Address of Hon. Robert E. Freer, Chairman,
Federal Trade Commission to the
Washington Institute on Practice and Procedure
before Administrative Tribunals of the
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"THE FEDERAL TRADE COMMISSION"

The editor has assigned me the task of compressing into a short paper complete description of the background jurisdiction, duties, and administrative procedure of the Federal Trade Commission. Since the texts of the statutes from which the Commission derives its jurisdiction occupy in themselves about three times the permitted length of the paper, it will be manifestly impossible for me fully to carry out the assignment.

LEGISLATIVE HISTORY AND BACKGROUND

The Federal Trade Commission administers several of the antitrust laws. The "grandfather" of the antitrust laws, the Sherman Act, was approved in 1890. In 1903 the Bureau of Corporations was established, primarily for the purpose of investigating business practices and reporting upon them to the President. The Sherman law vested in the courts power to act upon combinations in restraint of trade and monopolies, either in criminal or equity proceedings brought by the Attorney General or in private damage suits. The Bureau of Corporations' powers were designed to eliminate unfair business practices by exposing them to the light of publicity.

As early as 1913, there was considerable dissatisfaction in Congress over the continued growth of monopoly despite the Sherman law, and it was generally agreed that additional legislation was necessary, particularly in view of the position taken by the Supreme Court in the Standard Oil case, 1/ wherein what had been a dissenting opinion, fifteen years before 2/ became the majority position of the court in enunciating the famous "rule of reason," with only a single Justice dissenting.3/

Several different approaches to the problem of strengthening the antitrust laws were suggested. All felt that many business practices which contributed to the monopolistic situations condemned in the Sherman Act should be made illegal. There was some conflict over whether Congress should attempt to draw a statute enumerating specifically the business practices then considered unfair or whether an administrative agency should be created, and empowered to act under a broad standard of illegality.

1/Standard Oil Co. v. U. S., 221 U. S. 1.
2/U. S. v. Trans-Missouri Freight Ass'n., 166 U. S. 290.
3/See Senate Report 1326, 62nd Congress, 3rd Session.

The final outcome of the legislative consideration was enactment of two statutes, one creating the Federal Trade Commission, vesting it with most of the powers of the Bureau of Corporations, and directing it to prevent unfair methods of competition in commerce, and the other the Clayton Act, supplementing the Sherman Act by declaring certain specific practices illegal. The original bills to create the Commission authorized it to prevent "unfair competition." 4/ It was finally decided, however, to amplify this phrase to avoid any possibility that the Commission's jurisdiction would be restricted to the application of common law principles of unfair competition.

I have merely skimmed over the legislative history and background of the Commission, since I am to be followed on this program by Judge Covington, the distinguished co-author of the Federal Trade Commission Act, who prepared the House Committee report upon the bill, and who was in charge of its consideration in the House. It would be more than reckless for me, in the face of such authority, to go very far into detail on these subjects.5/

STATUTORY DUTIES

The Commission derives its jurisdiction from three statutes, the Federal Trade Commission Act,6/ the Clayton Act 7/ and the Export Trade Act.8/

The principal basis of jurisdiction is contained in section 5 of the Federal Trade Commission Act, which declares unfair methods of competition and unfair or deceptive acts or practices in commerce unlawful. When the Commission has reason to believe that any person, partnership or corporation has been or is engaged in unfair acts, practices or methods of competition in commerce, it is directed to issue and serve a formal complaint setting out wherein it believes the law to have been violated, if such a proceeding appears to the Commission to be in the interest of the public. Thus is initiated a proceeding which may culminate in an order directing the respondent to cease and desist from the practices considered unlawful.

I shall refer to this function of the Commission as its cease and desist order procedure.

4/H. R. 15613, 63rd Congress, 2nd Session.
5/For a very interesting discussion, see the dissenting opinion of Mr. Justice Brandeis in F.T.C. v. Gratz, et al., 253 U. S. 421
6/38 Stat. 717; 52 Stat. 111.
7/38 Stat. 730.
8/40 Stat. 516. Two other Statutes, the Packers and Stockyards Act, 42 Stat. 159, and the Miller-Tydings Act, 26 Stat. 209, as amended by Pub. Law 314, 75th Congress limit this jurisdiction.

Under section 12 of the Federal Trade Commission Act, added by the Wheeler-Lea Act in 1938, the dissemination of a false advertisement of food, drugs, devices or cosmetics is made specifically unlawful and subject to the cease and desist order procedure.

