located at 2345 Vauxhall Road, in the city of Union, State of New Jersey.

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 Bishop Industries, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale of distribution of Sudden Change lotion or any other product in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

> Advertising any such product by presenting a test, experiment or demonstration or part thereof that is presented as actual proof of any fact or product feature that is material to inducing the sale of the product, but which does not actually prove such fact or product feature.

*It is further ordered*, That respondent shall file a report of Compliance with the Commission within sixty (60) days from the date the order becomes final.

*It is further ordered*, That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

*It is further ordered*, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

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## In the Matter of

## STAR OFFICE SUPPLY CO., ET AL.

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

*Docket 8749. Complaint, Nov. 27, 1967—Decision, Apr. 16, 1970*

Order requiring a New York City distributor of stationery and office supplies to cease allowing their salesmen to falsely imply they have been recommended by officials of prospective purchasers' firms, falsely claiming connection with Government agencies, padding quantities of ordered merchandise, failing to furnish firm unit prices, substituting merchandise, refusing to accept cancellation of orders, and falsely claiming that overdue accounts have been assigned to a third party collection agency.

## 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 Star Office Supply Co., a corporation, and Henry Pinkwater, individually and as an officer of said corporation and doing business as Pioneer Credit Co., and, with other individuals, doing business under various fictitious trade names as referred to more particularly below, hereinafter referred to as respondents, have 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 Star Office Supply Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 5106 Broadway, in the city of New York, State of New York.

Respondent Henry Pinkwater is an individual and an officer of the corporate respondent and formulates, directs and controls its acts and practices, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent. In conjunction with said acts and practices, the said individual respondent does business as Pioneer Credit Co. and, with other individuals who vary from time to time, also does business under various fictitious trade names including, but not limited to: Century Supply Co., Central Stationery Co., Dorex Office Supply Co., Kent Supply Company, Normandy Office Supply Co., Office Systems, Oxford Systems, Pioneer Supply Company, Wald Office Supply Co., and York Supply Company.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the offering for sale, sale and distribution of stationery and office supplies to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of New York, to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have 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 their business, respondents

utilize a varying number of itinerant salesmen in inducing the sale and distribution of their products. The said salesmen use respondents' premises as their mailing address and headquarters, and have various clerical, fiscal and other follow up services relating to their sales performed for them in their absence by respondents. Respondents also provide said itinerants with merchandise samples, and with order forms and other business stationery which set forth one or another of the aforesaid fictitious trade names. Said salesmen call upon prospective purchasers and identify themselves, among other things, as representatives of one or another of said fictitious trade names or as persons having an interest in the merchandise of such firms, and solicit orders for respondents' products by means of acts, practices, statements and representations more particularly set out in Paragraph Five below.

Respondents also furnish travel expense funds by way of advances to the said itinerant salesmen, which sums are based, in large part, upon the excess of the expected net billing over the price set by respondents for the merchandise sold by said salesmen. Respondents thereafter ship, bill and collect payment for the merchandise under the particular fictitious trade name utilized by the salesmen, and in the event a shipment or payment therefor is refused in whole or in part, dissuade or mollify the purchaser and attempt to collect the proceeds, through the methods and means set forth more particularly under Paragraph Six (b) and (c) below.

In many instances when shipments are accepted and payment made without protest, respondents contact the purchasers by telephone in the name of the particular salesman or fictitious trade name used in the transaction, and attempt to and do induce additional orders for their products.

Therefore, all acts, practices, statements and representations of said itinerant salesmen, including those referred to specifically in Paragraph Five below, in conjunction with the means, instrumentalities, services and facilities furnished by respondents in the sale and distribution of their products as aforesaid, are the acts, practices, statements and representations of respondents.

PAR. 5. In the course and conduct of their sale and distribution of respondents' stationery and office supplies, as referred to in Paragraph Four hereof, and with the actual or implied consent, approval or ratification of respondents, said itinerant salesmen falsely and deceptively:

(a) Represent to prospective purchasers, contrary to the fact, that they are recommended by officials of the prospect's firm or of one of

its branches, or of affiliated or associated firms, or that they have a personal or other relationship with some such official.

(b) Describe themselves, contrary to the fact, as having past or prospective associations with various patriotic or public service organizations or branches of Government, including, but not limited to, the United States Departments of State and Defense, the United Nations, and Radio Free Europe.

(c) Solicit orders by stating, contrary to the fact, that they are disposing of, or liquidating stationery and office supplies for their firm, or for others having an interest therein.

(d) Pad or "kite" orders by utilizing confusing or misleading nomenclature and descriptions to denote the quantity of merchandise being ordered, which facts are frequently not known to the purchaser until his inspection of the merchandise shipment, or upon his subsequent receipt of a bill setting forth the actual quantities and the unit and total prices therefor.

Therefore, the acts, practices, statements and representations utilized by said itinerant salesmen in inducing the sale and distribution of respondents' products, in conjunction with the means, instrumentalities, services and facilities furnished by respondents, as aforesaid, were and are false, misleading and deceptive.

PAR. 6. In the further course and conduct of their business, respondents utilize the following unfair, false, misleading and deceptive practices, methods and means in connection with the sale and distribution of their products:

(a) Respondents ship stationery and office supplies which frequently differ with respect to brand name, type, quantity, size or quality from that represented or described by the salesmen in inducing orders and ordered by the purchaser.

(b) Respondents thwart and prevent cancellation of all or a part of orders by customers who assert bona fide reasons therefor, including acts or practices of salesmen as alleged in Paragraph Five hereof. Respondents, in a substantial number of instances, have failed and refused to accept such cancellations and to put the purchaser in touch with the particular salesman who induced their order by resorting to statements such as that the salesman must have been misunderstood, is out of the country or is not available; that he has left his firm or that the firm is no longer in business; or that respondents have no knowledge of, or responsibility for, his acts or practices. Respondents also prevail upon such purchasers to retain and pay for the merchandise, or attempt to mollify them by way of extra induce-

ments, such as extending the terms for payment or reducing the purchase price.

(c) In a substantial number of instances when purchasers refuse to pay for merchandise, respondents send letters or other communications under such names as Pioneer Credit Co., and by that and other means, falsely purport to be factors, assignees of the account or other third parties, in order to induce and coerce payment for the merchandise.

Therefore, the acts, practices, statements and representations of respondents, as aforesaid, are unfair, false, misleading and deceptive.

PAR. 7. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of stationery and office supplies of the same general kind and nature as that sold by respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts 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, representations, acts and practices were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid statements, representations, acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' 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.

*Mr. John J. McNally* and *Mr. Thomas J. Oden*, for the Commission.

*Mr. Jacob P. Lefkowitz*, New York, N.Y., attorney for respondents. *Mr. Arthur W. Jaspan*, of counsel.

## INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

APRIL 11, 1969

In the complaint issued on November 27, 1967, the respondents are charged with unfair, false, misleading and deceptive practices in connection with the sale of their products, in violation of Section 5 of the Federal Trade Commission Act. Respondents in their answer,

filed on December 26, 1967, in effect deny the material allegations of the complaint and allege that all persons engaged by the corporate respondent are independent contractors who are not under the control of the respondents.

On January 30, 1968, counsel for the parties met with the hearing examiner in a reported, but not public, prehearing conference and, as a result thereof, an agreed order was issued requiring, among other things, that pretrial briefs be filed on or before March 5, 1968, by complaint counsel, and by respondents on or before April 9, 1968. Trial briefs were filed accordingly. At a nonpublic conference held on April 16, 1968, the subject of time and place of hearings, among other matters, was discussed, and complaint counsel asked that hearings be scheduled in New York City, New York; Boston, Massachusetts; Baltimore, Maryland; and Los Angeles, California. In their trial brief, they listed the names of 30 witnesses to testify in New York City, 11 in Boston, 6 in Baltimore, and 11 in Los Angeles. Counsel for respondents agreed to put in their defense in New York City, except for such West Coast witnesses as they might call in Los Angeles immediately after complaint counsel rested their case in that city. On the basis of the showing made by complaint counsel on the record, the hearing examiner authorized hearings to be held in the above-named cities, with the exception of Baltimore, and issued an order fixing the time thereof, which was agreeable to the parties.

Hearings began in New York City on May 6, and concluded on May 16, 1968, at which time 27 witnesses, called by complaint counsel, testified. On May 21, 1968, hearings were held at Boston, at which time two commission witnesses appeared. At the conclusion of the direct examination of the first witness, Mr. Walter J. Kroll, respondents' counsel requested any pretrail statements made by the witness (Tr. 735). Complaint Counsel McNally made a statement covering six pages of the transcript (Tr. 736-742), in which he concluded (Tr. 742): "We do not believe it would be proper to turn these over to opposing counsel for cross-examination, and I was authorized by Washington to state that that was our official position on the question." The hearing examiner was handed a five-page field interview report, dated October 15, 1965, signed by Mr. David W. Dinardi, an attorney for the Commission in its Boston office, recording statements made by the witness. After carefully examining the report, the hearing examiner came to the conclusion that, with the exception of two paragraphs thereof, it represented a statement of the witness of the matters covered on direct examination which

should be turned over to respondents' counsel for use in connection with cross-examination. Complaint counsel refused to turn over the report to opposing counsel and a motion of the latter to strike the testimony of the witness was granted (Tr. 746).

