The Commission having concluded that the hearing examiner's judgment of his own ability to afford due justice and a fair hearing to the movant is persuasive and in these premises should be confidently supported by the Commission; therefore

It is ordered, That the motion to disqualify the hearing examiner from presiding in this proceeding be, and it hereby is, denied.

THE B. F. GOODRICH COMPANY ET AL.

Docket 6485. Order and opinion, Mar. 9, 1961

Order remanding case for reception of additional market data to determine the competitive effects of the sales commission method of distributing TBA products.

OPINION OF THE COMMISSION

By KINTNER, *Chairman:*

This proceeding commenced with the issuance of a complaint on January 11, 1956, charging The B. F. Goodrich Company and The Texas Company with acts, practices and agreements constituting a violation of Section 5 of the Federal Trade Commission Act. 15 U.S.C. §45 (1958). Respondents answered in due course, admitting in part the allegations of the complaint but denying that Section 5 has been contravened.

The principal issue framed by the pleadings is the legality of a contract between these respondents calling for the payment by Goodrich of a sales commission to The Texas Company (hereinafter referred to as Texaco) in return for sales assistance in promoting automotive tires, batteries and accessories (hereinafter referred to as "TBA" or "TBA products") of Goodrich to retail and wholesale petroleum outlets of Texaco. In addition, Texaco is charged with having entered into a substantially identical agreement with The Firestone Tire & Rubber Company, and Goodrich is charged with having entered into such agreements with five other oil companies in addition to Texaco.[1] Although Goodrich and Texaco are the only respondents in this proceeding, Firestone and Shell Oil Company are joined as respondents in a companion case, Docket 6487, and in another companion case, Docket 6486, The Goodyear Tire & Rubber Company and The Atlantic Refining Company are paired as respondents.

The complaint charges, in substance. that the success enjoyed by Goodrich and Firestone in selling to Texaco outlets has been purchased at the expense of competing TBA suppliers at the manufacturing and wholesale levels. Counsel supporting the complaint

[1] Other oil companies having sales commission agreements with Goodrich are Continental Oil Company, Jenney Manufacturing Company, Shell American Petroleum Company, The Ohio Oil Company and Emblem Oil Company.

allege that the Texaco-Goodrich and Texaco-Firestone sales commission contracts are unlawful because, *in conjunction with Texaco's economic power over its ostensibly independent wholesale and retail petroleum outlets*, these contracts operate to stifle the free choice of Texaco's retail and wholesale dealers insofar as their TBA purchases are concerned. Among the unlawful competitive effects stemming from Texaco's sales commission contracts charged by the complaint are these: 1) That suppliers of TBA competing with Goodrich and Firestone at the wholesale level have been foreclosed from access to Texaco's retail outlets on the same competitive terms as have been made available to Goodrich and Firestone; 2) That competing manufacturers of tires and other TBA items have been foreclosed from access to Texaco's wholesale distributors on the same competitive terms as have been made available to Goodrich and Firestone; 3) That competition between Goodrich and Firestone in selling to wholesale and retail outlets of Texaco has been destroyed; 4) That a substantial number of Texaco's petroleum distributors and service station operators have been denied their right to act as independent businessmen in exercising freedom of choice as to the TBA products which they may purchase and stock for resale; and 5) That the consuming public has been deprived of the benefits of free competition at the wholesale and retail levels insofar as TBA distribution through service station outlets under the sales commission plan is concerned.

Respondents deny these allegations and assert that their sales commission contract has strengthened competition in the distribution of TBA. Texaco, moreover, denies that it has power to control the TBA buying habits of its wholesale and retail outlets and denies that its sales efforts on behalf of Goodrich and Firestone are in any respect improper or coercive.

After hearings extending from September 1956, into December 1958, the hearing examiner filed his initial decision on October 23, 1959, dismissing the complaint as to Goodrich but holding that Texaco, by forcing a substantial number of its dealers to purchase sponsored TBA through use of threats of lease cancellation or other retaliatory action, has engaged in unfair methods of competition and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act. He further held that the charges of the complaint are sufficiently broad to sustain an order prohibiting overt acts of coercion on the part of Texaco even though he concluded the sales commission contracts themselves are not illegal. The initial decision contained an order against Texaco prohibiting future acts of coercion or intimidation designed to force Texaco dealers to purchase TBA products sponsored by Texaco.

Both sides have appealed from the initial decision. Counsel supporting the complaint contend that, while the order entered by the hearing examiner is well supported by the evidence of record, it will not be an effective means of remedying the unlawful effects on competition caused by the sales commission plan. They seek an order restraining respondents from continuing with their present sales commission agreements and enjoining them from entering into similar agreements in the future. They also contend that Texaco should be enjoined from purchasing TBA products from any manufacturer or other vendor of such products for resale to any wholesalers or retailers of Texaco petroleum products, ". . . or for distribution in any other manner, directly or indirectly, to any of the aforesaid wholesalers or retailers of Texaco petroleum products."

Texaco appeals claiming, among other things, that the hearing examiner erred as a matter of fact in finding that Texaco has coerced its dealers to purchase substantial amounts of sponsored TBA and as a matter of law in concluding that such action by Texaco constitutes an unfair method of competition and an unfair act or practice in commerce within the meaning of Section 5 of the Federal Trade Commission Act.

