escape the conclusion that 18 U.S.C. 3500 does not apply, and was not intended to apply, to any proceedings other than criminal cases tried in the federal courts. Nothing in the language or legislative history of the Jencks Act indicates that Congress thereby directed or authorized agencies like the Federal Trade Commission to apply to their own distinctive proceedings the specific provisions of the Jencks Act. In its application to such agency proceedings, the *Jencks* rule established by the Supreme Court was left intact by Congress. One may speculate whether, and how, Congress might have extended the provisions of the Jencks Act to proceedings other than criminal cases, had it chosen to legislate in the matter. But—to me at least—it is decisive here that Congress did not so legislate, and that the Jencks Act is expressly limited to criminal cases.

Restrictions on fundamental rights and fair procedures are not lightly implied. As the Supreme Court has held, courts and agencies of government must be careful that "traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition." (*Greene* v. *McElroy,* 360 U.S. 474, 508; see also *Kent* v. *Dulles,* 357 U.S. 116, 130.) The Court has emphasized that even in criminal cases it will not enlarge the specific restrictions contained in the Jencks Act. As Mr. Justice Brennan stated in his concurring opinion (joined by the Chief Justice, Mr. Justice Black, and Mr. Justice Douglas) in *Palermo* v. *United States,* 360 U.S. 343, 365: "Although it is plain that some restrictions on production have been introduced [by the Jencks Act], it would do violence to the understanding on which Congress, working at high speed under the pressures of the end of a session, passed the statute, if we were to sanction applications of it exalting and exaggerating its restrictions, in disregard of the congressional aim of reaffirming the basic *Jencks* principle of assuring the defendant a fair opportunity to make his defense."

If the Supreme Court will not "sanction applications of [the Jencks Act] exalting and exaggerating its restrictions," where is there authority for the Federal Trade Commission to do so? If the *Jencks* rule is applicable to agency proceedings, as the Commission concedes it is, we should not be reluctant to give the rule full force and effect. Our duty is not to nullify its protections, "exalting and exaggerating" the restrictions of the Jencks Act by extending them into an area far outside the expressed scope of the law.

V

Thus, the short answer to the Commission's use of the Jencks Act as justification for excluding F.T.C. interview reports from the *Jencks* rule is that the Act simply does not apply here; and that it would require "the most explicit action by the Nation's lawmakers," which is wholly absent here, to permit such a restriction of the rule. However, some further comments should be made regarding the Commission's erroneous assumption that the considerations that persuaded Congress to restrict the *Jencks* rule as applied to criminal cases are also applicable to F.T.C. proceedings.

One must recall the circumstances which led to the Jencks Act. The *Jencks* case was decided on June 3, 1957, and the Jencks Act became law on September 2, 1957 (71 Stat. 595). In that three-month period, as the Supreme Court later noted in *Palermo* v. *United States,* 360 U.S. 343, 346, there was considerable agitation over the scope and feared consequences of the *Jencks* decision: "Defendants' counsel began to invoke the *Jencks* decision to justify demands for production far more sweeping than that involved in *Jencks,* and under circumstances far removed from those of that case, and some federal trial judges acceded to those excessive demands." There was widespread "controversy and concern" that, particularly in criminal cases involving treason, espionage, and other offenses against national security, defense counsel might obtain unwarranted access to secret F.B.I. files. There was fear that the decision might unduly broaden the scope of pretrial discovery in criminal cases, again to the detriment of the Government. Pointing to the broad protections afforded defendants in criminal cases (*e.g.,* the presumption of innocence, the requirement that guilt be proved beyond a reasonable doubt, the privilege against self-incrimination, etc.), many persons contended that the *Jencks* decision unduly

tipped the scales against the Government in criminal prosecutions, especially in cases involving national security.[4]

The Jencks Act's most important restriction is in its definition of the "statements" required to be produced. The legislative history reveals that Congress' concern was that summaries might be inaccurate or distorted, and hence that their use for impeachment purposes could be unfair to the witness and the prosecution.[5] To be sure, "when confronted with his prior statement upon cross-examination the witness always has the opportunity to offer an explanation." [6] However, Congress seemed to be concerned that, whatever explanation or disclaimer the witness might offer, the effect of the statement would not easily be expunged from a juror's mind and the damage to the prosecution could thus be irreparable.[7]

Let us consider the applicability of the above factors to F.T.C. proceedings.

First, it is absurd to suggest that a threat to the "national security," which was so much in the minds of those responsible for the enactment of the Jencks Act and which its provisions so surely reflect, is in any way involved when a respondent requests an interview report in a Federal Trade Commission proceeding.

Second, the Commission's suggestion that requiring production of interview reports which are not "substantially verbatim" would "hamper" or create "undue interference" with the work of Commission attorneys is rather strange. It is difficult to see how a rule requiring production of interview reports "not substantially verbatim" would hamper the work of our attorneys any more than a rule requiring production of "substantially verbatim" reports. The Commission's view appears to be that the purpose of the distinction between "substantially verbatim" reports and summaries is to afford a Government attorney some

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[4] See generally H.R. Rep. No. 700, 85th Cong., 1st Sess. (1957); S. Rep. No. 981, 85th Cong., 1st Sess. (1957); S. Rep. No. 569, 85th Cong., 1st Sess. (1957); Note, *The Jencks Legislation: Problems in Prospect*, 67 Yale L. J. 674 (1958); Note, *The Aftermath of the Jencks Case*, 11 Stan. L. Rev. 297 (1959).

[5] *Palermo* v. *United States*, *supra*, at 350, 352; *Campbell* v. *United States*, 373 U.S. 487, 496–97; see especially *id.* at 502 (Clark J., dissenting).

[6] *Palermo* v. *United States*, *supra*, at 365 (Brennan, J., concurring).

[7] It is clear that Congress in defining "statements" did not intend to draw a distinction based upon the admissibility of the documents. Under the Jencks Act, admissibility is wholly irrelevant in determining a request for production. *Palermo* v. *United States*, *supra*, at 353, n. 10. Indeed, "substantially verbatim" written reports of an interview made by an investigator are no less hearsay than summaries. The original House bill did in fact limit "statements" to those signed or adopted by the witness, for the reason that any other reports would be hearsay. H.R. Rep. No. 700, 85th Cong., 1st Sess. (1950), p. 6. Congress specifically rejected this view by allowing "substantially verbatim" reports.

area in which his "work product" is protected. This would mean that the primary function of the distinction is simply to give Commission attorneys the option, and indeed the incentive, "to take statements in a fashion calculated to insulate them from production." [8]

At all events, the members of Congress certainly had no such thoughts in mind in drawing the Act's distinction between "substantially verbatim" reports and summaries. In the legislative history, neither *Hickman* v. *Taylor* nor the work product rule is mentioned in this connection. Rather, as I have already pointed out, Congress' main reason for defining "statements" as it did was its fear that in a criminal case the danger of undue prejudice to the prosecution from the use of an inaccurate or distorted summary for impeachment purposes would outweigh any unfairness to the defendant. There may be some danger in a criminal case that the jury will be influenced, to the detriment of the prosecution, by cross-examination based on an inaccurate report, regardless of how well the witness explains away the report. But this danger does not exist in agency proceedings tried before a hearing examiner. Even under the rule now fashioned by the Commission, upon request that an interview report be produced, it must be turned over to the hearing examiner so that he may determine whether it is *prima facie* "substantially verbatim." Thus, the trier of fact, the hearing examiner, will see the report even if it is in fact "inaccurate" or not "substantially verbatim." What further "prejudice" or "unfairness" to complaint counsel's case could result if the report were turned over to respondent?

But there is a more fundamental reason for rejecting the Commission's conclusion that we are justified in restricting access to interview reports because they may be inaccurate or distorted. The Commission has a duty to deal with this problem in the light of realities, and not on the basis of hypothetical, unreal and unsubstantiated dangers. I do not think it serves the public interest, or increases the public's respect for the integrity of the Commission's processes, for us here to impugn the accuracy and trustworthiness of interview reports prepared by Commission attorney-investigators. It is a fact, and one that the members of the Commission surely should not seek to obscure or deny, that these reports, while "summaries," are generally characterized by objectivity, accuracy, and reliability. The Commission expects,

[8] *Palermo* v. *United States*, *supra*, at 366 (Brennan, J., concurring.)

and receives, such reports from its attorney-investigators. Were it otherwise, we could not do our work properly.

It is incongruous and wrong for the Commission—in order to justify its restriction of the *Jencks* rule so as to make it inapplicable to F.T.C. interview reports summarizing oral statements of witnesses—to brand such reports as "inaccurate and misleading" in many instances.[9]

Nor does it accord with reality to suggest that allowing respondents access to interview reports could "easily convert the fact-finding process from a trial of the issues into a trial of the competency and accuracy of the work of the attorney" or that "it would disrupt and confuse the hearing by injecting into it irrelevant side issues." [10] Under the *Jencks* rule, the presiding officer, whether he be a judge or hearing examiner, is well able to prevent cross-examination from degenerating into a trial of such collateral issues. If the respondent's attorney formulates a question based upon his examination of the summary, he must accept the witness' response. If the witness explains that the summary is inaccurate, that is the end of the matter. There is neither "disruption" nor a trial of "irrelevant side issues." [11]

A basic premise of the rule announced by the Supreme Court in the *Jencks* case is that the standards of conduct for Government attorneys are high, and far more exacting than those applicable to attorneys in private litigation. We must do all we can to impress upon our attorneys that the Commission is primarily concerned with doing justice, not winning cases, and that no case is "won" if justice is denied.

Rather than instructing Commission counsel that high standards of fairness and justice require that they not withhold interview reports which may be vital to a respondent in making his defense, the Commission delivers an extraordinary paean to the interests of "confidentiality" and "executive privilege." Its opinions in these cases establish an elaborate and complex set of distinctions which in practical effect will serve as a manual on how to write interview reports so as to guarantee not having to produce them. In *R. H. Macy & Co.*, Docket No. 8650, issued March 10, 1966 [p. 1108 herein], the Commission goes even further. It tells our attorneys that even where the hearing examiner has de-

[9] If the other members of the Commission feel that the interview reports submitted to us every day are in many instances inaccurate, distorted, and unreliable, the remedy is not to restrict the *Jencks* rule. Instead, we should proceed without delay to correct the situation by making certain that all interview reports will be as accurate, complete, and trustworthy as I, at least, believe they are now.

