

to cease and desist and request for entry of an order staying the effective date of the cease and desist order be, and it hereby is, denied.

IN THE MATTER OF
HUMBLE OIL & REFINING COMPANY

Docket 8544. Order, Aug. 14, 1964

Order denying respondent's request to examine certain memoranda prepared by a Commission statistician.

ORDER DENYING RESPONDENT'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS

On July 29, 1964, the hearing examiner certified to the Commission an oral motion made by respondent during the course of hearings in this matter. Respondent sought an order compelling complaint counsel to furnish copies of certain memoranda written by one of his rebuttal witnesses, a Commission statistician, or in the alternative, an order striking the witness' testimony. Respondent alleged that examination of the memoranda was necessary in order to test the witness' qualifications and the validity of the expert opinion expressed in his testimony. The examiner regarded this motion as being in effect one to compel the production of confidential information from the files of the Commission, which could only be granted by the Commission itself under Section 1.134 of the Commission's procedures and Rules of Practice. Therefore, he expressed his intention to certify the motion to the Commission. Although respondent stated that it did not desire the examiner to delay the proceedings by certifying the motion to

the Commission, it did not withdraw the motion. Thus the motion remains to be acted upon.

Some of the documents sought by respondent, such as the transcript of the statistician's testimony in a prior Commission proceeding, were plainly proper material for use in challenging the qualification of the witness to express an expert judgment or in attempting to impeach his testimony. These materials were readily available to respondent by resort to the Commission's normal channels of public information. However, respondent has made no showing whatever that it attempted and failed to gain access to the materials by these means. Since these materials are plainly not confidential information within the meaning of Section 1.134, the examiner's certification cannot be construed as covering respondent's motion to compel production of them; the examiner had the authority to rule upon respondent's motion at least to this extent and, as we read in the record, did so rule.

Respondent also sought the production of certain internal memoranda that the staff statistician sometime in the past has prepared in the normal course of his staff duties, not related to his testimony in this or any other adjudicatory proceeding. While it is conceivable that examination of these might shed some light on the witness' qualification to comment on respondent's survey or might reveal a view about surveys that is inconsistent with the one expressed in his testimony, this possibility does not establish respondent's right to have access to them. The thrust of respondent's position is that there is a right to examine all of the undisclosed writings of an expert witness which in any way involve or reflect the use of his expert skills. Entirely apart from the obvious questions of privileged communication which arise in this case, it is apparent that this is a novel and wholly untenable view of the scope of impeachment. Almost any statement made by an expert witness, even one contained in a personal letter, conceivably could be relevant in evaluating the worth of his expert opinion. But it has been universally recognized that the line must be drawn somewhere—that a proceeding cannot be permitted to become a series of collateral and complex trials of the opinion of the expert witness, with the opponent of such testimony having an unfettered right of discovery with respect to everything the witness has said or written previously. In this instance, the Commission has no doubt that the attempt to impeach the opinion of a professional member of the Commission's staff by examining the internal memoranda prepared by him in the normal course of his duties falls well outside the bounds of permissible voir dire or cross-examination. Accordingly,

It is ordered. That respondent's motion be, and it hereby is, denied.

IN THE MATTER OF
FLOTILL PRODUCTS, INC., ET AL.

Docket 7226. Order, Sept. 3, 1964

Order denying respondents' petition for reconsideration, three participating Commissioners constituted a quorum.

ORDER DENYING RESPONDENTS' PETITION FOR RECONSIDERATION

This matter has come on to be heard by the Commission upon respondents' petition, filed August 5, 1964, for reconsideration of that portion of the Commission's final order issued herein on June 26, 1964 [65 F.T.C. 1099], which prohibits violations of Section 2(c) of the amended Clayton Act, and upon the answer of counsel supporting the complaint in opposition thereto.

In support of their petition, respondents assert that all members of the Commission should participate in the consideration of this case and that since the Section 2(c) provision of the order is supported by only two members of the Commission rather than a majority thereof, the order is not lawful.

The fact that a vacancy existed in the Commission at the time of the issuance of this final order does not render the order invalid.¹ Of the four Commissioners serving at that time, three participated in the decision. These three participating Commissioners constituted a quorum for the transaction of business in accordance with the Commission's rules and in the absence of a statutory provision relating thereto. *Drath v. Federal Trade Commission*, 239 F. 2d 452 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 917. A majority of a quorum is sufficient to sustain the validity of a final order of an administrative body. *Frischer v. Bakelite Corp.*, C.C.P.A. (Patents), 39 F. 2d 247 (1930), *cert. denied*, 282 U.S. 852. Since two of the three participating Commissioners concurred in the issuance of the final order, respondents' argument on this point must be denied.

In further support of their petition, respondents contend, in effect, that a new question has been raised by the opinion for the reason that the evidence relied upon does not sustain the Section 2(c) provision of the final order. Respondents have submitted certain affidavits in support of this argument.

The Commission has carefully considered respondents' argument and concludes that respondents have made no showing of any new

¹ Section 1 of the Federal Trade Commission Act provides, in part, that "A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission."