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HEARINGS ON COMPLAINTS

William C. Kern*

Proceedings Before The Hearing Examiner

The opinions contained in this paper reflect the personal views of the writer, and not necessarily the official policies of the Federal Trade Commission.

The pleadings are, of course, the compelling frame of reference in adversary proceedings, setting the boundaries and delimiting the entire sphere and scope of the hearings. But bearing equally on the content of the complaint, and, therefore, upon the scope of the hearings, is the investigation conducted before complaint.

Fashions in complaints change with the concepts of how the most desirable techniques to be utilized in increasing the administrative process can be made more efficient. They change with the concepts of a changing bench. As originally conceived, the Commission's complaints were considered investigatory in nature, and the charges therein might, therefore, be broad and general in their nature.1/ We find this point of view expressed by the Seventh Circuit Court of Appeals, where, in holding the complaint was sufficient, the court said:

> "While the complaint charges the cause of action in the words of the statute, we think this was sufficient to advise the petitioners of the nature in general of the complaint.
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> "Pleadings before the Commission are not required to meet the standards of pleadings in a court where issues are attempted to be framed with a measure of exactness which is designed to limit the broad sweep of investigation that characterizes the proceedings of administrative bodies."2/

However, the present fashion in complaints is to require far greater particularity in essential allegations. This is an outgrowth of an increasing recognition that the growing complexities of both fact and law in antitrust cases necessitate such particularity. It is now believed that the element of surprise should have no place in antitrust trials. In this connection, I recall that the Chairman of the Commission stated, in an address at Ann Arbor, Michigan: "In litigated cases involving legal and economic complexities, the issues should be carefully particularized in the complaint. Discovery procedures, of course, are not available. For this reason the pleadings and issues should be made as definite as possible."3/

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* Senior Trial Attorney, Federal Trade Commission.

1/ F.T.C. v. Gratz, 253 U.S. 421 (1920).

2/ A.E. Staley Manufacturing Co. v. F.T.C., 135 F. 2d, 453, 454 (7th Cir. 1943).

3/ Edward F. Howrey, "Revaluation of Commission's Responsibilities," 1953 Institute Federal Antitrust Laws, Ann Arbor, Michigan.

But respondents and their counsel should recognize that greater particularization of complaints also calls for more thorough investigation before complaint. The use of compulsory process will undoubtedly increase. In short, if we forsake the concept that the formal complaint is the point of departure for the investigation, then the investigation itself should be given not only added emphasis, but added formality. The value of administrative subpoenas issued during investigation was conceded by a former Assistant Attorney General of the United States with such cogency of expression that I quote:

> "These weaknesses, inherent in our pre-filing investigatory technique, could be eliminated if the Department were given the power to issue administrative subpoenas. Such subpoena power has been given to the Federal Trade Commission and the Securities and Exchange Commission, among others. It permits the Commission or its agents full access to the files of any concern investigated. Since the Federal Trade Commission also has a responsibility to enforce the antitrust laws, it would seem perfectly logical to give the Department of Justice the same type of subpoena power. If the Department had this same kind of subpoena power, it could simplify its pleadings, readily comply with pre-trial disclosure sought by defendants, and eliminate much pre-trial discovery of its own."1/

But though, in the past, the Commission has not fully utilized its investigative powers, I feel that it is now proceeding in that direction and will continue to do so. And it is my firm conviction, too, that those who may be presently convinced that other agencies or departments are better equipped than the Commission for handling some aspects of antitrust enforcement should withhold judgment until these as well as other techniques now being increasingly utilized may be more conclusively evaluated.

The advantage of more clearly outlining the issues through greater particularity of pleading rests not only in an easier determination of questions of relevancy, competency and materiality arising during the hearings but also rests in the fact that any limitation of the breadth and scope of irreconcilable issues saves both respondents and the government the time and money involved in protracted hearings.

Subsequent to the formulation of the issues through the pleadings, pretrial conferences are, of course, designed to furnish a further mechanism towards the accomplishment of this end. One of the more important powers of the Hearing Examiner under the Administrative Procedure Act is to hold conferences for the settlement or simplification of the issues by consent of the parties,2/ and the Commission's rules specifically so provide.3/ This procedure is certainly worth exploration in each instance and should bring productive results.

1/ Simplifying and expediting cases - Holmes Baldridge, Business Practices under Fed. Antitrust Laws - 1951 Symposium.

2/ Administrative Procedure Act, Section 7(b)(6).

3/ Commission's Rules of Practice, Rules VIII and XIV (6).

Furthermore, I have been informed that in the last few months in the more complicated cases and these almost uniformly involve anti-monopoly cases pretrial hearings have been called by the Hearing Examiner, even without request of the parties, with a view to simplifying the issues and handling bulk documentary evidence.

The desirability of pretrial hearings was recognized in the recommendations of the judicial conference on administrative procedure, approved and adopted March 24, 1953.1/ A study of the Commission's Rules in the light of such recommendations is now in progress. There can be and will be, I am sure, no serious area of contention between the views of administrative agencies and those who practice before them as to the efficacy of such pretrial procedures.

