

Mr. Eccles

CONFIDENTIAL

Date June 9, 1949.

To Board of Governors

Subject Production of Transamerica

From Mr. J. J. Smith, Special Counsel

Reports of Examination.

The Board has requested my opinion as to whether or not it should comply with the formal demand of Transamerica's counsel that the Board's 1943 and 1946 examination reports of Transamerica and its affiliates be produced for inspection by counsel for Transamerica.

For reasons hereinafter stated, I believe that the so-called "open", or non-confidential, sections of the reports should be so produced, and that this may be done without the necessity of the Board reversing the Hearing Officer's ruling that only parts of the reports be made available for inspection by Transamerica's counsel.

The reports referred to consist almost entirely of information and copies of documents obtained from officials, and the books, records and files, of Transamerica and its affiliates, and of expressions of opinions and conclusions by the Board's examiners with respect to the significance and effect of the facts disclosed by their examinations. Both examinations are said to have been made in the regular course of the Board's business, but the record also indicates that the examinations were likewise made for the additional and entirely proper purpose of enabling the Board to determine whether or not Transamerica had violated any law which it is the Board's responsibility to enforce. There seems to be no question but that these examinations were important factors in leading to the institution of the Board's present proceeding against Transamerica, and, as stated on the record by the Board's Solicitor, the contents of the Board's examination reports are "Basic to the entire material that has been going into these files" (R. 1694).

Through its Solicitor, and over the objections of counsel for Transamerica, the Board has placed in evidence much information and a large number of exhibits drawn from the Board's 1943 and 1946 examination reports. The Board's witnesses Smith and Reinholdt made extensive use of parts of the reports in refreshing their recollections, and their testimony, which included a number of expressions of opinions and conclusions, was based entirely on information obtained during the Board's examinations and contained in its reports. In addition to this, parts of the reports placed in evidence by the Board consisted of information obtained, and of opinions and conclusions expressed, by examiners who were not themselves called to the witness stand, but whose reports were, in part, read or put into the record through Messrs. Smith and Reinholdt.

Evidence drawn from the Board's reports was not offered as to all Transamerica companies examined by the Board or referred to in its reports. And the reports contain a great deal of information to which the Solicitor for the Board made no reference and which he did not offer in evidence.

The reports having been used in the manner above indicated, however, counsel for Transamerica formally requested on the record that the Board's complete 1943 and 1946 examination reports be produced for his inspection and use in cross-examining Mr. Reinholdt and in testing the opinions and conclusions offered in evidence from, and on the basis of, the information contained in the reports in question (R. 1610-1612, 1694-1695, 1709-1720). As I understand the record, the Board's Solicitor objected to this request, but he seems to have implied that he had no objection to producing those non-confidential parts of the Board's reports relating to the Transamerica companies with respect to which Mr. Reinholdt testified (R. 1610-1611, 1709-1712, 1715-1716). The Hearing Officer thereupon ruled, in effect, that Transamerica was entitled to inspect the Board's 1943 and 1946 reports of examination, "with confidential sections deleted, of the individual companies concerning which Mr. Reinholdt has given testimony," together with those parts of "the full reports of examination of Transamerica for the years 1943 and 1946 * * * relating to such companies" (R. 1716, 1721-1722, 1761-1762, 1916-1917).

Insofar as Transamerica's request for the Board's complete examination reports was denied, the position taken by the Board's Hearing Officer and Solicitor seems to have been influenced primarily by two considerations, namely, proper respect for the Board's own rule that reports of examination not be made public, and the rule, followed in some jurisdictions, limiting a witness' cross-examination to the scope of his direct examination. In my opinion, however, neither of these considerations furnishes a valid reason for refusing Transamerica's request for the reports, except insofar as the "confidential sections" of the reports are concerned. The question of Transamerica's right to inspect those sections is, in my opinion, not entirely free from doubt. But for the reasons stated in Section 8(d) of the Board's Rules of Organization and by the Board's Solicitor at R. 1718, and for the additional reason that no part of the confidential sections of the reports appears to have been offered in evidence, I am inclined to believe that the Board's Solicitor properly objected to, and the Hearing Officer properly denied, Transamerica's request for production of the confidential sections of the Board's examination reports. I believe that the remainder of the reports, however, should be produced for Transamerica's inspection.

In my opinion, it is clear that whatever privilege or confidential status might otherwise have attached to the open sections of the

Board's reports of examination (see Note, 123 A.L.R. 1278; Note, 165 A.L.R. 1302, 1320-1323, 1347 et seq.; Hickman v. Taylor, 329 U.S. 495, 505-514 (1947)), it was waived or lost by the use of parts of the reports in the manner above stated (see Western Union Telegraph Co. v. Baltimore & Ohio Telegraph Co., 26 F. 55, 56-57 (C.C. N.Y., 1885)). That being true, I believe that the open sections of the reports should be produced for Transamerica's inspection under well-settled rules which permit parties to inspect writings used by opposing witnesses to refresh their recollections (70 C.J. 597-598; 58 Am. Jur. Witnesses, Secs. 601, 605), require that where one party has offered part of a document or series of documents in evidence, his opponent be permitted to show so much of the remainder of the document or documents as serves to explain or give a complete understanding of the part offered (31 C.J.S. Evidence, Sec. 190; 20 Am. Jur., Evidence, Sec. 914), and authorize a court to order a party, including the United States and its agencies, to produce for his adversary's inspection documents pertaining to the issues of the case and which may contain, or lead to the discovery of, material evidence (Rule 34, Federal Rules of Civil Procedure; United States v. Grayson, 166 F. 2d 863, 870 (C.C.A. 2, 1948); United States v. Andolschek, 142 F. 2d 503, 506 (C.C.A. 2, 1944); Bank Line v. United States, 76 F. Supp. 801, 803-804 (S.D. N.Y., 1948); Bowles v. Ackerman, 4 F.R.D. 260, 262 (S.D. N.Y., 1945); Pike and Fischer, Discovery against Federal Administrative Agencies (1943) 56 Harvard L. Rev. 1125, 1129-1132).

