Nash-Finch Company.

SHELL OIL COMPANY

Docket 8537. Order and Opinion, Feb. 1, 1963

Interlocutory order denying, for lack of good cause shown, request for release from the Commission's files of confidential documents claimed to "show that the Commission has arbitrarily reversed its position [not to proceed against Shell] * * * to protect its position in the *American Oil* Case".

Order Denying Motion for Disclosure of Confidential Commission Records

The hearing examiner having certified to the Commission respondent's "Motion For Order Directing Counsel Supporting The Complaint To Produce Certain Documents Necessary To Respondent's Defense" because it appeared that the motion constituted a request for the release of confidential files of the Commission and he was without authority to rule thereon; and

It appearing to the Commission, for the reasons stated in the accompanying opinion, that respondent has not shown good cause

for the release of confidential information made requisite by § 1.164 of the Commission's Rules of Practice:

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

Commissioner Elman not participating.

OPINION OF THE COMMISSION

BY THE COMMISSION:

This matter is before the Commission on certification from the hearing examiner of respondent's motion for an order directing complaint counsel to produce certain documents from the Commission's confidential files. Under § 1.164(b) of the Commission's Rules of Practice, confidential information may be released to properly interested persons upon good cause shown if such release is not contrary to any statutory restriction, Commission rule or the public interest.

The preliminary point to be decided is whether respondent has shown good cause for the release of the documents sought. Respondent claims that the materials requested are necessary to the preparation of its defense and if this is so, then, of course, good cause has been shown. If, on the other hand, the documents requested would contribute nothing to respondent's defense, then good cause has not been shown and disclosure must be denied.

The material requested consists of internal Commission memoranda and other papers of the most confidential nature. Respondent's pleading describes the documents as follows:

(1) Memoranda to the Commission from its staff in the Phoenix, Arizona, investigation recommending the closing of the investigation;

(2) The minute of the Commission closing the Phoenix, Arizona, investigation;

(3) Any memoranda of recommendation of the Commission staff in the Smyrna, Georgia, investigation which recommend closing the investigation;

(4) Any minute of the Commission closing the Smyrna, Georgia, investigation;

(5) Any memoranda of the Commission staff relating to reopening, or to issuance of a complaint, in the Smyrna, Georgia, investigation;

(6) Any minute of the Commission on reopening, or on issuing a complaint in the Smyrna, Georgia, investigation;

(7) Any memoranda to the Commission of recommendation on the part of the Commission staff in the Seattle, Washington, investigation;

(8) Any minute of the Commission closing the Seattle, Washington, investigation, or recommending a complaint in that matter.

It is manifest from the description of the papers themselves that they have no relevance or materiality to the issues in any normal Commission proceeding, but respondent charges that this is not a normal proceeding but "* * * that in bringing the present complaint the Commission has used its discretion in an arbitrary manner to justify its prior decision in the *American Oil Company* case." Respondent speculates that the Commission had previously decided not to proceed against it and that the "* * * documents will show that the Commission has arbitrarily and without just cause reversed its position on the aforesaid issues solely to protect its position in the *American Oil* case." [1]

Respondent cites no facts in support of its charges for the simple reason that none exist. While respondent is not entitled to this information, we deem it necessary to disclose that no employee of the Commission ever recommended against the issuance of this complaint and the Commission did not at any time consider or decide that a complaint should not issue.

Moreover, respondent well knew that the Commission's investigations of its pricing practices in Smyrna-Marietta, Georgia, Seattle, Washington, and Long Island, New York, were not completed until the latter part of 1961, and that the results of these separate area investigations could not be normally processed, coalesced and submitted to the Commission until 1962, the year in which complaint issued. Respondent is aware that this proceeding differs materially from the *American Oil* matter in that it is based upon Shell's activities in a number of markets and is not confined to only the Smyrna-Marietta, Georgia, area.

Even if respondent's completely baseless charges were true to the extent that the Commission had originally decided not to issue a complaint and had changed its mind for any reason, there would still not be good cause shown for the release of the documents. The complaint announced that it was issued because the Commission "had reason to believe" that the law had been violated in the respects described. This is a pronouncement of the reason for the complaint's issuance and is not an allegation to be contested. The respondent's effort to obtain the documents constitutes an obvious attempt to probe the mental processes of the Commission, a practice universally condemned by administrative agencies and the courts.[2]

An appropriate order denying respondent's motion will issue.

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

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[1] Docket No. 8183, order to cease and desist June 27, 1962 [60 F.T.C. 1786].

[2] E.g., *United Airlines, Inc.* v. *Civil Aeronautics Board*, 281 F. 2d 53, 56 (D.C. Cir. 1960).

SHELL OIL COMPANY

Docket 8537. Order, March 7, 1963

Order denying motion to place documents in the public record, failing for the second time to show good cause.

Respondent's Motion To Place Documents In The Public Record avers that the Commission in denying respondent's earlier request for disclosure of Commission records made "statements of fact" in its opinion which are not supported by evidence of record. The motion argues that the Commission cannot "base findings upon matters which are outside the record" and asks that the documents forming the basis for the Commission's factual statements be produced and placed in the public record.

Respondent does not designate either the "findings" or the "statements of fact" which it feels require support, and in the absence of such designation the Commission is without knowledge both as to the alleged findings and statements to which reference is made. Respondent's counsel do state in their motion that they "do not agree with the accuracy of these statements" but, again, as in their earlier motion, they fail to make a showing to support their disagreement.

Presumably, the theory of respondent's motion is that the Commission's order of February 1, 1963, denying the motion for disclosure of records was based, at least in part, on certain unidentified "findings" and "statements of fact" which, in turn, reflect the content of memoranda and other material in the Commission's files. The opinion which accompanied the Commission's order clearly shows on its face that there is no validity to any such theory. As stated in both the opinion and order, the basis for the Commission's action denying respondent's motion was that the respondent had failed to show good cause for release of the requested documents.

Respondent having now failed again to show good cause for the request that documents be placed in the record:

It is ordered, That the Motion To Place Documents In The Public Record be, and it hereby is, denied.

Commissioner Elman not participating.

THE GRAND UNION COMPANY

Docket 8458. Order, Feb. 11, 1963

Interlocutory order granting respondent's counsel permission to examine special reports from some 180 competing food chains used by complaint counsel as the basis for statistical tabulations offered in evidence, and establishing conditions and safeguards upon such disclosure.