By section 4 of the Webb-Pomerene Export Trade Act, the prohibition against unfair methods of competition and the remedies provided for enforcing this prohibition are extended to unfair methods of competition in export trade against competitors engaged in export trade, even when the acts constituting such unfair methods are done without the territorial jurisdiction of the United States.

Section 2 of the Clayton Act 9/ makes it unlawful, in substance, to discriminate in price in the course of interstate commerce when the effect is to suppress competition, create a monopoly or injure or prevent competition; to pay or receive anything of value as brokerage or in lieu of brokerage when the recipient is acting in behalf of, or under control of, any one other than the person by whom the brokerage or allowance is granted; to pay customers for services or facilities furnished by the customer unless such payments are available to all competing customers on proportionally equal terms; to furnish services or facilities to a purchaser which are not accorded to all purchasers on proportionally equal terms; or knowingly to induce or receive a discrimination in price prohibited by the section.10/

Section 3 of the Clayton Act, in substance, makes it unlawful for a seller or a lessor to require that a lessee or purchaser shall not use or deal in the goods of a competitor of the lessor or seller where the effect of the arrangement may be substantially to lessen competition or tend to create a monopoly.

Section 7 of the Clayton Act makes it unlawful for a corporation engaged in commerce to acquire the whole or any part of the stock or other share capital of another corporation engaged in commerce, or of two or more corporations, where the effect of the acquisition may be substantially to lessen competition between the acquiring and acquired corporations, or between the two or more acquired corporations, or to restrain commerce in any section or community or tend to create a monopoly in any line of commerce.

Under section 8 of the Clayton Act is is unlawful for a person at the same time to be a director in two or more corporations where either has capital, surplus and undivided profits aggregating more than $1,000,000 and is engaged in commerce, if such corporations are or shall have been theretofore competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of the anti-trust laws.

9/As amended by the Robinson-Patman Act, Pub. Law 692, 74th Congress.
10/The Robinson-Patman Act, in addition to amending Sec. 2 of the Clayton Act, makes it a misdemeanor, in Sec. 3, to participate in certain types of price discrimination.

Section 11 of the Clayton Act prescribes the manner and procedure by which the Commission shall administer the provisions of sections 2, 3, 7 and 8 of the Clayton Act. The procedure in section 11 is practically identical with that set out in section 5 of the Federal Trade Commission Act, culminating in an order to cease and desist from the violations of the law.

Thus the Commission is empowered to issue an order requiring a person to cease and desist from a practice under ten different statutory provisions (there being, for all practical purposes, five different provisions contained in section 2 of the Clayton Act). In eight of these provisions specific practices are made unlawful and in two of them (section 5 of the Federal Trade Commission Act, and section 4 of the Export Trade Act) the Commission is directed to prevent methods and practices falling within broad standards of illegality.

In addition to the cease and desist order procedure, the Commission has a number of other powers and functions, some of them radically different in scope and nature. Paragraph (a) of section 2 of the Clayton Act, in addition to its provisions against price discrimination, empowers the Commission, after investigation and hearing, to fix and establish the limits of quantity discounts, as to particular commodities or classes of commodities, where it finds that available purchasers in great quantities are so few as to render differentials on account of savings in quantity production unjustly discriminatory or promotive of monopoly. If and when such quantity limits have been set, it is no longer possible under 2 (a) to reflect in discounts actual quantity savings beyond such limits. Presumably a party granting greater discounts than those set by the Commission in such a proceeding would then be subject to the cease and desist order procedure applicable to discounts not justified by savings, which might add still another to the previous list of cease and desist order proceedings.

Under section 6 of the Federal Trade Commission Act, the Commission is empowered to gather and compile information on the organization, business, conduct, practices, and management of any corporation engaged in commerce (except banks and common carriers subject to the act to regulate commerce); to require such corporations to file annual or special reports with the Commission or answers in writing to specific questions; and to make public such information as it shall deem expedient.

In addition, it may, upon the direction of the President or of Congress investigate and report the facts relating to any alleged violations of the anti-trust acts by any corporation.

The Commission is also authorized by section 6 to investigate conditions in foreign countries where associations, combinations or practices may affect the foreign trade of the United States and to report to Congress thereon with any recommendations it deems advisable.

An additional function is set out in paragraph (c) of section 6 empowering the Commission, upon its own initiative, to investigate the manner in which a final decree entered in a suit by the United States against a corporation to prevent and restrain a violation of the anti-trust acts is being carried out. Upon application of the Attorney General

it becomes the Commission's duty to make such an investigation. The reports of such investigations, with recommendations, are to be transmitted to the Attorney General and may be made public in the discretion of the Commission.

