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.

Commissioner Elman did not concur.

R. H. MACY & CO., INC.

Docket 8650. Order, March 10, 1966

Order remanding case to hearing examiner with instructions to grant respondent counsel access to certain parts of five interview reports relative to sweaters which are exhibits in this case.

ORDER REMANDING TO HEARING EXAMINER FOR FURTHER PROCEEDINGS

The examiner in this matter has certified his ruling made January 18, 1966, denying respondent requested access to certain interview or investigational reports, the examiner stating in effect that the evidence is crucial in the proceeding and that his ruling should be passed on by the Commission at this time to allow appropriate steps for correction, if necessary.

A Commission investigator testified for the complaint on direct that he purchased certain sweaters from stores of the respondent. Four of such sweaters were received in evidence. The examiner states that it is upon these four exhibits that complaint counsel rely to support the charge of misbranding in violation of the Wool Products Labeling Act. The examiner further states that he is satisfied that the investigator based his identification of the specific sweaters upon his recollection as refreshed, not by reports to the Commission and other notes, but by a pin ticket with handwritten notes which he attached to each sweater after its purchase. On cross-examination it was revealed that the investigator's recollection was aided by an examination he made the night before he testified, of a file which included copies of his typewritten reports to the Commission and some of his handwritten notes relating to the investigation.

Respondent's counsel asked to examine the records referred to for the purpose of cross-examination. The examiner made a

distinction in the material requested. He asked for the indicated file from complaint counsel and upon receiving it he extracted therefrom the handwritten notes. These notes were then turned over, without objection, to the respondent. As to the interview reports, however, the examiner indicated his view that such reports to the Commission were confidential, and he ruled specifically that for the purpose requested it was unnecessary for them to be made available.

The investigator testified that he had made five interview reports as to the sweaters identified and that he had signed these five reports (tr. 197, 202).

While Commission proceedings are not expressly governed by the terms of the Jencks Act (18 U.S.C. § 3500), which statute is limited to criminal prosecutions brought by the United States, the Commission has indicated it will follow the substance of this statute in appropriate circumstances. *Ernest Mark High*, 56 F.T.C. 625, 632 (1959). Reports of Government agents called as witnesses by the United States have been held to be subject to the requirements of the Jencks Act. *Clancy* v. *United States*, 365 U.S. 312 (1961); *Burke* v. *United States*, 279 F. 2d 824 (8th Cir. 1960), and cases cited therein at pages 825 and 826.

Therefore, where the investigator witness testifies, as here, on direct examination at the instance of complaint counsel and it develops during his testimony that he has made reports on the subject about which he testified and such reports are requested for cross-examination, it would be proper for the examiner to order the production of these documents. Complaint counsel is authorized to make them available.* Upon receiving the order to produce, however, complaint counsel may, under the procedure of the Jencks Act, elect not to comply with the order. If there is such a failure to produce the documents by complaint counsel, the examiner should strike the testimony involved. This procedure, it should be stressed, applies only the Jencks Act type statements.

The access request in this instance, it appears, is confined to the five interview reports to which reference has been made. The hearing examiner may order these produced and, if requested, he should, before turning them over, inspect the reports *in camera* and excise the portions not covered in the testimony.

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*Jencks Act type statements are clearly within the exception in § 1.133 of the Commission's Rules, as documents whose "use may become necessary in connection with adjudicative proceedings." Thus, complaint counsel has the general authority to release such documents during the course of a trial, and it is not necessary that he make a special request for the release of confidential information under § 1.134.

Here the witness testified as to the purchase of the sweaters in evidence, their identification and other closely related matters. Only such portions of the reports may be turned over to respondent. (See procedure for excision as set forth in paragraph (c) of the Jencks Act.) Accordingly,

It is ordered, That this matter be, and it hereby is, remanded to the hearing examiner for further proceedings consistent with