[10] *Inter-State Builders, Inc.*, p. 1152 herein.

[11] 3 Wigmore, *Evidence* § 1023 (1940).

termined that an interview report falls within the Jencks Act definition of "statement," complaint counsel has the option of acquiescing in the striking of the testimony of a witness who has already testified, rather than having to produce the interview report. Such evasive tactics have no place in Commission proceedings.[12] In the long run, they can have only a corrupting effect on agency processes.

## VI

Consideration of the procedural delays, confusion, and opportunities for error engendered by the Jencks Act standards and procedures demonstrates that their extension, by implication, to Commission proceedings is not only unfair but imprudent. The Jencks Act restrictions have already been recognized as a principal source of delay in criminal trials.[13] As the present cases demonstrate, they will surely have that effect in Commission proceedings.

Even assuming that interview reports will in some instances

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[12] The Jencks Act provides for the striking of testimony rather than dismissal of a prosecution where the Government refuses to comply with a district judge's direction to produce a witness' statement. Whatever the merits of that provision in criminal proceedings, it is wholly inappropriate in Commission proceedings where complaint counsel can file an interlocutory appeal to the Commission—which in the last analysis is responsible for maintaining confidentiality of agency files.

See also Note, *The Jencks Rule's Application to Adversary Adjudications of Administrative Agencies*, 68 Yale L. J. 1409, 1422–23 (1959):

"The sanctions imposed by the [Jencks Act] . . . should not be incorporated into an administrative law Jencks Rule . . . . A statement by a witness which the prosecution conceals may well be of extreme importance. This likelihood is increased when the prosecutor prefers to have the witness' testimony at trial expunged rather than permit the statement to be used on cross-examination."

[13] Judge Herlands of the United States District Court for the Southern District of New York thus describes the experience in criminal trials:

"[T]he Jencks Act, Title 18 United States Code, Section 3500, requires the United States Attorney to furnish defense counsel, upon request, with all pre-trial statements of a prosecution witness after the particular witness has completed his direct testimony at the trial.

"What constitutes a 'statement' within the meaning of this Act has been the subject of a multitude of decisions.

"To determine whether the particular documents constitute 'statements' within the meaning of the statute, the trial judge must frequently devote considerable time to a close reading of voluminous papers. Often he must conduct extensive hearings to determine, for example, whether the particular paper correctly reflects the witness' statement; whether it has been revised; or whether it consists of selected excerpts.

"The Supreme Court has held that, in certain circumstances, the trial judge has the duty to hold a non-adversary hearing on his own motion and to have extrinsic evidence adduced on this issue.

"These *voir dire* proceedings stall the main trial.

"Any trial judge who attempts to cut corners in order to save time may easily run afoul of the controlling appellate rulings.

"Then there is the provision of the Jencks Act that the statement must be turned over to the defendant if it 'relates to the subject matter as to which the witness has testified,' and that the trial judge must excise such portions of the statement that do 'not relate to the subject matter of the testimony of the witness.' What is the scope and thrust of the words 'relate to' and the words 'subject matter'? Dictionary definitions will not do.

qualify as "Jencks-type" statements under the criteria now established, the examiner would usually have to conduct a *voir dire* hearing, at which it may even be necessary to call the interviewing Commission attorney away from some other task, perhaps in another city, to testify at such a hearing. Meanwhile the continuity of the hearing has been disrupted, and, as in the cases before us, for considerable periods of time. This process may be repeated for each succeeding witness. Moreover, in such cases the distinction between "substantially verbatim" and "summary" reports may be hard to apply. Reference to hundreds of federal court decisions may be required. Some of these precedents are in conflict with one another. Indeed, in the cases before us, the issues may not have been finally disposed of. We have, for example, no guarantee that after remand we will not have another appeal by respondent, if the examiner applies the Jencks Act provisions too narrowly, or by complaint counsel, if he applies them too broadly.[14]

These delays are wholly unnecessary and can easily be avoided without sacrifice of any demonstrable interest. First, the simple rule of the *Jencks* case—which eschews the esoteric distinction between "substantially verbatim" and "summary" reports—will be easier to apply, will be unlikely to create a source of error, and, most important, will never require the holding of a *voir dire* hearing.

Second, it is essential, if inexcusable delays and disruptions of Commission proceedings are to be eliminated, that requests for production of interview reports be handled during prehearing proceedings, and not be deferred until after the witness testifies at the hearing. Although we hardly need look beyond these cases for illustration of the disruptive effects of the Jencks Act's post-direct requirement, it is significant that this procedure has been

"Nice questions are presented with respect to the factual and linguistic relevance of the witness' pre-trial statements to his trial testimony.

"Furthermore, assuming there is a relationship to such subject matter, how much should be turned over to the defendant? How much can be excised without eliminating qualifying or otherwise significant contextual material?

"To answer these and related questions, the judge must take the time to read all of the transcripts analytically.

"Every word of the witness' trial testimony and every word of the witness' pre-trial statement must be searchingly studied in relationship to each other.

"Where the trial testimony and pre-trial statements are voluminous, days must be required to complete the examinations, to designate and impound the excised excerpts, and to give defense counsel reasonable time to study the portions turned over to him prior to cross-examination. As a result, the main trial is adjourned; and the jurors are recessed.

"This procedure and this delay can take place with each trial witness as to whom the Government possesses a pre-trial statement."

Judicial Conference of the Second Judicial Circuit, *The Problems of Long Criminal Trials*, 34 F.R.D. 155, 168–69 (1963).

[14] Compare *Inter-State Builders, Inc.*, with *L. G. Balfour Co.*

cause for considerable concern and dissatisfaction in criminal trials. In addition to its disruptive effects, defense counsel have found that examination of interview reports while the trial is in process does not afford them sufficient opportunity to assess the reports' utility for impeachment purposes.[15] Accordingly, despite the Jencks Act's formal requirement that production be allowed only after the testimony of the witness on direct, in many cases there has been informal agreement for production of all witness reports before trial or at an early stage.[16] And one court of appeals has recommended this as a desirable procedure.[17]

Surely, in view of this, requests for production of witnesses' statements should not be deferred until after witnesses have testified on direct. That requirement in the Jencks Act reflects the variety of unique policy considerations in criminal cases which have traditionally been used to deny or limit pretrial discovery of the identity of prosecution witnesses.[18] But no such policy considerations are involved in Commission proceedings. Our Rules of Practice specifically provide for prehearing disclosure of the names of witnesses to be called at the hearing.[19] This, of course, also renders groundless the Commission's fears that production at a pre-hearing stage would permit "general access" to all interview reports in the Commission's files. The only reports required

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[15] Note, *The Jencks Act: After Six Years*, 38 N.Y.U.L. Rev. 1133, 1139–40 (1963) ; Junior Bar Section of the Bar Association of the District of Columbia, *Discovery in Federal Criminal Cases*, 33 F.R.D. 47, 118 (1963).

[16] Committee on Pretrial Procedure, Judicial Conference of the United States, *Report on Recommended Procedures in Criminal Pretrials*, 37 F.R.D. 95, 102 (1965). Note, *The Jencks Act: After Six Years*, 38 N.Y.U.L. Rev. 1133, 1139–40 (1963).

[17] *Ogden* v. *United States*, 303 F. 2d 724, 734 (9th Cir. 1962) :

"[I]t was not error to deny defendant's pretrial Jencks Act demands for statements of this and other witnesses. This is not to suggest that it is always, or even normally, inappropriate for the government to produce such statements before trial. Where the identity of the government's witnesses and the probable nature of their testimony is known, speedy resoultion of Jencks Act problems by early and full disclosure may serve the interests of all concerned."

See also Junior Bar Section of the Bar Association of the District of Columbia, *supra*, n. 15, at 122.

[18] The reluctance to permit pretrial production of witness lists and witness statements in criminal cases reflects a belief that there are dangers, peculiar to criminal proceedings, of perjury and manufactured evidence, and bribery and intimidation of prospective witnesses, as well as an assumption that the Government is entitled to the strategic advantages of surprise in enforcing the criminal laws. See Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. Rev. 228 (1964) ; Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L. J. 1149 (1960) ; Comment, *Federal Rules of Criminal Procedure—Rule 16, Second Preliminary Draft of Proposed Amendments*, 113 U. Pa. L. Rev. 1295, 1296 (1965).

[19] Rule 3.8 provides in relevant part:

"(a) The hearing examiner in any case may, and upon motion of any party or where it appears probable that the hearing will extend for more than five (5) days he shall, direct counsel for all parties to meet with him for a conference to consider any or all of the following: * * *

"(6) Such other matters as may aid in the orderly disposition of the proceeding, including disclosure of the names of witnesses and of documents or other physical exhibits which will be introduced in evidence in the course of the proceeding."

to be produced would be those reporting interviews with specific witnesses whom complaint counsel intends to call at the hearing. As the Ninth Circuit has pointed out (*Ogden* v. *United States*, 303 F. 2d at 734), "Where the identity of the government's witnesses and the probable nature of their testimony is known, * * * early and full disclosure may serve the interests of all concerned." The feasibility of this practice is demonstrated not only by the fact that it is a common and recommended procedure in federal criminal cases, but that, as the Commission observed in *Viviano Macaroni Co.*, Docket No. 8666, issued March 9, 1966 [p. 1104 herein], it is already an established practice in Commission proceedings.

Nor, finally, should there be any undue concern that production at a prehearing stage might result in the production of interview reports unrelated to the witness' testimony at the hearing. In the first place, it is most unlikely that the substance of the witness' statements in the interview reports will be broader than the subject-matter of his testimony at the hearing. Second, even under the Jencks Act, the court's role in determining whether a statement is related to the witness' testimony is a very narrow one. The standard of relevancy is necessarily broad and must be loosely applied to be consistent with the principle, which the Jencks Act reflects, that only the defense attorney can surely assess the document's usefulness for impeachment purposes. Accordingly, there is little likelihood that under a rule allowing pre-hearing production, the respondent will get substantially more than he would get under the wait-and-see rule of the Jencks Act. At all events, if respondent does get a little more—so what? Is it worth the costs in delay and disruption of adjudicative proceedings which the Commission's present approach entails?

