Order denying respondent's appeal from hearing examiner's denial of its requests for depositions and supporting subpoenas directed to several nonparties.

Opinion of the Commission

This matter is before the Commission upon the appeal of respondent from the hearing examiner's order, *inter alia*, denying its applications for depositions and supporting subpoenas ad testificandum in advance of hearing. The appeal has been taken pursuant to

§ 3.17(f) of the Commission's Rules of Practice, which provides that the Commission will entertain an appeal from a subpoena ruling only upon a showing that the ruling involves substantial rights and will materially affect the final decision and that a determination of its correctness before the conclusion of the hearing will better serve the interests of justice.

Respondent, on July 6, 1965, filed four applications for orders authorizing the taking of nonparty oral depositions and depositions upon written interrogatories. The applications for oral depositions cover forty-eight different manufacturers located in the States of New York, Connecticut, New Jersey, Pennsylvania, Ohio, Illinois, Wisconsin, Texas and California. The proposed schedule for the taking of these depositions runs from September 8, 1965 to October 28, 1965. The subject matter covers a wide range of information and it is likely that more time than is specified in the proposed schedule would be needed. The proposed depositions upon written interrogatories would go to 148 additional nonparties and these would be returnable on or before October 21, 1965.

The hearing examiner held a hearing on July 16, 1965, on the matter of authorizing the depositions, giving the parties at that time an opportunity to present their views orally. After hearing argument, he stated on the record that he would enter an order denying the applications. It is clear that he made one exception.[1] His written order denying the applications was issued July 20, 1965. The examiner's disposition is based, in part at least, upon the respondent's failure to make a showing as to the following: that the depositions would constitute or contain relevant evidence, that the number of depositions requested was not excessive, that the evidence called for would not be otherwise available or could not be obtained by respondent under compulsory process returnable at the hearing, that the depositions in such number and over the indicated time period would cause no undue burden or expense on another party and no undue delay in the proceeding.

The Commission, in *Topps Chewing Gum, Inc.*, Docket No. 8463, order issued July 2, 1963 [63 F.T.C. 2196] (a decision made on the basis of previously existing rules), stated that the conduct of adjudicative proceedings is primarily the responsibility of the hearing examiners and that an examiner's rulings on evidentiary or procedural matters arising in the course of such proceedings will not be reviewed

[1] Respondent insists that the examiner had denied the request for the deposition of Mr. S. K. Wellman, which request apparently was solely to preserve his testimony because of ill health and advanced age. It seems clear that the examiner has not denied this specific request and that his order herein reviewed covers only the applications for depositions aside from that for Mr. Wellman. The examiner plainly indicated that he would allow the deposition of Mr. Wellman, at page 266 of the transcript.

or disturbed in the absence of unusual circumstances. The Commission pointed out that it was therefore the examiner's duty to exercise firm direction over adjudicative proceedings to ensure that the Commission's policy of orderly, expeditious and continuous proceedings is not thwarted by either deliberate or inadvertent actions of the parties; that the need for positive control of proceedings involving the trial of complicated issues of fact cannot be too strongly emphasized. Continuing in its opinion in *Topps*, the Commission stated in part:

> The exercise of this responsibility [*i.e.*, control over the proceeding] is particularly important in directing and limiting the scope of the deposition procedure afforded by the Commission's Rules. Properly used, depositions afford a valuable method for the preparation of the respondent's defense, thereby making possible the continuous hearings contemplated by the Commission's Rules. Cf. *L. G. Balfour Company*, Dkt. 8435, Order Directing Disclosure of Documents, May 10, 1963 [62 F.T.C. 1541]. At the same time, care must be taken that depositions are not substituted for the continuous hearings required by these Rules and that they are not used as a means to delay the disposition of the proceeding. * * *

These principles continue to be controlling.