After receiving testimony on direct examination of the second witness, Mr. Arthur C. Rochon, the same chain of events occurred as have been related with reference to the first witness. Respondents' counsel requested any pretrial statement given by the witness. The hearing examiner was given a six-page, single-spaced field report of an interview of the witness, which took place on August 4, 1965, signed by Complaint Counsel John J. McNally, bearing the date November 1, 1965 (CX 539 A–F, *in camera;* Tr. 785). After looking over the report, the hearing examiner came to the conclusion that the report, with the exception of the first two paragraphs thereof, related to matters on which the witness gave testimony. In fact, the report contains more details of the transactions involved than the summary of the events related by the witness on the witness stand. Complaint Counsel McNally recognized this when he submitted the report to the hearing examiner by stating (Tr. 785): "This interview report contains additional material other than that which the man testified to, * * *." The witness stated that he was interviewed by Mr. McNally and the matters that he related to him were those to which he testified (Tr. 787). The following exchange took place (Tr. 788):

HEARING EXAMINER JOHNSON: You attempted to make an accurate report of the interview?

MR. McNALLY: Yes, sir. Of course I am not a professional investigator.

HEARING EXAMINER JOHNSON: But you are a lawyer, are you not?

MR. McNALLY: I am a lawyer.

The hearing examiner directed that the report, with the first two paragraphs blocked out, be turned over to respondents' counsel for their examination, which complaint counsel declined to do (Tr. 789), whereupon a motion of respondents' counsel to strike the witness' testimony was granted. At the request of Complaint Counsel McNally, a one hour recess was taken to permit him to "call Washington during the recess to see if they wish me to persist in this course in view of your ruling thereon" (Tr. 796). On resumption of the hearing, Mr. McNally said (Tr. 801):

I spoke to my superiors in Washington, and I summarized as best I could the issue and the posture of this case. My superiors concur in my recommendation that we persist in the approach we have taken,* * * .

Being informed by complaint counsel that all of the remaining Boston witnesses and all except one of the Los Angeles witnesses had

given statements, and that they would refuse to submit to opposing counsel any of such statements until the issue was resolved by the Commission, the hearing examiner cancelled all scheduled hearings, to be reset on ten days' notice.

On May 27, 1968, complaint counsel filed with the Commission a request for permission to file an interlocutory appeal, which was granted by the Commission on June 28, 1968. Commissioner Elman dissenting. The appeal was submitted by complaint counsel on July 8, 1968, and respondents' answer thereto was filed on July 18, 1968. In an order ruling on the interlocutory appeal, dated September 18, 1968 [74 F.T.C. 1595], and mailed September 25, 1968, it was directed that the examiner's ruling of May 21, 1968, striking the testimony of witnesses Kroll and Rochon, be vacated, and that the hearing examiner continue this proceeding in accordance with the views expressed in the Commission's accompanying opinion. Commissioner Elman dissented and filed a statement. In the opinion, it is stated in part (pp. 2–3) [pp. 1596-1597]:

The examiner seemed to wholly ignore the prior rulings of the Commission on the subject of production of pretrial interview reports with witnesses. He indicates the view that interview reports generally should be produced by complaint counsel. While he queried the investigators who had conducted the interviews on the issue of whether or not they attempted to accurately report what the witness had said, he made no attempt, so far as the record discloses, to determine whether these reports contained the witnesses' own statements as defined by the applicable law. His holding, rather, seemed to be on the general ground of his determination that production was necessary in "fairness" to respondent and his conclusion that the reports contain no confidential material.[2]

The Commission has set down detailed instructions on the question of the production of interview reports in such prior cases as *Inter-State Builders, Inc.*, Docket No. 8624 (order issued April 22, 1966) [69 F.T.C. 1152], and *L. G. Balfour Company*, Docket No. 8435 (order issued April 22, 1966) [69 F.T.C. 1118]. These cases hold that interview reports are not to be released for inspection where the witness interviewed has testified on direct unless such reports satisfy the requirements of the so-called Jencks Act for the production of witnesses' prior statements (18 U.S.C. § 3500 (1958)). Under section (e) of such Act, a statement subject to production is defined to mean

"(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.*" (Emphasis supplied.)

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[2] Some of the hearing examiner's statements on the subject follow:

"'Well, as I stated before, I believe this information in fairness to Respondent ought to be turned over to Respondent's counsel . . . .'" (Tr. 793.)

Although the hearing examiner is of the opinion that the policy of the Commission on the production of interview reports as established by prior rulings is lacking in logic and fairness, he did attempt to apply the requirements of the so-called Jencks Act.

The United States Court of Appeals for the Fourth Circuit in *United States* v. *Hemphill* (1966), 369 F. 2d 539, 542, stated:

[1] The qualified privilege of withholding the names and statements of informants has been repeatedly and consistently upheld by the Courts. This Court has done so, and there has been a succession of such cases in the Fifth Circuit, the last of which was decided on October 31, 1966.