Unlike the Federal Rules of Criminal Procedure, the purpose of the Commission's Rules is to encourage maximum prehearing discovery which will expedite hearings and assure that they are "not conducted under the 'sporting theory' of litigation where the goal is to surprise and confound your opponent." [20] To allow the kinds of delay and interruptions which now prevail is inconsistent with the Commission's policy that adjudication be expeditious and continuous.[21]

[20] *L. G. Balfour Co.*, Docket No. 8435 (Order Directing Disclosure of Documents, issued May 10, 1963, pp. 3–4 [62 F.T.C. 1541, 1543]).

[21] Rule 3.16(d) of the Commission's Rules of Practice provides:

"Hearings shall proceed with all reasonable expedition. Unless the Commission otherwise orders upon a certificate of necessity therefor by the hearing examiner, all hearings shall be held at one place and shall continue without suspension until concluded. (This does not bar overnight, week end, or holiday recesses, or other brief intervals of the sort normally involved in judicial proceedings.)"

VII

Finally, I think a word is in order with respect to the Commission's decision in *Viviano Macaroni Co.* That decision illustrates the Commission's misconception of its role in assessing the "relevance" of an interview report for purposes of discrediting a witness.[22] In *Viviano,* respondent requested inspection of interview reports of conversations with prospective witnesses. Respondent's counsel urged that a "number of the prospective witnesses are hostile to the respondent and that, if he can obtain the documents called for and if they demonstrate this hostility, he will be able, if not to attack the credibility of the witnesses, at least diminish the weight that should be given to their testimony." (*Viviano,* pp. 1104, 1106 herein.) The Commission held that respondent had failed to show good cause for the release of these documents under Section 1.134 of the Commission's Rules. It held that "what [respondent] seeks are the summary reports by agents as contained in interview reports. These reports would be the impressions of a third party as to what was said in a particular conversation. This, of course, would be inappropriate for impeachment purposes since such a report is not necessarily the statement of the prospective witness." (*Id.,* p. 1106.) The Commission also held that the claim "that there might be hostile witnesses in the group of prospective witnesses to be called by complaint counsel is clearly insufficient to justify production of documents within the category of an attorney's work product as defined in *Hickman* v. *Taylor.*" (*Id.,* p. 1107.)

Suppose an interview report reads as follows: "I talked to the witness for over an hour. He was very frank and outspoken in telling me that he hates the respondent and would like to send him to jail if he can, even if he has to lie under oath to do it." Under the Commission's decision in *Viviano,* such an interview report would not be producible since it would be merely an "agent's summarization" conveying "the impressions of a third party" and "inappropriate for impeachment purposes since such a report is not necessarily the statement of the prospective witness." I disagree. For purposes of impeaching the witness, such an interview report would be invaluable to the defense, and in my view is clearly producible under the *Jencks* rule.[23]

[22] The Commission in *Viviano* also concludes—erroneously in my view—that a prehearing request for intreview reports is subject to Rule 1.134 governing requests for confidential information. As the Commission holds in *Inter-State,* that rule is not applicable to such requests made during the hearing. I can conceive of no reason for making it applicable to an identical prehearing request. At whatever stage the request is made, a report whose use is "necessary in connection with adjudicative proceedings" is not "confidential information," as defined in Rule 1.133.

[23] *Cf. Rosenberg* v. *United States,* 360 U.S. 367, 370.

SEPARATE CONCURRING STATEMENT*

BY MACINTYRE, *Commissioner:*

Here the avalanche of words and arguments have come close to overwhelming the Commission. Resolution of a simple issue has been made difficult because it has become obscured in the mire of conflicting arguments.

The issue before the Commission is quite simple: Are respondents in Commission proceedings entitled, as a matter of right, to general access to Commission investigational files containing reports on work done in the field by Commission agents relating to persons who may be called as witnesses? I do not believe they are.

There is, of course, no question concerning the availability to respondents of Commission records necessary for their proper cross-examination of witnesses called by complaint counsel, such as the prior statements of persons who take the stand. The Commission, under its rulings in these cases, has made it clear that such documents are, or will be made, available to respondents upon a proper showing under its established procedures. It has refused to indiscriminately turn over to respondents the reports of work performed by its attorneys merely because the reports relate to a witness called to testify. To do so would, in effect, grant general access to the Commission's investigational files. Specifically, the Commission's position, as I view it, is that a work report relating to a witness, containing no more than a summary of what the witness said or may have said and which is not the witness' own statement, is not producible. Its rulings are consistent both with the Jencks rule contained in the Supreme Court's decision in *Jencks* v. *United States,* 353 U.S. 657 (1957), and the requirements of that rule as they have been codified by the Congress in the so-called Jencks Act (18 U.S.C. § 3500). This the Commission made clear in its opinion in *Inter-State Builders, Inc.,* Docket No. 8624 [p. 1152 herein].

The dissent apparently misconstrues the *Jencks* decision and consistently confuses the issue by equating the report of an interview with a witness with a statement of that witness. Neither the facts nor language of the *Jencks* decision afford a ground for a contention that the Court considered the two as necessarily one and the same thing. In fact, it seems clear that in referring to statements orally made to, and recorded by, an agent, the Court was not considering mere summarizations but rather the witness'

*Consolidated concurring statement *In the Matter of L. G. Balfour Co.,* Docket No. 8435 and *In the Matter of Inter-State Builders, Inc., et al.,* Docket No. 8624, p. 1152 herein.

own statements. It is also apparent from the Supreme Court's subsequent review of the *Jencks* decision in *Palermo* v. *United States,* 360 U.S. 343 (1959), that the Court was satisfied that the statute was framed to preclude an "expansive reading" going beyond the holding of that decision.

Further, the dissent unmistakably implies that by applying the Jencks Act standards for determining whether a document is producible the Commission deprived respondents of the full right to cross-examination and of due process. This astonishing statement I suspect will surprise the courts and the Congress. It deserves a reply. I think it goes without saying that in the light of the possible penalties in criminal proceedings the attendant procedures must comport to the highest Constitutional requirements of fairness and due process. As a result, the insinuation that the application of the Jencks Act to the administrative proceedings is somehow unfair is startling if not ludicrous. If application of the Jencks Act standard in administrative proceedings deprives a respondent of the right to a full cross-examination, the same must be true in criminal proceedings. After some eight years of interpretation I have yet to see a judicial decision questioning the fundamental fairness of the guidelines spelled out in the Jencks Act by Congress. If the Jencks Act standard meets the requirements of fairness for criminal proceedings *a fortiori,* it must meet the requirements for due process in a civil administrative proceeding which is nonpunitive.

Finally, cross-examination on the basis of a summary, which may or may not be complete, or a report of what a witness said, or may have said, would not necessarily bring the proceeding closer to ascertaining the truth but might well result in the converse, namely, the confusion of the testimony and the record. For example, the Court in *Palermo* noted the legislative concern with the danger of misinterpretation [1] inherent in a report merely relating portions, although accurately, from a lengthy oral recital. Cross-examination on this basis would be far more apt to contribute to a sporting type of trial than application of the carefully thought-out guidelines spelled out by Congress under the Jencks Act. The courts do not permit such procedure and there is no reason why an administrative agency should not show a similar concern for the witnesses appearing before it.

There are one or two additional points which should be touched upon in passing. No one seriously disputes the accuracy of our

[1] The dissents insistence that such a danger is not inherent in administrative proceedings because no jury is involved ignores the fact that the Jencks Act applies equally to jury and nonjury criminal trials.

attorneys' field reports for the purposes for which they are written, namely, to give the Commission information on which it may act. The same is also true of the reports of the agents of the Federal Bureau of Investigation whose reports must also, of course, meet the highest standards of probity and accuracy. Nor would anyone question that the Internal Revenue Service relies on the reports of its agents. Yet, the Court in *Palermo*, in connection with an Internal Revenue agent's memorandum of a conference with a witness, expressly recognized the Congressional preoccupation with the unfairness of allowing the defense to use statements to impeach the witness which could not fairly be said to be the witness' own, rather than the product of the investigator's selections, interpretations and interpolations.[2] Why, on this issue, should a differentiation be made between the attorneys of the Federal Trade Commission, agents of the Federal Bureau of Investigation or agents of Internal Revenue?

No respondent in these cases has been, nor should be, deprived of access to prior statements of witnesses necessary for its defense, and such access each will have. Neither the law nor fairness demands more.

I concur in the decisions of the majority in *Inter-State Builders, Inc.*, Docket No. 8624 [p. 1152 herein], and *L. G. Balfour*, Docket No. 8435, decided today [p. 1118 herein].

ORDER RULING ON INTERLOCUTORY APPEAL

This matter is before the Commission upon complaint counsel's interlocutory appeal from the hearing examiner's order of September 29, 1965, directing that certain interview reports be turned over to respondents. The Commission, upon consideration of the appeal and respondents' answer in opposition thereto, has determined that the order should be vacated and the proceeding remanded to the examiner for action consistent with the views expressed in the accompanying opinion. Accordingly,

*It is ordered,* That the hearing examiner's order of September 29, 1965, be, and it hereby is, vacated.

*It is further ordered,* That the proceeding be, and it hereby is, remanded to the hearing examiner for further action consistent with the views expressed in the accompanying opinion.

Commissioner Elman dissented and has filed a dissenting opinion. Commissioner MacIntyre concurred and has filed a separate concurring statement.

[2] In the Commission's own proceedings, take, as an example, the case where one of our attorneys interviews a number of witnesses at once. The resulting report would probably consist primarily of the attorney's impressions and evaluations of what went on at the session, and be more in the nature of reporting on an event rather than a recording of the persons' statements.

# INTER-STATE BUILDERS, INC., ET AL.

*Docket 8624. Order and Opinions, April 22, 1966*

Order vacating initial decision and remanding proceeding to the hearing examiner for him to review the interview reports of witnesses and determine whether or not portions of the reports should be made available to respondent's counsel under the Jencks rule.