In addition, upon application of the Attorney General, the Commission is empowered in paragraph (e) of section 6 to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the anti-trust acts in order that the corporation may thereafter maintain itself and conduct its business in accordance with the law.

The Commission is further authorized by section 6 to make reports to Congress, together with recommendations for additional legislation.

Section 7 of the Federal Trade Commission Act authorizes the Federal courts, in any suit in equity brought by or under the direction of the Attorney General under the anti-trust acts, upon conclusion of the testimony, and if the court is of the opinion that the complainant is entitled to relief, to refer the suit to the Commission as a Master in Chancery to ascertain and report an appropriate form of decree. In such a proceeding, the Commission must act under such rules of procedure as the court referring the suit prescribes, and the court may adopt or reject the Commission's report in whole or in part.

The Webb-Pomerene Export Trade Act exempts from the provisions of the Sherman Act, associations engaged solely in export trade, provided such associations do not enter into any agreements or conspiracies which artificially or intentionally enhance or depress prices within the United States, or substantially lessen competition within the United States, or do not restrain the export trade of a domestic competitor. The Act also exempts such associations from the provisions against acquisition of the stock of a competitor under section 7 of the Clayton Act unless such an acquisition restrains trade or substantially lessens competition within the United States. Export Trade Associations are required to file with the Commission a statement containing complete information on their organization and members and annually to report on their operations to the Commission. The Commission is empowered to require information on the organization, business conduct, practices, management and relation of such associations at any time. Failure to file requested information subjects them to a penalty of $100 for each day of failure, recoverable in a suit by the Attorney General. The Commission is directed, when it has reason to believe that an association has restrained trade within the United States, or restrained the trade of any domestic competitor, or done any act which artificially or intentionally enhances or depresses prices within the United States, or which otherwise restrains trade or lessens competition within the United States, to summon the association to appear before it and thereafter to conduct an investigation into the alleged violations of law. If, upon investigation, the Commission concludes that the law has been violated, it may make recommendations for the readjustment of the business of the association so that it may operate in accordance with the law. In case of failure to carry out the Commission's recommendations, its findings and recommendations are referred to the Attorney General for such action as he may deem proper.

The Wheeler-Lea Act added several important new provisions to the Federal Trade Commission Act. The Commission is enabled under Section 13 to apply to a District Court of the United States for a temporary injunction or restraining order to prevent the dissemination of a false advertisement of food, drugs, devices or cosmetics pending the final disposition of the regular administrative proceeding against the party under Section 5. Section 14 of the Federal Trade Commission Act, makes it a misdemeanor to disseminate a false advertisement of food, drugs, devices or cosmetics with intent to deceive, or where use of the commodity may be dangerous to health. The Commission is directed to certify the facts regarding any violation to the Attorney General, whose duty it is to institute appropriate enforcement proceedings in the courts.

Rules of Procedure

Paragraph (g) of Section 6 of the Federal Trade Commission Act authorizes the Commission to make rules and regulations for the purpose of carrying out the provisions of the Act.

Twenty-four Rules of Practice, as well as three Statements of Policy, have been promulgated. The first two rules deal with the organization of the Commission and the duties of the Secretary. Rules III to XXIII inclusive, deal with procedure in connection with cease-and-desist-order proceedings, and relate to service of complaints and orders, appearance of parties, form of documents, complaints, answers, motions, continuances and extensions, interventions, hearings on complaints, hearings on investigations, trial examiners, exceptions, statements of facts by attorneys, subpoenas, witnesses, depositions, evidence, briefs, oral argument, reports of compliance, and the reopening of proceedings.

These rules will be discussed in connection with the description of procedure to follow.

Stipulation Procedure

The Stipulation Procedure is set out in the Commission's published Statement of Policy. When the Commission has investigated a proposed respondent, and has reason to believe from this investigation that unfair methods of competition or unfair or deceptive acts or practices in interstate commerce have been or are being engaged in, it may offer the respondent the opportunity of executing a formal agreement, setting out the facts and agreeing in the future to cease and desist from the practices considered illegal. This opportunity to execute a stipulation is not extended where the Commission has reason to believe the respondents guilty of fraud; of advertising dangerous food, drugs, devices or cosmetics without appropriate warnings to the public; of violation of the Clayton Act; or where the unfair practice substantially restrains or suppresses competition. In addition to these exceptions the Commission will refuse to extend the privilege of stipulation where, by reason of the circumstances, it has no assurance that the stipulation will be observed and the practice eliminated or where it has any reason, sufficient to itself, to believe that the public interest would better be served by means of a formal complaint.