Reply briefs were filed by Texaco and Goodrich to the appeal brief of counsel supporting the complaint, and by counsel supporting the complaint to the appeal brief of Texaco. Oral argument was heard by the Commission on June 20, 1960, and the matter is now before the Commission for decision. Although there is evidence in the record tending to show that Texaco has in fact coerced its dealers to purchase sponsored TBA through use of threats of lease cancellation or other retaliatory action, we find that Texaco has sufficient economic power over its wholesale and retail petroleum distributors to cause them to purchase substantial amounts of sponsored TBA even without the use of overt coercive tactics. The determination of whether Texaco's exercise of such economic power in favor of Firestone and Goodyear under the oil company's sales commission contracts with these rubber companies constitutes an unfair method of competition depends, therefore, upon *the competitive effects* of these sales commission contracts; not upon whether Texaco has exercised its power to implement such contracts through the use of overt coercive tactics, or by more subtle, but equally effective, means.

At issue in this litigation, then, is the legality of a particular method of distributing TBA used by respondents. A key fact in evaluating the competitive effects of respondents' use of the sales commission method of distributing TBA is the fact that Texaco has sufficient economic power with respect to its retail and wholesale petroleum distributors to cause them to purchase substantial quan-

tities of the brand of TBA sponsored or sold by Texaco. But such economic power is a fact existing independently of any particular method of distributing TBA which Texaco may use. Whether the sales commission agreements between Firestone and Texaco and Goodrich and Texaco are unlawful must depend, therefore, upon the characteristics and the competitive effects of these sales commission agreements. For reasons set forth hereinafter, we conclude that this case must be remanded in order that market data may be introduced to show the competitive effects of Texaco's sales commission agreements with Goodrich and Firestone upon competing suppliers of tires, batteries and accessories at the manufacturing, wholesale and retail levels.

CHARACTERISTICS OF THE SALES COMMISSION PLAN

Motorists may purchase replacement TBA items from several major classes of distributors. Manufacturers of these items, for example Goodrich, maintain either company-owned or franchised wholesale and retail distribution outlets in all of the marketing areas for TBA products considered in the course of the hearings in this case. Gasoline service stations constitute a second major class of outlets for TBA products.

The complaint alleges that "Service stations, by the nature of their business, are particularly well adapted to be outlets for the sale of TBA products to the motorist consumer. They constitute a large and increasingly important market for TBA products." Goodrich admits the truth of this allegation in its answer and Texaco, in the course of the proceedings, introduced evidence tending to show that service stations accounted for almost 43 percent of all new replacement tires and tubes sold to motorists in the United States in 1956. Total TBA sales by gasoline service stations amounted to approximately $800,000,000 in 1956, according to Texaco.

The sales commission method of distributing TBA is a complex marketing technique affecting competitive relationships among manufacturers, wholesalers and retailers of various products linked together by but one common factor: the motor vehicle. Although Goodrich is one of the largest rubber companies in the United States and a leading manufacturer of tires, inner tubes and certain related products such as fan belts and radiator hose, the company does not manufacture automotive batteries at all, but instead purchases for resale batteries marked with the "B. F. Goodrich" label from The Gould National Battery Company and Globe-Union Battery Company. Among the automotive accessories purchased for resale by

Goodrich under the original manufacturers' own brand names are the following:

Product	Brand name
Oil filters	Fram.
Spark plugs	Champion.
Wiper blades	Trico; Anco.
Waxes	DuPont; Simoniz; Mac's; Johnson.
Battery cables	Auto-Lite.

Goodrich operates 5 tire manufacturing plants across the country, located in Ohio, Pennsylvania, Alabama, Oklahoma and California. Tires are shipped from these plants to 15 company-operated merchandising warehouses (also called master warehouses) situated in principal metropolitan areas of the nation. These plants and master warehouses in turn ship to 31 district warehouses of Goodrich located in various parts of the country. Batteries and accessories are shipped directly from the original manufacturers' own plants to master and district warehouses of Goodrich.

There are some 489 wholesale and retail stores operated by Goodrich throughout the United States, and these stores sell not only TBA products, but also many different household and home supply items, including toys, bicycles, power tools, lawn and garden equipment and furniture. In addition to these company-owned stores, Goodrich markets its products through various types of independent wholesale and retail distributors and dealers throughout the United States, including specialized tire dealers, new car dealers, garages, and service stations. Total net sales of the rubber company exceeded one-half billion dollars in 1954.

Texaco is a large producer and distributor of petroleum products. The company's products are sold at wholesale and retail in every state of the United States. Total net sales by the oil company exceeded one and one-half billion dollars in 1954.

Texaco sells its refinery products directly to some 31,000 retail outlets in the United States. These directly-supplied accounts are of two principal classes: 1) lessee-operated stations, and 2) contract dealers. Lessee-dealers lease service station properties from Texaco and these properties have facilities enabling the lessees to stock and sell TBA products. Contract stations are owned by the station operators themselves or are leased from someone other than Texaco. An undetermined number of Texaco's contract stations apparently do not have facilities to stock and sell TBA, or to do maintenance work on motor vehicles. Contract dealers of this description may be garages or restaurants and taverns with outside gasoline pumps.