1/ First Report of The Conference on Administrative Procedure, I C. 5 and 6:

"5. PREHEARING AND OTHER CONFERENCES. That the agencies encourage hearing officers to call and conduct prehearing conferences and other conferences during hearings, with a view to the simplification, clarification, and disposition of the issues involved, and with a further view to the shortening of the proof on the issues.

"6. PREHEARING CONFERENCE RULE. That the agencies adopt the following rule or one of similar import:

> In any proceeding the agency or its designated hearing officer upon its or his own motion, or upon the motion of one of the parties or their qualified representatives, may in its or his discretion direct the parties or their qualified representatives to appear at a specified time and place for a conference to consider
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> (a) the simplification of the issues;
> (b) the necessity of amendments to the pleadings;
> (c) the possibility of obtaining stipulations, admissions of facts and of documents;
> (d) the limitation of the number of expert witnesses;
> (e) such other matters as may aid in the disposition of the proceeding.
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> The agency or its designated hearing officer shall make an order which recites the action taken at the Conference, the amendments allowed to the pleadings and the agreements made by the parties or their qualified representatives as to any of the matters considered, and which limits the issues for hearing to those not disposed of by admissions or agreements; and such order shall control the subsequent course of the proceeding unless modified for good cause by subsequent order."

Motions and Interlocutory Appeals

Consistent with the maturity of the Administrative Process, as well as with the increasing recognition of the desirability of expanding the Hearing Examiner's authority over the conduct of hearings, motions of an interlocutory character are, with the few exceptions later noted, considered the peculiar province of the Examiner. Furthermore, to circumvent delay, interlocutory appeals from motions made to the Examiner and ruled upon by him have been sharply limited. The Commission limits the right to prosecute interlocutory appeals from rulings of an Examiner during the time a proceeding is pending before him to instances when it is shown to the satisfaction of the Commission that the prompt decision of such appeal is necessary to prevent unusual expense and delay. There are a few exceptions to this general limitation: (1) appeals may be taken to the Commission by the parties from the Examiner's denial of a motion to quash or refusal to issue a subpoena for the production of documentary evidence; (2) an Examiner's ruling to suspend or disbar an attorney during the course of hearings may be appealed to the Commission; and (3) a motion to remove an Examiner for bias or cause may be appealed to the Commission.1/

Furthermore, where a motion to dismiss is made before an Examiner and either granted as to all parties of the complaint in regard to one or more respondents, or is granted as to any part of such charges in regard to any or all respondents, the Hearing Examiner is required to render an initial decision dismissing the complaint as to such charges. This decision is appealable directly to the Commission pursuant to the rule governing appeals from initial decisions.2/

The limitations imposed upon the former, almost unlimited, right to prosecute interlocutory appeals at will to the Commission during the course of hearings have eliminated serious delays previously encountered. In the past, critics were able to charge, with some merit, that Commission procedures made it an instrument of delay. Changed procedures, I believe, bring it more closely to the ideal - an instrument of justice, and of justice administered expeditiously.

Moreover, in order to obviate needless delays in the handling of motions which still reach the Commission, machinery has been established to insure expedition of the Commission's decision. One member of the Commission has been designated a motions Commissioner and has been charged with considering all interlocutory appeals and presenting them to the full Commission, together with his recommendations as to whether such appeals are justified under the rules.

These present procedures of the Commission, in interlocutory matters and interlocutory appeals, appear to conform substantially to the recommendations adopted by the President's conference on November 23, 24, 1953.3/

1/ Commission's Rules of Practice, Rules XIV, XVI, XX.

2/ Id., Rule X.

3/ First Report of The Conference on Administrative Procedure, I C. 10(a) and (b):

"INTERLOCUTORY MATTERS AND INTERLOCUTORY APPEALS. That the agencies adopt the following practice:

(a) broad authority should be granted hearing officers to rule upon interlocutory matters which arise during the course of hearings, and interlocutory appeals from rulings should be reduced to a minimum;

(b) interlocutory appeals which the agency may entertain should be disposed of promptly."

Oral and Documentary Proof

As for oral and documentary proof, the foundation stones should be laid by means of a comprehensive trial brief detailing as to each issue to be proved the supporting testimony to be adduced through each witness, as well as the documentary data to be introduced and showing through whom and for what purpose.

(a) Oral Proof

The trial brief, when properly prepared, will indicate exactly what information is desired of the various witnesses. As each necessary item of evidence goes into the record through the mouth of a witness, it should be checked off on the trial memorandum so that counsel may know, without even having before him a transcript of the proceeding, that the portion checked and necessary to his case, is in the record.

Unlike oral testimony adduced during a trial by jury, the main purpose of counsel is to build a record which will, by unambiguous testimony of witnesses, sustain and make mandatory the findings which will be later proposed to the Hearing Examiner. To this end questions should be as brief as possible, single barreled and to the point. The witness's answer should be listened to with attention, any repetition should be avoided, any incomplete or vague answers should be immediately clarified by additional questions, the witness should not be interrupted while giving his answer, nor should opposing counsel be permitted to do more than to make appropriate objection, and the reporter should be watched to see that he is getting the oral testimony properly, as well as all objections of counsel, rulings by the Examiner, etc. A bad reporter, just as a bad lawyer, can make a bad record -- and acting with concerted ineptitude, they will invariably and in combination make a fatally deficient record. The Hearing Examiner, of course, plays a vital role in seeing to it that such fiascos do not occur; his intelligent supervision of the presentation and introduction into the record of testimony as well as exhibits is one of his most important functions.

