For P. M. Release on Monday August 24, 1959

"AUTHORITY OF HEARING EXAMINER TO CONTROL COURSE OF HEARING"

Remarks by

EDWARD T. TAIT
Federal Trade Commissioner

Before The

SECTION OF ADMINISTRATIVE LAW

AMERICAN BAR ASSOCIATION

Miami Beach, Florida

August 24, 1959

Just as a company's organizational chart is no better than the men filling the key spots, so one cannot overlook the human factor in a critical analysis of hearing examiners. Fortunately, at the Federal Trade Commission we have been very successful with this problem. We have a career group of hearing examiners of legal ability, integrity and, generally, judicial temperament. These men will compare favorably with the judges of any court of original jurisdiction in a court of comparable size.

With such men it is appropriate merely to provide general guide lines to achieve uniformity of law enforcement. Holding too tight a grip on the reins interferes with the examiner's discretion, individual initiative and with the performance of his judicial function. The Federal Trade Commission has recognized these administrative principles. Also we have recognized the ability of our examiners. By a case-by-case series of holdings the Commission has noted the areas in which an examiner can exercise his own discretion.[1/] Too great an interference with such discretion will cause uncertainty and delay.

1/ See remarks by Commissioner Tait, "Interlocutory Appeals," before Section of Antitrust Law, American Bar Association, Washington, D. C., April 10, 1959; also Tait, "Increasing Responsibilities of Commission Hearing Examiners," 1959 Trade Practice Annual, Washington, D. C.

Before mentioning some of the newer cases, let's review quickly the more obvious authority of the Federal Trade Commission hearing examiners. We are aware that oral argument is often held before the hearing examiner; that suggested findings and orders with appropriate memoranda of law may be submitted to him by the parties; and that he is required to file an initial decision. This decision, of course, is a part of the official record and includes the findings of fact, conclusions and order in addition to a detailed report on the evidence.

Further, under the Commission's present Rules of Practice, the hearing examiner not only has authority to regulate the general course of hearings and to rule on questions of evidence but also to dispose of all other motions in cases pending before him. For instance, he is authorized to allow amendments to pleadings in the special circumstances outlined by the rules; to permit interventions in a proceeding; to take or grant the taking of depositions and to determine their scope; to issue subpoenas; and, generally speaking, to take any action with respect to trial proceedings necessary to resolving the issues presented. Noteworthy in this connection, I think, is the authority of the hearing examiner to hold conferences for purposes, inter alia, of settling or simplifying the various issues. I am glad to report that recently there has been renewed emphasis in the use of the pre-trial conference and I hope this trend will gain added momentum.

More recently the Commission has had occasion to hold that a number of specific matters, procedural and otherwise, are to be considered initially within the sound discretion of the hearing examiner. In other words, unless there is a clear showing of an abuse of discretion or prejudicial error, the examiner's rulings in such matters are not subject to interlocutory appeal. Typical rulings within this category and likewise indicative of the examiner's broadened sphere of authority during course of trial are rulings granting or denying motions for disclosure of names and addresses of prospective witnesses testifying in support of the complaint;[2/] closing the case without disposing of all motions to strike evidence and modifying the usual requirement for the simultaneous filing of proposed findings;[3/] granting motion to amend the complaint to conform to evidence introduced by consent of the parties,[4/] and setting termination dates for the presentation of evidence.[5/]

Members of the Bar will be particularly interested in the decision made by the Federal Trade Commission on July 2, 1959, in the American Metal Products case, D. 7365. Here the hearing examiner, during a pre-trial conference, directed counsel supporting the complaint to (a) mark for identification all exhibits in his possession which he intended to offer in

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2/ Scott Paper Company, D. 6559 (1957); Gulf Oil Corporation, D. 6689 (1958); Mytinger & Casselberry, Inc., D. 6962 (1958).
3/ Luria Brothers & Company, Inc., D. 6156 (1958).
4/ Erie Sand and Gravel Company, D. 6670 (1957).
5/ Gulf Oil, supra.

evidence in the proceeding; (b) furnish a copy of each of such exhibits to each of respondents' counsel; (c) prepare a list of all such exhibits with a brief description thereof; and (d) deliver one copy of the list to each counsel for respondents and two copies to the hearing examiner. The order further provided that the admission of the genuineness of each exhibit should be deemed made unless objected to within ten days of receipt. Although not contained in the terms of the formal order, the hearing examiner, as a condition for the issuance of this order, sought and received the agreement on the record of each counsel for the respondents to abide by a similar order to be later directed to them.