Section 5 of the Federal Trade Commission Act authorizes the Commission to proceed to formal complaint where such a proceeding appears to it to be in the public interest. If by formal agreement an unfair practice (other than the types above mentioned) may be eliminated without a formal proceeding, and the delay and expense, both to the Government and to the respondent incident thereto, the Commission generally feels the public interest adequately to be protected thereby.

Trade Practice Conference Procedure

As set out in Rule XXIV, the trade practice conference procedure is designed to afford an opportunity for voluntary participation by interested groups in the formation of rules to provide for the elimination and prevention of unfair methods of competition and unfair or deceptive acts or practices; to foster and promote fair competitive conditions and to encourage high ethical standards in business relationships.

Trade practice conference proceedings may be authorized by the Commission on its own motion or upon application by representatives of industry.

When such conferences are authorized, public announcement is made of the time and place of the conference, a member of the Commission is usually designated to preside, and all members of the industry are invited to take part in the conference and propose rules, offer suggestions and any other pertinent material. A transcript of the conference is made which includes all rules, resolutions, modifications, amendments and other matters offered at the conference.

Following this conference, the Commission publishes a draft of proposed trade practice rules, copies of which are furnished to every one attending the conference or who might be interested therein, and before any final action is taken thereon, public hearing is held at which all interested persons, including members of other industries, and representatives of consumers or other groups, may submit in writing relevant suggestions or objections, and may appear and be heard.

Following this hearing, the proposed rules are passed upon by the Commission, and in the form found proper, are published by the Commission and copies sent to all members of the industry, together with an acceptance form providing opportunity to signify an intention to observe the rules in the conduct of their business.

The origins of eliminating unfair practices by this means go back to 1918, in connection with an industry where a certain type of misrepresentation was engaged in by nearly all the members. It would have been possible for the Commission to proceed against this industry, one member at a time, by the usual cease and desist order method. However, unless such proceedings were culminated at the same time and against all of the industry members, some might have been left free to continue an unfair method which gave an advantage over those competitors required by order to cease and desist from the practice. In this first proceeding, the entire industry was given the

opportunity of simultaneously abandoning a practice which was engaged in by some members only to meet the competition of those less scrupulous.

Situations of this sort are commonly found in the Commission's work. A few unethical traders may induce an entire industry to resort to unfair methods of competition on a wide-spread basis. An effective agreement to cease and desist from such practices by means of a trade practice conference saves the Commission a great deal of expense, and enables it to reach the objectives of the Act much more efficiently, as well as avoiding for the industry the publicity and expense of numerous proceedings.

There is still another important advantage in the trade practice conference method. The Commission's principal jurisdiction is derived from a broad standard empowering it to prevent unfair methods of competition and unfair or deceptive acts or practices. Over twenty-five years, scores of business practices have been held by the Commission to be unfair methods of competition. These holdings of the Commission comprise more than twenty-three volumes of its decisions (presently being published at a rate of several volumes per year) and there are many court decisions reviewing them. In its trade practice rules, the Commission seeks to make the broad standard of Section 5 as interpreted in these Commission and court decisions specifically applicable to the practices in the industry involved in the conference. This procedure is of great benefit in making the administrative process and the decisions of the Commission of more certain application.

Trade Practice rules are divided into two groups. In Group I rules, the Commission proscribes specific practices which are considered to violate the statutes within its jurisdiction. In Group II rules, the Commission receives and publishes as expressions of the industry standards of ethical conduct considered desirable by the industry, but ordinarily Group II rules are of such nature that failure to observe them does not constitute a violation of the law. When information is received that a party has violated a trade practice rule, the Commission scrutinizes all the facts and acts in accordance with the basic statutory procedure rather than by authority of the rules as such.

Since the Commission does consider that its Group I trade practice rules express the requirements of the law, it will proceed against anyone engaging in practices proscribed in such a rule under the statutory procedure for using an unfair method of competition or for violating the Clayton Act as the case may be.