The treatment of an adverse witness is covered by the Commission's Rule of Practice XV, which specifically permits counsel to use leading questions when examining an adverse party or, if he appears to be hostile, unwilling or evasive. Such a witness may be contradicted or impeached by the adverse party. Cross-examination of such a witness is customarily limited to the subject matter of his cross-examination by the party who called him. Of course, he may be later called to support the contentions of the adverse party, but as the latter's own witness.1/

Often too great emphasis is placed by opposing counsel upon repeated and continuous objections. When sound, such objections, of course, are proper and should be clearly and briefly put. The grounds for objections should be carefully stated on the record, as the ultimate decision as to possible error may be a matter of vital import on appeal, either to the

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1/ Commission's Rules of Practice, Rule XV (a).

Commission or the courts. However, argument in support thereof is usually made off the record. But frivolous and repetitive objections only serve to irritate and should, of course, not be indulged.1/

The Commission has provided a method for taking depositions of witnesses, either orally or upon interrogatories before any person having power to administer oaths, who has been designated for that purpose, either by the Commission or the presiding trial examiner.2/ The procedure set out by the rule follows the usual procedure in chancery practice. The procedure has been rarely utilized to my knowledge, but is available where great distances and expense militate against setting a hearing for taking the testimony of an isolated witness.

One cannot give consideration to the matter of oral testimony in adversary proceedings without placing emphasis upon the fact that the Commission, has not only required, but even more strongly under present policy requires that the ordinary and established rules of evidence be observed. The administrative process should not constitute a vehicle for legal license insofar as the basic requirements of evidence are concerned. Indeed, it is the considered judgment of the writer that such license in the past, more than any other factor, has brought violent, and, in many cases merited, criticism upon the administrative process. This section of the bar, experts as you are, is thoroughly familiar with the major cases on this subject. Some cases indicate considerable latitude may be granted as to the more rigid rules of evidence, but in the main, the stricter rule has prevailed.3/

The Commission's Rule XXII includes a statement expressed in practically identical form in the Administrative Procedure Act:

> "All findings, conclusions and orders made and issued by the trial examiner shall be based upon the whole record and supported by reliable, probative and substantial evidence."

That established rules of evidence obtain in Commission's proceedings is further emphasized by the statement in the Commission's Rule XVIII:

> "The Trial Examiner subject to appeal to the Commission as provided in Rule XX shall admit relevant, material and competent evidence but shall exclude irrelevant, immaterial and unduly repetitious evidence."

I believe all these to be fundamentally healthy and wholesome ground rules enabling both respondent's counsel and government counsel to operate in an atmosphere of fair play.

1/ Id., Rule XVIII, "Objections -- Objections to evidence shall be in short form, stating the grounds relied upon and the transcript shall not include argument or debate thereon except as ordered by the presiding officer. Rulings on such objections shall appear in the record."

2/ Id., Rule XIX.

3/ John Bene & Sons, Inc. v. F.T.C., 299 Fed. 468 (2d Cir. 1924); Associated Laboratories, Inc. v. F.T.C., 150 F.2d 629 (2d Cir. 1945); Phelps Dodge Corp. v. F.T.C., 139 F.2d 393 (2d Cir. 1943); Samuel H. Moss v. F.T.C., 148 F.2d 378 (2d Cir. 1945), Cert. denied, 326 U.S. 734 (1945); Hills Bros. v. F.T.C., 9 F.2d 481 (9th Cir. 1929) Cert. denied, 270 U.S. 662 (1929); Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197 (1938); Arkansas Wholesale Grocers Assn. v. F.T.C., 18 F.2d 866 (8th Cir. 1927), Cert. denied, 275 U.S. 533 (1927).

After all, the purpose of these formal proceedings is to adduce the facts and only the most credulous will say that the facts can be arrived at by hearsay, by secondhand or by rumor testimony.

The fact that some irrelevant testimony may seep into a record, however, can create no fatal error where findings are supported by reliable, substantial and probative evidence. Such irrelevancies can unduly prolong the trial, yet it should be recognized that to be overly technical on questions as to admissibility may provoke appeals and that therefore it is sometimes better to allow such evidence in if not too time-consuming.1/

(b) Documentary Proof

Since a principal desideratum in antitrust cases before the Commission is to make a clear and concise record unencumbered with extraneous matter, documentary proof in such cases is vital. The objective of keeping the record to a minimum must be balanced against the objective of putting the material facts into the record in clear and convincing fashion.

If you will indulge the elemental, the three steps in introducing any document into the record are, of course, identification, explanation, and presentation or offer. At counsel's request, each document is given an identification number by the reporter at the examiner's instruction. The document is then identified, either by stipulation or agreed statement for the record, or through a witness. If a witness is employed for this purpose he should be the person who prepared the document, or a signatory party as to a contract, or a proper custodian in regular course of business. While documents often speak for themselves as to relevancy and materiality, a brief descriptive guide to the essential content of a document by oral testimony is necessary before it may be offered. After such initial steps of identification and explanation, considered sufficient to justify its receipt in evidence, the document is then offered in evidence. If there is no objection, or objection is made and overruled, the Examiner will then rule that the document is admitted in evidence and it becomes a part of the record. In spite of the elementary simplicity of such procedure, it is surprising how many times error creeps in. Counsel must be ever vigilant that all steps are properly taken and that the record so indicates.

