

IN THE MATTER OF
KELLOGG COMPANY, ET AL.

Docket 8883. Interlocutory Order, May 29, 1974

Order denying applications for review and requests for oral argument hereon by respondents General Foods Corporation and Kellogg Company of administrative law judge's orders calling for production of materials considered to be trade secrets.

Appearances

For the Commission: *Donald E. Purcell, Catherine Winer, William S. Hemsley, Jr., Anthony Joseph, David M. Malone, Lawrence Bernard and Edward M. Shumsky.*

For the respondents: *Bierbower & Rockefeller, Washington, D.C. for Kellogg Company. Clifford, Warnke, Glass, McIlwain & Finney, Washington, D.C. for General Foods Corporation.*

ORDER DENYING APPLICATIONS FOR REVIEW

In February 1973, the administrative law judge in this matter issued subpoenas *duces tecum* against the above-named respondents requiring that they produce certain information which they considered to be trade secrets. Following extensive briefing and oral argument, the judge, by order of February 12, 1974, limited the subpoenas in certain respects but, in essence, overruled respondents' objections to disclosure of the trade secrets.

Upon further briefing, the judge, by order of March 20, 1974, provided for disclosure of such information to counsel of record, their supervisory and clerical employees engaged in this litigation and, in certain instances, in-house counsel for respondents and their clerical employees, and experts and economists whose assistance is required by counsel in conducting this litigation.

Respondents General Foods Corporation and Kellogg Company then requested that the judge make a determination, pursuant to Section 3.23 (b) of the Commission's Rules of Practice, which would allow them to apply for Commission review of the orders of February 12 and March 20, 1974. Notwithstanding the judge's refusal to make such a determination, said respondents (hereinafter "Applicants") each apply for review with oral argument of the above orders, including the order of April 23, 1973 refusing to make a determination pursuant to Section 3.23 (b).

Applicants argue that the Commission has the inherent power to review any ruling by an administrative law judge. They argue that review is warranted because the judge has abused his discretion by requiring that respondents exchange trade secrets with their correspondents who are also their competitors, and by failing to require that complaint counsel demonstrate the relevance of the trade secrets, the need for their disclosure, and the inability to satisfy such need by alternative means.

Applicants apparently concede, as they must, the general rule that confidentiality is not sufficient basis for denial of discovery of material necessary for litigation. *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). However, they suggest that an exception must be made for this case because respondents are not charged with a conspiracy or any equivalent thereof. The judge properly concluded that there was insufficient basis for such an exception. Protection of applicants' highly sensitive business information is provided by means of a protective order which the judge, in the exercise of his discretion, has concluded is adequate.

As the Commission has held on numerous occasions, the administrative law judge has broad discretion in controlling the conduct of adjudicative proceedings, and his rulings will be reviewed only in cases of clear abuse. *E.g.*, *Warner Lambert Co.*, Docket No 8891, order of September 18, 1973, at 2 [p. 485 herein]. Applicants' argument that the

¹ It appears, however, that there is some merit to Kellogg's contention that certain of the subpoenaed materials should not be disclosed to in-house counsel. From the descriptions contained in the judge's order, these materials appear to be of such a sensitive nature that they should be disclosed only upon a determination by the administrative law judge that disclosure is necessary to a just adjudication. As complaint counsel observe in the second footnote on page seven of their memorandum in opposition to these applications, the judge has not yet ruled on the question of whether such necessity exists; hence Kellogg's complaint of abuse of discretion on this point is premature.

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judge failed to require certain showings is belied by the pleadings submitted by complaint counsel and the judge's orders. These documents indicate that he has given ample consideration to respondents' objections and that he has not abused his discretion in rejecting them or in refusing to make a determination under Section 3.23 (b). Accordingly,

It is ordered, That the aforesaid applications for review, along with the requests for oral argument, be, and they hereby are, denied.