Texaco sells its petroleum products indirectly to about 7,500 additional service stations through approximately 711 wholesale dis-

tributors. Wholesale distributors either own bulk storage facilities or lease them from Texaco. Many wholesale distributors also distribute TBA products along with petroleum products.

Goodrich maintains either company-owned or franchised independent wholesale and retail dealers in most principal cities of the United States and in many smaller communities as well. In cities and towns where Texaco retail stations are located, such stations are assigned to either the local Goodrich or the local Firestone dealer, or sometimes to both. The assigned TBA distributor is intended to be the supply point from which the Texaco dealer will purchase a substantial percentage of his requirements of TBA.

Texaco dealers who operate service station, as distinguished from non-service station establishments, such as restaurants and garages which also sell gasoline, not only buy and sell Texaco petroleum products but also offer TBA at their stations and in addition perform various automotive services and repairs. Texaco maintains sales offices throughout its marketing area and employs salesmen whose duty it is to solicit orders for Texaco petroleum products from Texaco dealers.

When orders for petroleum products are obtained, the salesmen cause such products to be delivered to the Texaco service station dealers who pay for them at time of delivery or at other specified times. The same Texaco salesmen *also* act as agents for Goodrich and Firestone, soliciting TBA orders from Texaco dealers, frequently accompanied on their rounds by salesmen employed by the local Goodrich or Firestone distributors. If TBA orders are obtained, they are turned in to the appropriate TBA suppliers—the local distributors of either Goodrich or Firestone—who deliver the merchandise and are paid by the Texaco dealers. The TBA suppliers, in turn, make reports of such sales to the District Sales Offices of their respective companies.

Under the terms of the sales commission contracts between Goodrich and Texaco and Firestone and Texaco, Texaco is entitled to a commission amounting to 10 percent of the net sales value of all sponsored (i.e., Goodrich or Firestone) merchandise sold to Texaco retail dealers, as consideration for the assistance given by the Texaco sales organization in obtaining TBA orders from Texaco dealers.[2]

Goodrich's TBA sales to Texaco accounts increased from $12.7 million in 1952 to $18.9 million in 1956, while Firestone's sales volume advanced from $29.6 million in the former year to $39.9 million in the latter. By 1956, Goodrich and Firestone were selling a combined total of almost $60 million in TBA to Texaco accounts

[2] On purchases of sponsored TBA by its wholesale distributors, Texaco is entitled to a commission of 7½ percent. A 5 percent commission is payable in a few instances not significant for present purposes.

each year, and were paying Texaco approximately $5.4 million in sales commissions annually. During the five year period 1952 through 1956, total sales to Texaco accounts by Goodrich and Firestone amounted to $245.1 million, and the two rubber companies paid over $21.8 million in sales commissions to Texaco.

Sales by Goodrich under its sales commission agreements with other oil companies have also increased over the years. In 1952 there were three oil companies other than Texaco having such agreements with Goodrich: Continental Oil Company, Jenney Manufacturing Company and Shell American Petroleum Company. Total sales by Goodrich to outlets of these three oil companies rose from $3.5 million in 1952 to $7.8 million in 1955, chiefly due to increases in sales to Continental Oil Company accounts. Then, in 1953, Goodrich undertook sales commission arrangements with Ohio Oil Company and Emblem Oil Company, and by 1955 was selling about $2.6 million in TBA to outlets of these two oil companies.

Goodrich has attempted to supply service station accounts from local independent Goodrich wholesalers wherever possible, as shown by Table I, below:

TABLE I.—*Number of oil company outlets supplied by independent Goodrich distributors, 1952 through 1955*

Date	Total oil company outlets	Supplied by independent distributors	Percentage by independent distributors
12-31-50	2,040	442	22
12-31-51	2,469	820	33
12-31-52	4,075	1,876	46
12-31-53	5,065	2,486	49
12-31-54	6,065	3,127	52
12-31-55	7,042	3,908	55

The same trend is discernible for Texaco outlets, as shown by Table II:

TABLE II.—*Number of Texaco outlets supplied by independent Goodrich distributors 1952 through 1955*

Date	Total Texaco accounts	Supplied by independent distributors	Percentage by independent distributors
12-31-50	1,874	438	22
12-31-51	2,245	743	33
12-31-52	2,763	1,228	44
12-31-53	3,189	1,664	52
12-31-54	3,864	2,172	56
12-31-55	4,444	2,636	59

Table II indicates that the number of Texaco accounts assigned to Goodrich increased from 1874 in 1950 to 4444 in 1955, and that

during these years the number of such accounts supplied by independent local distributors of Goodrich TBA items increased from 22 percent to 59 percent. Table I shows that the number of accounts assigned to Goodrich by all six oil companies having sales commission agreements with Goodrich increased from 2040 in 1950 to 7040 in 1955, and that the percentage of such accounts supplied by independent local Goodrich distributors increased from 22 percent to 62 percent during the same years.

Taken together, the facts set forth above indicate the possibility of serious potential threats to competition resulting from Goodrich's sales commission agreements with Texaco and other oil companies. Service station outlets of Texaco blanket the entire United States, as do Goodrich's TBA distribution facilities. The total volume of sponsored TBA sold to Texaco outlets increased from barely over $40 million in 1952 to approximately $60 million in 1956, and during the same years Goodrich entered into sales commission agreements with several other oil companies as well.

However, the record in this case does not contain sufficient market data to enable the Commission to assess the competitive effects of the sales commission method of distributing TBA employed by these respondents. The case will be remanded to the hearing examiner for the taking of evidence indicating the competitive effects of the sales commission contracts at the manufacturing, wholesale and retail levels of TBA distribution.

ORDER REMANDING PROCEEDING TO HEARING EXAMINER

Counsel supporting the complaint and respondent, The Texas Company, having filed cross-appeals from the hearing examiner's initial decision; and

The Commission having determined that the record as presently constituted does not provide an adequate basis for an informed determination of the competitive effects of the sales commission method of distributing tires, batteries and accessories employed by the respondents, and being of the opinion that the record should be supplemented in this respect to the end that all of the issues involved in the case may be finally and conclusively disposed of on their merits:

It is ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner for the reception of such further evidence concerning the competitive effects of the respondents' practices as may be offered in conformity with the views expressed in the accompanying opinion of the Commission.

It is further ordered, That after the receipt of such additional evidence the hearing examiner indicate any changes he may wish to make in his initial decision in the light thereof.

H. P. HOOD & SONS, INC.

Docket 7709. Order and opinion, Mar. 14, 1961

Interlocutory order remanding matter to hearing examiner for reconsideration of rulings placing documents "*in camera*".

OPINION OF THE COMMISSION

By ANDERSON, *Commissioner:*

The complaint in this matter charging the respondent with violating subsections (a) and (d) of Section 2 of the Clayton Act was issued December 30, 1959. An answer denying the principal allegations of the complaint was filed March 24, 1960. The hearings commenced in Boston, Massachusetts, on May 2, 1960. Intermittent hearings were held throughout 1960, but at the time this appeal was filed counsel supporting the complaint had not yet completed the case in chief.

Throughout the hearings held to date, the hearing examiner has, upon motion of counsel for respondent and upon his own initiative, ordered that many documents offered as evidence in support of the complaint be placed "*in camera*". The term "*in camera*" in our practice means that documents made subject to such orders are not made a part of the public record but are kept secret and only respondents, their counsel and authorized Commission personnel are permitted access thereto. While the hearing examiner here has not defined the exact scope of his orders, it appears that they operate to prevent counsel supporting the complaint from disclosing the contents of the "*in camera*" documents to witnesses or prospective witnesses without the express permission of the hearing examiner.

The record indicates that the following documentary exhibits were placed "*in camera*" on the days indicated:

Commission Exhibits 27–30, May 3, 1960.
Commission Exhibits 35–148; 150–151, May 4, 1960.
Commission Exhibits 155–157; 180–245, October 18, 1960.
Commission Exhibits 246–248; 979–986, October 19, 1960.
Commission Exhibits 987–988, October 20, 1960.
Commission Exhibit 248A (revised), November 15, 1960.
Commission Exhibit 248C, November 16, 1960.

On November 23, 1960, counsel supporting the complaint moved the Commission to extend their time to appeal from the November "*in camera*" rulings of the hearing examiner to December 23, 1960. This extension was granted and the brief containing this appeal was filed December 22, 1960. Respondent filed its answering brief on January 13, 1961.

Specifically, this appeal asks that we reverse all of the hearing examiner's orders placing documents "*in camera*" made throughout the course of the hearings. Respondent raises the question of timeliness, pointing out that the 10-day period for taking appeals from the rulings of the hearing examiner (Rule 3.20(b)(1) of the Rules of Practice) had expired on all except the rulings made on November 15 and 16, 1960, before the appeal was filed. While this is technically true, we feel that in this instance the public interest dictates a comprehensive approach to all of the "*in camera*" rulings made. The appeal as a whole deals with what is, in effect, a continuing ruling based upon a consistent policy followed throughout the hearings. The rulings appealed from are harmonious and related and thus the thrust of a decision as to the correctness of any one of them should apply with equal force to all. This view has the additional merit of forestalling piecemeal future appeals which may be taken from refusals to release certain of these documents from their "*in camera*" status when circumstances arise which in the opinion of counsel supporting the complaint merit such release.

We are entertaining this appeal at this stage in the proceeding because it involves a question of transcending importance concerning the manner in which adjudicative hearings are conducted and because we are convinced that a decision now would better serve the interests of justice. An expression of the Commission's views at this time should effect a modification in the hearing procedure utilized in this matter which in turn may well affect the final decision rendered. Further, we are persuaded that a decision *in praesenti* is necessary to serve as a guide to hearing examiners and counsel in other proceedings.

The Commission's Rules of Practice do not specifically provide for the "*in camera*" procedure involved here. However, the selective withholding of exhibits from the public record has been the practice in our adjudicative hearings for many years. When properly employed, the practice has merit and we have not up to this time promulgated any definitive directions or restrictions with respect to it. The matter has been left where it belongs, to the sound discretion of the hearing examiner, and until now we are not aware that this discretion has been abused.

There can be no question that the confidential records of businesses involved in Commission proceedings should be protected insofar as possible. In fact, under certain circumstances such protection is guaranteed by statute. Thus, Section 6(f) of the Federal Trade Commission Act expressly prohibits the Commission from publishing by way of a report the "trade secrets and names of customers" obtained through the exercise of the inquisitorial powers granted

by other parts of that section.[1] The Administrative Procedure Act (5 U.S.C. 1002(c)) provides that some matters of official record may, for "good cause found", be withheld from public scrutiny.[2]

On the other hand there is a substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons. While the Federal Trade Commission Act does not specifically provide that Commission adjudicative hearings must be open to the public, we have interpreted Section 5(b) which provides *inter alia*, that any interested person may, upon good cause shown, be allowed to intervene in a proceeding as imposing upon this body the duty of public hearings.[3] Our interpretation has the support and concurrence of a United States Court of Appeals.[4]

The desirability and in fact the necessity for public hearings is such an engrained and accepted part of our judicial system that it needs no lengthy endorsement from us. However, with respect to Federal Trade Commission hearings in particular, there are peculiarly pressing reasons for holding all aspects of adjudicative hearings open to public gaze. Quite obviously the deterrent effect of public proceedings upon potential violators is greater by reason of the fact that they are open to all interested persons. But of greater importance is the fact that the public record of past proceedings serves as a guide to the Bar and other professions who are called upon to advise the business community of this country in trade regulation matters. To foreclose our hearings and the evidence adduced therein from the scrutiny of such professionally interested persons would serve in a large measure to defeat the very reason for our existence. To the unesoteric the field of trade regulation law is a labyrinth, and the guiding "silken thread" is the study and analysis of past proceedings. Problems such as the formulation of an adequate cost justification defense or the erection of a statistical rebuttal to an inference of adverse competitive effect can only be solved by access to the evidence in past cases. One need only to glance through the many books and articles on subjects of this type to discover the authors' dependence upon a study of the public record, including the documentary evidence in decided cases. Suffice it to say that we firmly believe the best interests of the public are served when all interested persons may, if they so desire, famil-

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[1] Section 6(f) has no application to adjudicative hearings but forbids only "* * * the *publication* of 'trade secrets and names of customers,' in public reports that the Commission may make 'from time to time' * * *." *Federal Trade Commission* v. *Tuttle*, 244 F. 2d 605, 616 (2d Cir. 1957), *cert. denied* 354 U.S. 925.

[2] See also Rule 30(b) Federal Rules of Civil Procedure.

[3] Accordingly, Rule 3.16(a) of our Rules of Practice decrees "All hearings in adjudicative proceedings shall be public unless otherwise ordered by the Commission."

[4] *E. Griffiths Hughes, Inc.* v. *Federal Trade Commission*, 63 F. 2d 362 (D.C. Cir., 1933).

iarize themselves with all aspects of an adjudicative proceeding. And it matters not whether that person's interest is motivated by an intention to intervene in the matter, to prepare for other litigation, to write an article or by mere curiosity.

Quite obviously a hearing in which the documentary evidence is kept secret is not in all aspects a public hearing. And this is especially true in Robinson-Patman Act cases where by far the greater percentage of basic facts tending to prove or disprove the charge consists of documentary evidence. Lists of favored and nonfavored customers, their purchase volumes and the prices they were charged are among the facts generally shown by documents. Defensive evidence such as cost savings data is necessarily submitted in documentary form. Thus, the indiscriminate placement of documentary evidence "*in camera*" makes a pretense of our announced public hearings since the testimony, without the documents, may make little or no sense.

It is also important to keep in mind that the final resolution of proceedings of this type almost invariably requires not only the production of the respondent's records but also the production of similar records by the competitors of respondent. Injury at the primary level of competition is most often shown by recourse to the confidential records of competitors. Quite obviously there is no way in which the relevant records of competitors can be shielded from the eyes of a respondent as an "*in camera*" ruling does not bar the parties. Thus, the effect of any "*in camera*" ruling is, of necessity, one-sided, it shields the respondent from his competitors but cannot protect the competitors from respondent.

But, as we have indicated, the Commission should protect the confidential records of persons or corporations involved in proceedings before it insofar as such protection is practicable. Is this duty in conflict with our duty to hold public hearings? We think not. The answer lies somewhere between the Scylla of indiscriminate "*in camera*" rulings and the Charybdis of complete and unnecessary disclosure.

As we have pointed out, the Administrative Procedure Act sanctions the secretion of "matters of public record . . . for good cause found." As we view it, the solution of the problem lies in the judicious interpretation of the rather indefinite words, "good cause". The rule followed by the hearing examiner in this matter is illustrated by his statements in the record. In making one of his rulings placing documents "*in camera*", he said:

> My reason for receiving these records in camera, as stated off the record previously, is that in this hearing examiner's opinion these exhibits, Commission's exhibits 180 through 245 inclusive, contain confidential business information and there is no showing at this time that the public interest would be

served by making this confidential information a matter of public record. On the other hand, by requesting that they go in camera, counsel for respondents [sic] has stated and implied it might possibly harm his client if they were received as public exhibits.

The rule followed by the hearing examiner is obviously incorrect since he placed upon counsel supporting the complaint the burden of showing why the documents should be placed in the public record. As grounds for placing the documents "*in camera*", he relied upon the unsupported statement of respondent's counsel that their public disclosure might result in injury to respondent. Quite clearly, the burden of showing "good cause" rests with the party requesting that the documents be placed "*in camera*". Neither party need show cause why evidence should be placed in the public record since such placement is mandatory unless excused.

