VIVIANO MACARONI COMPANY

Docket 8666. Order and Opinion, March 9, 1966

Order denying request of respondent for access to confidential Commission documents pertaining to certain investigations.

OPINION OF THE COMMISSION

This matter is before the Commission on the certification of the hearing examiner of a portion of the application of respondent's counsel, filed March 1, 1966, requesting the inspection and copying of documents in the Commission's confidential files pertaining to investigations made by the Commission. Complaint counsel, on March 4, 1966, filed a memorandum stating their position as to the examiner's certification.

The respondent's request for documents to the hearing examiner was as follows:

2. . . .

(a) All letters written to the Federal Trade Commission by all of the persons listed in Appendix A hereto which have been identified to the respondent as prospective Commission witnesses or any additional Commission witnesses not yet identified and also copies of all letters sent by the Commission to said persons;

(b) All written statements given by the persons listed in paragraph 2(a) above;

(c) All memoranda of meetings, interviews and/or telephone conversations made by Commission personnel with all of the persons listed in paragraph 2(a) above.

At the commencement of the hearings on March 2, 1966, agreement was reached satisfactory to the parties which in substance provides that the documents called for by subparagraphs 2(a) and 2(b) will be made available to respondent if they contain a statement or statements pertinent to the witnesses' testimony or the issues involved in the proceeding. Such documents will be first turned over to the hearing examiner for his inspection.

Accordingly, the certification concerns solely the request under 2(c), above, which is for all memoranda of meetings, interviews, and/or telephone conversations made by Commission personnel with prospective witnesses.

Documents of this kind, if any such exist, would be contained in the confidential files of the Commission and these generally can be obtained only under the provisions of § 1.134 of the Commission's Rules of Practice. The cases dealing with this question have made clear that a request during the course of a hearing for confidential information in the Commission's files

will be treated as an application under § 1.134 of the Commission's Rules. The hearing examiner, in such a case, is required to certify the matter to the Commission with his recommendation. See *L. G. Balfour Company,* Docket No. 8435, orders issued October 5, 1962 [61 F.T.C. 1491] and May 10, 1963 [62 F.T.C. 1541]; *R. H. Macy & Co., Inc.,* Docket No. 8650, order issued September 30, 1965 [68 F.T.C. 1179]. Under § 1.134 the Commission may direct that confidential documents be disclosed to an applicant upon a showing of good cause therefor.

Respondent's position is that it is not required to meet the standard of "good cause" under § 1.134 because the documents requested are relevant and necessary for its defense and, accordingly, the material should be released under the exception in § 1.133 of the Commission's Rules. Section 1.133 broadly declares that records and files of the Commission and specified documents and information are confidential, and it provides the following exception:

> . . . Except to the extent that the disclosure of such material or information is specifically authorized by the Commission or to the extent that its use may become necessary in connection with adjudicative proceedings, they may be disclosed, divulged, or produced for inspection or copying only under the procedure set forth in § 1.134.

The exception in § 1.133 referred to clearly does not, during the course of a proceeding, so change the requirements for the release of confidential information that a discovery type request prior to the trial on an assertion showing only a possible general helpfulness to a respondent in the preparation of its defense is sufficient to override the requirements of Rule 1.134. The exception in pertinent part relates to material and information which may be necessary for use in connection with an adjudicative proceeding and this, in general, includes that which complaint counsel must use in the presentation of his case and other vital documents such as Jencks type statements. See *Ernest Mark High,* 56 F.T.C. 625 (1959); *Sun Oil Company,* Docket No. 6934, order issued September 15, 1958. It is not a general authorization for pretrial discovery bypassing the Commission's requirements in § 1.134 governing the release of confidential data. Commission cases prior and subsequent to the adoption of the present Rule 1.133 have stressed that confidential material requested in the course of a hearing ordinarily cannot be obtained except by application to the Commission. *Postal Life and Casualty Insurance Company,* Docket No. 6276, 52 F.T.C. 651 (1956); *Thomasville Chair Company,* Docket No. 7273, 56 F.T.C. 1651 (1959); *Giant*

Food, Inc., Docket No. 7773, 58 F.T.C. 1193 (1961); *Shell Oil Company*, Docket No. 8537, order issued February 1, 1963 [62 F.T.C. 1488]; *L. G. Balfour Company, supra; R. H Macy & Co., Inc., supra; Modern Marketing Service, Inc.*, Docket No. 3783, order issued January 7, 1966 [p. 1077 herein].

