the same hereby are, denied.

## PURE OIL CO.

*Docket 6640. Order and Opinion, Mar. 20, 1958*

Interlocutory orders upholding hearing examiner's ruling directing that complaint counsel produce a certain interview report, and vacating and setting aside his rulings conditionally denying said counsel's requests for production by respondent of certain statements and for a subpena duces tecum for production thereof.

INTERLOCUTORY APPEAL FROM CERTAIN RULINGS

By the COMMISSION:

This matter is before the Commission on an interlocutory appeal of counsel supporting the complaint from several rulings of the hearing examiner made during the course of hearings held June 27, 1957, and December 10 and 11, 1957. The June 27 ruling appealed from is that directing counsel supporting the complaint to produce a Commission investigator's report of an interview with J. F. Liles, who appeared as a witness and testified at the instance of counsel supporting the complaint. The December 10 and 11 rulings appealed from

are those conditionally denying counsel supporting the complaint's requests for production by respondent of certain affidavits or statements of designated witnesses who also testified in support of the complaint, and requests for issuance of a subpoena duces tecum directed to Pure Oil Co., respondent, for production of such documents.

The circumstances surrounding the appeal are as follows:

On June 27, 1957, during the testimony of J. F. Liles, a Commission witness, respondent's counsel requested the production of an interview report with this witness said to have been prepared by a Commission investigator indentified as Francis J. Stewart. Liles testified that he had been interviewed by this investigator. The hearing examiner directed production of the interview report and noted in effect that he would examine it for relevancy and then make the relevant portions, if any, available to respondent. Counsel supporting the complaint refused to comply with this order, it appearing generally that the grounds relied upon were the lack of authority of the examiner and the discretion invested in said counsel with respect to confidential documents.

Subsequently, during the hearing of December 10, 1957, counsel supporting the complaint requested that counsel for respondent be directed to produce a certain affidavit signed by witness Samuel Ray Harris. This witness was then on the stand testifying for counsel supporting the complaint. During the course of the examination of this and some other dealer witnesses, it was shown that they had given statements to representatives of respondent. Apparently, these were signed and notarized statements taken following the issuance of the complaint and related to matters alleged in the complaint. The hearing examiner denied the request on the ground that it was inequitable to order respondent to produce this document while counsel supporting the complaint stood in defiance of the examiner's order to produce the interview report concerning witness Liles. The examiner indicated he would order the production of the Harris affidavit if counsel supporting the complaint would agree to produce the Liles interview report.

The hearing examiner made similar rulings with respect to requests of counsel supporting the complaint for production of the statements or affidavits of witnesses Charles E. Allgood and Seth Calvin Gordon. On December 11, 1957, counsel supporting the complaint requested production of a statement signed by witness William Arthur Burke, then testifying in support of the complaint. At this time said counsel agreed to produce the interview report with Liles in conformity with the examiner's prior order, as the examiner had indicated he must to obtain production of any such document. Counsel, however, specifi-

cally limited his agreement to produce to the Liles report only. The examiner then ruled that he would not order respondent to produce such statement unless counsel supporting the complaint agrees that he would comply with all future orders of the hearing examiner respecting the production of documents.

The examiner likewise refused to grant the requests made by counsel supporting the complaint on December 10 and 11, for the issuance of a subpena duces tecum for the production of such statements or affidavits. The December 10 request was for a subpena directed to Pure Oil Co. for the production of all statements taken by any representative of that company from their independent dealers with respect to a certain alleged plan. The request for subpena of December 11, was not particularized. These requests were denied as to the witnesses testifying for the same reasons that production of the documents was not directed. Counsel supporting the complaint thereupon appealed from these several rulings.

The ruling of June 27, 1957, directing production of the report of interview with Liles was not appealed from within the time permitted by section 3.20 of the Commission's rules of practice, and, thus, this ruling is not now subject to interlocutory appeal. The fact that counsel in support of the complaint may have considered an appeal within such time unnecessary because of the examiner's failure to insist upon immediate compliance with his direction is wholly immaterial. Under the Commission's procedures for adjudicative cases, the primary responsibility for the orderly conduct of hearings for the receipt of evidence rests with the hearing examiner. This officer, in the discharge of his duty, has the necessary authority to rule on all motions and other requests which may be appropriate in adversary proceedings, and it seems elementary that he is entitled to expect counsel, both in support of and in opposition to the complaint, to govern themselves accordingly. Unless and until it is reversed or modified, an examiner's ruling represents the law of the case on the points covered, and it should not be necessary to remind counsel that it is his obligation to either obey such ruling or take the steps provided in the rules of practice to have it reviewed. Under no circumstances can he be permitted to arrogate to himself the right to decide whether or not he will be bound by it or when he will appeal from it.

