

ALLIED CHEMICAL CORPORATION, ET AL.

Docket 8767. Order and Opinion, January 30, 1969

Order denying respondent's appeal from examiner's denial of motion to subpoena Commission records.

OPINION OF THE COMMISSION

This matter is before the Commission upon two appeals; (a) respondents' appeal filed December 20, 1968, from the hearing examiner's denial of their motion for a subpoena for records of the Commission and complaint counsel's answer thereto filed December 30, 1968; and (b) complaint counsel's appeal filed December 23, 1968, from the order of the hearing examiner disposing of the motion for the issuance of the subpoena for records of the Commission, and respondents' answer thereto filed January 3, 1969, entitled "Respondents' Motion To Dismiss Complaint Counsel's Appeal From Order Of Hearing Examiner."

Respondents' motion for records of the Federal Trade Commission was filed on November 22, 1968. In this motion respondents requested the production or disclosure of various documents, papers and other materials in the records of the Commission, including the names, addresses and business affiliations of all persons interviewed by the Commission's staff in connection with this matter and all memoranda, transcripts or other records reflecting the substance of such interviews. This motion was considered in a prehearing conference held on December 12, 1968. In the course of this conference complaint counsel stipulated with respondents' counsel for the production of part of the documents sought and the hearing examiner supplemented the stipulations by his directions on the record, including a protective order. The hearing examiner subsequently issued a formal, written order, filed December 13, 1968, denying respondents' motion for the issuance of a subpoena for records of the Federal Trade Commission, which order recited the stipulations of complaint counsel and the arrangements made for the production of certain of the records requested.

Respondents now appeal from such denial insofar as respondents have not received production of all the documents and materials sought. The documents not produced upon respondents' request under the stipulations and the order and directions of the hearing examiner would appear to be reports of interviews, if any, of persons interviewed by the Commission's staff in connection with this matter.

Complaint counsel agreed, prior to the December 12, 1968, conference, to supply the information requested in Item 3 of the respondents' motion, that is, the names, addresses and business affiliations of all persons interviewed by the Commission's staff in connection with this matter so long as the respondents would disclose like information.¹ It appears that this arrangement was satisfactory to respondents and the examiner's directions at the pretrial conference explicitly covered the terms of such exchange. (It is the examiner's direction in such matter, limiting the exchange to persons interviewed outside the organizations, which forms the basis for complaint counsel's appeal.)

Respondents, however, seek the production of the reports of the interviews with such persons. They claim, in effect, that they are entitled to such access as a matter of a general discovery right. Respondents assert that the Commission's staff has engaged in what is described as a far-reaching investigation covering a period of more than one year and that in that period, both before and after the issuance of the complaint, thirty-nine persons were interviewed, of which complaint counsel indicated an intention to call only eleven. Complaint counsel will not reveal, it is claimed, what they have learned from any of the persons interviewed. Respondents argue that they "cannot hope to retrace complaint counsel's steps." The reasons they assert are that the hearing date set for February 3, 1969, does not allow sufficient time and, furthermore, that they have "every reason to believe that the interviewees will not prove cooperative." Thus, they argue that in the circumstances it would be unfair and a denial of due process to permit the hearing to proceed without requiring complaint counsel to divulge materials favorable to respondents' case or casting doubt on the complaint counsel's case.

As legal authority for their contention that they are entitled to interview reports as a part of prehearing discovery, the respondents cite the cases of *Giles v. Maryland*, 386 U.S. 66 (1967); and *Brady v. Maryland*, 373 U.S. 83 (1963). These cases, in our view, are inapposite to Commission proceedings. Both involve the suppression of evidence where the defendants were found guilty of crimes for which they had been sentenced to death (commuted to life in the *Giles* case). The holdings in such cases, on vastly different factual circumstances, have little, if any, direct relevance to administrative proceedings. In addi-

¹ Complaint counsel supplied this information to respondents on December 12, 1968 (Tr. 149-150).

tion, neither case expressly deals with the rights of a party being proceeded against so far as matters of pretrial discovery are concerned. They are concerned with production of material and admissible evidence which had been suppressed. The interview reports here involved are not in that category.

The holding in *Hickman v. Taylor*, 329 U.S. 495 (1947), is more nearly, if not precisely, in point. In such case the Court was dealing with pretrial discovery applications under the Federal Rules of Civil Procedure and the right, if any, to inquire into materials collected by an adverse party's counsel in the course of preparation for possible litigation. The Court held in that case there was only a naked general demand for the materials as a matter of right and a finding by the District Court that no recognizable privilege was involved. That, the Court stated, was insufficient to justify discovery of what it described as the lawyer's "work product."

This case is not dissimilar. The interview reports sought generally come within the category of the work product of a lawyer and no adequate justification has been presented for their disclosure. While respondents claim that they do not have the time to conduct the interviews, they have not demonstrated that any attempt has been made to interview the persons in question nor have they given any reasons why this should take more time than that available. Respondents also claim that they have "every reason to believe" that the interviewees will not prove cooperative, but they have not elaborated on this statement and they have not demonstrated that they will fail to receive cooperation. These are the sole grounds mentioned. Under the controlling *Hickman* precedent this is insufficient justification for the production sought. See also Commission Rule 3.36(b) covering the content of a motion for a subpoena for Commission records.