Instead of waiting until the time of hearing to authenticate documents, the Commission's rules provide for a procedure whereby at any time after filing answer, counsel may serve on the opposing side a written request for the admission of the genuineness and authenticity of any relevant documents described in and exhibited with the request or the admission of the truth of any relevant matters of fact set forth in such documents.2/

1/ Associated Laboratories, Inc. v. F.T.C., 150 F.2d 629 (2nd Cir. 1945).
2/ Commission's Rules of Practice, Rule XIII.

With a view to minimizing the record, the Commission likewise has a rule bearing on documentary evidence, which provides that "where relevant and material matter offered in evidence is embraced in a document containing other matter not material or relevant and not intended to be put in evidence, such immaterial or irrelevant parts shall be excluded, and shall be segregated insofar as practicable."1/

If administrative procedures for handling bulk documentary evidence during antitrust proceedings are to prove effective in building an orderly and comprehensive record, attorneys for both the government and respondents must put aside any idea that this is a sparring ground wherein any strategic advantage can be taken of the opposition. Technical problems of identification and authentication should be cut through in an attitude of mutual desire to effectuate a routine, but complex portion of the proceeding. Of course, all rights of the parties should be saved as to objections on questions as to admissibility. Constructive and helpful suggestions in this respect have been suggested by experts in this field. For example, it has been suggested that the agenda of pretrial conferences should include (a) the identification and authentication of proposed exhibits, and (b) the exchange of exhibits.2/ The First Report of the Conference on Administrative Procedure recommended that prehearing conferences include a consideration of the possibility of obtaining stipulations, admissions of facts and of documents.3/

The need for the improvement of procedures in the handling of documentary evidence, particularly in antitrust cases where normally there is a substantial volume of such testimony, has found further recognition in the First Report of the Conference on Administrative Procedure, with respect to the submission of documentary evidence in advance and with respect to offering only the pertinent excerpts of documents.4/ While I can, of course, not venture an opinion as to whether the Commission will adopt the conference's recommendations, I can state that they are presently being given careful scrutiny.

The main objectives of all such recommendations looking towards a shorter and more scientific and efficient method of handling documentary evidence are clearly both in the public interest as well as the interest of private litigants. I feel, therefore, that there is a very real probability that very constructive progress will be made in increasing the efficiency of administrative procedures in this connection, and I am certain that this antitrust section of the American Bar Association will continue in the future, as it has in the past, to make worthy contributions towards this goal.

Any discussion of oral and documentary proof must include some mention of the desirability of preparing a current index of the record in proceedings involving voluminous evidence. Just as a comprehensive trial brief is indispensable to orderly presentation of both oral and documentary proof, so

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1/ Id., Rule XVIII.

2/ Judge E. Barrett Prettyman, Six suggestions for Improvement, Business Practices Under Federal Antitrust Laws, 1951 Symposium.

3/ First Report of The Conference on Administrative Procedure, I C. 6 (c).

4/ First Report of The Conference on Administrative Procedure, I C. 7 & 8.

is the proper indexing of the record indispensable to locating, extracting and digesting such oral and documentary proof in complicated cases. In cases running into several thousand pages it is almost impossible to prepare a complete digest of the record within the time allowed to prepare proposed findings. The only answer is to prepare a current index, which is not a digest purporting to reflect the evidence but rather a double card index by topics and by witnesses. From the daily transcript is prepared a two-card index, one of witnesses and the topics they discussed, and one of topics and the witnesses by whom they were discussed, all by page numbers. Exhibits should be indexed in the same manner.

If properly and accurately kept, at the conclusion of hearings, counsel will be able to prepare findings without delay and with the knowledge that his proposals are based on all the applicable evidence. This process has become almost an indispensable mechanism in any protracted antimonopoly proceeding. Its importance was stressed in the First Report of the Conference on Administrative Procedure.1/ Its vital role as an important trial mechanism has been recognized by the judiciary, some judges having expressed the belief that current indexing should be required in Court and agency proceedings which involve long and voluminous testimony.2/ Its vital role as an administrative trial technique also has been recognized by the members of the District of Columbia Bar, who are, of course, often faced with the problem of handling the lengthy records built up in trials before the many Federal agencies.3/

1/ First Report of the Conference on Administrative Procedure, I C. 11(a) and (b).

> "(a) In any formal proceeding in which it is anticipated that the record will exceed 2,500 pages, provision should be made either through counsel for the parties or the staff of the agency for a daily or current index of the record which will be available to the hearing officer and all counsel;
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> "(b) The index should be topical (not a digest),and as a minimum, each topic of testimony should be the heading of a card on which the name of each witness who testified upon the topic should be entered, the page of the record where each portion of his testimony appeared, and the number of each exhibit relating to the topic. The index should contain, on separate cards, the name of each witness and the topics on which he testified."

