

Order

IN THE MATTER OF

WARNER-LAMBERT COMPANY

Docket 8891. Interlocutory Order, Sept. 18, 1973.

Order denying appeals of complaint counsel from rulings of the administrative law judge issuing subpoenas *duces tecum* under Sections 3.36 and 3.34(b) of the Commission's rules and returning matter to judge for rescheduling of return dates of subpoenas. Commissioner Dixon not concurring.

Appearances

For the Commission: *Edward F. Downs, Wallace S. Snyder, William S. Busker and Patrick E. Power, Jr.*

For the respondent: *Mudge, Rose, Guthrie & Alexander, New York, New York and Bergson, Borkland, Margolis & Adler, Washington, D.C.*

ORDER DENYING COMPLAINT COUNSEL'S APPEAL FROM DISCOVERY
RULINGS OF ADMINISTRATIVE LAW JUDGE

This matter is before the Commission upon appeals by complaint counsel seeking reversal of two rulings made by the administrative law judge during the course of a pretrial hearing conference in this matter held on March 20, 1973. The first ruling directed issuance of a subpoena *duces tecum* to the Secretary of the Commission under Section 3.36 of the Commission's Rules of Practice directing production of certain reports, comments and analyses prepared by Dr. Patricia Charache and Dr. Alan Gittelson of Johns Hopkins University. The second ruling directed issuance of subpoenas *duces tecum* to Drs. Charache and Gittelson under Section 3.34(b) of the Commission's rules directing production of essentially the same material called for by the Section 3.36 subpoena issued upon the Secretary. By orders of April 18, 1973, the Commission stayed the return dates of the three subpoenas pending disposition of the appeals.

The facts giving rise to the appeals are undisputed. Briefly, during the investigation prior to the issuance of complaint, respondent Warner-Lambert submitted to Commission staff certain tests conducted by the company which allegedly supported the company's claims as to the effectiveness of Listerine Antiseptic as a cold remedy. The tests were subsequently turned over to Drs. Charache and Gittelson, who had been hired as consultants by Commission staff to assist in the preparation of the matter for complaint. The doctors analyzed

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the tests and submitted reports thereon to Commission staff, which reports, according to complaint counsel, are critical of respondent's tests. It is these reports and any other related comments or analyses of the two doctors that respondent sought, first from the Commission's files by motion filed pursuant to Section 3.36 of the Commission's Rules of Practice, and secondly, directly from the doctors themselves by motion filed under Section 3.34(b) of the rules.

Respondent does not seriously contend that what it seeks by the subpoenas does not fall within the scope of complaint counsel's work product for which a strong showing justifying disclosure must be made. Respondent argues, rather, that it made the required showing to the administrative law judge, that the judge was satisfied with that showing and that his rulings ought not be disturbed in the absence of a clear abuse of his discretion.¹

We need not decide whether the administrative law judge erred in holding that the reports must be produced. *Compare* Fed. R. Civ. P. 26(b)(1) and (4)(A), Advisory Committee Notes on 1970 Amendment, 28 U.S.C.A. at 160-161 (1972). Administrative law judges have discretion with respect to the conduct of adjudicative proceedings. This discretion will not be disturbed except for its clear abuse; and considering all of the circumstances, we find no such clear abuse here. Accordingly,

It is ordered, That the appeal of complaint counsel, filed March 27, 1973, from a ruling by the administrative law judge issuing a subpoena *duces tecum* under Section 3.36 of the Commission's Rules of Practice be, and it hereby is, denied.

It is further ordered, That the appeal of complaint counsel, filed April 12, 1973, from a ruling by the administrative law judge issuing a subpoena *duces tecum* under Section 3.34(b) of the Commission's Rules of Practice be, and it hereby is, denied.

It is further ordered, That the matter be returned to the administrative law judge for rescheduling of return dates of the aforesaid subpoenas.

Commissioner Dixon not concurring.

¹ Response to Complaint Counsel's Appeals Under Section 3.36, filed April 6, 1973, at pp. 3-9; Response to Complaint Counsel's Application for Review Under Section 3.23, filed April 25, 1973, at pp. 2-9.

Complaint

IN THE MATTER OF

AMERADA HESS CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF THE FEDERAL
TRADE COMMISSION ACT AND THE CLAYTON ACT, SEC. 7

Docket C-2456. Complaint, Sept. 18, 1973—Decision, Sept. 18, 1973.

Consent order requiring a New York City based refiner-transporter of petroleum products, among other things to divest itself entirely of Clarco Pipe Line Co., a transporter of crude oil; prohibiting the acquired company Clarco from refusing to transport crude oil; and restraining a Burlington, Vt., manufacturer of asphalt, with operations in the State of Mississippi, from acquiring any asphalt refineries shipping asphalt in or into Mississippi. The order further prohibits two corporations and two individuals, in perpetuity, from owning or controlling any equity or debt interest in Clarco except for those already existing.

Appearances

For the Commission: *Harold G. Munter* and *Hugh F. Bangasser*,
For the respondents: *Briscoe R. Smith*, of *Milbank, Tweed, Hadley
& McCloy*, New York, New York

COMPLAINT

The Federal Trade Commission, having reason to believe that Amerada Hess Corporation has acquired a controlling stock interest in Clarco Pipe Line Company, a Mississippi corporation, and that it has purchased the Black Creek Refinery at Purvis, Mississippi, including pipeline and terminal facilities, from Gulf Oil Corporation, a corporation, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C., Section 18), and/or in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C., Section 45); that through its officers and directors and others has unreasonably restrained competition in the production and sale of crude oil to, and asphalt from, refineries located in the State of Mississippi; and that through its officers and directors and others it has attempted to monopolize and has monopolized the transportation of crude oil in eastern Mississippi; and that it has acquired the power to exercise total price control over crude oil produced in eastern Mississippi; hereby issues this complaint pursuant to Section 11 of the Clayton Act (15 U.S.C., Section 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C., Section 45(b)), stating its charges as follows: