

fied, and shall certify the matter to the Commission for its consideration.

It is further ordered, That the Secretary shall cause service of this order to be made upon respondent, National Biscuit Company, and its attorneys.

Commissioner MacIntyre not participating.

LEHIGH PORTLAND CEMENT COMPANY

Docket 8680. Order and Opinion, July 31, 1970

Order vacating hearing examiner's protective order of September 24, 1968, protecting material submitted against disclosure, and remanding case to hearing examiner.

OPINION OF THE COMMISSION

This matter concerns the production of information pursuant to certain subpoenas *duces tecum* issued at the instance of respondent. The subpoenas were directed to several third-party cement companies and have identical specifications. Four of the cement companies refused to comply and court enforcement proceedings were instituted. A district court judgement granting enforcement was vacated on appeal and the case was remanded to the Commission for further consideration.¹

The controversy here turns on the question of what protection against public disclosure should be given to information responsive to Specifications 2a-k of the subpoenas. The third-party cement companies contend that this information should receive the same confidential treatment as that granted to material furnished pursuant to similar specifications in third-party subpoenas issued in *Mississippi River Fuel Corporation*, Docket No. 8657 (Order Entertaining and Denying Appeals From Hearing Examiner's Denial of Motions to Quash or Limit Subpoenas, issued June 8, 1966) [69 F.T.C. 1186]. In *Mississippi* we directed that the information should be submitted to a reputable and disinterested accounting firm, which shall compile and present the material to respondent's counsel in such manner that no individual company's confidential arrangements or data will be revealed. Counsel for respondent, Lehigh, although willing to protect the confidentiality of the material in other ways, opposes the *Mississippi* method on the ground that it impairs their right to prepare adequately for cross-examination and to conduct an effective defense.

This is the third time this matter is before us. Briefly summarizing the prior proceedings, we note that initially the examiner out of defer-

¹ *Federal Trade Commission v. Crowther*, No. 23,924 (D.C. Cir., opinion filed June 25, 1970 [8 S. & D. 1212]).

ence to our decision in *Mississippi* did grant *Mississippi* treatment to the information supplied under Specifications 2a-k.² On appeal by Lehigh's counsel, we remanded because we believed that the examiner had incorrectly interpreted *Mississippi* as allowing him no discretion to make his own independent determination with respect to the form of confidential treatment that would be most appropriate under the particular facts of the case.³ On remand, the examiner then ordered that the information be submitted without *Mississippi* treatment, but he did frame a protective order to assure that respondent's counsel will not use the subpoenaed data for an improper competitive purpose.⁴ The third-party cement companies appealed from this order of the examiner, and we denied the appeal, finding that the examiner's order indicated a thoughtful and workable balancing of the conflicting interests of respondent and the third parties.⁵ When the third-party cement companies still refused to comply with Specifications 2a-k of the subpoenas, court enforcement proceedings were instituted which have resulted in the present remand by the court of appeals.

The grounds for the court of appeal's remand is that the Commission has not sufficiently identified and articulated its reasons for denying the *Mississippi* method of confidential treatment to the third-party cement companies. The court stated that, "The facts have that degree of parallelism which entitles both [the third-party cement companies] and ourselves to a fuller explanation from the Commission as to why the *Mississippi* approach should be jettisoned without giving credence to the charge that similar supplicants receive dissimilar dispensations."⁶ The court accordingly remanded the case for further consideration in light of the court's opinion. For the reasons hereafter noted, we are disposing of this matter by reinstating for information furnished pursuant to Specifications 2a-k, the confidential treatment ordered in the examiner's order of June 14, 1968 (*supra*, n. 2), including the provision granting *Mississippi* treatment.

It is true that this case is similar to *Mississippi* in many respects. Specifications 2a-k of the subpoenas here are virtually identical to the subpoena specifications involved in *Mississippi*; both cases are merger cases in which the Commission has challenged the acquisition by a cement manufacturer of ready-mix concrete companies; and in

² Order Modifying Subpoenas *Duces Tecum*, in Respondent's Behalf, Directed Against Third Party Cement Companies (June 14, 1968). The examiner also modified the subpoenas in other respects, but these modifications are not now contested, and the subpoenas have been complied with except for the production of information pursuant to Specifications 2a-k.

³ Order of Remand to Hearing Examiner (August 2, 1968 [74 F.T.C. 1585]).

⁴ Order Directing Third-Party Cement and Ready-Mixed Concrete Manufacturers To Comply with the Examiner's Orders Modifying Subpoenas Issued in Respondent's Behalf in This Proceeding (September 24, 1968).

⁵ Order Denying Interlocutory Appeals (November 22, 1968 [74 F.T.C. 1629]).

⁶ *Federal Trade Commission v. Growthier*, *supra*, n. 1, slip op. p. 8.

both instances the respondent is demanding the information from third-party cement companies, which are competitors or potential competitors of the respondent. But, as we shall now show, there are also significant factual differences between the two cases, which are also clearly relevant to the form of protective order that should be entered.

In *Mississippi*, respondent's counsel to whom the disclosure would have been made, were employees of respondent or its subsidiary.⁷ Furthermore, the protective order entered by the examiner in that case would have permitted disclosure to personnel of respondent insofar as it was necessary for respondent's counsel to consult with such personnel in order to prepare for and assist in the defense of the proceeding.⁸ The third-party cement companies in *Mississippi* vigorously protested revealing any of the requested information to respondent's employees, contending that respondent's real purpose was to gather highly confidential data which would be of incalculable value to respondent in competing with the third-party cement companies. Consequently, while we doubted that the information sought was of so confidential or sensitive a nature, out of an abundance of caution, and in order to avoid any possibility that the data would be improperly used, we directed that the data be submitted pursuant to the *Mississippi* method.⁹

On the other hand, in this proceeding the information is to be given only to respondent's independent counsel, who, in a written stipulation filed with the examiner, agreed that the information would not be revealed to respondent or to others, except that it would be disclosed to independent technical experts when deemed necessary for counsel's trial preparation, and documents designated as trial exhibits would be disclosed to counsel for the Federal Trade Commission. Both the first examiner assigned to this proceeding, and his successor, accepted this assurance of confidentiality by respondent's independent counsel as having been given in good faith.¹⁰ Since there appeared to be no danger that the third-party cement companies would be harmed by disclosing the information to respondent's counsel, and since respondent's counsel was asserting that the data was needed for cross-examination and for preparing respondent's defense, we found

⁷ Respondent's counsel in *Mississippi* admitted this fact on the record. *Mississippi River Corporation*, Docket No. 8657, Prehearing Conference (February 21, 1966) pp. 695-696.

⁸ *Mississippi River Fuel Corporation*, Docket No. 8657, Order for Taking of Depositions (January 27, 1966).

⁹ *Mississippi River Fuel Corporation*, Docket No. 8657, Order Entertaining and Denying Appeals From Hearing Examiner's Denial of Motions To Quash or Limit Subpoenas (June 8, 1966 [69 F.T.C. 1186]).

¹⁰ Order Modifying Subpoenas Duces Tecum, in Respondent's Behalf, Directed Against Third Party Cement Companies (June 14, 1968), p. 22; Order Directing Third-Party Cement and Ready Mixed Concrete Manufacturers To Comply With the Examiner's Orders Modifying Subpoenas Issued in Respondent's Behalf in This Proceeding (September 24, 1968), p. 2.

the order of the examiner denying *Mississippi* treatment, but protecting against disclosure to respondent's employees and to the public generally, to represent a reasonable balancing of the interests of the parties.