Investigation Prior to Formal Action

Mr. Justice Douglas is credited with saying recently, in connection with cases coming to the Supreme Court, that he felt just like an oyster, getting only what the tide brought in.11/ This apt simile applies generally to the courts, particularly in the field of competitive practices. Courts may deal only with such cases and controversies as are presented to them by parties competent to maintain an action. One of the

11/ Washington Evening Star, August 20, 1939, p. 1.

purposes of Congress in creating the Federal Trade Commission was to endow an agency in the field of trade regulation with a mobility not possessed by the courts, one that need not merely take what the tide brings in. As a consequence, the Commission is empowered to, and does, initiate investigations upon its own motion as well as upon information presented by competitors, consumers or others, including Federal, State and municipal authorities. Certain of the practices under its jurisdiction lend themselves to enforcement by the "oyster" method--that is, use of an unfair practice such as, for example, defamation of a competitor will usually bring an immediate complaint to the Commission from the injured party. Other practices, however, more remotely affect both the public and competitors and unless the Commission is vigilant in watching for them, they may never come to its attention. The Radio and Periodical Division scrutinizes a representative segment of radio continuities, newspaper and periodical publications and mail-order catalogs in search of advertising which may be false or misleading. Many thousands of advertisements are subjected to preliminary scrutiny every year, and hundreds of these preliminary inquiries develop into full-fledged administrative proceedings to correct false advertising. A great many of these matters would never be called to the Commission's attention by private parties, largely because they do not have sufficient information to determine the questionable nature of the advertisements.

Investigations which require field work, and which look toward an administrative proceeding, as distinguished from general economic investigations, are under the supervision of the Commission's Chief Examiner. The Commission is given, under Section 9 of the Federal Trade Commission Act, power to inspect books, papers and correspondence of parties under investigation, as well as to subpoena such papers, either prior or subsequent to the issuance of a formal complaint.

No publicity whatever is given to any investigation looking toward an administrative proceeding unless and until the Commission either publishes an executed stipulation or serves a formal complaint. The investigational staff has been built up over the years and is highly efficient. Investigators on the staff are not "detectives" in any sense of the word, but are trained attorneys or accountants capable of completing complicated investigations with a minimum of supervision.

Perhaps I can give you the clearest idea of how the Commission functions by taking a purely hypothetical case and following it through from beginning to end. Let us suppose that the Commission receives a letter from a wholesaler of groceries stating that certain of his competitors have concertedly threatened manufacturers from whom he buys in interstate commerce, with the result that these manufacturers will no longer sell him goods. The office of the Chief Examiner looks into these allegations in a preliminary way, and, if they appear well-founded, makes a complete and thorough field investigation, which is reported fully to the Commission. We will assume that the Chief Examiner's report of this field investigation indicates the following to be true:

There are five wholesalers serving one trading area, all purchasing from numerous manufacturers in other States and reselling to retailers.

Wholesaler A, who has complained to the Commission, has fallen into disfavor with the other four wholesalers because of his policies of reselling at a very small margin. These wholesalers enter into an understanding among themselves whereby each writes to the manufacturers supplying all five and threatens to withdraw his business unless such manufacturers refuse to sell to Wholesaler A, and the manufacturers do thereafter refuse to sell to A.

Formal Procedure

If from these facts, the Commission decides that it has reason to believe that the wholesalers are engaged in an unfair method of competition in commerce, and that a proceeding would be in the interest of the public, it directs the preparation and service of a complaint against them charging violation of the law.12/

In reaching its decision to issue complaint the Commission acts ex parte, and the applicant, through whom the subject matter of the proceeding may have come to the attention of the Commission, has no standing as a party at any stage. The Commission makes it a practice not to reveal the identity of applicants, and to proceed on the basis of the public interest rather than of any private grievances.

The complaint is prepared in accordance with the Commission's direction in the office of the Chief Counsel, usually by the attorney who will appear in support of the complaint at the trial of the case, and is served upon respondents, generally by registered mail. This complaint outlines all the facts, describes the parties fully and the nature of their business, and states wherein the Commission believes the facts to constitute a violation of the law.

The respondents may appear for themselves, either through a bona fide officer with proper authorization if they are corporations, by a partner if they are partnerships, or they may appear by attorney. Any attorney in good standing admitted to practice before the Supreme Court of the United States or the highest court of any State or territory of the United States or of the District of Columbia may represent them before the Commission.13/

The complaint requires the respondents to make an answer thereto within twenty days, unless an extension of time for good cause shown, has been granted by the Commission.14/ An answer may be submitted by the respondents jointly or by each one individually. The answer must specifically admit, deny or explain each of the facts alleged in the complaint

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12/ In practice such a complaint would in all probability join the manufacturers as well, but to simplify the illustration they are omitted.