Although the ruling of June 27 is not subject to interlocutory appeal, consideration of the rulings of December 10 and 11, 1957, involves also a review of the June 27 ruling, since compliance therewith was one of the conditions attached to the later rulings.

In the opinion of the Commission, the ruling of June 27 was erroneous. The Commission considers data and information received from any informant to be confidential as well as privileged and permits

disclosure only in accord with the provisions of section 1.133 of the Commission's rules of practice, subject, however, to the rules of law with respect to privilege in the conduct of any proceeding.

In this instance, there was no action which deprived the interview report with witness Liles of its status as a privileged document. This witness testified that he had been interviewed by an attorney-examiner named Stewart. Respondent, on the basis of this admission, requested production of the interview report for the purpose, it was stated, of seeing whether the witness made any statements to Mr. Stewart inconsistent with his testimony. There is no showing that the interview report was used in any way during the course of the hearings. It was a report prepared not by the witness but by an outside party. Such report, in additon to being privileged, is pure hearsay and would be inadmissible if offered as evidence. Furthermore, it could not be successfully used to impeach the testimony of the witness. The fact, if it be a fact, that a third party had reported what the witness had said would be wholly immaterial. This situation is entirely different from that in *Jencks* v. *U.S.*, 353 U.S. 657 (June 3, 1957), whether or not the rule of that case may be held to apply to administrative proceedings. Among other things, in *Jencks* the production requested was for documents prepared by witnesses on the stand concerning activities as to which they testified.

Respondent in its brief in opposition to the appeal cites our opinion *In the Matter of Columbus Coated Fabrics Corporation, et al.*, docket No. 6677 (decision on interlocutory appeal, December 23, 1957). The cases are not comparable. There the Commission was considering in pertinent part the appeal of that respondent from the examiner's ruling which denied production of an indefinite number of unidentified documents other than interview reports and also the excised portions of certain interview reports. We held that, under the circumstances, the examiner properly ruled in denying production of the documents other than interview reports and that he did not err in excising nonrelevant parts of the interview reports ordered turned over to respondent. In ruling on the propriety of excising irrelevant material in reports, we did not thereby rule as to the correctness of the order for production of these reports. That question was not before us. Counsel in support of the complaint had not appealed from the ruling requiring such production.

Because the ruling of June 27 was in error, the rulings of December 10 and 11 were necessarily erroneous also since they imposed upon counsel supporting the complaint the obligation to produce a document which the examiner had no power to require and should not have required. Futhermore, it was unreasonable to attach a condition that counsel supporting the complaint must agree to produce any thing

else the examiner ordered. Each order for production must be determined on its own merits when made.

In granting the appeal from the rulings of December 10 and 11, we are deciding only that the examiner erred in conditioning his order for the production of documents sought by counsel supporting the complaint upon the production of the Liles report or upon an agreement to produce any other document which the examiner might order. The question whether or not counsel supporting the complaint are entitled to the affidavits or statements they seek is not before the Commission, and on this point no decision is made.

Accordingly, the appeal is denied insofar as it is from the June 27 ruling and granted insofar as it is from the rulings of December 10 and December 11, 1957.

ORDER RULING ON INTERLOCUTORY APPEAL

Counsel supporting the complaint having filed an interlocutory appeal from the hearing examiner's ruling of June 27, 1957, directing that said counsel produce a certain interview report, and from the examiner's rulings of December 10 and 11, 1957, conditionally denying the requests of said counsel for an order by the examiner directing the production by respondent of certain statements and conditionally denying requests for a subpena duces tecum for production of such documents; and

The Commission, for the reasons stated in the accompanying opinion, having denied the appeal insofar as it is from the ruling of June 27, 1957, and having granted the appeal insofar as it is from the rulings of December 10 and 11, 1957:

*It is ordered*, That the rulings of December 10 and 11, 1957, involved in this appeal, be, and they hereby are, vacated and set aside.

## B. F. GOODRICH CO., ET AL.

*Docket 6485. Order, March 26, 1958*

Interlocutory order upholding hearing examiner's ruling denying respondent's motion to withdraw from instant proceeding any issue as to its dealings, etc. with Firestone Tire & Rubber Co., since the question thus presented