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FEDERAL TRADE COMMISSION DECISIONS

Address of

Hon. Edward F. Howrey, Chairman
Federal Trade Commission

Before the

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In my talk before the New York State Bar Association last January, I said that the heart of the Commission's work, as a body of experts, is its fact finding. It is also the most difficult.

My experience as a lawyer and as a quasi-judicial fact finder has convinced me that agency fact finding, or rather the lack of it, is one of the soft spots of administrative law. The manner and method in which administrative agencies arrive at decisions must be improved.

Ordinarily it is not my practice to criticise the "old" Federal Trade Commission. In order, however, to establish the need for a new Commission policy with respect to fact finding and elucidation by opinion, it seems necessary to deal with former practices and policies. To avoid any suggestion that my criticism may be personal or partisan, I will rely for my critique, on other commentators, on studies made under the aegis of official committees and commissions, and on judicial opinions.

Primarily, of course, learning, skill, impartiality and fair-mindedness are personal qualities. There are quasi-judicial officers of great ability who can preserve a detached and objective point of view regardless of their relation to the controversy or their natural inclinations. There are other men who are not qualified, either by temperament or training, and who become partisans at an early stage. In any problem of administration or adjudication, these personal factors are far more important than the questions of form and procedure. Questions of personality, however, are beyond the scope of this paper.

Gerard Henderson, in his early work on the Federal Trade Commission, was perhaps the most devastating of all the critics.1/ He referred to the Commission's findings as "masterpieces of ambiguity." Professor Davis, 25 years later, was equally unhappy about our decisional work. He said that the Commission "has been glaringly deficient in its failure to prepare reasoned opinions and to develop a reliable body of case law."2/

In the past, formal findings have been made by the Commission only in those cases in which the decision supported the charges of the complaint. This was manifestly wrong. If charges have been made which prove to be erroneous, the respondents is entitled to an

1/Henderson, The Federal Trade Commission (1924), pp. 105-163.
2/Davis, Administrative Law (1951), pp. 547-548.

unequivocal and detailed exoneration.3/ And, of course, the published reports of the Commission's decisions suffer greatly, as a storehouse of precedents, from the fact that only decisions favorable to the Commission have been published. It is important that the business world know what it may do, as well as what it may not do.

The findings generally contained no narrative statement of the kind usually included in court decisions. Instead there were formalistic "findings," in numbered paragraphs, phrased generally in "the artificial legal phraseology of a common law pleading," and designed to embody ultimate conclusions of fact, rather than to set forth the happenings or events or economic considerations out of which the controversy arose.

Formal findings of this type are a poor means of conveying information. Almost any controversy, especially a business controversy of the kind that comes before the Federal Trade Commission, has a history and a setting. "To understand the business or economic significance of a practice, we must know something of its origin, of the objects and purposes of those who pursue it, of the persons who object to it and their reasons, and of its practical effect. We need a descriptive and narrative report, couched in simple and direct language."4/

Even a statement of a clear-cut violation suffers when it is made in formalistic terms. It does not satisfy our legitimate thirst for facts to learn that "numerous agents and representatives of respondents ... while acting within the scope of their employment with the purpose, intent and effect of stifling and suppressing competition ... and for the purpose of embarrassing, harassing and restraining competitors of respondent, ... have by divers means and methods induced and procured and attempted to induce and procure a large number of ... customers ... to cancel and rescind orders ... placed with competitors."5/

Nor does it help us to learn that "There are among respondent's competitors ... many who sell soap similar in grade and quality ... and many who sell soap of a grade and quality which has a retail value of, and sells for, the price marked by the respondent on said containers ..."6/

3/Section 8(b) of the Administrative Procedure Act (5 U.S.C. 1007) would seem to require this. It provides that "All decisions ... shall ... include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof" (underscoring supplied). Care should be exercised, of course, not to provide a respondent, especially in advertising cases, with unfair competitive weapons. For example, where an over-all cure is claimed, and for reasons unrelated to the merits counsel supporting the complaint fail to make a case, the findings should not indicate that the validity of the claim has been established.