We come now to the heart of the problem. What minimum showing constitutes "good cause" and will justify withholding documents from the public record? Of course, a definitive answer responsive to all factual situations cannot be given and indeed none should be attempted since this is an area which quite obviously falls peculiarly within the scope of the hearing examiner's discretion. The most that we shall attempt is to define the policy framework within which the examiner's discretion should operate.

It is our belief that the correct rule requires a showing that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved. The showing may consist of extrinsic evidence or, in certain instances, may be inferred from the nature of the documents themselves.

While all authorities agree that there is no absolute privilege against disclosure of business secrets, the courts have generally attempted to protect confidential business information from unnecessary airing. Cases dealing with this subject quite frequently make use of the term "trade secrets", but there appears to be some confusion as to the scope of the term, with some courts defining it to include only those facts dealing with secret formulas, research or processes,[5] while others seem to hold the term embraces all confidential business records.[6] It seems to us that there is such a wide difference between a secret formula or process and ordinary business records that a single term cannot encompass the whole field. Obviously, the disclosure of a secret formula will almost invariably

[5] In re *Dependable Merchandise Corp.*, 14 F.R.D. 257 (S.D.N.Y. 1953); *Ferguson* v. *Ford Motor Co.*, 8 F.R.D. 414 (S.D.N.Y. 1948).

It should be noted that Section 6(f) of the Federal Trade Commission Act apparently recognizes a distinction by separately naming "trade secrets and names of customers."

[6] *Erone Corp. et al.* v. *Skouras Theatres Corp. et al.*, 22 F.R.D. 494 (S.D.N.Y. 1958). 8 Wigmore, Evidence § 2212 (3d ed. 1940).

result in injury while the revelation of a business record may in many instances produce no more than embarrassment. In the parlance of the military, the former would be labeled "top secret" while the latter would rate only the classification of "confidential" or "restricted". Thus, it seems obvious that a different degree of protection should be afforded these two classes of information.

Since the impact of disclosure of a "trade secret", as distinguished from other records, would almost certainly be productive of injury, motions to place documents of this nature "*in camera*" should be sympathetically considered. In most instances, injury sufficient to establish "good cause" for sealing the documents can be inferred from the nature of the "trade secret" itself.

The documents involved in this proceeding are not "trade secrets", but consist for the most part, of ordinary business records. They do contain information of a type which most businesses would prefer to keep confidential, such as the names of customers, prices to certain customers, costs of doing business and profits. But the probability of a concrete injury resulting from the disclosure of these documents cannot be inferred from the nature of their content nor from the mere fact that respondent prefers to keep them confidential. Thus, documents of this type do not merit the degree of protection afforded to "trade secrets". In our view, requests to seal relevant evidence of this type should be looked upon with disfavor and only granted in exceptional circumstances upon a clear showing that an irreparable injury will result from disclosure.

While it is obviously not possible to make an *a priori* ruling as to the facts which would constitute a showing of "good cause" under the rule, we can point to certain possible grounds which, in our opinion, would not support an "*in camera*" ruling. Quite clearly the mere embarrassment of the movant should not foreclose public disclosure. Nor should documents be sealed simply on the ground that they contain information which competitors for business reasons are extremely desirous to possess.

Certainly the exposure of the respondent to possible treble damage actions is not the type of injury which would constitute "good cause" for secreting this evidence. Placing documents "*in camera*" for this reason would constitute a direct attempt to frustrate and defeat the will and intent of Congress. In enacting Section 4 of the Clayton Act (15 U.S.C. 15), which provides in part that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages * * *." Congress intended that such private suits would supplement and bolster the antitrust enforcement efforts of government prosecution. This Congressional purpose has been recognized by the Supreme Court in *Lawlor* v.

National Screen Service,[7] wherein the Court, holding that the circumstances of that case did not bar the action as *res judicata*, stated:

> Particularly is this so in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble damage action.

Thus, in our view the secretion of evidence for the purpose of frustrating possible treble damage plaintiffs would be opposed to the public interest and the clearly expressed will of Congress. Our efforts should be directed to aiding, not hindering, private enforcement of the antitrust laws.[8]

There is, moreover, a common sense reason why protection of parties from treble damage litigants is not a valid ground for sealing exhibits. We must assume that all documentary evidence admitted by the hearing examiner is relevant and material to the charges made in the complaint and would, as a consequence, be relevant and material in a similarly founded treble damage proceeding. Thus, *all* documentary evidence submitted in this case could be sealed on this ground. As we have indicated, a "public hearing" in which most of the relevant evidence was secret would be little more than a pretense.

Of course, if documents were tendered and received upon the express condition that they would be placed "*in camera*", there is no room for the exercise of any rule since good faith would demand that the condition be kept. Some of the documents here in question were secured from respondent by means of a subpoena *duces tecum*. Respondent claims that its return to several of the subpoena's specifications was conditioned on the hearing examiner's assurance that the documents would be placed "*in camera*". Our examination of the record reveals only one instance which would support respondent's claim. While the situation is not exactly clear, it appears that respondent supplied the documents identified in the record as Commission Exhibits 155–157 on the condition that if offered in evidence they would be placed "*in camera*". Counsel supporting the complaint voiced neither assent nor objection to the conditional response, but their subsequent acceptance of the documents constitutes assent to the limitation placed upon their use and bars them from objecting to their "*in camera*" status. We find no merit in and reject respondent's claim that a number of other documents were supplied pursuant to a similar agreement.