The Commission's rule on depositions (§ 3.10(a)) in pertinent part reads as follows:

> At any time during the course of a proceeding, whether or not issue has been joined, the hearing examiner, in his discretion, may order that the testimony of a witness be taken by deposition and that the witness produce documentary evidence in connection with his testimony. Such order may be entered upon a showing that the deposition will constitute or contain evidence relevant to the subject matter involved and that the taking of the deposition will not result in any undue burden to any other party or in any undue delay of the proceeding. * * *

This rule gives the examiner broad discretion on matters of discovery. He may order depositions upon a showing of certain minimum requirements, that is, that the depositions will constitute or contain relevant evidence and that the taking of the depositions will not result in any undue burden to another party or any undue delay in the proceeding. The examiner, however, is not bound to order the taking of depositions when these conditions are met; he may require more. He may, for instance, require a showing as to the usefulness and need of the requested depositions or other justification. He likewise has broad discretion as to the manner and form of the depositions and the protections which may be needed for a party or a deponent (§ 3.10(d) of the Rules of Practice).

The examiner, in this case, was confronted with an extensive request for depositions (including interrogatories) covering 196 persons. It is clear that he believed, after hearing the arguments, that respondent had not made the minimum justification required

by the Commission's rule, namely, relevancy and the avoidance of undue burden to any party or undue delay in a proceeding. The fact that almost 200 persons were to be deposed over a period of some two months time, and probably more, with the great likelihood of many motions to quash or modify and the necessity of rulings thereon, could well have suggested to the examiner that the proposed discovery procedure would necessarily result in an undue delay of the trial of this proceeding.

The examiner, furthermore, looked beyond the claim of mere relevance. He in effect required respondent to show some real necessity for the taking of this large number of depositions, with the inevitable delays and burdens connected therewith. We neither agree nor disagree with his decision to require a greater showing. We hold simply that in this proceeding and in these circumstances he did not abuse his discretion in the requirements he established and in his denial of the applications. We emphasize that in the matter of discovery the hearing examiner is given, by the Commission's Rules of Practice, a broad discretion, and the Commission, except by a clear showing of an abuse of that discretion, will sustain the examiner in his rulings in such matters.

Respondent has not shown that the ruling herein involves substantial rights and will materially affect the final decision and that a determination of its correctness before the conclusion of the hearing will better serve the interests of justice. Accordingly, it is directed that the appeal from the examiner's ruling denying respondent's applications for depositions and subpoenas be denied. An appropriate order will be entered.

Order Denying Appeal From Denial of Applications for Depositions and Subpoenas

Respondent having filed an appeal from the hearing examiner's order filed July 20, 1965, *inter alia*, denying its applications for depositions and supporting subpoenas ad testificandum, which appeal was filed pursuant to § 3.17(f) of the Commission's Rules of Practice; and

The Commission having considered the said appeal answer thereto filed by complaint counsel August 16, 1965, the reply filed by counsel for respondent August 24, 1965, and having determined, in accordance with the views expressed in the accompanying opinion that respondent's appeal should be denied:

It is ordered, That respondent's appeal from the hearing examiner's order filed July 20, 1965, denying its applications for depositions and supporting subpoenas ad testificandum, be, and it hereby is, denied.

MISSISSIPPI RIVER FUEL CORPORATION

Docket 8657. Order and Opinion, Sept. 2, 1965

Order and opinion denying in part respondent's request for the production of confidential Commission documents covering relationships between portland cement producers and ready-mix concerns, and remanding case to hearing examiners.

ORDER AND OPINION DENYING IN PART MOTION FOR PRODUCTION OF DOCUMENTS AND REMANDING TO EXAMINER

This matter is before the Commission upon the hearing examiner's certification of respondent's motion for the production of confidential Commission documents listed by respondent as follows: (1) all documents as described in the first paragraph of the motion covering relationships between portland cement producers and ready-mix concerns, including such information as credit arrangements, increases in accounts receivable, reserves for losses on credit extensions, evidence of indebtedness and many other details; and (2) Special Reports received by the Commission in response to its December 1, 1964 resolution directing an investigation of corporations engaged in the production and distribution of portland cement.