2/ Judge E. Barrett Prettyman, Suggestions for Trial of Complicated Cases, 34 A.B.A.J. 770.

3/ Manual on Trial Technique In Administrative Proceedings, The Bar Association of District of Columbia, 1950.

SUBPOENAS

Subpoenas requiring the attendance of witnesses or the production of documentary evidence from any place in the United States at any designated place of hearing may be issued either by any hearing examiner or Commissioner. But application for a subpoena duces tecum must be made in writing, set forth the reasonableness of the scope and the general relevancy of the documents desired, and verified by oath or affirmation.1/

Where application is made to an examiner for a subpoena duces tecum and he refuses to issue such subpoena, or when he issues such subpoena and refuses or denies a motion made to quash, an appeal may be taken immediately to the Commission as a matter of right.2/

The methods of service of a subpoena are set out in Section 5 of the Federal Trade Commission Act as follows:

> "Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person, partnership, or corporation; or (c) by registering and mailing a copy thereof addressed to such persons, partnership, or corporation at his or its principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same."

The Commission's powers relative to the issuance of subpoenas are derived from Section 9 of the Federal Trade Commission Act.

Subpoenas duces tecum do not issue as a matter of course, but only after the issuing official is satisfied by the statements contained in the verified application that such subpoenas are proper. Furthermore, they are subject to a motion to quash by either the witness to whom they are directed or by the opposing party who, if he feels such subpoenas are violative of any right, may oppose the issuance or after issuance, move to quash. An interesting example of just such a situation in one of the Commission's current antimonopoly cases occurred on January 29, 1954, when the Commission, by its order quashing subpoenas duces tecum, ruled that a respondent in a price discrimination case will be allowed to subpoena a competitor's records only to the extent they are relevant to its defense.3/

1/ Commission's Rules of Practice, Rule XVI.
2/ Id., Rule XVI.
3/ Standard Motor Products, Inc., F.T.C. Docket 5721.

The Commission said, in an opinion by Commissioner Albert A. Carretta:

"The respondent is entitled to subpoenas directing the production of such documents and records as are relevant to its defense that its lower prices were made in good faith to meet a lawful equally low price of a competitor. Respondent is not entitled to access to documents and records of its competitors which are not relevant to that defense."

EXPERT TESTIMONY

Antitrust cases abound in unusually complicated economic facts which are the subject of evaluation by expert witnesses called for that purpose. In both Clayton Act cases, where the probable effect upon competitors is a controlling criterion, or indeed in Section 5, Federal Trade Commission Act cases, where methods of competition are challenged as restraining or monopolizing trade, many and varied economic factors in this field become important considerations. The Commission has affirmed the importance of such considerations in two recent decisions.1/

In the Maico case, the Commission's opinion stated:

"The need for specialized consideration in matters involving complex economic factors and the intention of Congress that the Federal Trade Commission should give such consideration to these matters has often been recognized by the Supreme Court, as for instance, in the Cement case ***."

And, in the Pillsbury opinion, the Commission gave further emphasis to this conclusion by the following statement:

"In creating the Federal Trade Commission, Congress had two principal ideas in mind: first, to create a 'body of experts' competent to deal with complex competitive practices 'by reason of information, experience and careful study of business and economic conditions'; and second, to authorize this body of experts to deal with unfair competitive methods in their incipient stages.

"The driving impulse in creating this, and other administrative agencies, was the need for specialization and expertise. The complexities of modern American trade and industry had made it apparent that effective trade regulation could neither be accomplished by 'self-executing legislation nor the judicial process.' See F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 142 (1940); Oppenheim, Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy, 50 Mich. L. Rev. 1139, 1211, n. 215 (1952)."

Moreover, under the cost-justification proviso in Section 2(a) of the Clayton Act alone, the problem of demonstrating cost justification or the lack of it presents formidable problems with respect to procedures for evaluating savings in the costs of manufacture, sale and delivery of various products to various classes of customers. Recognizing the complexities in this

1/ The Maico Co., Inc., F.T.C., Docket 5822. Pillsbury Mills, Inc., F.T.C. Docket 6000.

field, as you know, the Chairman has established an advisory committee on cost justification, consisting of accountants, economists and lawyers representing all viewpoints. The result of their survey is awaited with interest. It is hoped that they will bring a degree of clarity and uniformity to the consideration of this problem. Present conflicts between Commission's accountants and respondent's accountants as to the basic methods of approach may perhaps be narrowed. I doubt, however, that the fundamental characteristic of expert testimony will ever be removed entirely (nor indeed could it be in any adversary proceeding). That is, that it is the accepted procedure for each side to present experts who state conflicting views, which are later made the basis for proposed findings by each side which are likewise in direct conflict. Fortunately, however, the Commission is equipped to draw on its experience and expertness in resolving such conflicts, and their activities in performing this vital function have received the judicial approbation of the courts.1/

I have labored the increasing emphasis on the use of expert testimony in antitrust cases of an economic and accounting nature, without detailing precise procedures by which such testimony is placed into the record. But such procedures present no serious problems, nor do they differ materially from the use of expert testimony in other types of cases. Again, if you will indulge the elemental, the direct testimony of an expert witness consists of four parts: (a) his qualifications as an expert; (b) the material from which he fashions his opinion; (c) the reasoning process by which he reaches his conclusion or opinion; and (d) the conclusion or opinion itself.

