

Interlocutory Order

90 F.T.C.

IN THE MATTER OF

AMREP CORPORATION

Docket 9018. Interlocutory Order, Aug. 10, 1977

General counsel directed to petition United States District Court (S.D.N.Y.) for grand jury testimony; and procedures established for *in camera* review by ALJ and access to testimony by counsel for both sides.

ORDER GRANTING REQUEST FOR APPLICATION TO UNITED
STATES DISTRICT COURT FOR GRAND JURY TESTIMONY

In a report of August 2, 1976, the administrative law judge in this proceeding recommended that the Commission seek access to grand jury testimony presented by a prospective witness in this proceeding, Mr. Paul W. Heinz, in a criminal proceeding against this respondent, *United States v. Amrep Corp.*, No. 75 Cr. 1023 (S.D.N.Y.). We took that recommendation under advisement pending completion of the criminal proceedings in the expectation that Mr. Heinz' testimony would be turned over to respondent in those proceedings, 88 F.T.C. 457 (1976). The law judge, in a report of July 27, 1977, now informs us that respondent has not secured access to transcripts of the testimony, and the criminal case has concluded. Respondent requests access to the transcripts for their potential value in impeaching Mr. Heinz' prospective testimony. Accordingly,

It is ordered, That the Commission's General Counsel shall expeditiously petition the United States District Court for the Southern District of New York for discretionary release, pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, of all transcripts of grand jury testimony presented by Paul W. Heinz, in connection with *United States v. Amrep Corp.*, No. 75 Cr. 1023.

It is further ordered, That should any such transcripts be secured by the General Counsel acting on the Commission's behalf, they shall be delivered to the Administrative Law Judge in this proceeding, who shall review them *in camera* to determine whether they would be producible after direct examination of Mr. Heinz, under the standards in conformity with the Jencks Act which the Commission has established, *Ernest Mark High*, 56 F.T.C. 625, 632-633 (1959); *L. G. Balfour Co.*, 69 F.T.C. 1118 (1969); *Inter-State Builders, Inc.*, 69 F.T.C. 1152 (1969); *Star Office Supply Co.*, 74 F.T.C. 1595 (1968). Access may be granted to complaint counsel in advance of hearings to enable them to reassess whether to elicit testimony from Mr. Heinz. Access to respondent should be granted after direct examination of Mr.

Heinz if such transcripts are within the Commission's Jencks Act standards.

IN THE MATTERS OF

BRISTOL-MYERS COMPANY, ET AL. D. 8917

AMERICAN HOME PRODUCTS CORPORATION, ET AL.
D. 8918

STERLING DRUG INC., ET AL. D. 8919

Dockets 8917, 8918, 8919. Interlocutory Order, Aug. 11, 1977

Denial of motion by complaint counsel for extension of time in which to file application for interlocutory appeal.

ORDER DENYING MOTION FOR EXTENSION OF TIME

Complaint counsel in these three related proceedings jointly move for an extension of time for filing with the Commission an application for interlocutory review under Section 3.23(a)(1) of our Rules of Practice. Applications for review under this provision are required to be filed "within five (5) days after notice of the Administrative Law Judge's ruling." The order from which counsel intend to appeal would grant respondents access to what are described as "two non-contemporaneous interview reports prepared by a staff attorney."

An extension of time is sought, in complaint counsel's words, "in order to seek appeal alternatively under Section 3.23(b) of the Rules," evidently because of counsel's view that the Administrative Law Judge would be inclined to rule that the question presented was suitable for interlocutory appeal. Delaying their filing under subsection (a)(1) until the filing under subsection (b) is due would assertedly "avoid the needless duplication in filing essentially identical motions before both the Commission and the Administrative Law Judge."

We have great difficulty in following complaint counsel's reasoning in this matter. An application for review under Section 3.23(a)(1) addresses itself directly to the Commission's discretion, without the necessity for a ruling by the Administrative Law Judge. On the other hand, no application may be filed with the Commission under Section 3.23(b) in the absence of:

a determination by the Administrative Law Judge in writing, with justification in support thereof, that the ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy.

Even if such a determination is made, the decision whether or not to entertain an appeal would still be committed to the Commission's