We have given careful consideration to what course of action we should now take to comply with the court's remand. As noted above, there are grounds for differentiating this case from *Mississippi*. The court of appeals, in its opinion, however, intimates that it would not consider such grounds acceptable for denying *Mississippi* treatment to the cement companies here, because we did not expressly refer in our opinion in either case to the presence of house counsel in the one case or independent counsel in the other, and because in *Mississippi* we found no fault with the *Mississippi* procedure as such, *Federal Trade Commission v. Crowther*, *supra* n. 1, slip op. pp. 9-10 [8 S. & D. 1218-9].¹¹ We believe, therefore, that the most appropriate way of disposing of this matter at the present posture of the case, is to reinstate the provisions of the first examiner's order granting *Mississippi* treatment, but giving respondent's counsel the right to obtain full disclosure during the hearing if they show the need therefor. We recognize that respondent's counsel assert that furnishing the information to them on an anonymous basis will prevent them from using the information for cross-examination and for preparing respondent's own case. But these fears are largely prospective at this stage, and may never materialize. It may turn out during the hearing, for example, that the compilations prepared under the *Mississippi* procedure will give respondent's counsel all the information they need. If they do not, the first hearing examiner's order expressly provides that respondent may apply for relief by way of discovery if proper showing is made. As the examiner himself recognized (Order of June 14, 1968, *supra*, n. 2 at p. 23), the examiner will be in a better position to pass on the real necessity for further disclosure, after hearing complaint counsel's proof.¹²

Accordingly, we will vacate the examiner's protective order of September 24, 1968, insofar as it applied to compliance with Specifica-

¹¹ It would seem obvious, however, that even though there may be no unfairness in the *Mississippi* procedure itself in a given situation, the balance should still be struck in favor of full disclosure to counsel, if there is the possibility that this will expedite the trial and, as was true here, there is no prejudice to the subpoenaed parties.

¹² We note that in their answer to respondent's appeal from the examiner's order of June 14, 1968, counsel for the third-party cement companies argued that Lehigh's counsel would not be entitled to full disclosure at any time. This, of course, is erroneous. As we pointed out in our opinion remanding the case to the examiner, "Neither the Commission nor the courts have given recognition to an absolute trade secret privilege. The revelation of a trade secret will be compelled if it is indispensable to the proceeding." Opinion (August 2, 1968), p. 3 [74 F.T.C. 1587]. Moreover, the third-parties appear to have abandoned this argument on their later appeal from the examiner's order of September 24, 1968, see p. 14 of their memorandum in support of appeal, filed October 21, 1968.

tions 2a-k of the subpoenas, and order production of this information subject to the confidential treatment provided for such information in the examiner's order of June 14, 1968. An appropriate order will be entered.

Commissioner MacIntyre did not participate.

ORDER AFTER REMAND

The Commission on November 22, 1968 [74 F.T.C. 1629], having issued its order and opinion denying an interlocutory appeal by several third parties, including the Louisville Cement Company, Martin Marietta Corporation, General Portland Cement Company, and Medusa Portland Cement Company, from the hearing examiner's order of September 24, 1968, ordering compliance with subpoenas *duces tecum* issued in respondent's behalf; and

Proceedings for enforcement of the subpoenas having been instituted against the above-named four third-party cement companies upon their refusal to comply, and the United States Court of Appeals for the District of Columbia Circuit in said proceedings having on June 25, 1970 [8 S. & D. 1212], rendered its decision vacating the judgment of the United States District Court for the District of Columbia entered on December 1, 1969, which granted enforcement of the subpoenas, and remanding the case to the Commission for further consideration in light of the court's opinion, and

The Commission having reconsidered the appeals of the aforesaid four third-party cement companies in light of the court's opinion, and the contentions of respondent's counsel in opposition thereto, as well as the prior proceedings in this case;

Now, therefore, and for the reasons stated in the accompanying opinion;

It is ordered, That the hearing examiner's protective order of September 24, 1968, is vacated insofar as it applies to the production of material by the Louisville Cement Company, Martin Marietta Corporation, General Portland Cement Company and Medusa Portland Cement Company, in response to Specifications 2a-k of the subpoenas *duces tecum* issued on January 25, 1968, at the request of respondent.

It is further ordered, That material submitted by the aforementioned four third-party cement companies in response to Specifications 2a-k of the subpoenas, as modified by the examiner's order of June 14, 1968, shall be protected against disclosure in the manner provided therefor in the hearing examiner's order of June 14, 1968.

It is further ordered, That this matter be, and it hereby is, remanded