It is necessary to have in the record all the essential material upon which the expert will be asked to express his opinion. The witness may then be asked to examine the pertinent exhibits, to read the pertinent testimony, and on that basis, to express his opinion and conclusions. But often it may be necessary to put an expert on the stand before all such basic material has been introduced. In that case it becomes necessary to resort to the hypothetical question. The hopothetical question, and it is usually involved, should always be prepared in writing in advance and with expert assistance.2/ It is highly important to have clearly stated in the record the precise steps or methods of calculation or deduction by which the witness arrived at his opinion or conclusion. The Commission, which is itself an expert, will be highly interested in the process or method by which a certain conclusion is reached, as such process or method is persuasive in a determination of the soundness of the witness' conclusion.

In order to condense and coordinate the presentation of expert testimony, it is recommended that such testimony be included in the agenda of the pretrial conference procedure. Such testimony, if contemplated, should be properly the subject of conference is an effort to establish that which is undisputed and to establish clearly the points of controversy over testimony.

In conclusion, may I venture the opinion that it is in the appraisal and evaluation of such highly technical and specialized problems by the utilization of its peculiarly specialized experience that the Commission performs a function

1/ F.T.C. v. Motion Picture Advertising Service Co., 344 U.S. 392 (1953).
2/ Goldstein, Trial Technique, 452.

that the courts have found to be most perplexing and difficult, as well as most time consuming. It is by effectively working out procedures and setting up standards to perform this vital role that administrative agencies justify the expectations and the hopes of their creators.

OFFICIAL NOTICE

The only reference to official notice in the Administrative Procedure Act appears in Section 7(d), as follows:

> "Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record any party shall on timely request be afforded an opportunity to show the contrary."

The Commission's Rules of Practice contain a substantially similar provision.1/

The general rule with regard to official notice has been stated as follows:

> "The courts will take judicial notice of facts evidenced by public records and facts of common knowledge or general notoriety."2/

The final report of the Attorney General's Committee on Administrative Procedure contained this clarifying statement with regard to the question of official notice:

> "(c) Official notice.--A court requires no proof of obvious, notorious facts; instead it takes 'judicial notice' of them. Judicial notice has been described as 'primarily a simplifying process' whose 'aim is to assume for the purposes of the instant litigation certain elements which experience has shown to be safely assumable.' Clearly an administrative agency may take notice of the same kind of fact which a court notices. But administrative agencies necessarily acquire special knowledge in their sphere of activity."

The above references make it clear that the Commission may take official notice of its own records and of standard authorities as well as other matters covered by the usual rules concerning such notice. An attorney should always call attention on the record to matters which he desires the examiner and the Commission to notice officially, and he must be specific in his description of such matters. It is also suggested that copies should be furnished to the examiner of such material which is desired that he officially notice when this is possible.

That administrative agencies may take a broader official notice than the courts has been indicated. This proposition rests upon the following reasoning:

1/ Commission's Rules of Practice, Rule XVIII.
2/ 31 C.J.S., Evidence, Sections 7, 9.

"But if the information has been developed in the usual course of business of the agency, if it has emerged from numerous cases, if it has become a part of the factual equipment of the administrators, it seems undesirable for the agencies to remain oblivious of their own experience and strip themselves of the very stuff which constitutes their expertness. It appears far more intelligent, if fairness to the parties permits, to utilize the knowledge that comes from prior acquaintance with the problems. Laborious proof of what is obvious and notorious is wasteful."1/

OFFERS OF PROOF

According to the view of some courts, the sustaining of an objection to a question raises no question for review unless it is made to appear in the trial court what the answer of the witness would be. In other words, an offer of proof is essential. The problem involved is inherently the problem of properly preserving excluded evidence in the appellate record. Offers of proof are commonly utilized in connection with adversary proceedings before hearing examiners of the Commission. The method of utilizing offers of proof does not differ from the accepted method practiced in the courts.

We find this expression with respect to offers of proof in Wigmore on Evidence, Third Edition, Section 20:

"Furthermore, if the ruling was one excluding a question, so that the offering party is the exceptor, he must state the tenor of the expected answer to the question, and if the objecting party is the exceptor, then the tenor of the answer given; so that it may be seen whether this answer was favorable or unfavorable and therefore whether he has lost by the one or been injured by the other (this statement being known in Federal Practice as an 'offer of proof')."2/

A recent example of use of offers of proof in connection with antimonopoly cases before the Commission is set forth in the opinion of the Supreme Court in Automatic Canteen Company of America v. Federal Trade Commission, 346 U.S. 61, as follows:

"The Commission made no finding negativing the existence of cost savings or stating that whatever cost savings there were did not at least equal price differentials petitioner may have received. It did not make any findings as to petitioner's knowledge of actual cost savings of particular sellers and found only, as to knowledge, that petitioner knew what the list prices to other buyers were. Petitioner, for its part, filed offers of proof that many sellers would testify

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1/ Final Report of Attorney General's Committee on Administrative Procedure, p. 71.
See also: Gellhorn - Administrative Law, Cases & Comments (2d Ed.) pp. 553-601. Gellhorn - Official Notice in Administrative Adjudication, 20 Texas L.R. 131; Faris - Judicial Notice by Administrative Bodies, 4 Ind. L.J. 16. Judicial Notice by Administrative Tribunals, 44 Yale L.J. 355. 42 Am. Jur., Public Administrative Law § 13.

