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REMARKS
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BEFORE CONFERENCE ON ANTITRUST LAWS AND TRADE REGULATIONS
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"THE PROPOSAL FOR AUTHORITY TO ISSUE
TEMPORARY CEASE AND DESIST ORDERS"



Background of Pending Proposals

In the 86th Congress, the Hon. Tom Steed (D. Okla.) a member of the House Small Business Committee, and the Hon. Wright Patman (D. Texas), Chairman of that Committee, introduced identical bills to authorize and empower the Federal Trade Commission to enter temporary cease and desist orders to provide for temporary relief, pending the issuance of Final Orders in long, drawn-out litigated cases. 1/

For a period of time prior to the introduction of his bill to empower the Federal Trade Commission to issue temporary cease and desist orders, Rep. Steed, as Chairman of a special subcommittee of the House Small Business Committee, had heard testimony and received considerable evidence from small business firms about trade practices in the dairy industry. He had listened to numerous complaints that price discriminations involving sales at prices below cost and other related practices,

1/ Rep. Steed's bill was H. R. 8841. The bills introduced by Rep. Patman and other members of the House Small Business Committee on that occasion were H. R. 8842, H. R. 8843, H. R. 8844, and H. R. 8869, all of the 86th Congress.

were destroying small business firms and tending to create monopolistic conditions in the sale and distribution of dairy products.

In the course of testimony before Rep. Steed's Subcommittee in April, 1958, it was pointed out that complaints about these alleged destructive trade practices had been made to the Federal Trade Commission. In that connection, it was further alleged that due to provisions of existing law and procedures, long drawn-out litigation would ensue before the issues could be resolved. In the meantime, victimized small-business concerns would be forced out of business as a result of these practices. 2/

At that point, a representative of dairy industry-small business firms suggested that one way to overcome this difficulty would be for the Federal Trade Commission to issue temporary cease and desist orders, pending resolution of the long drawn-out and protracted litigation. 3/

2/ Page 42, H. Rep. 2713, 85th Congress.

3/ Ibid. pp. 42, 43. In that connection, the witness testified as follows:

"Due to the slowness of our enforcement divisions, and I say this with no bitterness on the subject because I believe that our enforcement divisions of the United States Government are terribly overloaded

(cont'd. on p.3)

Similar proposals for legislation of this kind were made by others. At that time, the House Small Business Committee recommended favorable consideration of these

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at the present time because we have so many sinners in the camp, I offer the following suggestion as an amendment to the Robinson-Patman Act.

"When a formal complaint is entered with Federal Trade Commission, by one or more of a group of small concerns operating either in a limited area and/or on a few items of an industry against a large and formidable company operating in all lines of an industry and often with diversified interests this formal complaint should go before a committee of 3 members of the Federal Trade Commission, who shall make a prompt preliminary investigation of the formal complaint, not taking more than 30 days. If they have reasonable belief that the complaint justified a complete detailed investigation then they should order the company, against whom the formal complaint is lodged, to discontinue the practice pending further investigation, final hearings, and conclusion.

* * *

"Now, gentlemen, you have got to get this thing down so the action is prompt. A fire chief does not go and look at a fire and then afterward call out his engines. He brings his engines with him and that is what must be done.

"Large companies know the laws as they have large expensive legal organizations. Sometimes one wonders whether these legal organizations are employed to keep the company operating within the laws and whether they are engaged in finding ways to evade the laws."

proposals. In the 86th Congress, the House Small Business Committee in its Final Report 4/ submitted a strong recommendation for amendment of the Federal Trade Commission Act to authorize and empower the Federal Trade Commission to enter temporary cease and desist orders. In referring to the testimony which had been taken about this problem during 1958 and 1960, it was stated:

"Currently pending at the Federal Trade Commission are 24 cases involving price discrimination and other trade practices utilized by the large processors and distributors of dairy products. These cases have been pending for periods up to 12 years -- nine of them have been pending for a period of more than 6 years, and others for varying periods of time. Representatives of the Federal Trade Commission who have testified during the course of hearings about this situation have failed to indicate that under existing law better results can be obtained. On the contrary, they have made it clear that they believe that under existing law they are doing all that is possible to expedite the litigation of these cases."