[2] The qualified privilege must give way shortly before and during the trial of an actual enforcement proceeding to the extent that fairness requires the Secretary to furnish lists of prospective witnesses and written statements obtained from them. In that process, the fact that some witnesses were early informants may incidentally appear, but, as the Fifth Circuit clearly pointed out in the *Robinson & Stephens* case, the policy favoring anonymity of informants must give way when it conflicts with the countervailing policy favoring fair and orderly trials and pretrial procedures.

[3] This was the concern of the District Judge. We share his conviction that when the United States, a cabinet official, or an agency of the United States comes into the Court as a plaintiff, they are subject to the same rules as private litigants, and the open disclosure which is now demanded of litigants in the federal courts, because of its fairness and its contribution to accuracy in the factfinding process, is equally demanded of such plaintiffs.

In *InterState Builders*, *supra*, the Commission has recognized in words (but disregarded) the principles laid down in *Hemphill* when it said:

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 administrative 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. (Pages 17–18.) [69 F.T.C. 1162–1163.]

* * * * * * *

The Ninth Circuit has held that an administrative agency "may not avoid [Jencks rule] by adopting regulations inconsistent with its requirements." *Harvey Aluminum* v. *N.L.R.B.*, 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 prevent 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 circumstances 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 (2d 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 protect statements taken down by an attorney, and still preserve the sanctity of the attorney's work product. If a government attorney has reported 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 remarks 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). (Pages 29–31.) [69 F.T.C. 1170–1172.]

* * * * * * *

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. (Page 32.) [69 F.T.C. 1172.]

It was further stated (page 8) [69 F.T.C. 1156]:

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 3½ hour conference was not an oral statement within the meaning of the Act.

In complaint counsel's interlocutory appeal, it was revealed that a certain number of the persons subpoenaed to appear at the Los Angeles hearings "could not be served" and "presumably will not appear" (p. 7). Thereafter, on the information supplied by complaint counsel that only two witnesses from the Los Angeles area would be used, the Los Angeles hearings were cancelled, and it was directed that the two witnesses be brought to the New York City hearings. Pursuant to agreement of counsel herein, an order was issued on October 25, 1968, rescheduling hearings in Boston beginning on November 13, 1968 (three days), and in New York City on November 18, 1968 (five days), for the purpose of permitting complaint counsel to complete their case-in-chief and for the respondents to put in their defense.

Hearings were resumed at Boston on November 13, 1968, at which time the hearing examiner stated on the record that apparently he had not made himself clear as to the basis for his rulings of May 21, 1968, striking the direct testimony of witnesses Kroll and Rochon.

He stated he came to the conclusion, upon reading each of the field reports, that it was a statement within the meaning of the Jencks Act, being a substantially verbatim recital of what the witness told the investigating attorney. He recited the procedures that he, like most lawyers, followed when making an investigation: He would make notes at the time of the interview and, after dictating a statement, the notes would be destroyed. Under such circumstances, he stated, the statement should be considered contemporaneous with the interview (Tr. 816–19).

It developed at the second Boston hearings that complaint counsel had not been forthright and candid with the hearing examiner on May 21st by failing to reveal that they had in their possession notes which Complaint Counsel McNally had made with respect to Witness Rochon at the time of the interview. It was also learned that Commission Attorney Dinardi had in his possession notes with respect to Witness Kroll. Furthermore, this information was not made known to the Commission by complaint counsel in their interlocutory appeal.

After direct examination had been completed of the first witness called at Boston in support of the complaint on November 13, 1968, the witness, Mr. Everett M. Russell, said he had been questioned in 1965 with reference to matters on which he had given testimony by a representative of the Commission, whose name he could not recall. He said the investigator made notes at the time of the interview. Respondents' counsel requested that he "be furnished with the memoranda under the Jencks Rule in connection with this witness before proceeding with cross examination" (Tr. 845–46). There was turned over to the hearing examiner a three-page field report, dated October 27, 1965, made by John J. McNally, Attorney, of an interview that took place on August 2, 1965. Attached thereto was a list of nine documents obtained from Mr. Russell at the time of the interview (CX 540 A–D—*in camera*). The hearing examiner read the report (*in camera*) and called Mr. McNally as a witness. On voir dire, Mr. McNally said that, while stationed in the Commission's Seattle Field Office as a trial attorney, he was given an assignment as an investigator in this case for about three months (apparently in 1965), at which time he interviewed a number of people in Boston and the surrounding territory; that he made notes—"I don't know whether I did it while I talked to him or outside in my car" (Tr. 850); and that he dictated his field reports, relying upon his notes, the exhibits given him, and his recollection. He testified that he had the notes in