In keeping with our belief that matters of this type should remain subject to the sound discretion of the hearing examiner, we

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[7] 349 U.S. 322, 329 (1955).

[8] There is no question that confidential business data is not privileged in a private treble damage action and parties are obligated to disclose all information relative to the charges made in the action. E.g., *Seff* v. *General Outdoor Advertising Co. et al.*, 11 F.R.D. 597 (N.D. Ohio 1951).

are remanding this matter to him for his further consideration in accordance with the views expressed in this opinion. The documents in question shall remain "*in camera*" pending reconsideration by the hearing examiner after he has afforded respondent opportunity to show cause why they should not be made a part of the public record.

Commissioner Kern did not participate in the decision of this matter.

ORDER REMANDING CASE

This matter having been heard and considered by the Commission upon the interlocutory appeal filed by counsel supporting the complaint from orders of the hearing examiner placing documents "*in camera*" and upon respondent's answer in opposition to said appeal; and the Commission for reasons stated in the accompanying opinion having determined that said orders of the hearing examiner are based upon an erroneous standard:

It is ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner with instructions that he remove from their "*in camera*" status and place in the public record all documents heretofore received "*in camera*" excepting Commission Exhibits 155–157 and such other of said documents which upon reconsideration, after the parties have been afforded an opportunity to present their views thereon, appear to warrant "*in camera*" protection in accordance with the Commission's views as expressed in the accompanying opinion.

Commissioner Kern not participating.

CARNATION COMPANY ET AL. (D. 6172)
THE BORDEN COMPANY ET AL. (D. 6173)
BEATRICE FOODS COMPANY (DELAWARE) ET AL. (D. 6174)
NATIONAL DAIRY PRODUCTS CORPORATION ET AL. (D. 6175)
PET MILK COMPANY ET AL. (D. 6176)
FAIRMONT FOODS COMPANY ET AL. (D. 6177)
ARDEN FARMS CO. ET AL. (D. 6178)
FOREMOST DAIRIES, INC., ET AL. (D. 6179)
H. P. HOOD & SONS, INC. (D. 6425)

Dockets 6172 through 6179 and 6425. Order, Mar. 15, 1961

Order remanding proceedings for further evidence as to competitive effects of alleged unlawful practices.

Counsel in support of the complaints having appealed from the hearing examiner's initial decision dismissing the complaints in

these proceedings, and the Commission having tentatively considered the matter on the briefs and oral arguments; and

It appearing that an informed disposition of the appeal requires an appraisal of all aspects of the competitive effects of the practices alleged to be unlawful, involving, among other things, a consideration of the approximate amount of trade and commerce in ice cream and other frozen products which has been or may be restrained or otherwise affected by such practices; and

The Commission having noted that the records as presently constituted do not contain accurate and reliable statistics from which this information may be ascertained, and being of the opinion that the records in the several cases should be supplemented by the addition of such material:

It is ordered, That each of these proceedings be, and it hereby is, remanded to the hearing examiner for the reception of such further evidence as may be offered for the purpose of showing, for some reasonable period of time, the extent to which requirements contracts, "trade agreements" or other exclusive dealing agreements have been used by the various respondents, their subsidiaries and affiliates in connection with, or ancillary to, the sale of ice cream and other frozen products, the identity and location of the customers with whom such arrangements have been negotiated, and the quantities and dollar volumes of the products which have been involved in the transactions.

It is further ordered, That after the receipt of such additional evidence the hearing examiner indicate changes, if any, he may wish to make in his initial decision in the light thereof.

Commissioner Kern not participating.

EKCO PRODUCTS COMPANY

Docket 8122. Order, Apr. 12, 1961

Interlocutory order upholding hearing examiner's denial of motion to strike charges of Sec. 7 violation.

This matter having been heard by the Commission upon respondent's interlocutory appeal from that portion of the hearing examiner's order of March 9, 1961, denying respondent's motion to strike all of the allegations of the complaint which charge that the acquisition of McClintock Manufacturing Company by respondent violates Section 7 of the Clayton Act; and

It appearing that respondent has made no showing of any additional circumstances which warrant the conclusion that the Commission, in issuing its complaint herein, erred in its administrative decision that it had reason to believe that respondent's acquisition

of McClintock Manufacturing Company violates Section 7 of the Clayton Act; and

The Commission being of the opinion that a determination of the issues presented herein before conclusion of the trial is not required to better serve the interests of justice; and hence, the appeal is not one to be granted under §3.20 of the Commission's Rules of Practice:

It is ordered, That the respondent's appeal from the hearing examiner's order of March 9, 1961, be, and it hereby is, denied.

GIANT FOOD, INC.

Docket 7773. Order and Opinion, Apr. 20, 1961

Interlocutory order denying issuance of subpoena ad testificandum directing Commission investigator to release confidential information obtained in interviewing witnesses.