Much more has been said and written about the backlogs and delays in the handling of important cases at the Federal Trade Commission. President elect Kennedy on December 15, 1950, received a report in which it was stated:

"Inordinate delay characterizes the disposition of adjudicatory proceedings before substantially all of our regulatory agencies." 5/

4/ H. Rep. 2235, 86th Cong., p. 167.

5/ Report from Hon. James M. Landis to President elect Kennedy on Regulatory Agencies and Commissions, December 15, 1960.

The Federal Trade Commission was singled out as an agency where the problem was particularly acute and reference was made to frustration of its efforts to expeditiously dispose of its work.

On March 21, 1961, a report was made by the Federal Trade Commission to the Chairman of the House Small Business which set forth a number of the facts involved in this problem. That report was published in the Congressional Record. 6/ That report showed that a large number of cases in which small business was vitally interested had been pending at the Federal Trade Commission from periods ranging from six to 10 years unresolved. Many of these cases were directed against practices which were alleged to be destroying small business firms and otherwise substantially lessening competition and tending to create monopolies. Of course, it appears that while these cases drag on, the practices which are allegedly destructive continue. The statement has been made that the Federal Trade Commission is not at fault. It has been said that it has done as well as it could with the tools Congress gave it.

How Will The Problem Be Resolved?

This problem is proving troublesome to many. Members of the Federal Trade Commission, Members of Congress, and others are worried about it. They are asking themselves what

6/ The Congressional Record (daily copy, March 22, 1961, pp. 4338-4339).

can we do about this problem? How shall we resolve it? Few are those who answer with the words "do nothing".

In the meantime, additional bills have been introduced in Congress by Representative Steed 7/ and by the Chairman of the House Small Business Committee 8/, and the Chairman of the Senate Small Business Committee. 9/ Identical bills have been introduced by other members of Congress.

On June 15, 1961, the Executive Office of the President, in a report to the Chairman of the House Committee on Interstate and Foreign Commerce, stated:

"The Departments of Justice and Commerce, the Federal Trade Commission, and the Small Business Administration have all submitted reports favoring the objectives of these bills. The Department of Justice and the Federal Trade Commission have pointed up a number of technical difficulties which they feel need clarification before enactment. The Bureau of the Budget concurs with the reports of these agencies."

On August 28, 1961, the President of the United States, in a letter directed to the Chairman of the House Committee on Interstate and Foreign Commerce, strongly supported legislative proposals authorizing the Federal Trade Commission to issue temporary cease and desist orders.

7/ H.R. 1233, introduced January 3, 1961, and H.R. 8830 introduced August 21, 1961.

8/ H.R. 1817 and H.R. 8831.

9/ S. 2552.

Pending Proposals: H. R. 8830, H. R. 8831 and S. 2552

These bills, while authorizing the Federal Trade Commission to issue temporary cease and desist orders, would not empower the Commission to use that authority routinely or as a matter of course. The bills have included safeguards and limitations which were suggested in the President's letter of August 28, 1961, to the Hon. Oren Harris. It is noted that in his letter, the President, in reference to the proposed cease and desist order, stated that "Such order should, of course, be subject to the protection of appropriate due process, including the safeguards of judicial review." It is reiterated that the pending bills - H. R. 8830, H. R. 8831 and S. 2552 provide these safeguards. In that connection, it is explained that they contain safeguards such as those which surround the traditional temporary injunctive orders entered by courts. Among those requirements are: (1) a prima facie showing of illegality of the acts sought to be enjoined; (2) a showing that irreparable injury would result if the alleged illegal action should be permitted to continue; and (3) provision for proper judicial review of questions challenging the validity of the restraining order.

It is emphasized that these pending legislative proposals provide for the issuance of temporary cease and desist orders only in those cases where the Federal Trade Commission has made an investigation and has reason to believe that the practices which would be made subject to the temporary cease and desist order are illegal under the terms of one or more of the statutes administered by the Commission. In other words, the Commission would not be authorized under these pending bills to issue any temporary order to cease and desist prior to its issuance of a complaint in which it is stated that there is reason to believe that the acts and practices in question are illegal. The Commission recognizes the inappropriateness of entering a temporary injunctive order in any case where there is lacking substantial "probable cause" for believing that the challenged acts or practices are in violation of law.

