

Interlocutory Order

95 F.T.C.

IN THE MATTER OF

GENERAL FOODS CORPORATION

*Docket 9085. Interlocutory Order, Feb. 15, 1980*ORDER DIRECTING GENERAL COUNSEL TO CONTINUE COURT
ENFORCEMENT OF SUBPOENA DUCES TECUM

On November 16, 1979, the administrative law judge certified his recommendation to the Commission that the General Counsel be directed to continue proceedings for enforcement of a subpoena *duces tecum* issued to Hills Bros. Coffee, Inc. By motion dated December 3, 1979, Hills Bros. urged the Commission to withdraw its enforcement efforts. On December 20, 1979, respondent General Foods, filed a pleading in support of the ALJ's recommendation.

Our original order for court enforcement was issued on July 12, 1979, and directed the General Counsel to seek enforcement of those portions of the subpoena that concern marketing plans for Hills Bros.' "High Yield" coffee. After enforcement proceedings were initiated in district court, we learned, through the General Counsel, that complaint counsel had informed the administrative law judge that proof of economic injury to Hills Bros. was not an essential element of their case. However, the ALJ had previously denied Hills Bros.' motion to quash partly because he deemed the documents on "High Yield" coffee relevant to the question of economic injury. We therefore issued an order on November 9, 1979, directing the ALJ to reconsider his ruling in light of complaint counsel's assertions. Our order also directed the General Counsel to seek a stay of enforcement proceedings in district court pending the ALJ's reconsideration.

The ALJ's present recommendation for enforcement recognizes complaint counsel's statement that economic injury to Hills Bros. is not essential to their case. However, his certification is based on the fact that complaint counsel have nevertheless expressed their desire to elicit testimony on this subject. The ALJ believes that information concerning Hills Bros.' ability to introduce "High Yield" to the market after the period of General Foods' allegedly anticompetitive activities is relevant to the economic injury issue. He has limited his recommendation for enforcement, however, to marketing plans that concern only the first year in which "High Yield" coffee was introduced. This modification was suggested to conform to a similar limitation adopted by the ALJ in responding to a motion by Folger Coffee Company to quash a similar subpoena *duces tecum*.

The Commission has consistently held that an administrative law judge has wide discretion in discovery matters and that his determina-

tions should not be reversed absent a clear abuse of discretion. E.g., *Warner-Lambert Co.*, 83 F.T.C. 485 (1973). We find no such abuse of discretion here because the documents sought from Hills Bros. may well have substantial relevance to the testimony adduced by complaint counsel on economic injury. (See Commission Rule 3.31(b)(1).) We therefore agree with the law judge's recommendation that court enforcement of the subpoena be sought to the extent its specifications cover marketing plans for the first year "High Yield" was sold.

Hills Bros. has objected to the fact that the protective order issued by the ALJ on August 28, 1978, permits General Foods' in-house counsel as well as its outside counsel free access to the requested marketing plans. In our order of July 12, 1979, we observed that "the safeguards imposed by the ALJ to protect sensitive commercial data seem reasonably designed to prevent unwarranted disclosure of such information to respondent's employees." We have reconsidered these comments, however, in light of the competitive injury that Hills Bros. might suffer if its marketing plans should be disclosed to General Foods. Given the obvious competitive sensitivity of Hills Bros.' marketing plans and the fact that General Foods is represented by outside counsel, it is not clear why access to these materials should be extended to General Foods' three inside counsel of record, one or more of whom may well have advisory responsibilities to their employer that conflict with maintaining the confidentiality of Hills Bros.' marketing plans. Accordingly,

It is ordered, That the General Counsel continue to seek court enforcement of the subpoena *duces tecum* issued to Hills Bros. in so far as it seeks marketing plans for the first year "High Yield" coffee was sold, and

It is further ordered, That paragraph (4)(a) on page 7 of the ALJ's order of August 28, 1978 be modified to delete references to General Foods' named inside counsel. In the event that General Foods concludes that access to the Hills Bros. documents by one of its inside attorneys is essential to ensure fair representation, the ALJ is free to entertain an application by General Foods for a modification of the protective order subject to Hills Bros.' right to oppose any such application, in accordance with paragraph (6) on page 8 of the August 28, 1978 order.

Interlocutory Order

95 F.T.C.

IN THE MATTER OF
AMREP CORPORATION

Docket 9018. Interlocutory Order, Feb. 19, 1980

ORDER DENYING MOTION FOR A HEARING TO INTRODUCE EVIDENCE,
COMMENT AND ARGUMENT CONCERNING *EX PARTE* COMMUNICATIONS

By motion dated January 23, 1980, respondent AMREP Corporation requests an opportunity for comment and an evidentiary hearing on *ex parte* communications between the investigative and prosecutorial staff and the Commission in this proceeding. The respondents' motion also requests leave to introduce evidence as to whether all *ex parte* communications concerning matters litigated in this case have been disclosed to the respondent. Finally, AMREP seeks to place into evidence communications that are not part of the record.

The respondent argues that its motion for comment and a hearing on *ex parte* matters finds support both in *AMREP v. Pertschuk*, No. 79-0491 (D.D.C., filed April 6, 1979), *appeal docketed*, No. 79-1592 (D.C.Cir. 1979) and in the Commission's order of July 12, 1979. We agree that the court's opinion and our order affirmed the respondents' right to comment on *ex parte* communications. Nevertheless, it was apparent in both instances that such comments were to be made in the course of the Commission's normal appellate procedure. The respondent should thus have been well aware that its opportunity to address *ex parte* matters was in its appeal brief and, to the extent full discussion would have required, in its answer and reply briefs. *See* Rule 3.52. Furthermore, while the court's opinion and our order noted that the Commission was empowered to take evidence on appeal, they did not indicate the respondent had any right to an evidentiary hearing. Rule 3.54 makes it clear, in fact, that such hearings are to be held only if the Commission deems them necessary.

Here, AMREP has evidently decided to forego its right to address *ex parte* matters in the context of normal appellate procedures. It has instead raised the issue in a motion filed eleven days after its answer brief. The motion does not explain what the nature of its comments on *ex parte* communications might be, why it feels any evidentiary hearing is required, or even why it waited until the eleventh hour to seek such relief. At this late stage in the proceedings, the Commission is not prepared to grant the respondents' requests on such an insubstantial showing.

We are similarly unprepared to grant AMREP's request to introduce evidence as to whether it has been fully informed of all *ex parte* communications concerning matters in litigation before the agency.