OPINION OF THE COMMISSION

By the Commission: This matter has been certified by the hearing examiner to the Commission for its consideration of respondent's request that an employee of the Commission be permitted or ordered to testify in this proceeding. Counsel for respondent has filed a memorandum in support of this request.

Respondent is charged with violating the Federal Trade Commission Act through the use of false, misleading and deceptive statements and representations with respect to the prices of merchandise which it offered for sale and the savings accorded to purchasers thereof. Certain witnesses, members of the public, were called by counsel supporting the complaint for the purpose of testifying as to their understanding of claims used by respondent in its advertising. On cross-examination, these witnesses testified that they had been interviewed by an investigator of the Commission prior to the hearing. Some of them also testified that other persons had been contacted by the investigator but had not received subpoenas to appear as witnesses in this proceeding. On the basis of this testimony, respondent contended that it was entitled to know whether persons who had been interviewed but who had not been called as witnesses had given statements in response to the investigator's inquiries which were favorable to respondent. It, therefore, made application for issuance of a subpoena duces tecum directing the investigator to produce "such documents, records, diary, correspondence or memoranda as will disclose the dates, places and persons whom you interrogated with regard Federal Trade Commission Docket No. 7773, along with such documents, records, correspondence or memoranda

which disclose the nature of the interview, the type of questions asked and the responses received." This application was denied by the hearing examiner and, while an appeal from this ruling was pending before the Commission, respondent requested that a subpoena ad testificandum be issued directing the investigator to appear and testify with respect to his participation in the proceeding. This request was granted by the hearing examiner and the subpoena was issued. The investigator appeared in response thereto and after having given his name and address and his position and length of service with the Commission declined to answer questions asked by respondent's counsel concerning the investigation of this matter on the ground that he had not been authorized by the Commission to divulge this information. Respondent now requests the Commission to permit or order the investigator to testify and the matter is before us on this request and on the certification of certain questions by the hearing examiner.

The information which respondent seeks was obtained by the investigator in the performance of his official duties and, therefore, is clearly confidential under the Commission's Rules of Practice. Since the persons from whom this information had been obtained had not testified concerning the subject matter of the interviews, the confidential status of such information had not been waived. Consequently, the hearing examiner had no authority to require the investigator to divulge this information and his issuance of a subpoena ad testificandum for that purpose was improper. *Postal Life & Casualty Insurance Company*, Docket No. 6276 (Order Ruling on Interlocutory Appeal, January 10, 1956), and *Sun Oil Company*, Docket No. 6934 (Order Ruling on Interlocutory Appeal, September 15, 1958).

Although it has not been presented in proper form, we will regard respondent's request as an application for release of confidential information made pursuant to §1.134 of the Commission's Rules of Practice. We have held that in determining whether requested information will be disclosed, we will consider the purpose for which such information is to be used and will order its release only upon a showing by the applicant of a real or actual need therefor. *Postal Life & Casualty Insurance Company*, *supra;* and *Thomasville Chair Company*, Docket No. 7273 (Order Ruling on Interlocutory Appeal, November 6, 1959). It is, therefore, necessary to consider respondent's reason for requesting the information.

Respondent argues, in effect, that of the persons interviewed by the investigator, only those whose testimony would support the complaint were called as witnesses and that the persons who had indicated that they would not be misled by respondent's advertising

had not been asked to testify. Its purpose in calling the investigator as a witness is to prove through his testimony that certain members of the public would not be deceived by the advertising in question.

Respondent's argument is at best conjectural. The mere fact that certain persons were not called as witnesses does not indicate that they would have testified adversely to the complaint. In any event, the investigator's account of what he was told by those persons concerning their understanding of respondent's advertising would not be competent evidence. Moreover, there is nothing in respondent's brief to indicate that there is anything unique about the persons interviewed by the investigator. It appears that they are merely members of the public who were asked to give their impressions of respondent's advertising. Certainly, respondent does not wish to argue that the only persons who would not be misled by the advertising in question are the ones that were interviewed by the investigator but not called as witnesses. Consequently, respondent has not only failed to demonstrate an actual need for the information it requests but does not even claim that such a need exists. Its application for the release of confidential information is, therefore, denied.

The questions which have been certified to us by the hearing examiner are in effect broad, general inquiries concerning the right of an attorney-examiner to refuse to answer questions when called as a witness for respondent and concerning the protection against disclosure afforded by the "work product" principle to the notes, memoranda, interview reports and other information assembled by an attorney-examiner in preparation of a case for trial. In view of the disposition made of respondent's request for the release of confidential information, these questions are not presently before the hearing examiner. Consequently, we do not deem it appropriate at this time to enter into an academic discussion of technical procedural problems which can best be resolved when presented in specific factual situations as they arise.

An appropriate order denying respondent's application will be entered.

ORDER DENYING RESPONDENT'S APPLICATION FOR RELEASE OF INFORMATION

This matter having been heard by the Commission upon respondent's application for the release of certain information allegedly obtained by an attorney-examiner of the Commission in the performance of his official duties and upon the answer of counsel supporting the complaint in opposition thereto; and

The Commission, for the reasons stated in the accompanying opinion, having directed that an appropriate order denying respondent's application for the release of said information be entered;

It is ordered, That respondent's application for the release of said information be, and it hereby is, denied.

GIANT FOOD, INC.