## OPINION OF THE COMMISSION*

BY JONES, *Commissioner:*

The complaint charges that Inter-State Builders, Inc., a corporation, and Milton S. Gottesman, who controls and directs the acts and practices of said corporation, violated Section 5 of the Federal Trade Commission Act by making certain misrepresentations in connection with the sale and distribution of aluminum and insulated siding products.

In his initial decision, the hearing examiner sustained the allegations of the complaint and found that respondents had violated Section 5 as charged.

Respondents have appealed from the initial decision, urging among other things that the hearing examiner erred in refusing at the hearing to inspect certain Commission interview reports prepared by Commission investigators recounting interviews with the consumer witnesses who testified at the hearing on behalf of the Commission to determine whether or not such reports were required to be made available to the respondents for the purpose of cross-examining and impeaching such witnesses. Respondents maintain that the examiner should have ordered that the reports be made available if they were "written by the witness or, if written by another, [were] approved or adopted by the witness" or were "verbatim transcriptions of witnesses' statements" and specifically urge that the Commission apply "the criteria of the Jencks statute" (Respondents Brief on Appeal, pp. 11, 12).

It is our view that the hearing examiner misconceived the proper rule to be followed in considering respondents' counsel's request for production of prior statements made by the witnesses called by complaint counsel and that his refusal to inspect the interview reports in order to determine whether they came within the Jencks rule requiring production of certain types of pretrial statements given by witnesses to the Government constituted

*For dissenting opinion of Commissioner Elman and concurring statement of Commissioner MacIntyre in this case, see consolidated opinion and statement *In the Matter of L. G. Balfour Co.*, Docket No. 8435, pp. 1128, 1149 herein.

error requiring a remand of this case to the examiner with instructions to reopen the hearing and to reconsider this issue in the light of this opinion.

In view of our disposition of this ground of respondents' appeal, we do not address ourselves to the remaining issues raised by respondents on this appeal.

## I

### *The Jencks Decision and Act*

On June 3, 1957, the Supreme Court handed down its landmark decision in *Jencks* v. *United States,* 353 U.S. 657, in which the Court held that the defendant was entitled to inspect all prior reports made to the F.B.I. by two witnesses, Ford and Matusow, whom the Government called during the trial concerning meetings about which they had testified at the trial. Ford had testified that his reports had been made "immediately following each meeting, while the events were still fresh in his memory. He could not recall, however, which reports were oral and which in writing" (p. 665). Matusow testified that he had made both oral and written reports to the F.B.I. The Supreme Court stated:

> We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F.B.I., touching the events and activities as to which they testified at the trial. We hold further that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for the purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less (pp. 668–669).

Thus, the rule laid down in the *Jencks* case by the Supreme Court was that for purposes of cross-examination, a defendant is entitled to the production of any statements made to the Government by the witness in writing or, when orally made, as "recorded" by the Government agent.

Shortly after the *Jencks* decision the rule laid down by that decision was codified in statutory form in what is known as the Jencks Act, 18 U.S.C. 3500. In a case decided after the *Jencks* case, but prior to the statute, *United States* v. *Anderson,* 154 F. Supp. 374, 375 (E.D. No. 1957), the Court held that a witness' statement under the *Jencks* case

> * * * includes only continuous, narrative statements made by the witness recorded verbatim, or nearly so, by persons acting for the United States, and does not include notes made during the course of an investigation (or

reports compiled therefrom) which contain the subjective impressions, opinions or conclusions of the person or persons making such notes.

The report of the House Managers of the Jencks bill, signed by all of the House Conferees, stated that the provisions of the bill were "in line with the standard enunciated" in the *Anderson* case. H. R. Rep. No. 1271, 85th Cong., 1st Sess. 3, quoted in *Palermo* v. *United States,* 360 U.S. 343, App. B, p. 359 (1959).

The Jencks Act provides as follows:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term statement, as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. (Added Pub. L. 85–269 Sept. 2, 1957, 71 Stat. 595.)

One of the reasons motivating Congress to codify the Supreme Court's decision in *Jencks* was its concern to reaffirm the basic *Jencks* principle but to protect Government files from unreasonable and unwarranted demands and to make certain that the rule laid down in the *Jencks* decision would not be indiscriminately extended to require production of agents' summaries of interviews regardless of their character or completeness. *Palermo* v. *United States,* 360 U.S. 343, 350, 365 (1959); *Campbell* v. *United States I,* 365 U.S. 85, 92 (1961); *Johnson* v. *United States,* 269 F. 2d 72, 74 (10th Cir. 1959); *Communist Party of the United States* v. *Subversive Activities Control Board,* 254 F. 2d 314, 325 (D.C. Cir. 1958). Congress in enacting the Jencks Act, was concerned lest the Courts give an "overly expansive" reading to the *Jencks* case. The Supreme Court pointed out in *Palermo* that:

Not only was it strongly feared that disclosure of memoranda containing the investigative agent's interpretations and impressions might reveal the inner workings of the investigative process and thereby injure the national interest, but it was felt to be grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations and interpolations (p. 350).

In general, the Courts in applying the Jencks rule as codified in the Act have sought to adopt a common sense approach to the definition of what constitutes a Jencks "statement" so as to require production of what is clearly the witness' words and to keep out of evidence anything which is merely an agent's summary of a witness' words.

In *Palermo* v. *United States,* 360 U.S. *supra* at 352, the Supreme Court stated that the touchstone of the statutory definition of a "statement" was Congress's clear intent "that only those statements which could properly be called the witness' own words should be made available to the defense for purposes of impeachment." The Court went on to point out that:

It was important that the statements could fairly be deemed to reflect fully and without distortion what had been said to the government agent. Distortion can be a product of selectivity as well as the conscious or inadvertent infusion of the recorder's opinions or impressions. It is clear

from the continuous congressional emphasis on "substantially verbatim recital," and "continuous, narrative statements made by the witness recorded verbatim, or nearly so * * *," see Appendix B, post 79 S. Ct. page 1228, that the legislation was designed to eliminate the danger of distortion and misrepresentation inherent in a report which merely selects portions, albeit accurately, from a lengthy oral recital. Quoting out of context is one of the most frequent and powerful modes of misquotation. We think it consistent with this legislative history, and with the generally restrictive terms of the statutory provision, to require that summaries of an oral statement which evidence substantial selection of material, or which were prepared after the interview without the aid of complete notes, and hence rest on the memory of the agent, are not to be produced. Neither, of course, are statements which contain the agent's interpretations or impressions (pp. 352–53).

The Courts have held that the Jencks Act requirement that transcriptions of oral statements shall be made "contemporaneously" does not mean "simultaneously" (*United States* v. *McKeever,* 271 F. 2d 669, 675 (2nd Cir. 1959) and *United States* v. *Waldman,* 159 F. Supp. 747, 749 (D.N.J. 1958)). Thus, in the *Waldman* case, it was held that the transcription which was made while the agent's "memory was fresh" from notes taken while the agent was talking to the witness constituted a contemporaneous transcription.

The Courts have further held that a "substantially verbatim recital" of an oral statement does not mean "precisely verbatim" (*United States* v. *McKeever, supra,* and *Williams* v. *United States,* 338 F. 2d 286, 288 (D.C. Cir. 1964)) and that a statement may be "substantially verbatim" even though it is made in the third person. *Williams* v. *United States, supra.* Furthermore, variances such as "grammatical and syntactical changes, rearrangement into chronological order, [or] omissions [or] additions of information immaterial for impeachment purposes" will not prevent a transcription from being "substantially verbatim." *Campbell* v. *United States II,* 373 U.S. 487, 495, fn. 10 (1963); *United States* v. *Aviles,* 337 F. 2d 552, 558 (2nd Cir. 1964). A summary of an oral statement, however, is not considered to be a substantially verbatim transcription. In *Palermo* v. *United States,* 360 U.S. 343 (1959), the Court held that a 600-word summary of a 3-½ hour conference was not an oral statement within the meaning of the Act.

In *United States* v. *McKeever, supra,* the Court suggested that certain factors be considered in determining whether or not a statement is substantially verbatim. These were: (a) the length of the report in comparison to the length of the interview, (b) the lapse of time between the interview and its transcription

and (c) the extent to which the report conforms to the language of the witness. In *Williams* v. *United States, supra,* the following additional guidelines were proposed by the Government: (d) the appearance of the substance of the witness' remarks, (e) the use of quotation marks and (f) the presence of comments or ideas of the interviewer.

With respect to written statements, the Supreme Court has held that an interview report prepared from notes which have been read back to and approved by a witness constitutes a "written statement" within the meaning of Subsection (e)(1) of the Jencks Act even though the report was made seven hours after an interview. *Campbell* v. *United States,* 373 U.S. 487 (1963).

## II

### *Applicability of the Jencks Decision And Act to Administrative Proceedings*

Prior to the *Jencks* decision, defendants in civil or administrative actions were generally denied witnesses' statements made to attorneys or investigators acting on behalf of plaintiffs in the course of their pretrial investigation and preparation of the case either on the ground that they constituted the attorney's work product or, when the plaintiff was a Government agency, on the additional grounds of privilege or confidentiality of Government files. See *N.L.R.B.* v. *Quest-Shon Mark Brassiere Co.,* 185 F. 2d 285, 289 (2nd Cir. 1950); *United States* v. *Deere,* 9 F.R.D. 523, 527–28 (D. Minn. 1949); *Alltmont* v. *United States,* 177 F. 2d 971 (3rd Cir. 1949), *cert. denied,* 339 U.S. 967; *United States* v. *Kelsey-Hayes Wheel Co.,* 15 F.R.D. 461, 462 (E. D. Mich. 1954); *United States* v. *Shubert,* 11 F.R.D. 528, 539 (S.D.N.Y. 1951).

The basis for the denial of production insofar as it was grounded on privilege or confidentiality rested mainly on the Court's concern not to reveal unduly the identity of informants and on its general concern with maintaining confidentiality of Government files. See *United States* v. *Deere, supra* at pp. 525–527 and *United States* v. *Kelsey-Hayes Wheel Co.,* 15 F.R.D. 461, 463–64 (E.D. Mich. 1954). As the court in *Kaiser Aluminum & Chemical Corp.* v. *United States,* 157 F. Supp. 939, 945–46 (Ct. Cl. 1958) noted, an important public policy consideration underlying the doctrine of executive privilege is to encourage the frank and open exchange of views and disagreements between government employees and their superiors which might be dis-

couraged if government files were indiscriminately open to inspection by litigants. See also *N.L.R.B.* v. *Botany Worsted Mills*, 106 F. 2d 263, 267 (3rd Cir. 1939) and *Machin* v. *Zuckert*, 316 F. 2d 336, 339 (D.C. Cir. 1963).