We turn then to the question of whether respondent has shown good cause as required by § 1.134. To qualify under this rule there must be a showing of real or actual need. *Postal Life and Casualty Insurance Company, supra; Thomasville Chair Company, supra; Shell Oil Company, supra; Giant Food, Inc., supra; R. H. Macy & Co., Inc., supra; Graber Manufacturing Company, Inc.*, Docket No. 8038, order issued December 13, 1965 [68 F.T.C. 1235]; *cf. Texas Industries, Inc.*, Docket No. 8656, order issued May 18, 1965 [67 F.T.C. 1378].

Here respondent has made no showing as required under Rule 1.134. In its application filed on March 1, 1966, respondent makes only the unsupported claim that the documents are necessary for its defense. In his argument before the examiner on March 2, 1966, according to the examiner, respondent's counsel urged that a "number of the prospective witnesses are hostile to the respondent and that, if he can obtain the documents called for and if they demonstrate this hostility, he will be able, if not to attack the credibility of the witnesses, at least diminish the weight that should be given to their testimony."

It should be stressed that respondent is not, in this connection, seeking prior verbatim statements of the prospective witnesses, which documents will be available pursuant to the agreement to supply the items listed under subparagraphs 2(a) and 2(b) of the request; rather, what it seeks are the summary reports by agents as contained in interview reports. These reports would be the impressions of a third party as to what was said in a particular conversation. This, of course, would be inappropriate for impeachment purposes since such a report is not necessarily the statement of the prospective witness. For this reason the Commission has previously ruled that interview reports which are merely agents' summarizations are not to be produced. *Ernest Mark High, supra.* As indicated in *Ernest Mark High,* the Commission, in connection with the statements of a Government witness to an agent of the Government, will follow the substance of the Jencks Act. (18 U.S.C. § 3500.) If there is any question whether or not the report is a statement within the scope of Section (e) of that statute, the examiner may inspect the document and make a determination. But that would not occur until

after the witness takes the stand. The Jencks Act is strictly limited in its application to uses for impeachment. *Palermo* v. *United States,* 360 U.S. 343, 349 (1959); *United States* v. *Berry,* 277 F. 2d 826 (7th Cir. 1960). It is not to be used for general discovery.

Moreover, the documents involved would come within the rule protecting an attorney's work product. See *Hickman* v. *Taylor,* 329 U.S. 495 (1947). As the Court there stated:

> . . . Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney. (*Id.* at 510.)

The Court continued:

> . . . This work [preparation of a client's case] is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served. (*Id.* at 511.)

The claim here that there might be hostile witnesses in the group of prospective witnesses to be called by complaint counsel is clearly insufficient to justify production of documents within the category of an attorney's work product as defined in *Hickman* v. *Taylor.* See also *Graber Manufacturing Company, Inc.,* Docket No. 8038, order issued December 13, 1965 (pages 6 and 7 of slip opinion) [68 F.T.C. 1235, 1239–1240].

The examiner has recommended in his certification that because respondent has failed to show good cause for the release of the material requested under subparagraph 2(c) of its application that such request should be denied. We are in agreement with his recommendation. An appropriate order will be issued.

Commissioner Elman did not concur.

ORDER RULING ON QUESTION CERTIFIED

This matter having come before the Commission upon the certification of the hearing examiner of respondent's application

filed March 1, 1966, requesting access to documents in the confidential files of the Commission, and the Commission having determined, for the reasons set forth in the accompanying opinion, that the respondent's request should be denied:

It is ordered, That respondent's request for access to confidential documents in the Commission's files be, and it hereby is, denied.