4/Henderson, op. cit. supra, p. 109.

5/Ibid. p. 112.

6/Final Report of Attorney General's Committee on Administrative Procedure (1941), p. 443.

These are not reports of facts, but conclusions as to the existence of a practice, and even the practice is not so described that we gain any conception of its scope, its effect, or the means used in carrying it out. This form of report has even served, according to some critics, to conceal serious conflicts in the evidence.

The hearing examiner formerly was charged by tradition, and sometimes by directive, to make formalistic and ultimate findings. Under such directions he was apt to approach the task in the wrong frame of mind. He was apt to begin with the legal conclusions which he wished to reach. Next he would ascertain what conclusions of fact were necessary in law to support the result. Finally, if he were conscientious, he would comb the record to ascertain whether it contained sufficient supporting evidence.

A person charged with writing a narrative, descriptive account of a controversy approaches the task from a different viewpoint. His first concern is to set forth as clearly and accurately as possible what has happened. Having stated the facts, he will endeavor to reach general conclusions of fact or judgment, and finally he will apply the law to these general conclusions. He will be concerned throughout with the fairness and accuracy and impartial character of the report, rather than with its sufficiency in supporting one or another legal conclusions.

The members of the Attorney General's Committee on Administrative Procedure were also severe critics. They said:

> "... The findings of fact /of the Federal Trade Commission/ are phrased formalistically in language which closely resembles the language of the complaint itself. ... In the absence of a narrative statement of facts, portraying the history and background of the problem, it is frequently impossible to appreciate just what business methods are involved in the case. Similarly, the findings of fact ordinarily do not outline or otherwise refer to the respondent's defense or justification. ...
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> "The nakedness of the Commission's decisions extends not only to the facts, but also to questions of law. Except in a limited number of cases, the decisions contain no discussion of the principles of law under which the conduct in question is held to be illegal; neither is there any reference made to prior decisions of the Commission and the courts. The result is that most of the Commission's decisions ... are of indifferent value as precedents for attorneys and businessmen. ...
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> "The development of law through the deciding of individual cases is a process both of inclusion and of exclusion. That is, it is important to understand what is permitted by law, as well as to know what is forbidden. Not only, therefore, should the Commission seek to develop a body of precedent based on its holdings that

conduct has been improper, but also it should formulate, for their precedent value, those decisions which are 'adverse to the complaint.'" ...7/

The final report of the Attorney General's Committee recommended that opinions accompany decisions. This was based on the following reasons: First, error and carelessness may be squeezed out in the opinion-shaping process. Second, the exposure of reasoning to public scrutiny and criticism is healthy. Third, the parties will be better satisfied if they know the bases of the decision. Finally, opinions enable the private interests involved, and the bar that advises them, to obtain additional guidance for their future conduct.8/

The 1949 Task Force Report of the Hoover Commission said that "A most serious deficiency of the Commission is its failure to write an opinion which sets forth the contentions and issues involved in the case and the policies, standards, or rules being applied ..., which refers to the precedents ..., and if the case represents an attack upon a new problem provides a full elucidation of the Commission's reasoning."9/

The courts have long been critical of Commission decisions. Mr. Justice Cardozo's statement, made in another connection, is often quoted as applicable to the Federal Trade Commission: "We must know," he said, "what a decision means before the duty becomes ours to say whether it is right or wrong."10/

Other justices have said:

"The Commission has not explained its conclusion with ... 'simplicity and clearness.'"11/

* * *

"If judicial review is to have a basis for functioning, the Commission must do more than pronounce a conclusion by way of fiat and without explication."12/

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7/Monograph of the Attorney General's Committee on Administrative Procedure, Part 6, Federal Trade Commission (1940), pp. 29-30. See also Final Report of Attorney General's Committee (1941), p. 136.

8/Final Report of Attorney General's Committee on Administrative Procedure, supra, p. 30.

9/Task Force Report on Regulatory Commissions (1949), Appendix N, p. 129.

