

1979 WL 1586  
United States District Court, E.D. Arkansas, Western  
Division.

Little Rock School District, et al.

v.

Borden, Inc., et al.

State of Arkansas

v.

Borden, Inc., et al.

United States

v.

Borden, Inc., et al.

**No. LR-76-C-41**

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**No. LR-C-77-126**

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**No. LR-C-77-108**

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Filed January 17, 1979

Mr. Starkey thereupon proceeded to testify fully in response to questions from the grand jury.

In this civil action, plaintiff State of Arkansas on November 15, 1978, questioned Mr. Starkey in a duly noticed deposition about various matters pertaining to pricefixing in the dairy industry in Arkansas, and particularly with respect to Dean Food Products, to which Mr. Starkey responded that he was invoking his Fifth Amendment privilege against self-incrimination.

The State of Arkansas first contends that the deposition testimony of Mr. Starkey should be compelled by this Court because the United States Attorney has indicated, by letter, that no further prosecutions are contemplated for any conduct involving the pricing of milk in the State of Arkansas occurring before April 22, 1977. As the Court stated in its Order of December 29, 1978, denying plaintiff's motion to compel the deposition testimony of Messrs. Lynn and Proctor, the Court will not accept promises of no prosecution from the local office of the United States Attorney as a substitute for the appropriate Congressionally-mandated procedure under 18 U. S. C. § 6003(b).

EISELE, D. J.

*[Prior Immunity]*

### Memorandum and Order

\*1 Pending before this Court is plaintiff State of Arkansas' motion to compel the deposition testimony of Mr. Carlos Lee Starkey. Mr. Starkey is an employee of defendant Dean Food Products, Inc., in this civil anti-trust case. In October, 1976, Mr. Starkey appeared before a federal grand jury of the Eastern District of Arkansas and, in response to questions concerning price-fixing by members of the dairy industry in Arkansas, invoked his Fifth Amendment privilege against self-incrimination. In February, 1977, on the motion of the United States under 18 U. S. C. § 6001, the United States District Court for the Eastern District of Arkansas, Judge Oren Harris, conferred immunity from criminal prosecution upon Mr. Starkey by ordering that he testify before a federal grand jury and that any testimony given pursuant to the Order would be subject to the immunity provisions of § 6002.

Plaintiff State of Arkansas also contends that the prior grant of immunity from prosecution on the motion of the Justice Department effectively precludes any assertion of a Fifth Amendment privilege by Mr. Starkey. In reply, Mr. Starkey contends that the government will not treat any deposition testimony by him as "derived" from his grand jury testimony, and that he thus could subject himself to criminal prosecution on an "independent source" basis, without the protection of his prior immunity. Although such an argument may have some merit in the situation in which the deposition interrogators in the civil case have no direct knowledge of the substance of the deponent's immunized grand jury testimony, in this case many of the deposition questions flow directly from the prior grand jury testimony, such testimony having been a part of that grand jury testimony ordered produced to plaintiffs by this Court in an Order of April 28, 1977.<sup>1</sup> And all of the questions put to Mr. Starkey in his deposition concerned the general area of

inquiry about which he testified before the grand jury. It is fair to state, as plaintiff suggests, that Mr. Starkey's grand jury testimony "permeates" the deposition questions. Therefore, the deposition testimony of Mr. Starkey would be, in the ordinary sense of the word, "derived" from his grand jury testimony and cannot constitute an independent source upon which a criminal prosecution should be based. See generally, *Kastigar v. United States*, 406 U. S. 441 (1972). A further grant of immunity for Mr. Starkey in the context of this civil case is unnecessary.

\*2 Further, Mr. Starkey will also be protected from criminal prosecution by state authorities that might be based on any deposition testimony by virtue of the requirement that every sovereign, state or federal, recognize the immunity from prosecution granted by another sovereign. The State of Arkansas is therefore required to afford Mr. Starkey the same protection as he has from federal authorities. See, e. g., *Murphy v. Waterfront Comm'n.*, 378 U. S. 52 (1964); *In re Bianchi*, 542 F. 2d 98 (1st Cir. 1976); *United States v. Watkins*, 505 F. 2d 545 (7th Cir. 1974).

Such deposition testimony in response to questions substantially gleaned from immunized grand jury testimony is not at all comparable to the situation in *United States v. Kuehn*, 562 F. 2d 427 (7th Cir. 1977), where an individual created incriminating evidence independent of his immunized grand jury testimony by

freely repeating the testimony to a reporter, who later recounted the conversation.

As for Mr. Starkey's more general contention that any deposition testimony could lead to independent source prosecutions, this position, insofar as it relies on "disturbing" examples of criminal prosecutions following some grant of "use" immunity, actually is an argument against the concept of use immunity itself, an argument that may have appeal as a matter of policy but that has no merits in this action. See *Kastigar, supra*, 406 U. S. at 459-62. Any criminal prosecution of Mr. Starkey, for example, will have to be based upon the prosecution's satisfaction of its heavy burden, under *Kastigar*, to show the independent sources of the prosecution, and these sources cannot include and cannot be derived from his deposition testimony in this case.

It is therefore Ordered that plaintiff State of Arkansas' motion to compel the deposition testimony of Mr. Carlos Lee Starkey be, and it is hereby, granted.

#### All Citations

Not Reported in F.Supp., 1979 WL 1586, 1979-1 Trade Cases P 62,471

#### Footnotes

<sup>1</sup> In that Order the Court pointed out, in the context of the potential disparity in the parties' relative positions in this case were the grand jury testimony not disclosed, the potential for the use of the grand jury testimony during a deposition. The Order states that the grand jury testimony was not to be used in this civil litigation for purposes other than that of impeachment or to refresh the recollection of a witness, without prior authorization of the Court. The Court here had in mind that the use of the grand jury testimony in the discovery phase of this case would be along the lines that plaintiff has sought to use it with respect to Mr. Starkey's deposition, although this specific Fifth Amendment problem was not foreseen at the time.

**Little Rock School Dist. v. Borden, Inc., Not Reported in F.Supp. (1979)**

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1979-1 Trade Cases P 62,471