2/ See also Jones on Evidence, 4th Ed., Volume 3, § 894; 26 Ruling Case Law, Evidence, Section 53.

that they had never told petitioner that the price differential exceeded cost savings. An offer of proof was in turn made by the Commission as to the testimony of these sellers on cross-examination; such proof would have brought out that petitioner never inquired of its suppliers whether the price differential was in excess of cost savings, never asked for a written statement or affidavit that the price differentials did not exceed such savings, and never inquired whether the seller had made up 'any exact cost figures' showing cost savings in serving petitioner."

BURDEN OF PROOF

In general, the rules relative to burden of proof in a Commission proceeding do not differ from those with which we are familiar in general legal and chancery practice.1/ The Commission's Rules provide:

> Counsel supporting the complaint shall have the general burden of proof and the proponent of any factual proposition shall be required to sustain the burden of proof with reference thereto.2/

The burden of proof resting on counsel supporting the complaint is, of course, inextricably tied up with the question of the essential and constituent elements of establishing a prima facie case. Nowhere do we find these matters in clearer perspective than in price discrimination cases under Section 2 of the Clayton Act. The problems of establishing the prima facie case, as well as the burden on the respondent, once the prima facie case is established, of showing justification in a Section 2(a) price discrimination case, have been discussed by the Supreme Court as follows:

> "The Government interprets the opinion of the Circuit Court of Appeals as having held that in order to establish 'discrimination in price' under the Act the burden rested on the Commission to prove that respondent's quantity discount differentials were not justified by its cost savings. Respondent does not so understand the Court of Appeals decision, and furthermore admits that no such burden rests on the Commission. We agree that it does not. First, the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits, requires that respondent undertake this proof under the proviso of § 2(a). Secondly, § 2(b) of the Act specifically imposes the burden of showing justification upon one who is shown to have discriminated in prices. And the Senate committee report on the bill explained that the provisos of § 2(a) throw 'upon any who claim the benefit of those exceptions the burden of showing that their case falls within them.' We think that the language of the

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1/Congressman Patman describing the rule as to burden of proof under Section 2(b) of the Robinson-Patman Amendment to the Clayton Act said: "It means exactly the rule of law today. It is a restatement of existing law. So far as I am concerned you can strike it out. It makes no difference. It is the law of this land exactly as it is written there." (80 Cong. Rec. 8231).

2/Commission's Rules of Practice, Rule XVIII. See also Administrative Procedure Act, Section 7(c).

Act, and the legislative history just cited, show that Congress meant by using the words 'discrimination in price' in § 2 that in a case involving competitive injury between a seller's customers the Commission need only prove that a seller had charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors."1/

We find this relationship between the matter of burden of proof and the establishment of the prima facie case likewise thoroughly discussed and analyzed at length in the first Supreme Court decision on Section 2(f) of the Clayton Act, the provision under which proceedings may be had against buyers who knowingly induce or receive discriminatory prices. To attempt to analyze this important decision would only unduly lengthen this paper; however, it merits careful study.2/

SUMMATION

After all the evidence is in the record and the parties have rested, the Examiner enters his order closing the proceeding for the reception of evidence. Thereafter, although the Commission's rule in that respect is permissive, it has become the practice in antimonopoly cases to prepare and file for consideration by the Examiner proposed findings and conclusions, together with the reasons for such proposals. Recognition of the increased importance of the initial decisions of Examiners suggests the necessity for filing proposed findings. The reasons for adopting such findings may be stated under each proposed finding, or may be incorporated in a separate memorandum brief, filed contemporaneously with the filing of proposed findings. Such proposed findings must be in writing, and must contain exact references to the record and authorities relied on.3/ It has become a frequent practice, consistent with the increasing authority extended to Examiners, as well as the potential finality of their initial decisions, to request oral argument in support of proposed findings and such request may be allowed at their discretion.

It is in the preparation of proposed findings that counsel will be rewarded for their labors in keeping a current index of the record. With the help of such index, counsel can support each proposed finding by all possible references to the record. Although these procedures before the hearing examiners

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1/F.T.C. v. Morton Salt Co., 334 U.S. 37 (1948); see also Corn Products Co. v. F.T.C., 324 U.S. 726 (1945); Samuel H. Moss, Inc. v. F.T.C., 148 F. (2d) 378, (2d Cir. 1945), Cert. Denied 326 U.S. 734 (1945); F.T.C. v. Cement Institute, 333 U.S. 683 (1947).

2/Automatic Canteen Co. of America v. F.T.C., 346 U.S. 61 (1953).

3/Commission's Rules of Practice, Rule XXI:

"At the close of the reception of evidence before the trial examiner in all formal proceedings, or within a reasonable time thereafter to be fixed by the trial examiner, parties may file for consideration by the trial examiner their proposed findings and conclusions, together with their reasons therefor. Such proposals shall be in writing and shall contain exact references to the record and authorities relied on. Sufficient copies thereof shall be filed, pursuant to Rule XII, to provide one (1) copy for each party concerned and three (3) copies additional.