It may well be that cases can be found which would support a refusal on the part of the Board to produce the reports demanded by Transamerica. And it may also be that the rules to which I have referred do not furnish a precise and complete analogy. I believe, however, that their cumulative effect is controlling, and that if this were a proceeding at law, a court would not hesitate to order the Board's reports produced for Transamerica's inspection. It might well be said here, as the court said in Bowles v. Ackerman, 4 F.R.D. 260, 262 (S.D. N.Y., 1945), a price control action for an injunction and triple damages in which the Price Administrator resisted the defendants' motion to produce data taken by him from the defendants' files:

"It is obvious that defendants are seeking the evidence obtained by plaintiff's investigators from them, and which, undoubtedly, will be used upon the trial of the case against them. Such evidence cannot be said to be privileged. And if it is to be revealed on the trial, and comes from the defendants, it can hardly now be said to be confidential. * * *

"I am unable to appreciate the fairness of an argument that one party may obtain evidence from another, upon which it seeks an injunction of wide application

and to hold the latter to liability in a large penalty, and may refuse to reveal that evidence, where required by orderly procedure in the suit brought, on a claim that it is confidential."

In addition to this, I think it also important to bear in mind the fact that if this were a court proceeding, practically none of the evidence offered from the Board's reports of examination would have been admissible. Entirely apart from the question of the relevance of some of it, virtually all of it ran counter to one or more of the well-settled rules against hearsay, opinion evidence and secondary evidence. I do not mean by this to imply that the evidence should not have been admitted in this administrative proceeding in which the Board asserts no subpoena power. The point is that the evidence was admitted under an administrative relaxation of the rules referred to, while Transamerica was denied access to parts of the Board's reports by virtue of a strict -- and, in my opinion, erroneous -- application of other rules. This type of procedure is, I believe, clearly inconsistent, and may furnish strong support to Transamerica's contention that it is not being accorded a fair trial. For it does not comport with due process, in my opinion, to relax conventional rules of evidence and procedure in favor of the Board, while enforcing them against its adversary. If the rules are to be relaxed in favor of one party, they should likewise be relaxed in favor of the other. Hearsay and opinion evidence having been offered from the Board's reports of examination, it therefore seems to me that even if the reports were not otherwise subject to inspection, their inspection should be allowed, in fairness, in order to accord to Transamerica an opportunity to bring to the Board's attention on the record any pertinent material in its reports which might serve to explain, qualify or rebut the evidence which the Board has offered from that source.

While I have not, of course, discussed this matter with the Solicitor for the Board or with counsel for Transamerica, it is my understanding that the Board's Solicitor does not object to Transamerica's inspection of the non-confidential sections of the Board's reports. He stated on the record that he did not "want the impression to go abroad that we are unwilling to produce for the inspection of [Transamerica's counsel] any of the papers upon which the Board is predicated this case" (R. 1709), and, as already stated, his objection to producing the reports seems to have been prompted to some extent by respect for the Board's own rule which makes undisclosed examination reports confidential (R. 1715, 1804; see also R. 1721). As I understand, the present concern of the Solicitor for the Board is that a reversal by the Board of the Hearing Officer's ruling might be embarrassing to the Hearing Officer.

It seems obvious to me that this is not a valid basis upon which to determine the question presented. Furthermore, it is not necessary for the Board to reverse the Hearing Officer's ruling in respect of

the Board's examination reports. Since Transamerica has not yet brought the ruling up for review, no question in that connection is now pending before the Board. In the circumstances, without the entry of any Board order reversing the Hearing Officer's ruling, the Board's reports may be made available to Transamerica in any one of three ways, namely:

1. By the Board's Solicitor withdrawing his record objection and voluntarily producing the reports for Transamerica's inspection.

2. By the Hearing Officer reconsidering his ruling and himself ordering that the reports be produced.

3. By a retroactive rescission of the Board's rule requiring that examination reports of holding companies not be made available to the companies examined.

One further matter should be mentioned. I am advised by Mr. Hostrup, of the Board's Division of Examinations, that the examination reports in question state that Transamerica and certain of its subsidiary banks, at various times had not complied with provisions of law relating to the submission and publication of reports, affiliations with securities companies and the voting of stock of member banks, with respect to some of which violations of law, Mr. Hostrup states, no action has been taken by the Board. Mr. Hostrup also informs me that in a few instances statements which should have been made only in the confidential sections of the Board's reports were inadvertently or erroneously included in the open sections.

Whether or not it would embarrass the Board to disclose, by production of its reports, that it had failed to take action to correct the violations of law referred to in the reports, I do not know. It may very well have been that the Board was vested with and exercised discretion in the matter or had other good reasons for the course which it followed. However that may be, possible embarrassment to the Board because of the disclosure of such violations is not in my opinion a valid ground for declining to produce the Board's reports.

As for the statements which should not have been included in the open sections of the reports, I think the Board may delete or paraphrase them in the event that the reports are produced for Transamerica's inspection. If the reports are so modified, however, I assume that the Board's Hearing Officer or Solicitor would notify Transamerica, on the record, of the precise paragraphs and pages deleted or paraphrased and the reason for the Board's action. Otherwise, production of the reports would imply that they are in the exact form in which they were submitted to the Board.