Upon interlocutory appeal by counsel in support of the complaint the Commission held that §3.10 of the Commission's Rules of Practice 6/ authorizes the hearing examiner to order disclosure of such exhibits. Furthermore, the Commission held that on the facts in the case the hearing examiner had not exceeded his discretion. In the past it has been recognized that the examiner, by agreement, could enter such an order. Such voluntary pre-trial, I believe, is the best and perhaps the most effective method. The American Metal Products

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6/ §3.10 Pre-hearing conferences. (a) The hearing examiner may, at his discretion, direct counsel for all parties to meet with him for a conference to consider: (1) Simplification of the issues; (2) Necessity or desirability of amendments to pleadings, subject, however, to the provisions

case confirms that the examiner, if necessary, can order the same result. It will be interesting to watch the course of these pre-trial developments in administrative practice. Incidentally, an outstanding address by Judge Irving R. Kaufman, recently given before the Federal Trial Examiners Conference, should be required reading for all interested in the success of administrative proceedings.

No flat rule can be easily devised which will outline for the examiner the extent to which he should use this mandatory pre-trial authority. He should keep in mind, of course, that his function is not merely to expedite hearings. His purpose is to provide a fair and just hearing for all. Perhaps the ordering of advance disclosure of exhibits in appropriate cases should be limited by controlling the time prior to the hearing within which such disclosure should be made. In some cases the hearing examiner might order that this information should be disclosed a month prior to the initial hearing. In other cases he may feel that disclosure for a few days would be sufficient. Then, too, the examiner must consider the nature and confidentiality of the information to be disclosed.

6/ (cont.)
of §3.9 (a) (1); (3) Stipulations, admissions of fact and of contents and authenticity of documents; (4) Limitation of the number of expert witnesses; and (5) Such other matters as may aid in the disposition of the proceeding. (b) Pre-hearing conferences, in the discretion of the hearing examiner, may be stenographically reported as provided in §3.16 (f), but shall not be public unless all parties so agree. The record shall show the matters disposed of by agreement in such pre-trial conference. The subsequent course of the proceeding shall be controlled by such action.

Certainly if the documents involved were secured from the respondent there would be little reason to refuse their disclosure.

This ruling of the Commission is a further step in the direction of eliminating unnecessary delay in our administrative proceedings. Of course, only time will tell the extent to which our hearing examiners and counsel will avail themselves of pre-trial procedure. Counsel for respondents should be aware that this sword cuts both ways and that they, too, should expect that they will be required to disclose appropriate information at an appropriate time.

Finally, I believe that we at the Federal Trade Commission can help minimize delay by following these policies:

(1) By granting broad trial discretion to our hearing examiners;

(2) By supporting to the fullest extent the examiners' efforts to expedite proceedings;

(3) By encouraging the use of pre-trial conferences, particularly conferences narrowing the issues to be tried;

(4) By recognizing and encouraging the efforts of our Executive Director, our Bureau Directors, and others who in their day-to-day work combat problems of delay.

You and I know that respondents also must share with the Commission the burden of minimizing delay. Historically, the

surest way to lose rights is to abuse them. Due process is not a static concept.

I am sure I speak for the members and staff of my Commission when I say that we are happy to have the Section of Administrative Law of the American Bar Association direct its attention and give a substantial portion of its annual meeting to the subject, "How Can Undue and Unnecessary Delay in Administrative Proceedings be Eliminated." This is a problem of constant concern to us and we sincerely welcome your suggestions. I believe that any elimination of delay will strengthen the enforcement of our laws and thereby the public's respect for them, and will, within the limits of the authority granted us, tend to strengthen our capitalistic free enterprise system.