10/United States v. Chicago, M., St. P. & P. R. Co., 249 U.S. 499 (1953), recently quoted in F.T.C. v. Motion Picture Advertising Co., 344 U.S. 392, 398 (1952).

11/Mr. Justice Frankfurter, F.T.C. v. Motion Picture Advertising Co., 344 U.S. 392, 398 (1952).

12/Id. 401.

"... if judicial review is to have any meaning, extension of principle to meet new situations must be based on some minimum demonstration to the courts that the Commission has relied on relevant criteria ..."13/

* * *

"If independent agencies could realize how much trustworthiness judges give to workmanlike findings and opinions and how their causes are prejudiced on review by slipshod, imprecise findings and failure to elucidate by opinion the process by which ultimate determinations have been reached, their work and score on review would doubtless improve."14/

In a recent case, in 1953, the Supreme Court said:

"While this Court ought scrupulously to abstain from requiring of the Commission particularization in its findings so exacting as to make this Court in effect a court of review on the facts, it is no less important, since we are charged with the duty of reviewing the correctness of the standards which the Commission applies and the essential fairness of the mode by which it reaches its conclusions, that the Commission do not shelter behind uncritical generalities or such looseness of expression as to make it essentially impossible for us to determine what really lay behind the conclusions which we are to review."15/

Some of my friends counter this criticism with the observation that more often than not, where the Commission merely announces its formal findings and conclusions, without explanation or supporting opinion, the courts have sustained them. They refer to the Chenery cases and suggest that an S.E.C. order was set aside because that Commission went beyond the formal findings and discussed the reasons and basis for its action; they say that if the decision had been limited to findings, the Court probably would not have delved behind them.16/

But surely an administrative agency should do more than merely win its cases. It is also important, I think, that the published decisions of an agency fulfill two objects. They should constitute the authentic public record of what was done by the tribunal in the particular case, and they should afford a collection of precedents by which its action in future cases can be forecast. The latter function is perhaps the more important of the two, especially where the tribunal is administering laws as general in their terms and as important to the business world as the Clayton Act and the Federal Trade Commission Act.17/ Much can be said to the effect that this will contribute a great deal to the development of greater certainty in this field of the law.

13/Id. 403-404.
14/Mr. Justice Jackson, F.T.C. v. Ruberoid Co., 343 U.S. 470, 490 Footnote 9/ (1952).
15/Automatic Canteen Co. of America v. F.T.C., 346 U.S. 61, 81 (1953).
16/See Davis, Administrative Law, 1951, pp. 552-560.
17/Henderson, op. cit. supra p. 105.

It may be helpful, at this point, to summarize the practical reasons why the Commission's decisions should contain a narrative statement of basic facts and a supporting legal opinion. As we have seen the most prominent reason discussed by the courts is the facilitation of judicial review.

A second important reason is to protect against careless or arbitrary action. Judge Frank gives this first place: "It is sometimes said that the requirement that the trial judge file findings of fact is for the convenience of the upper courts. While it does serve that end, it has a far more important purpose - that of evoking care on the part of the trial judge in ascertaining the facts ... Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper."18/

Other reasons for basic findings and opinions are to help parties plan their cases for appeal, to keep agencies within their jurisdiction, to test complex economic and competitive questions which require a special expertness, and finally to build up a body of trade regulation law which will afford an important degree of certainty for the guidance of businessmen.

Since the passage of the Administrative Procedure Act, in 1950, there has been great improvement in the procedures and decisions of the Commission. The hearing examiner now issues an initial decision which becomes final unless reviewed by the Commission. This has resulted in the proceeding before the Commission becoming appellate in nature. However, the decisions of the Commission on review have not been those of an appellate tribunal. Usually they are in the form of entirely new findings - sometimes identical with the findings of the hearing examiner. Until recently, opinions were prepared only in cases involving a novel or important issue. But even here the opinion, except in case of dismissals, has been accompanied by findings using legalistic stock phrases and ambiguous words. Occasionally it has been difficult to reconcile the ultimate findings and conclusions with the rationale of the Commission's opinion.

