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"INTERLOCUTORY APPEALS"

Remarks By

EDWARD T. TAIT
Federal Trade Commissioner

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I am very glad to have this opportunity to discuss interlocutory appeals at the Federal Trade Commission. Too often formalistic opinions, orders and rules of practice leave much to be desired. They often fail to provide insight into the Commission's general thinking with respect to interlocutory matters.

Interlocutory appeals, of course, are appeals to the Commission from rulings of the hearing examiner during the course of a proceeding pending before him. To begin with, it will be helpful to have a basic understanding of the role of the hearing examiner.

Recently, in an article for the 1959 Trade Practice Annual, I had occasion to point out the new role of the hearing examiners at the Federal Trade Commission. Their role has grown from that of being a mere presiding officer. Now they possess great responsibility.

The passage of the Administrative Procedure Act in 1946 paved the way for the present status of the hearing examiner. Prior to that time, for example, virtually the only types of motions the examiner could rule on were those relating to matters of evidence. However, all such rulings were automatically subject to appeal to the Commission. Motions addressed to the pleadings, such as motions to amend or for a bill of particulars, were passed on by the Commission itself. An examiner was responsible for fixing the time and place of hearing and for the orderly progress of his case, but even here his use of discretion was extremely limited. In effect, nearly all matters required special and immediate attention by the Commission regardless of whether they were substantive or procedural. As a result, trial proceedings were fraught with indecision and unnecessary interruption. This tended to delay the day-to-day trial of cases and to prolong litigation generally.

At the same time the hearing examiner's end contribution was minimal. After hearing the evidence he was chargeable only with rendering a report. Quite often these reports were little more than summaries of the testimony. Specific findings of ultimate fact were lacking. The reports were only advisory. They did not constitute a part of the official record, and the Commission itself made the initial decision from its own independent consideration of the entire record.

Significant changes in the duties of the hearing examiner have now been made by the Commission within the structure outlined by Congress in the Administrative Procedure Act. For instance, oral argument is now held before the examiner; suggested findings and orders may be submitted to him by the parties; and he is now required to file an initial decision. This decision is a part of the official record and includes findings of fact, conclusions and orders in addition to a detailed report on the evidence.

The Commission's present Rules of Practice have broadened the hearing examiner's authority to regulate the course of the trial proceedings and to rule on evidentiary questions. He is also to dispose of all other motions in cases pending before him; to allow amendments to pleadings in the special circumstances prescribed by the rules; to permit interventions; to authorize the taking of depositions; to issue subpoenas; and generally to take any action in connection with the trial necessary to resolving the issues. The examiner is likewise authorized to hold conferences in aid of settling or simplifying the issues. Finally, it is important to note that under current procedure the examiner's initial decision automatically becomes the decision of the Commission unless appealed from or reviewed upon the Commission's own motion. Even when modified or reversed by the Commission, the initial decision remains as part of the record for consideration by an appellate court upon any subsequent judicial review.

As a caveat, I emphasize that the ultimate statutory responsibility for just decision in all cases still rests squarely on the Commission. Thus, the hearing examiner's conclusions, interpretations of law and even ultimate findings are necessarily open to Commission review on their merits.

Much of what I have said should indicate that the Commission is constantly striving toward a goal desired by the courts, the Congress, and most respondents. It is also one which no doubt is of more than passing interest to the taxpayer. This common goal is to put a stop to protracted litigation and to eliminate delay in the trial of cases--in consonance, of course, with the elements of due process. With this background our interlocutory appeal procedure, provided for under §3.20 of the Commission's Rules of Practice, is brought into proper focus. The procedure is designed to expedite litigation and to admit full benefit from the wide

latitude in judgment and discretion now accorded the hearing examiner.

When an interlocutory appeal, which must be in the form of a brief, is filed with the Federal Trade Commission, copies are served upon all parties of record. The original, along with the formal docket in the proceeding, is immediately assigned to the "Motions Commissioner" to await the filing of answers. The office of "Motions Commissioner" is usually rotated on a yearly basis among the several members of the Commission upon designation by the Chairman.

Under his delegated authority the Motions Commissioner is to determine all procedural interlocutory appeals or motions and to prepare and have issued in the name of the Commission appropriate orders. This action by the Motions Commissioner is subject to ratification by the Commission.

Should the appeal relate to the merits or to a subpoena, however, the Motions Commissioner presents the appeal to the Commission, with recommendation, and the Commission acts upon it directly rather than by the process of ratification.

The Commission will not entertain an interlocutory appeal unless certain mandates are met. As I have said, the appeal must be presented in the form of a brief; the brief must set out the grounds of the appeal; it must show the necessity for immediate decision; and it must be filed within ten days after the appealing party has notice of the adverse ruling by the hearing examiner.

It should also be borne in mind that, unless the hearing examiner or the Commission so orders, the filing of an interlocutory appeal does not operate to suspend the hearings before the examiner. At the same time it should be noted that error in a ruling by the examiner is not waived by a party's failure to take an interlocutory appeal. To the contrary, our Rules of Practice expressly provide that an aggrieved party may assign adverse rulings as error upon subsequent appeal from the initial decision. I am quite sure that if this latter circumstance were fully appreciated by counsel, trial proceedings before the examiner would be less frequently interrupted with appeals to the Commission.

An interlocutory appeal is not a matter of right unless it should concern either an examiner's denial

of a motion to issue, limit or quash a subpoena; or a joint appeal by all parties to a consent order agreement from an examiner's action rejecting such agreement; or an examiner's action barring or suspending an attorney from participation in a proceeding.

Otherwise, the specific grounds for an interlocutory appeal are quite limited. §3.20 of the Rules provides in part that the Commission may grant such appeal only when it finds: (1) that the adverse ruling involves substantial rights, (2) that the ruling will affect the final decision, and (3) that determination of the correctness of the ruling before conclusion of the trial would better serve the interests of justice. Admittedly, these conditions precedent constitute only the bare structural bones to which the Commission must give substance through the decisional process. Proceeding on a case-by-case basis we have tried to do just that.

A few of the significant decisions wherein the Commission has held that an interlocutory appeal did not come within the category of those to be entertained under §3.20 of the Rules would include the following. In Fred Bronner Corporation, D. 7068 (1958), and Howard Stores Corporation, D. 7074 (1958), the Commission held as not allowable under §3.20 interlocutory appeals from the hearing examiners' rulings denying respondents' motions to dismiss the complaints. The dismissals were sought primarily upon grounds that the challenged practices had been abandoned. Respondents' motions were made prior to the receipt of evidence and were accompanied by ex parte affidavits. Obviously, the examiners' rulings would not have materially affected the final decisions. And further, it should be readily apparent that the factual issues raised by such motions are best resolved by the development of a complete record.

The Commission has taken a similar view with respect to appeals from rulings denying motions, made by respondents at close of the case-in-chief, to dismiss complaints for want of proof. In such circumstances the principal question before the examiner is whether a prima facie showing of the complained violations has been made. Such a ruling does not constitute a final decision on the merits of a proceeding, nor does it affect substantial rights of a respondent.

A number of decisions have concerned matters considered initially to be within the sound discretion

of the hearing examiner. In these matters the Commission has shown steadfast reluctance to entertain an appeal from a particular ruling unless there is clear showing that the examiner has abused his discretion.

Matters of this nature wherein the Commission refused to consider the appeal were presented in Scott Paper Company, D. 6559 (1957), and Gulf Oil Corporation, D. 6689 (1958). Both cases involved appeals by counsel supporting the complaint from orders by the examiners directing that counsel disclose to respondents the names and addresses of witnesses to be called at subsequent hearings to testify in support of the complaint. Similarly, in Mytinger & Casselberry, Inc., D. 6962 (1958), the Commission refused to consider respondents' appeals from orders denying their motion seeking disclosure of the names and addresses of such witnesses.

Thus in two cases the respondents were given the names and addresses of witnesses and in another case such information was refused. Although apparently contradictory, I consider this position sound in principle and in practice. In neither case was the examiner shown to have abused his discretion.

In the matter of Luria Brothers & Company, Inc., D. 6156 (1958), counsel in support of the complaint appealed from an order entered by the hearing examiner upon his closing of the record for the reception of evidence. The appeal sought reversal of the action closing the case without disposing of all motions to strike evidence and of the action requiring that suggested findings be filed by counsel supporting complaint prior to the date when respondents' proposals and motions were due to be submitted. The Commission denied the appeal from both rulings. In neither instance were substantial rights affected; there was no showing of prejudicial departure from orderly procedure; the matters related to areas committed to the sound discretion of the examiner.

Among other things the Commission recognized, as did the examiner, that orderly trial procedure ordinarily means timely rulings on motions to strike prior to submission of the case for decision on its merits.

Throughout his rulings the hearing examiner laid stress upon the unusual number and the complexity of

the issues. In these circumstances, the examiner considered that the course taken by him would expedite the proceedings and be of material aid in rendering a sound decision on the merits.

The Commission made it clear that counsel supporting the complaint could except to adverse rulings on subsequently filed motions to strike, irrespective of the examiner's disposition of any motion to reopen filed as a result of rulings striking evidence.

Both the Commission and the hearing examiner recognized that it is more equitable to give parties equal time, running concurrently, for the submission of suggested findings. This has been our customary practice. It is a practice to be departed from only in unusual circumstances.

The Commission had further occasion to emphasize the hearing examiner's discretion in the Gulf case, supra. Alleging undue delay, respondent requested that the examiner order that submission of proponents' proof be closed or, alternatively, that the examiner set an early date for termination of evidence. Forthwith, the examiner, asserting lack of authority, certified the motion to the Commission. The hearing examiner was held to have committed error in concluding that he lacked authority to rule on respondent's motion.

Some time later the Commission felt obliged to hold that the examiner when he did rule, abused his discretion by closing the case before counsel supporting complaint had sufficient opportunity to introduce his then available evidence.

Additional rulings held to be within the hearing examiner's sound discretion and not subject to interlocutory appeal, absent a clear showing of abuse or prejudicial error, have included rulings denying request for postponement of scheduled hearings, Morse Sales, Inc., D. 6613 (1956); granting motion to amend the complaint to conform to evidence introduced by consent of the parties, Erie Sand and Gravel Company, D. 6670 (1957); denying motion to reset date of initial hearing, Union Carbide Corporation, D. 6826 (1957); denying request for continuance and for limitation of situs, Surplus Tire Co., Inc., D. 7004 (1958); rejecting evidence not deemed material to the issues, Salyer Refining Company, Inc., D. 6339 (1957); and denying request for

leave to amend answer to complaint, National Dairy Products Corporation, D. 7018 (1958).

It is believed that the foregoing decisions illustrate a policy which will speed up litigation and better serve the public interest. Obviously, some interlocutory decisions demand detailed consideration of the trial record. More often than not, the questions raised fade into background matters of minor import through subsequent development of the issues. A policy of routinely entertaining such appeals only encourages fragmentary submission of cases and inevitably results in delay. Such would be the price of agency over-the-shoulder supervision of the hearing examiner.

I also hope that the decisions which I have mentioned this afternoon may serve as signposts along the way. No magic formula has as yet been devised for swift and unerring determinations as to whether our Rules' tests for entertaining interlocutory appeals on their merits have been met. Nor have we pinpointed the metes and bounds of the hearing examiner's discretion. Even so, this represents no sound reason for abolishing interlocutory appeals in toto. I assure you that the Commission is striving hard to fashion appropriate touchstones.