

We are not persuaded by respondent's claimed need for the Bureau of the Census mailing list for preparation of its defense. We are unable to ascertain from respondent's motion of November 5, 1970, the reasons why respondent needs, apparently for discovery purposes, the mailing list from the Bureau of the Census when similar information based on SIC product codes and plants is readily available from published commercial sources.

It is ordered, That respondent's motion of November 5, 1970, for the issuance of a subpoena *duces tecum*, certified by the examiner, be, and it hereby is, denied.

It is further ordered, That complaint counsel's motion of January 6, 1971, for the issuance of a subpoena *ad testificandum*, certified by the examiner, be, and it hereby is, *granted*.

DIENER'S, INC., ET AL.

Docket 8804. Order and Opinion, Feb. 8, 1971

Order denying request for permission to file an interlocutory appeal from hearing examiner's ruling striking the testimony of a Commission attorney-investigator appearing as a witness.

DISSENT BY COMMISSIONER MACINTYRE

Here the Commission has in effect approved a method of trial in a lawsuit which I think is unwise. Therefore, I voice this dissent.

At the outset, let it be understood that I have no objection if any investigator of the United States Government who, in the conduct of his investigation, collected certain exhibits or factual statements, is called as a witness to identify such exhibits or to establish the fact that certain statements had been made by a party charged. I do object and think it unwise for an investigator to be called as a witness to testify about an investigation he has conducted and in the course of such testimony to be called upon to identify not only exhibits he collected and establish the fact that certain statements were made to him, but also be called upon to interpret evidentiary factual information and state conclusions with respect thereto. Of course when a witness is permitted to do that, his competence is open to question. Then, it is appropriate to subject him to unlimited cross-examination not only regarding his competence but all other matters relevant to his fitness to judge the guilt or innocence of the person charged. This would include such matters as bias, prejudice, credibility, etc. Even such unlimited cross-examination, which apparently the Commission is willing to permit here, does not remove the evil, nor cure the soreness,

inherent in the use of trial methods as are involved in this case up to this point.

I would approve the striking of the testimony of the witness in question and the issuance of a direction that the trial of this matter be pursued in a more traditional and acceptable manner.

OPINION OF THE COMMISSION

This matter is before the Commission upon complaint counsel's request for permission to file an interlocutory appeal pursuant to Section 3.23(a) of the Commission's Rules of Practice. Complaint counsel seek to appeal the hearing examiner's ruling of December 15, 1970, in which the examiner struck the testimony of a Commission attorney-investigator who appeared as a witness. The ruling was based on complaint counsel's failure to produce the summary memorandum written by such witness, and on the examiner's finding that the summary memorandum constituted a "Jencks" statement.

The examiner's ruling was correct. The summary memorandum prepared by Mr. Koman clearly constitutes a written statement made and signed by him, and the examiner has found that it relates to the subject matter of his testimony. It therefore qualifies as his "statement" as defined by the Jencks Act,¹ and is subject to production under the Commission's procedures.²

It is clear, however, that complaint counsel resisted production of the summary memorandum for lack of definite authorization from the Commission to release this type of document. Complaint counsel accurately characterize the summary memorandum as a confidential, internal document. We believe, however, that the principles of fairness underlying the "Jencks" rule deserve equal recognition. Commission counsel are therefore authorized to make a summary memorandum available to respondents where it contains statements which relate to the subject matter of testimony given by the government agent who prepared the memorandum. If complaint counsel elect not to produce, the hearing examiner should strike the testimony involved. It is also the examiner's duty, on the motion of complaint counsel, to excise the portions of any such statement which do not relate to the subject matter of the testimony of the witness.

In this case, since the examiner has correctly applied the law, there is no need for an interlocutory appeal. Inasmuch as complaint counsel were inhibited from producing the statement by factors beyond their control, however, the examiner might find it appropriate to reopen the record to give complaint counsel an opportunity to produce the

¹ 18 U.S.C. § 3500.

² See, *R. H. Macy & Co., Inc.*, Docket No. 8650 (March 10, 1966) [69 F.T.C. 1108].