In order to improve the initial decisions of the hearing examiners and the final decisions of the Commission, I have made the following recommendations:

1. The hearing examiner should issue findings and conclusions and his reasons therefor in every case, whether they be favorable or adverse to the allegations of the complaint. He should abandon formal and legalistic "findings" and adopt instead narrative and descriptive reports.19/ Such a practice would, in my opinion, greatly enhance the

18/United States v. Forness, 125 F. 2d 928, 942 (C.A. 2, 1942), cert. den. 316 U.S. 694 (1942). See also Frank, Say It with Music, 61 Harv. L. Rev. 921 (1948).

19/This, of course, would not apply in cases where respondents file admission answers. Whether findings are required in such cases or whether they can be treated in the same manner as consent orders, discussed on page 9, is now under study.

quality of the initial decisions. Where an examiner must review the evidence presented by both sides, analyze and dispose of arguments, give convincing reasons for his decision and distinguish or reconcile the precedents, and then apply the proper remedy, he is much more likely to reach a just and well-considered conclusion than if he is permitted 20/ merely to state in legal phraseology his ultimate findings of fact and law.

One word of caution: The initial decision of the hearing examiner should not be merely a legal opinion; that is the job of the appellate body - in this case, the Commission. While the initial decision (if it is to have value) should be narrative and expository in form, it must, under the provisions of the Administrative Procedure Act, indicate the examiner's findings and conclusions on material issues with such specificity as to advise the parties and the reviewing court or commission of their record and legal basis.

2. The form and content of the order to cease and desist, which is part of the initial decision, should be improved. The most serious recent criticism of the Commission has been that of Mr. Justice Jackson and Mr. Justice Frankfurter in their dissenting opinions in the Ruberoid 21/ and Motion Picture Advertising 22/ cases. They state that the Commission has failed to perform its quasi-legislative function of interpreting a general statute so as to clarify its application to a particular situation or practice. This criticism applies especially in Clayton Act cases where hearing examiners and the Commission have issued orders in the language of the statute rather than in specific language prohibiting the particular practices involved.

The prohibitions of the order should deal with the specific issues and should be so clear that respondents will have no doubt as to what is expected of them. The exact practice fould to be illegal should be expressly prohibited, as well as such other practices as may be necessary to assure adequate relief.

There is no simple solution to the formulation of a proper remedy, but it is believed that findings of the type described above will greatly assist the hearing examiner and the Commission in drafting in each case the type of order required.

3. The Commission, on review or appeal, should not issue new or separate findings. There may be a rare case where the Commission will want to issue its own findings - it, of course, retains complete freedom to do so - but the appellate nature of the proceeding dictates appellate decisions. It was obviously the intent of the Administrative

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20/ **"Permitted" is probably the wrong word.** The present staff of hearing examiners of the Commission is one of the best in government. They have used formalistic "findings," not from desire, but because of tradition and Commission directive. "Given their head," I feel certain their initial decisions will meet the requirements I have suggested.

21/ F.T.C. v. The Ruberoid Co., 343 U.S. 470 (1952).

22/ F.T.C. v. Motion Picture Advertising Service Co., 344 U.S. 392 (1952).

Procedure Act that agencies should attach considerable weight to the findings of the examiner who saw and heard the witnesses. I do not mean that the Commission should abdicate its fact-finding responsibility, but imagine the confusion of an appellate judge who may want to compare the two sets of findings, the hearing examiner's and the Commission's, which are often similar in form but which may or may not be identical in content.

Where the Commission disagrees with some of the findings in the initial decision, it is the purpose of an opinion to point that out, to explain why the Commission differs, and to order the findings modified accordingly. Since the Commission, under the statute, has the ultimate fact finding responsibility, the opinion should, of course, expressly adopt the findings and conclusions of the hearing examiner as modified.

4. The Commission should write an opinion in every case.23/ This is probably the most important single step which the Commission could take toward enhancing the value and authority of its decisions and in providing for a remedy adequate in form and scope.