Respondents' request does not raise the precise issue with which the Commission was concerned in prior referred to cases such as *Inter-State Builders, Inc.*, Docket No. 8624 (order issued April 22, 1966) [69 F.T.C. 1152]; *L. G. Balfour Company*, Docket No. 8435 (order issued April 22, 1966) [69 F.T.C. 1118]; and the more recent *Star Office Supply Co.*, Docket No. 8749 (order issued September 18, 1968) [74 F.T.C. 1595]. In those cases the question of production related to interview reports for persons who had testified at the trial. In this matter, it is clear that respondents will be given pretrial statements of witnesses qualifying under the Jencks Act, if any, at the time the witnesses testify (Tr. 99). Cf. 18 U.S.C. §3500 (1958). Respondents, how-

ever, want all statements made by all persons interviewed in connection with the case, whether or not producible under the Jencks Act and whether or not these relate to complaint counsel's witnesses. Respondents are, in effect, claiming the right to examine the Commission documents generally to determine whether or not any contain information favorable to its defense. The Commission's discovery rules do not go so far. Respondents are not entitled as a matter of discovery right to the general production of all interview reports for persons interviewed in connection with this proceeding. For a full discussion of the Commission's views on the production of interview reports under the Jencks rule see *Inter-State Builders, Inc., supra*, and *L. G. Balfour Company, supra*.

Complaint Counsel's Appeal

As previously mentioned, complaint counsel appeal from what they describe as an order of the hearing examiner issued in disposition of a motion for issuance of a subpoena for records of the Federal Trade Commission. Such counsel assert that this order was served on them December 16, 1968, and provides that complaint counsel supply respondents with a list of names, addresses and business affiliations of all persons interviewed by the Commission's staff in connection with this matter and that respondents' counsel provide complaint counsel with a list of the names, addresses and business affiliations of all persons outside of respondents' organizations interviewed by respondents' counsel in connection with this matter. Complaint counsel characterize this order as unfair and as applying a dual standard in that it requires complaint counsel to supply the names of all persons interviewed whereas respondents' counsel is required to supply the information only as to those persons outside of its organizations.² As heretofore noted, complaint counsel have already submitted the required information to respondents. It is not disclosed on the record whether this listing includes interviews with any persons other than those outside of the Federal Trade Commission. In any event, it appears that complaint counsel's objection is not so much with the breadth of the order so far as it affects complaint counsel as it is with the qualification which requires respondents' counsel to produce the information only as to persons outside respondents' organizations.

Respondents raise questions about the appropriateness and

² Complaint counsel apparently have misread the hearing examiner's ruling since the examiner expressly limited his direction to complaint counsel to produce the information to persons outside the Commission (Tr. 114).

the timeliness of complaint counsel's appeal. The matter is complicated by the fact that the hearing examiner made a ruling on the subject at the pretrial conference on December 12, 1968, and the next day, on December 13, 1968, in effect formalized his ruling by issuing an order denying respondents' motion for subpoena. Because the situation is not clear and also because respondents will not be prejudiced in view of our rejection of complaint counsel's request on the merits, we will proceed to consider complaint counsel's appeal as properly and timely made under the Commission's rules.

We are not persuaded that the matter raised by complaint counsel is anything more than a procedural detail within the discretionary authority of the hearing examiner. This whole question of the exchange of information concerning persons interviewed was considered in depth before the hearing examiner at the pretrial conference of December 12, 1968. Complaint counsel, at that time, presented their argument that they believed respondents' counsel should produce the names of persons interviewed inside as well as outside of respondents' organizations. They failed, however, to give any substantial reasons why the broader request was necessary and they failed to persuade the hearing examiner to their point of view. Moreover, an issue was raised as to whether or not complaint counsel were, in effect, trying to obtain additional discovery when it appears that their time for such discovery had run out. In such circumstances we can find no justification for interfering with the hearing examiner's resolution of the question.

Accordingly, the appeal of respondents and of complaint counsel will be denied. An appropriate order will be entered.

Commissioners Elman and Nicholson dissented.

ORDER DENYING INTERLOCUTORY APPEALS

Respondents, on December 20, 1968, having appealed from the hearing examiner's denial of their motion for a subpoena for records of the Commission, and complaint counsel, on December 23, 1968, having appealed from the hearing examiner's order disposing of the motion for the issuance of the subpoena for Commission records; and

The Commission having determined, for reasons appearing in the accompanying opinion, that such appeals should be denied:

It is ordered, That the appeal of respondents filed December 20, 1968, be, and it hereby is, denied.

It is further ordered, That the appeal of complaint counsel filed December 23, 1968, be, and it hereby is, denied.

Commissioners Elman and Nicholson dissenting.