In a Commission proceeding an essential element for a cause of action is the protection of the public interest. Therefore, the Commission would, under the authority provided by the pending legislative proposals,

enter a temporary order only where the failure to do so would substantially diminish or impair the effectiveness of any relief ultimately directed by the Commission for the protection of the public. In this respect, the issue of irreparable injury comes into focus under the proposed temporary cease and desist order provisions. Upon this issue the ultimate burden of proof would rest upon the Commission, not the respondent. In that connection, any showing made by the respondent concerning hardship or other effects which the proposed order would have upon it would be considered by the Commission in determining whether such order would be in the public interest.

Under these legislative proposals, judicial review of a temporary cease and desist order issued by the Commission would be available, either upon appeal by the respondent, or by application of the Commission for an order of enforcement. In either event, the order of the Commission should be enforced by the Court of Appeals unless it is shown that such order does not satisfy the provisions of the statute, or if it is shown that the Commission acted arbitrarily or capriciously. The court should not substitute its judgment for that of the

Commission regarding the necessity for a temporary injunctive order.

In order to prevent unnecessary hardship, the Commission, in any case in which it issues a temporary cease and desist order, would thereupon place the case on a special calendar or docket for expeditious determination. Such proceedings would be given precedence over other pending cases and be expedited in every way to the maximum extent, consistent with fairness and justice.

As has been pointed out, law enforcement by the Federal Trade Commission on many occasions has been frustrated by delays and an increasing backlog of cases. The present Commission is attempting to eradicate this evil; it seeks to speed up the procedures before the Commission so as to cut down on delays and the backlog of cases.

Among the steps recently taken by the Commission to cut down on delays and backlogs of its cases, are changes recently made in its organization, policies, procedures, and rules of practice. In spite of these efforts, in contested cases before the Commission, various procedural steps are required in order to comply with the Administrative Procedure Act and other statutes assuring due process. This will, of

necessity, consume considerable time, especially in an involved case, before the Commission can render its final decision in the matter. Even then, if the Commission's decision contains an order to cease and desist, the respondent may in due course appeal to the courts.

All of these various steps inevitably are time consuming. Therefore, a considerable period of time may elapse between the issuance of a complaint and final judicial approval of an order to cease and desist.

During all of this period, a respondent is free under existing law to continue the practices charged in a complaint.

During this interval, small businessmen frequently suffer serious injury, including severe loss of business or even failure due to the allegedly illegal practices of their larger competitors against whom the Commission has issued the complaint.

It appears that in some instances of this kind, the ultimate result is damage to the vigor of competition in the market place. Long ago we discovered that you cannot have competition without competitors. It is obvious that competitive harm of this kind could be avoided in many instances if the Commission should be given the authority sought in the pending legislative proposals for temporary cease and desist orders.

Delay works greatly to the advantage of respondents in

these monopolistic or restraint of trade cases in the same way it does for respondents in cases involving deceptive acts and practices, such as, false advertising.

Some have alluded to the fact that the issuance of temporary cease and desist orders pendente lite would be drastic action. Such action would be significant. However, it would be far less drastic than actions which have been and now are being taken by Federal regulatory commissions. The Federal Trade Commission and other such commissions long ago were authorized and empowered to enter permanent injunctions in the form of final cease and desist orders. If it should be concluded that these commissions are not sufficiently competent to enter temporary cease and desist orders, then it would seem that it would follow logically that they are incompetent to enter the more drastic permanent and final cease and desist orders, such as they have been entering for many years.

In discussing the significance of temporary cease and desist orders, we should not overlook or ignore the significance of the acts or practices they would be expected to stop. Which is more drastic - a temporary cease and desist order directed to a party to stop

temporarily the use of a practice, or the continuation of a practice which would result in destruction of business firms and impairment of the public interest?

Upon lifting of a temporary cease and desist order, a practice could be resumed. However, business firms and competition destroyed as a result of the use of the practice, cannot be revived as could business practices upon the lifting of a temporary cease and desist order. In other words, a corpse may be lifted from the grave, but we have not yet found the magic by which we can restore life to the corpse.