The bases for the denial of production of such statements on the ground that they represented the attorneys work product are elaborated in great detail in the Supreme Court's decision in *Hickman* v. *Taylor*, 329 U.S. 495 (1947). In that case, involving a private civil action for damages, plaintiff sought production of both signed and unsigned statements of certain witnesses taken by defendants' attorney in the course of preparing his case for trial.

The Supreme Court stated that the basic question at stake was whether any of the discovery devices "may be used to inquire into materials collected by an adverse party's counsel in the course of preparation for possible litigation" (page 505). The Court pointed out:

> Examination into a person's files and records, including those resulting from the professional activities of an attorney, must be judged with care. It is not without reason that various safeguards have been established to preclude unwarranted excursions into the privacy of a man's work. At the same time, public policy supports reasonable and necessary inquiries. Properly to balance these competing interests is a delicate and difficult task (p. 497).

After weighing the purported need for the documents in question against the importance of preserving the freedom of the attorney to develop his case, the Supreme Court concluded that plaintiff had failed to make any showing which would justify the court in ordering the production of either the signed or the unsigned statements which had been gathered by defendants' attorney. In reaching this conclusion, the Court discussed at some length the importance of maintaining intact the work product rule and pointed out:

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though

roughly termed by the Circuit Court of Appeals in this case as the "Work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served (pp. 510–511).

The Court refused to entertain plaintiff's argument that due process required that he be given full discovery into all relevant material which in this case included signed statements of eye witnesses to the accident which was the subject of the lawsuit regardless of whether the statements had been gathered by the attorney.

Recognizing that the work product rule must bend where substantial prejudice or injustice would result, the Supreme Court discussed the circumstances under which some discovery of an attorney's files might be permitted:

We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty. Were production of written statements and documents to be precluded under such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning. But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order. That burden, we believe, is necessarily implicit in the rules as now constituted (p. 394).

However, with respect to oral statements the Court felt that they should *never* be produced:

But as to oral statements made by witnesses to Fortenbaugh, whether presently in the form of his mental impressions or memoranda, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production. The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks.

Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer (pp. 512–513).

The Court concluded that:

* * * [U]ntil some rule or statute definitely prescribes otherwise, we are not justified in permitting discovery in a situation of this nature as a matter of unqualified right. When Rule 26 and the other discovery rules were adopted, this Court and the members of the bar in general certainly did not believe or contemplate that all the files and mental processes of lawyers were thereby opened to the free scrutiny of their adversaries. And we refuse to interpret the rules at this time so as to reach so harsh and unwarranted a result (p. 514).

It is against this background that the applicability of the Jencks rule to civil and administrative proceedings must be viewed.

The courts which have considered the question of the applicability of the principles announced in the *Jencks* decision to administrative proceedings have uniformly held that the Jencks rule is applicable to these proceedings because as the Supreme Court stated in *Jencks,* "justice requires no less." Thus, in *N.L.R.B.* v. *Adhesive Products Corporation,* 258 F. 2d 403, 408 (2nd Cir. 1958), the Court stated that "logic compels the conclusion that [the rules set forth in the *Jencks* decision] are applicable to an administrative hearing." In *Great Lakes Airlines, Inc.* v. *C.A.B.,* 291 F. 2d 354, 364 (9th Cir. 1961), the Court declared that it has been "judicially recognized" that "the underlying principle of the Jencks case and statute * * * is generally applicable in administrative proceedings * * *." In *Harvey Aluminum Co.* v. *N.L.R.B.,* 335 F. 2d 749, 753 notes 9 and 10 (9th Cir. 1964), the Court refused to decide "whether the compulsion of the rule is constitutional or statutory," but held nevertheless that the "underlying principle of Jencks must be followed" by an administrative agency (p. 753, n. 10). This same principle was enunciated by the Court in *Communist Party of the United States* v. *Subversive Activities Control Board,* 254 F. 2d 314, 327–328 (D.C. Cir. 1958), where the applicability of the Jencks Act to administrative proceedings was again affirmed, the Court pointing out that it reached this result because:

"the laws under which these agencies operate prescribe the fundamentals of fair play." Their proceedings must "satisfy the pertinent demands of due process."

See also *Basic Books, Inc.* v. *F.T.C.,* 276 F. 2d 718 (7th Cir. 1960); *N.L.R.B.* v. *American Federation of Television and Radio*

*Artists,* 285 F. 2d 902, 903 (6th Cir. 1961); *Schere* v. *Christenberry,* 179 F. Supp. 900, 905–906 (S.D.N.Y. 1959), *Carlisle* v. *Rogers,* 262 F. 2d 19 (D.C. Cir. 1958).

Thus, the courts in applying the Jencks rule to administrative proceedings have followed the principles of the Supreme Court's decision in the *Jencks* case. Recognizing that the Jencks Act merely represents a codification of those principles and is expressly applicable only to criminal cases, the courts have nevertheless followed substantially the same tests laid down by the Jencks Act as applied by the courts to criminal cases since the *Jencks* decision did not define the types of oral statements to be produced beyond describing them as those which were "recorded" by the Government agent. As the Court in the *Harvey Aluminum* case stated in applying the Jencks principle to N.L.R.B. proceedings: just as "Congress did in enacting the Jencks Act" an administrative agency may adopt reasonable rules implementing this principle "so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest" (335 F. 2d 749, 753, n. 10). No court has suggested that a more expansive test should be applicable to civil or administrative proceedings than is now applicable to criminal cases. Indeed, the Court of Appeals for the District of Columbia made it quite clear in its opinion in *Communist Party of the United States* v. *Subversive Activities Control Board,* 254 F. 2d *supra* at 325, that it would be improper to go beyond the confines of the *Jencks* case in considering the production of witnesses' statements to administrative proceedings:

> The new act of Congress requires the production of "statements" but defines statements as those written, signed or approved by the witness himself, or "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital * * * recorded contemporaneously." *Surely the executive files of the Government are not to be invaded more easily and with less basis in a regulatory administrative proceeding of this sort than they would be in a criminal prosecution* (p. 325). (Emphasis added.)

In appeals from administrative decisions, as in criminal cases, the courts have sought to distinguish carefully between those witnesses' words and those which represent merely attorneys' summaries of such statements and have confined production of witnesses' oral statements solely to written statements which reflect substantially the witnesses' own words. *Harvey Aluminum Co.* v. *N.L.R.B., supra* at 753; *Communist Party of the United States* v. *Subversive Activities Control Board, supra* at 325, and *Basic Books, Inc.* v. *F. T. C., supra* at 722.

The Commission has already recognized in general the applicability of the Jencks rule to its proceedings.[1]

Applying these considerations and legal principles to the instant case, we hold that respondents were correct in their contention that the Jencks rule is applicable to administrative proceedings and that under this rule any written statements in the possession of the Commission prepared or approved by the witness relating to the subject matter of such witness' testimony must be produced for inspection by respondents' counsel for possible use in cross-examination. We hold further that any written statement in the Commission's possession which represents a substantially verbatim transcription of any oral statements given to a Commission investigator by such witness must also be made available to respondents' counsel under the same circumstances.

In determining whether a statement represents a substantially verbatim transcription of the witness' oral words as recorded by the Government investigator, it is clear that the hearing examiner must be careful to apply the criteria laid down by the Supreme Court in the *Palermo, Campbell* and other related cases so as to require production of what can fairly be said to reflect a witness' own words and to avoid production of what is in fact an attorney's summary of a witness' remarks.

As the Supreme Court's decisions in the *Jencks, Hickman* v. *Taylor* and *Palermo* cases make clear, the problems raised in determining the discovery rights of defendants in this area of witness' statements are exceedingly complex.

On the one hand, there is the basic consideration of fairness to administrative respondents. While the problem is of course more acute in criminal proceedings, where defendants have more limited discovery rights than are available in civil or administra-

[1] *Ernest Mark High*, 56 F.T.C. 625 (Dkt. 6940, 1959). However, in the cases in which the Commission has adverted to the Jencks rule it has denied production of interview reports to respondents on a variety of grounds which have been sustained by the Court where appeals on the issue were taken. *Pure Oil Co.*, 54 F.T.C. 1892, 1894–95 (Dkt. 6640, 1958) (production of interview report refused on the grounds that it was "privileged"; it was not "used in any way during the course of the hearings" and it was hearsay since it was "prepared not by the witness but by an outside party"); *Basic Books, Inc.*, 56 F.T.C. 69, 85–86 (Dkt. 7016, 1959), aff'd. 276 F. 2d 718 (7th Cir. 1960) (production of witnesses' statements denied because "there was no evidence in the record of the existence of any written statements of any of the witnesses" and because an oral report by an attorney-examiner cannot be successfully used to impeach the testimony of a witness); *Bakers Franchise Corp.*, 56 F.T.C. 1636 (Dkt. 7472, 1959) (production of reports and questionnaires denied because interview reports by Commission attorneys are privileged as "work product"; each witness was subjected to cross-examination; and the investigating attorney fully described the substance of his interviews during the hearing); *Western Radio Corp.* (Dkt. 7468, 1963), aff'd. 339 F. 2d 937 (7th Cir. 1964) (reversal of hearing examiner's denial of request for examination of test report refused because report was skeletal and thus of no value for impeachment purposes and because no reliance was placed by the Commission on the testimony to which it related).

tive proceedings and where the defendants' rights in jeopardy in such cases may go to the essence of an individual's liberty, nevertheless, as the courts and the Commission have asserted many times, questions of fairness to civil defendants or respondents are basic to the administration of justice. The need for steadfast and zealous protection of defendants' or respondents' rights is not only the concern of the courts, but, where the Government is the moving party, it also becomes of equal concern to the administrative agency.