"Upon request by either party, oral argument may be allowed by the trial examiner. The record shall show his ruling on each proposed finding and conclusion.

appear more comprehensive than was customary before the Initial Decision Rule was promulgated, it is believed that such procedures are important. That they are extremely helpful to Examiners in reaching their initial decisions is obvious. Moreover, upon appeal from them to the Commission, it becomes a comparatively simple matter to prepare the appeal brief, as well as the oral argument.

FORMULATION OF INITIAL DECISION

The Commission's rules 1/ provide that within thirty days from the date of the order closing the case before the Examiner, he shall make and file an initial decision which becomes the decision of the Commission thirty days from service thereof upon the parties, unless prior thereto (1) an appeal is filed under the appropriate rule; (2) the Commission by order stays the effective date of the decision, or (3) the Commission, upon its own initiative, issues an order placing the case on its own docket for review.

The initial decision so prepared and filed must include a statement of (1) findings and conclusions, with the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record; and (2) an appropriate order.

BRIEFS

An appeal brief filed with the Commission must be preceded by a notice of intention to appeal, which notice must be filed by any party within ten days after service upon him of the Examiner's initial decision. 2/

The Commission's rule requires that such a brief contain:

(1) a subject index of the matters presented, with page references, and a table of the cases, textbooks and statutes cited, and reference to the pages where they are cited;

(2) a concise abstract or statement of the case;

(3) exceptions to specific findings and conclusions of fact, or parts thereof, or conclusions of law in initial decision; exceptions to the failure of the initial decision to include other findings or conclusions of fact, law or discretion; exceptions to any prejudicial error in procedure, including conduct or ruling of the trial examiner; or exceptions to the substance or form of the order or part thereof; together with proposed findings of fact, conclusions of fact or of law, and an order, or parts thereof, in lieu of those to which exception is taken with specific page references to the parts of the record or the authority relied upon;

1/ Id., Rule XXII.
2/ Id., Rule XXIII.

(4) Argument exhibiting clearly points of fact and law relied upon in support of each exception taken, together with specific page references to the parts of the record cited and the legal or other authorities relied upon.1/

Here again, in the preparation of the appeal brief, the current index of the record will be of invaluable assistance. It will enable counsel to support each proposition contained in the brief by reference to every apposite item of evidence. A well-prepared trial brief will likewise prove invaluable, as the analysis and material previously used in the preparation of the trial brief can be extremely helpful in the preparation of the appeal brief.

The issues or questions presented on appeal should be precisely formulated.

An appeal brief must be filed within thirty days from the date of the initial decision, and must include all matters upon which the appeal is taken. Matter not involved in the appeal brief may not thereafter be presented to the Commission, in oral argument or otherwise. Twenty copies of both the appeal brief and the notice of intention to appeal must be filed, in the prescribed form.2/ Unless leave be granted, no brief shall exceed seventy-five pages.

With respect to the opposing brief on appeal, the brief of a party opposing an appeal, designated opposing brief, must contain only facts, reasons and arguments in opposition to exceptions taken in the appeal brief, except where necessary to correct any inaccuracy or omission in the appeal brief. Such opposing brief must be filed within twenty days after service of the appeal brief. No further briefs in addition to the appeal brief and opposing brief shall be filed, except by special leave.3/

No brief should be longer than absolutely necessary to convincingly present the facts and the law. But the task is necessarily conditioned by several factors: the length of the record - the facts; the complexity of the questions involved - the law. Where the record is lengthy and the legal issues complex, these factors, if urged in connection with a request for leave to file a longer brief than the Commission's Rule allows, are usually persuasive.

The following have been given as the essential qualities of a brief:

"(a) Compliance with rules of court [or Commission]
(b) Effective statement of facts.
(c) Good, clear, forceful English.
(d) Argumentative headings.
(e) Appealing formulation of the questions involved.
(f) Sound analysis of the legal problems in argument on the law.
(g) Convincing presentation of the evidence in argument on the facts.
(h) Careful attention to all portions of the brief.
(i) Impression of conviction that allays the reader's doubts."4/

1/ Id., Rule XXIII.
2/ Id., Rule XXIII.
3/ Id., Rule XXIII.
4/ Wiener, Effective Appellate Advocacy, p. 50.

CONCLUSION

There is no easy way to try a complicated antimonopoly case. There are no short cuts. One cannot do it "by ear." There is no substitute for thorough preparation for each stage of the proceeding. There must be prepared, as a necessary foundation, a comprehensive trial brief. Pre-trial hearings can reduce some of the later trial burden and provide for orderly presentation of documentary evidence. The record of oral and documentary proof will directly reflect the extent of preparatory work which has been performed before hearings commence. Such proof must be put into the record in orderly sequence. In order to do so, however, thorough study must be given to each item of proof. A lawyer must know his facts. He must know his law. He must know his case. He will then, and only then, be properly equipped to build a clear, concise and convincing record. With such a record readily available through current indexing, he can then go forward with confidence to the preparation of findings, to briefing, and to argument.