The examiner correctly certified the motion for production of these confidential documents, along with his recommendations, under the procedure outlined in *L. G. Balfour Company*, Docket No. 8435, order issued May 10, 1963 [62 F.T.C. 1541]. His recommendation is to deny the motion. As to the first paragraph (he considered the two paragraphs separately), he determined that the request amounted to a fishing expedition with the hope that something helpful might turn up. He also stated there was no showing that the discovery sought is necessary to enable respondent to meet the evidence which may be presented and no showing that a denial would constitute unfairness. His recommendation to deny the production sought in the second paragraph of the motion is based upon the reasons in his certification of a similar request, and the Commission's ruling thereon, in *Texas Industries, Inc.*, Docket No. 8656, order issued May 18, 1965 [67 F.T.C. 1378].

While the second paragraph of the motion deals exclusively with Special Reports obtained by orders issued under Section 6(b) of the Federal Trade Commission Act, it is apparent that the information listed in the first paragraph of the motion, if it exists at all, would also likely be contained, in whole or in part, in Special Reports or, if not in Special Reports, it would have been obtained under such circumstances as to make the same considerations of confidentiality apply. The Commission, in its opinion in *Texas Industries, Inc.*,

supra, expresssed its view on the production of such information, stating that it is highly confidential and will not be disclosed unless the needs of basic fairness so dictate. There the needs of fairness did not so dictate, because no part of the Reports had been, or would be, turned over to complaint counsel to be introduced in evidence in the proceeding, and, so, it was not a case of denying respondent access to evidence available to complaint counsel.

This matter is governed by the same principles. Here the examiner found that respondent has had, or before the hearings will begin will have had, full discovery of all the evidence in the possession of complaint counsel. Although it is possible, as the examiner assumed, that some of the documents may be relevant or helpful to respondent in the preparation of its defense, this is insufficient to override the public interest against disclosure. The Commission's ability to conduct a sound and comprehensive industrywide inquiry into the cement industry would likely be impaired by releasing Special Reports and like confidential records for use in an adjudicative proceeding such as this. See the full discussion of this subject in the opinion in *Texas Industries, Inc., supra.* Therefore, we are in accord with the examiner's recommendations generally and we will deny respondent's motion except for certain particular documents which will be separately treated below. The latter are documents relating to financial dealings between U.S. Steel and Certified Industries and a loan agreement involving a ready-mix concern referred to by complaint counsel in their answer to respondent's motion.

As to these specific documents, the examiner apparently would deny production on the same grounds as he would in general deny the information and documents requested in the first paragraph of the motion. But that seems to overlook the fact that these are documents specifically defined by complaint counsel and the further circumstance that some of them may possibly soon be produced in another proceeding. There is even doubt as to whether or not complaint counsel intends to use them in this proceeding, although the examiner assumes they will not be so used. Also, the examiner has not made a positive determination on the relevance of, or respondent's need for, these documents. He merely states that he cannot say that they would not be relevant or helpful. An inspection of the documents by the examiner may aid him in making this determination. In the circumstances, we will remand the matter to the examiner, with the following instructions:

(a) Determine whether part or all of such documents were obtained by Special Reports pursuant to orders issued under Section 6(b) of the Federal Trade Commission Act.

(b) Determine whether part or all of such documents are to be

introduced into the record in this proceeding by complaint counsel.

(c) Examine such documents and make a positive determination whether they contain information relevant to the issues raised by the complaint and whether they are needed by the respondent for its defense.

(d) Determine whether these documents contain information which is privileged or which should not be disclosed because it would be contrary to the public interest to do so.

(e) If necessary, certify any question of the production of these documents to the Commission, with an appropriate recommendation. Accordingly,

It is ordered, That the examiner inspect the documents covering the financial dealings between U.S. Steel and Certified Industries and the loan agreement involving a ready-mix concern referred to by complaint counsel in their answer to respondent's motion and make the determinations outlined herein and take such further action as may be required in light of the views expressed in this opinion.

It is further ordered, That respondent's motion, other than as to the exceptions covering the documents specified by complaint counsel in their answer to respondent's motion, be, and it hereby is, denied.

ASSOCIATED MERCHANDISING CORPORATION ET AL.

Docket 8651. Order and Opinion, Sept. 23, 1965

Order denying respondents' request to appeal from hearing examiner's order