On the other hand, there are equally important policy considerations involved in ensuring that the fact-finding process will be advanced and not impeded in its fundamental objective of ascertaining truth and that attorneys, whose proper performance of their duties is also of fundamental concern to the proper functioning of our judicial system, be protected from any undue interference in the discharge of their duty to advance and protect the interests of their clients, *e.g., Hickman* v. *Taylor, supra.*

In applying these general policy considerations to the issue at hand, we believe that the distinction drawn by the courts in prior cases, criminal and administrative, between requiring production of written or oral statements given by witnesses and refusing production of attorney's summaries of such statements is essential and that the same distinctions must be drawn in Commission hearings as well. The vital importance of preserving inviolate the work product of attorneys so eloquently detailed by the Supreme Court in its opinion in *Hickman* v. *Taylor* applies with even greater force to the investigatory work of Government attorneys who are engaged not only in the representation of their client, but in the protection of the public interest.[2]

It is obvious that the Supreme Court's concern that an attorney not be inhibited in the proper performance of his duties is of particular relevance and significance in the case of Government attorneys whose proper discharge of duties is essential not only to a single client, but to the general public whose interests are served by the efficient and effective administration of the Commission statutes. Commission attorneys almost always interview industry members, customers, suppliers and the like in the course of their investigations of whether violations of law have taken place. The attorney's investigating reports based on these interviews and on documents and other pertinent data are basic to the evaluation of the case which must be made, first by his

[2] See *United States* v. *Deere & Co.*, 9 F.R.D., *supra* at 527–528, and *United States* v. *Kelsey-Hayes Wheel Co.*, 15 F.R.D., *supra* at 462.

superiors, and ultimately by the Commission. The considerations noted by the Supreme Court for not in any way hampering the attorney in his work are thus of vital importance with respect to the work of the Commission attorney whose work represents the basis for the Commission's decision as to whether a law violation has taken place or not, and if so, what enforcement steps should be taken. The Supreme Court's expressed fears as to the effect on the caliber of an attorney's work of undue liberality in permitting access of opposing counsel into the attorney's files are, therefore, of even greater concern in the case of Government attorneys, where the potential effects of unreasonable rules in this area may be to hamper the proper investigation and evaluation of alleged law violations.

The Supreme Court's concern in *Palermo* with the unfairness and distortions of the fact-finding processes of trial which use of attorneys' summaries of a witness' statements could generate applies with equal force to Commission hearings before trial examiners. In *Palermo,* the Court emphasized Congress' concern in enacting the Jencks statute that it would be "grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations and interpolations." 360 U.S. *supra* at 350. The unfairness inherent in the use of summaries is as present in Commission hearings before an examiner as it is in a criminal case which may or may not be conducted before a jury.

There is little doubt that any attorney's summaries of interviews which he conducts will inevitably, by the very fact of selection, omission and emphasis, reflect the attorney's own state of knowledge at the time of the interview and also his own thoughts and subjective impressions of what he is being told influenced as well by the type and form of the questions which he posed during the interview. To this extent, his summary may more accurately reflect his own views of the case and state of knowledge of the issues at the time of the interview than it will of the witnesses' state of knowledge. Summaries prepared earlier in the case may be less representative of the witnesses' state of knowledge than those prepared at a later stage in the case. If respondents were given access to all these summaries for use in cross-examination, witnesses might well be far more confused and misled as to what they had thought or known at the time of the interview than their present recollection at the time of trial and their testimony as a result far less accurate than if counsel on

both sides were required to probe the witnesses' memory without confronting the witness with what in many instances might be inaccurate and misleading summaries. Confronted with an attorney's summary purporting to reflect his remarks, the witness might be caused to retract or change his statement because of what he feels may have been a prior inconsistent statement by him. If the prior statement was in fact made by him no unfairness could result; but if the prior statement was an incorrect interpretation of his remarks, he might well be influenced to defer to the views of the examining attorney and modify his remarks to the obvious detriment of truth rather than to its advancement, which is the purpose of all fact-finding and discovery.

Moreover, use of attorney's summaries of witnesses' statements could easily convert the fact-finding process from a trial of the issues into a trial of the competency and accuracy of the work of the attorney. Such a result would not only demean the professional status of the attorney but it would disrupt and confuse the hearing by injecting into it irrelevant side issues.

For all of the foregoing reasons, we conclude that the Jencks rule should be applied to Commission proceedings but that the principles of that case should not be extended beyond the rule laid down in that case and subsequently codified in the Jencks Act. We should make clear that in reaching this conclusion we are in no way suggesting that we are laying down here in this case any absolute rule respecting all materials which may be contained in Government files or in attorneys' interview reports. In some situations a litigant's need for data in Government files may be so compelling and the adverse effects of disclosure so minimal, or at least relatively so, that disclosure would be appropriate. We do not pass on this question since it is not involved in this case. We hold only that with respect to Jencks statements, respondents shall be entitled to inspect any written statement made by a witness to a Commission attorney or investigator or any written report or portions thereof which reflect in substantially verbatim form any oral statement given by the witness to such attorney or investigator but that any summaries of such statements made by the attorney or investigator should not be produced.

With respect to the timing of the production of Jencks statements, subsection (a) of the Jencks Act expressly provides that no statement or report made by a prospective Government witness to an agent of the Government shall be the subject of inspection "until said witness has testified on direct examination in the

trial of the case." Cases applying the principles of this statute to administrative proceedings have held that "Jencks statements" need not and should not be produced until after a witness has testified on direct examination. See *N.L.R.B.* v. *Vapor Blast Company,* 287 F. 2d 402, 407 (7th Cir. 1961); *N.L.R.B.* v. *Chambers Manufacturing Corporation,* 278 F. 2d 715, 716 (5th Cir. 1960); *Raser Tanning Company* v. *N.L.R.B.,* 276 F. 2d 80, 83 (6th Cir. 1960), *cert. denied,* 363 U.S. 830; *Local No. 320 International Union of Operating Engineers, AFL-CIO,* 150 N.L.R.B. No. 47 (1964); *Walsh Lumpkin Wholesale Drug Co.,* 129 N.L.R.B. No. 31 (1960).

We believe that this procedure which has been followed in criminal cases and in administrative proceedings as well without any undue delay or unfairness resulting to defendants should be applicable to Commission hearings. It is clear that the Jencks rule was designed solely as a rule to ensure that defendants would be fully protected in their rights of cross-examination. The rule was never envisaged as a general rule of discovery. Viewing the rule in this manner it is clear that demands for production of Jencks statements in advance of a witness' testimony would be premature. In some instances the witness might not ultimately be called upon to testify. In other instances a witness' testimony might be unrelated to prior statements which he made to the Government. It is obvious, therefore, that the rules laid down by the Supreme Court and Congress for the production of Jencks statements apply with equal force to Commission hearings.

There is an additional consideration of particular pertinence to Commission hearings which underlies our conclusion that production of these statements should not be made until after the witness has in fact testified. Persons interviewed by Government attorneys in Commission investigations are frequently customers, suppliers, or even competitors of the proposed respondent with interests which might be adverse to respondent and which could be injuriously affected if respondent was totally free at any time to discover what they have told Commission counsel. Indeed, if any general access to statements of such interviewees was unnecessarily granted they might choose to remain silent rather than risk any adverse reaction on the part of the respondent to their having talked to Commission investigators. This could have serious and lasting effects on the Commission's ability to conduct effective investigations of its cases. Since the Commission depends on investigations to discharge its statutory

obligations of law enforcement, and since the persons to whom it must go for information may be subject to economic coercion or intimidation, we must strike a balance between those needs and the respondent's legitimate interest in perparing for trial. Respondent is at all times free to interview any and all industry members who in its judgment have facts which bear on the issues in the complaint and on its defense. Thus, respondent has no need to preparing its case for trial to have access to any statements which Commission counsel has procured in the course of his investigation. By the time pretrial under Commission rules has advanced to the point of exchanging witnesses' names, respondent will have in most cases substantially completed his own trial preparation, formulated his defenses and probably even planned his trial strategy. Moreover, he is entirely free to conduct such interviews with or about such designated witnesses as in his judgment are necessary. What the witness may have told Commission counsel is still not necessary for respondent's trial preparation even at this point. Moreover, the witness, though listed by counsel, may never even be called to testify. It would not appear, therefore, that even at this point in pretrial does respondent have any need for Jencks statements. Indeed, respondents themselves in their brief recognized that the use of Jencks statements "is for impeachment only *after* a witness has testified" and need not be produced in pretrial discovery (Respondents' Reply Brief, p. 6). (Emphasis in original.)

For all of these reasons, we conclude that Jencks statements may not be demanded until after the witness in question has in fact testified on direct examination.

## III

### *Application of the Jencks Rule to Respondents' Demand*

At the hearing, which took place in Cincinnati between October 13 and October 16, 1964, complaint counsel called 19 witnesses, consisting of the individual respondent, Milton S. Gottesman, and 18 consumers who had purchased respondents' products. Subsequent to the testimony on direct examination of the first witness, Mr. Gottesman, the following discussion appears in the transcript (Tr. 100–102):

> Mr. Ostrander [respondents' counsel] . . . I was going to, if I could, before recess, move that any statements which the examination of this witness was based now that the testimony is completed be made available to me, prior statements of Mr. Gottesman that were made to other Government attorneys that conducted this investigation which we don't have.

Mr. Whitehead: The only thing that I have that I am reading from is the interviewer's report. Of course, that's privileged.

Hearing Examiner Poindexter: Counsel says he has none.

Mr. Ostrander: Well, as I understand the rule, your Honor, I think perhaps I am entitled to look over what he has.

Hearing Examiner Poindexter: You mean you are entitled to look over the investigating—Commission's investigator's report to the Federal Trade Commission of his interview with the respondent?

Mr. Ostrander: I think there was some direct quotes here taken and I think we have a right to have this made available to us to examine.

Mr. Whitehead: I object.

Hearing Examiner Poindexter: Just a minute, one at a time, please. Counsel supporting the complaint says he has no written statement by the witness, is that correct?

Mr. Whitehead: I have none.

Hearing Examiner Poindexter: All right. Now, he says he does have a statement by the Commission's investigator who interviewed Mr. Gottesman. Now, is that the statement that you are asking to be produced?

