ance with the provisions of § 4.19 of the Commission's Rules of Practice, a new initial decision based on the record as then constituted.

By the Commission.

L. G. BALFOUR COMPANY ET AL.

Docket 8435. Order and Opinion, Oct. 5, 1962

Interlocutory order remanding to hearing examiner for reasons for his recommended disposition, certification of motion for order permitting inspection and copy of documents in Commission's files.

OPINION AND ORDER REMANDING RESPONDENTS' MOTION TO INSPECT AND COPY DOCUMENTS

The hearing examiner, by his order dated September 12, 1962, has certified to the Commission for its determination respondents' motion, filed August 27, 1962, for an order directing counsel supporting the complaint to permit respondents to inspect and copy certain documents in the possession of the Commission. The documents requested by respondents' motion include: (1) documents obtained by the Commission from respondents; (2) four specific documents; (3) documents prepared or received by respondents which were obtained by the Commission from sources other than respondents; and (4) correspondence between respondents and the Commission.

The examiner's order, citing the order of the Commission in *Union Bag-Camp Paper Corp.*, Docket 7946, certifies respondents' motion, together with his recommendation, to the Commission. The examiner recommends that the only part of respondents' motion which should be

granted is the request to examine certain documents submitted to the Commission by the respondents. He further recommends that the remaining documents "fall within the privileged category and should not be disclosed". The examiner gives no explanation for these recommendations.

This disposition by the examiner of the respondents' motion misconceives the purpose and purport of the Commission's order in *Union Bag-Camp Paper Corp.*, which provided, inter alia,

> . . . that any future requests for confidential information in the possession of the Commission which may be filed by respondent in this proceeding shall be addressed initially to the hearing examiner who shall consider and initially determine whether good cause for the release and disclosure to respondent of such information has been shown; and if he shall make such an affirmative initial determination, the examiner shall thereupon certify the matter to the Commission, which retains exclusive authority under Rules 1.163 and 1.164 to release confidential information upon good cause shown.

This procedure was adopted because the determination of good cause for the release of documents in the Commission's files entails, primarily, consideration of issues of fact which require for their determination a detailed knowledge of the issues of the proceeding which, at this stage of the case, is possessed by the examiner.

In making his initial determination of such a matter, an examiner should in the first instance hear both sides relative to the merits of the demand. The material sought by the request (or representative samples thereof) should usually be submitted to him for his examination and study in the light of the contentions by the proponent and opponent.

Naturally, situations may arise where the papers in question relate to strictly internal affairs of the Commission, or where the documents are plainly confidential, such as minutes of Commission meetings. In those or similar circumstances, the examiner should decline to examine the material and should forthwith forward the request for release to the Commission, without any further consideration on his part.

In analyzing the relevance of the papers involved, the examiner should be governed by the charges made in the complaint. It is respondent's burden to show why, and how, the requested documents will aid in meeting these charges.

In considering the issues raised by applications for the release of documents, examiners should find it helpful, and frequently even necessary for guidance, to consult judicial decisions and precedents under the Federal Rules of Civil Procedure concerning the scope and justification of motions for discovery. It is emphasized, however, that the Federal Rules as such do not control Commission proceedings. Prob-

lems emerging from the assertion either of privilege or of the right to "work product" should be examined in the light of principles established by the federal courts, especially in those cases in the antitrust field dealing with the validity of the claim of privilege or the application of the "work product" rule.

The examiner, after having received memoranda or briefs, and having heard oral argument (if he deems it necessary), should forward his certification accompanied by a written statement, in which he should set forth, in as much detail as appropriate, his reasons for the recommended disposition of the demand by the Commission. Thereafter, either side may submit to the Commission a further memorandum, expressing assent or dissent, under the applicable Rules of Practice.

The examiner's order herein fails to satisfy the requirements of this procedure, since it gives no explanation whatsoever for the recommendation that certain documents be released or for the conclusion that others are privileged and should not be released. Thus, the Commission is in no better position to determine whether the documents requested by respondents should be released pursuant to Section 1.164 of its Rules than it would have been had the request been initially addressed to the Commission. Accordingly,

It is ordered, That respondents' motion for the inspection and copying of documents in the possession of the Commission be, and it hereby is, remanded to the hearing examiner for further consideration and disposition in accordance with this opinion and order.

By the Commission, Chairman Dixon dissenting, and Commissioner MacIntyre concurring in the result, with the understanding that it does not provide for the release of documents which are confidential by operation of law or which otherwise the Commission is required by the public interest to keep confidential.

CHAS. PFIZER & CO., INC.

Docket 7780. Order and Opinion, Oct. 10, 1962

Denial of respondent's motion to disqualify the Chairman because of his association with the Senate Subcommittee on Antitrust and Monopoly.