Moreover, an opinion which deals impartially with the respondent's case and meets conscientiously the arguments which he has presented is much more likely to dispose of the controversy and satisfy the parties. Nothing is so exasperating to a lawyer as to find that a tribunal has ignored his carefully prepared defense. To do so is to create dissatisfaction and encourage appeals to a higher court.

The Commission deals with matters of vital importance to business. Many of the questions which come before it relate to controversies of long standing which are debated at conventions and in trade journals. If the Commission were to issue in all such cases informative and readable opinions, they would have an influence far beyond the immediate controversy.

Every lawyer knows the characteristics of a well-considered case. "It states," according to Henderson, "clearly and fully the relevant facts. It summarizes the contentions of the opposing parties in such a way as to bring out the main issue of law involved. Upon this issue, it reviews the precedents, reconciling conflicts and tracing the law through to the latest utterance of an authoritative tribunal. In the light of these precedents, the precise new issue presented ... is clearly formulated, and a decision is reached, ... Such a case at once takes its place as a precedent, and, if the point is important, may profoundly influence the future course of the law. The very same case, however, involving the same facts and decided the same way, may be

23/It has been suggested that the formulating of elaborate opinions in every case would put an impossible strain on the time and energy of the individual Commissioners. So it would. But simple and routine cases do not require "elaborate" opinions. Such cases can be dealt with adequately in short concise opinions, particularly where the initial decision is well prepared.

utterly without influence if the opinion leaves the issues obscure or the grounds of decision uncertain."24/

My own formula for Commission opinions is a statement or history of the case, a statement of facts, the questions presented on appeal, a discussion of the applicable law, and the application of that law to the salient facts of the case. This formula must of necessity be flexible and may vary from case to case.

5. The only clear-cut exception to the considerations I have discussed lies in the field of uncontested cases; namely, those cases which are disposed of by consent settlement. There, findings of fact are not only unnecessary but act as a deterrent to the accomplishment of greater compliance by voluntary means. I have recently proposed an amendment to the existing Rules of Practice dealing with consent settlement which would make unnecessary any recital of facts in the settlement other than those concerning the Commission's jurisdiction.

It has been suggested that a cease and desist order based on consent, and not containing factual recitations, might be unenforcible in court because the statute requires the Commission to make findings.

The case law, interpreting the National Labor Relations Act which contains the same provision, is clearly against this view.25/ Also consent orders of this sort, without findings other than jurisdictional findings, and without admissions, have been commonly used by the Department of Justice in prosecutions under the antitrust laws. Their validity and enforcibility have been emphatically upheld by the Supreme Court which said that any error in facts "is waived by the consent to the decree."26/

The Commission's refusal to negotiate such orders has prevented the question arising under the Federal Trade Commission Act, except by way of dictum. In one case the Court said that "consent that the cease and desist order might issue waived every defense except a challenge of the jurisdiction over the subject matter."27/

Under the old rule, as most of you know, there could be no settlement that did not dispose of the entire case as to all respondents before the taking of any testimony.

The new rule, if adopted, will permit, in the discretion of the hearing examiner, settlement of all or any part of the case as to any respondent at any stage of the proceeding.

24/Henderson, op. cit. supra, p. 335.
25/N.L.R.B. v. J. L. Hudson Co., 135 F. 2d 380 (C.A. 6, 1943), cert. den. 320 U.S. 740 (1943).
26/Swift Co. v. U. S., 276 U.S. 311 (1927).
27/National Candy Co. v. F.T.C., 104 F. 2d 999 (C.A. 7, 1939), cert. den. 308 U.S. 610 (1939).

In closing I should like to stress the fact that the Federal Trade Commission was intended by Congress to perform its duties in a field of administrative and regulatory law in which much pioneer and expert work was needed. It was expected to establish precedents by which businessmen could be guided in the conduct of their affairs. I do not see how this duty can be performed unless the Commission prepares and publishes basic findings of fact and well reasoned opinions, and provides remedies that deal with and correct the precise mischief involved.

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