Mr. Ostrander: Yes, if there is a narrative statement of their conversation which I presume that's what he is talking about I think that I should be entitled to look at that narrative statement.

Hearing Examiner Poindexter: Well, you are not entitled to see that, Mr. Ostrander, and the request will be denied.

Mr. Ostrander: Well, your Honor, I don't think that I am asking for the work product here and I know that we are not. . . .

Hearing Examiner Poindexter: Counsel states that it is a report by the Commission investigator of his interview with Mr. Gottesman. Now, if that's not a work product I don't know what you would call it and that is privileged and not subject to examination by Respondent's counsel.

It's not a written statement by the witness.

Mr. Ostrander: Note my exception.

Respondents' counsel made no attempt to examine any pretrial statements with respect to the three witnesses who immediately followed Mr. Gottesman or even to establish that these witnesses had made statements to any agent of the Commission.

The fifth witness was another consumer, Mrs. William D. Ross. At the conclusion of her testimony on direct, the following colloquy took place (Tr. 168–171):

Mr. Whitehead: All right, I have no further questions.

Hearing Examiner Poindexter: You wish to cross-examine, Mr. Ostrander?

Mr. Ostrander: Yes. First I would like to know if the Government has a statement taken from this witness during the examination and if so I would like to see it.

Mr. Whitehead: I have nothing. The field report of the investigating attorney is all I have.

Mr. Ostrander: Which I presume does not include any statements by the witness?

Mr. Whitehead: No written statement by the witness. The interviewer's report in the terminology of the investigating attorney.

Mr. Ostrander: Well, again, your Honor—

Hearing Examiner Poindexter: Do I interpret your statement, Mr. Whitehead, the witness, Mrs. Ross, has given no written statement to the Federal Trade Commission?

Mr. Whitehead: That's right, your Honor.

Hearing Examiner Poindexter: And you have none in your possession?

Mr. Whitehead: That's right, your Honor.

Mr. Ostrander: Well, I would like to ask one additional question. Did Mrs. Ross give a statement that the agent of the Federal Trade Commission then wrote down?

Hearing Examiner Poindexter: I didn't understand your question.

Mr. Ostrander: Well, I want to be sure that we aren't just concerning ourselves with something that might be in her handwriting that she personally wrote out. It might be that she dictated a statement to an agent of the Federal Trade Commission.

Hearing Examiner Poindexter: If she did, so what? You have spent time and found that she gave no written statement to the Commission. The Commission has no written statement according to counsel.

Mr. Ostrander: I am not questioning counsel, I just want to be sure that it isn't her statement written by someone else.

Hearing Examiner Poindexter: Well, counsel, the investigator I presume that he wrote—he questioned her and wrote down what she said or tried to, but you are not entitled to see that.

Mr. Ostrander: I think we are if it's in her language, if it's something that she dictated.

Hearing Examiner Poindexter: Well, I presume that he did his best to state what she said in her language. I assume that he did that.

Mr. Ostrander: If so I think we are entitled to that:

Hearing Examiner Poindexter: Well, I ruled yesterday and you are not entitled to see that. That's the work of the Commission investigator, Mr. Ostrander.

Mr. Ostrander: I am sure the Court will bear with me if I prepare my record as I think it has to be prepared.

Hearing Examiner Poindexter: Well, let's not go through this on every witness. You are not entitled to see it. There is no need to spend all this time on something that I previously ruled on and I thought we had it clear.

Mr. Ostrander: Well, as it relates to different witnesses I want to be sure the situation was the same, but I won't come back to it again.

Subsequently, complaint counsel called 14 additional consumer witnesses. No further attempts were made by respondents' counsel to obtain prehearing statements.

Respondents urge that the examiner erred in refusing to inspect the reports made by the Commission's investigators of interviews with Mrs. Ross, as well as with the other consumer witnesses called by complaint counsel at the hearing. Respondents in this appeal have not pressed their demand with respect to the pretrial statements made by respondent Milton S. Gottesman but have limited their request to the consumer witnesses called by complaint counsel.

Complaint counsel argues that the hearing examiner's ruling was not in error since respondents' counsel did not present his demand in accordance with the requirements of the Commission's rules as reflected in Rule 1.134 in that respondents' request should have been directed to the Commission and should have set forth good cause; second, that the reports demanded by respondents were attorney's work product and hence not producible; third, that in view of the exhaustive cross-examination of the witnesses in question by respondents' counsel, production of the reports would be of no conceivable value to him; and finally that no proper foundation had been laid for the documents demanded and hence that the demand was invalid.

We find no merit in any of these contentions put forward by complaint counsel.

Complaint counsel argues that since interview reports constitute confidential information within the meaning of Rule 1.133 (see *Bakers Franchise Corporation,* 56 F.T.C. 1636 [1959]), respondents were required under Rule 1.134 to make a request to the Commission for the interview reports.

There is no support either in the express language of the Commission's rules or in considerations of practicality for complaint counsel's interpretation of these two rules.

The procedure provided for in Rule 1.134 respecting applications for confidential data to be addressed to the Commission is not applicable to "Jencks statements" since these statements are clearly within the exception provided in Rule 1.133(a) which excepts from confidential status documents "whose use may become necessary in connection with adjudicative proceedings." There is little doubt that possible Jencks statements are "necessary" to respondent for use in cross-examination and thus come within this exception clause. This would appear to have been the conclusion of the Commission in *Ernest Mark High,* 56 F.T.C. 625, 633 (1959), where the Commission stated "that where there is doubt as to the nature of the report, the examiner should inspect it and make a determination."

This conclusion as to the applicability of the exception clause to Rule 1.133 to "Jencks statements" is reinforced by the possible invalidity of the Rule 1.134 procedure if it were to be applied to such statements and by the impracticability and unfeasibility of using this procedure to secure copies of such statements for cross-examination purposes in the middle of a hearing.

The Ninth Circuit has held that an administrative agency "may not avoid [the Jencks rule] by adopting regulations incon-

sistent with its requirements." *Harvey Aluminum* v. *N.L.R.B.*, 335 F. 2d 749, 753 (9th Cir. 1964). One of the basic ingredients of the Jencks rule is that the statement is "to be turned over at the time of cross-examination" (*Palermo* v. *United States*, 360 U.S. 343, 345 (1959)) to "facilitate proper cross-examination," *United States* v. *Rosenberg*, 257 F. 2d 760, 763 (2nd Cir. 1958), *aff'd.* 360 U.S. 367 (1959); *Basic Books* v. *F.T.C.*, 276 F. 2d 718, 722 (7th Cir. 1960). A court might rule that delaying cross-examination pending submission of an application for production to the Commission and a ruling by the Commission does not constitute production at the time of cross-examination. However, of even greater importance is the delay in the hearing and the unfairness to complaint counsel which would result from such a procedure. Requiring such application to be addressed to the Commission would interrupt the hearings contrary to the intent of the Commission Rules 3.1 and 3.16(d), would inconvenience the witness, would present respondents from conducting an immediate cross-examination and might severely prejudice complaint counsel in that the delay would give respondent additional time to study and prepare for cross-examination and might therefore encourage him to make demands for production which he might not otherwise make. For all of these reasons, we hold that respondents' counsel was correct in directing his demand for Jencks statements to the hearing examiner and that the examiner should have called for the reports in question, examined them and should have held whatever hearings were necessary in order to establish whether any statements contained therein had been approved or adopted by the witness and the circumstance of the recording by the attorney in order to determine whether they are summaries or substantially verbatim transcriptions.

Complaint counsel's argument that respondents' demand must fail because the interview reports in question are privileged as attorney's work product was rejected implicitly by the Supreme Court in its *Jencks* decision and directly by all other courts in cases under the Jencks Act in which the issue has been raised. *United States* v. *Hilbrich*, 341 F. 2d 555, 557 (7th Cir. 1965); *United States* v. *Aviles*, 315 F. 2d 186 (2nd Cir. 1963), vacated and remanded *sub nomine Evola* v. *United States*, 375 U.S. 32 (1963), *aff'd. on remand*, 337 F. 2d 552 (1964), *cert. den.*, 380 U.S. 906 (1965); and *Saunders* v. *United States*, 316 F. 2d 346 (D.C. Cir. 1963), *cert. den.*, 377 U.S. 935.

In the *Saunders* case, the Court explained its reasoning in refusing to read the "work product" rule in the Jencks Act:

> The work product rule * * * protects the mental processes of the attorney * * * [I]t is possible to produce "statements" taken down by an attorney, and still preserve the sanctity of the attorney's work product. If a government attorney has recorded only his own thoughts in his interview notes, the notes would seem both to come within the work product immunity and to fall without the statutory definition of a "statement." But if the attorney has made only a substantially verbatim record of his interview, then, quite the contrary, his notes constitute a "statement" and include no protected material flowing from the attorney's mental processes. * * * If the notes contain both verbatim remarks of the witness and personal observations of the attorney, then paragraph (c) of the act requires that the district judge inspect the statement and excise the protected material if this is possible (pp. 349–350).

Thus, the Court in *Saunders* made very clear its view that Jencks constituted a limitation on the work product rule and not vice versa. In view of the limited nature of the Jencks rule, it is clear that the policy considerations underlying the work product rule which were so emphatically stressed by the Supreme Court in *Hickman* v. *Taylor* are still operative whenever Jencks statements are not involved. We hold that the same considerations are present in administrative hearings and that the work product rule must give way to the principles enunciated in the *Jencks* decision to the extent of statements which reflect in substantially verbatim form the words of the witness.

Complaint counsel's further contention in his brief that "nothing could be gained from further cross-examination with the aid of Commission interview reports," is equally without merit as a ground for sustaining the examiner's refusal to consider respondents' request for the production of statements. The Supreme Court in its decision in *Palermo* v. *United States,* 360 U.S. 343, 346 (1959) made it clear that its *Jencks* decision related solely to the production for impeachment purposes of specific statements relating to the subject matter of a witness' testimony after proper demand and not to their admissibility and that the trial court's duty was to determine whether Jencks statements existed and not to determine whether such statements were of "value" for impeachment purposes. Thus, any questions of "value" are irrelevant where in fact a Jencks statement exists.

Complaint counsel's final objection that respondents' counsel failed to make a proper demand or to lay an adequate foundation for his demand seems to us in the context of what transpired at this hearing to be without substance.

The courts have never imposed rigid requirements with respect to the form of demand which must be made. No "ritual of words" is stated to be required for the demand of Jencks statements.

*Howard* v. *United States,* 278 F. 2d 872, 874 (D.C. Cir. 1960). The reason for this flexibility was explained by the Court in *United States* v. *Aviles,* 315 F. 2d 186 (2nd Cir. 1963); vacated and remanded *sub nomine Evola* v. *United States,* 375 U.S. 32 (1963); aff'd. on remand, 337 F. 2d 552 (1964); *cert. denied,* 380 U.S. 906 (1965):

> Ours is an adversary system of criminal justice. It is not, however, a "game of verbal jackstraws," the object of which is to see whether the actions of either the Government or the defense can be pulled out from under the language of the applicable statutes, the demands of opposing counsel, or the orders of the court, without disturbing any of the latter. * * * Of course the Act does not require that demands for statements must be of precise nicety, and we are unwilling to hold that such requests be couched in formal or technical language" (pp. 190, 191).

Nevertheless, the courts have generally insisted that regardless of the form in which a demand for a "Jencks statement" is made, counsel must make some showing that a statement has been made to the Government or that a report of an interview with the witness has been prepared by a Government agent. *Ogden* v. *United States,* 303 F. 2d 724 (9th Cir. 1962); *Communist Party of the United States* v. *Subversive Activities Control Board,* 254 F. 2d 314 (D.C. Cir. 1958). Whether or not counsel must go further and introduce facts indicating that a statement fits within one of the definitions set forth in the Jencks Act would appear to depend on the type of statement requested. To form the basis for a written statement as defined in Section (e) (1) of the Jencks Act counsel must normally make some showing on cross-examination that the statement or report was prepared by or shown to and approved by the witness. *Ogden* v. *United States,* 303 F. 2d *supra* at 737; *United States* v. *Lamma,* 349 F. 2d 338 (2nd Cir. 1965). However, with respect to an oral statement within the meaning of Section (e) (2) of the Jencks Act, defendant is not usually required by the courts to attempt to establish that a substantially verbatim transcription was made of the statement. *Saunders* v. *United States,* 316 F. 2d 346, 349 (D.C. Cir. 1963), cert. denied, 377 U.S. 935. Thus, in the *Ogden* case, *supra,* one of the witnesses testified on cross-examination that he had been interviewed by F.B.I. agents and had observed them taking notes. The Court held that this testimony was sufficient to indicate the creation of an oral statement within the meaning of Section (e) (2) of the Jencks Act but that the defendant had not properly raised the issue under Section (e) (1) since he could have and did not explore the matter on cross-examination. The reason why different standards have

been applied with respect to oral and written statements was set forth in the *Lamma* decision at page 341:

> * * * [I]n the (e) (2) situation * * * defense counsel, unlike the court, has not seen the reports or notes, and is not in a position to formulate intelligent questions as to the circumstances surrounding the recording of the oral statement in order to determine whether a substantially verbatim recital exists. On the other hand, in the (e) (1) situation, when the issue is adoption or approval, the defense labors under no such disadvantage, for its lack of access to the document does not prevent defense counsel from asking the witness appropriate questions.

In the instant case, as noted above, respondents have limited their demand for prehearing statements to the 18 consumer witnesses. The only consumer witness with respect to whom a prehearing statement was directly requested by respondents during the hearing was Mrs. Ross, the fourth consumer witness. Respondents' counsel had made such a demand previously with respect to complaint counsel's first witness Milton Gottesman. On both occasions he was told flatly by the hearing examiner that he was not entitled to any interview reports and that he should not raise the issue again.

Complaint counsel had admitted at the hearing that an interview report was in existence with respect to the witness Ross, but did not disclose whether similar reports were available with respect to later consumer witnesses because of the hearing examiner's denial of counsel's request for Mrs. Ross' report and his admonition to counsel not to come back to the issue. Respondents' counsel did not make or attempt to make any showing that the report respecting Mrs. Ross was a substantially verbatim transcription of the witness' remarks or that she had adopted or approved it. Nor did he make any demands for possible Jencks statements of any of the other consumer witnesses called by complaint counsel.

The case at bar is in sharp contrast to *United States* v. *Lamma, supra,* where the Court, in holding that the trial judge had not erred in failing to conduct a hearing to determine adoption or approval, noted that the defense counsel had had "every opportunity" to explore the issue but had failed to do so.

In the instant case the examiner made his ruling denying counsel access to this report with such finality that respondents' counsel had no choice but to declare, as he did: "I won't come back to it again." As the Court declared in *Howard* v. *United States,* 278 F. 2d 872, 874 (D.C. Cir. 1960):

> Moreover, the court's hostility toward this entire line of questioning emphasizes the futility of efforts to further pursue the matter.

In view of the hearing examiner's attitude, we cannot now speculate as to what counsel might have done or inquired about had he not been so abruptly cut off. Nor can we hold that respondents have waived their right to statements with respect to the witnesses who were called after Mrs. Ross. The issue is less clear with respect to the three witnesses who preceded Mrs. Ross. Although the examiner had refused to order the production of reports with respect to the first witness, Milton S. Gottesman, he did not at that point permanently close the door to further requests as he later did at the conclusion of Mrs. Ross' testimony. Thus, there might be some basis for concluding that respondents were not concerned with gaining access to any previous statements which may exist with respect to these witnesses. Nevertheless, the point is not free from doubt on the record in this case.

In the light of the record in this case and the hearing examiner's erroneous conception as to the nature and scope of the Jencks rule, we hold that he erred in refusing to consider counsel's request for production of possible Jencks statements with respect to Mrs. Ross and the consumer witnesses who followed her. Since this case will have to be remanded to enable the examiner to consider this request in the light of this opinion, it would seem to be the preferable course for the examiner to consider the issue with respect to each of the consumer witnesses who preceded Mrs. Ross as well.

The final point to be considered is the procedure to be followed by the hearing examiner in making a determination as to whether or not a statement or report is a "Jencks statement." The initial step is for him to inspect the document *in camera*. He may be able to determine from its face whether it is a mere summary or has been approved by the witness. If it is unclear whether the document qualifies as a Jencks statement the examiner should on his own motion conduct a voir dire examination into the circumstances surrounding its making. At this hearing extrinsic evidence, including, where appropriate, testimony by the witness as well as by the person who transcribed the statement or made the report, may be introduced. *Palermo* v. *United States,* 360 U.S. 343 (1959) ; *Campbell* v. *United States,* 365 U.S. 85 (1961) ; *Campbell* v. *United States,* 373 U.S. 487 (1963). Thereafter the hearing examiner should prepare findings embodying the factual bases for his conclusions on this point so that the point can be examined on appeal.

IV

The hearing examiner's initial decision is vacated, and the case is remanded to the examiner to examine the interview reports made with respect to each of the consumer witnesses called by complaint counsel to determine, by appropriate procedures, whether or not such reports contain "Jencks statements" The examiner should deliver to respondents' counsel any reports or portions thereof which are found by him to be "Jencks statements" and to relate to the witness' testimony on direct examination. If requested by respondents' counsel, the examiner should reconvene the hearing-in-chief to permit respondents' counsel to utilize such reports or portions thereof for the purpose of cross-examining those consumer witnesses whom respondents' counsel requests be recalled for such purpose. Finally, the examiner should issue a new initial decision which should include specific findings with respect to the issues presented on this remand. An appropriate order will issue.

Commissioner Elman dissented and has filed a dissenting opinion.

Commissioner MacIntyre concurred and has filed a separate concurring statement.

ORDER DIRECTING REMAND

This matter having been heard by the Commission upon the the appeal of respondents from the initial decision of the hearing examiner and upon the briefs and oral argument in support thereof and in opposition thereto, and

The Commission having rendered its opinion, determining that the initial decision should be vacated and that the matter should be remanded to the hearing examiner for further proceedings as outlined in said opinion, and having considered only the procedural issues referred to in said opinion, and having made no determination with respect to any of the substantive issues raised by respondents in their appeal:

*It is ordered,* That the initial decision be, and it hereby is, vacated and the proceeding be, and it hereby is, remanded to the hearing examiner to:

(1) examine the interview reports made with respect to each of the witnesses (other than Milton S. Gottesman) called by counsel supporting the complaint to determine by appropriate procedures, including a hearing if necessary, whether or not such reports contain pre-hearing statements which should be made available to respondents' counsel under

the "Jencks rule" as described in the Commission's opinion of this date;

(2) deliver to respondents' counsel any of such reports or portions thereof found by him to be statements within the meaning of the "Jencks rule" and to be relevant for the purposes of cross-examination;

(3) if requested by respondents' counsel, reconvene the hearing-in-chief to permit respondents' counsel to utilize such reports or portions thereof for the purpose of cross-examining any of such witnesses whom respondents' counsel requests be recalled for such purpose; and

(4) issue a new initial decision which should include specific findings with respect to the issues presented on this remand.

Commissioner Elman dissented and has filed a dissenting opinion. Commissioner MacIntyre concurred and has filed a separate concurring statement.

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## DEAN FOODS COMPANY ET AL.

*Docket 8674. Order, April 25, 1966*

Order vacating hearing examiner's order denying respondent's request for subpoenas duces tecum directed to four dairies and ordering hearing examiner to reconsider the matter.

### ORDER GRANTING APPEAL, VACATING RULING DENYING REQUEST FOR SUBPOENAS AND DIRECTING RECONSIDERATION

This matter is before the Commission upon the appeal of complaint counsel under § 3.17(f) of the Commission's Rules of Practice from the hearing examiner's ruling contained in his memorandum to complaint counsel, dated March 29, 1966, denying their request to issue subpoenas duces tecum directed to four named persons to appear and to testify and to produce documents, for the reason that a hearing had not been scheduled in the proceeding. The hearing examiner stated, in his memorandum, that the time and place of hearings will be fixed at a prehearing conference scheduled for May 23, 1966, that he sees no necessity to require the appearance of the parties prior to the time of the "regular hearings," and that the said counsel's request could be renewed after hearings have been scheduled.