13/ No register of attorneys who may practice is maintained and it is not necessary for an attorney to apply for admission to practice. A written notice of appearance on behalf of a specific party or parties in a particular proceeding, containing a statement that the attorney is eligible, is all that is necessary.

14/ Pursuant to Rule VII.

(unless the respondent is without knowledge and in which case it shall be so stated), and should contain a clear and concise statement of the facts which constitute the ground of defense.

If any issues of fact are drawn in the answers, or if no answer is filed, a hearing for the taking of testimony must be held, pursuant to notice of time and place contained in the complaint.15/

Assume in our hypothetical case that the four respondents admit all the allegations of the complaint except the one charging their action to be pursuant to agreement or understanding, and deny that their acts constitute an unfair method of competition.

A Trial Examiner is designated by the Commission to preside over the hearings. The trial examiner is designated from among those members of the Commission's Trial Examiners Division who have no connection whatever with any other feature of the Commission's work than the exercise of such quasi-judicial duties. Witnesses are called first by the Commission's Trial Attorney in support of the allegation that the respondents acted pursuant to agreement or understanding.

The Trial Examiner is given full authority to rule upon the admissibility of evidence in a hearing, and provision is made for appeals from such rulings to the Commission. The Commission may, if it deems it advisable, postpone argument on such appeals to final argument upon the merits, or it may hear the appeals specially during the course of the trial of the case.

In hearings before Trial Examiners the Commission requires adherence as closely as possible to the rules of evidence as established by equity courts. Thus, incompetent or irrelevant evidence, offered either by the Commission's attorneys or those of the respondent, is excluded by trial examiners. However, no adherence is made to the strict letter of the rules of evidence when the result is to defeat substantial justice.16/ The courts have upheld the Commission's right to receive evidence or testimony which "is of the kind that usually affects fair-minded men in the conduct of their daily and more important affairs," although perhaps technically incompetent. 17/

15/ This hearing may not be held less than thirty days following service of the complaint by the terms of the Federal Trade Commission Act, Sec. 5.

16/ In only one instance has the Commission attempted to enunciate any rule of evidence by which it will be bound. Rule XIX states 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."

17/ Bone & Sons, Inc. vs. F. T. C., 299 Fed. 468, where the court held that failure to exclude incompetent evidence was not ground for reversal, but suggested that the Commission must use a high degree of fairness in finding facts therefrom.

May I emphasize, however, that the Commission very rarely permits any departure from the fundamental principles governing the admission of evidence in equity proceedings, and it must be satisfied that there is sound reason for such departure and that no element of fairness will be thereby impaired or disregarded.

At the conclusion of the hearing, the trial examiner is empowered to request, either on his own motion or that of counsel, a statement in writing from attorneys for the Commission and attorneys for the respondents, setting forth the contentions of each as to the facts proved in the proceeding. The trial examiner is required within fifteen days of receipt of the complete stenographic transcript of the testimony to file with the Commission a report upon the evidence. Copies of this report are served upon each attorney for the respondents and upon the Commission's attorney. The report contains a statement of the allegations of the complaint, the contents of the answer, and a summary of the evidence adduced at the hearing, with citations to the record.

Within ten days after receipt of the trial examiner's report, counsel may file exceptions thereto. These exceptions should specify the particular part or parts of the report to which they relate, and may suggest any additional facts which the exceptor feels should have been included.

The report of the trial examiner is not considered as a part of the formal record and is not a decision or finding of the Commission in any sense of the word.

Opening brief in support of the complaint must be filed by the trial attorney of the Commission within twenty days after service upon him of the trial examiner's report; and brief on behalf of the respondents must be filed within twenty days after service of the brief in support of the complaint.

The Commission's rule of practice 18/ requires briefs to contain a concise abstract or statement of the case and a clear statement of the points of fact or law to be discussed with reference to the authorities relied upon in support of each point. Exceptions to the trial examiner's reports are also required to be reproduced in the briefs.

Oral argument before the Commission on the issues of fact and law may be had, if ordered by the Commission, on written application of the respondents or their attorneys or of the Chief Counsel of the Commission received within fifteen days following the filing of the respondents' brief.

By the time this stage of the proceeding has been reached, the issues of fact and law have ordinarily been considerably reduced. The Commission familiarizes itself with the trial examiner's report, the briefs and those parts of the record which are in dispute, and is in a position to consider the oral arguments of counsel.

18/ Rule XX.

In our hypothetical case there has been but one issue of fact and one issue of law raised. If the Commission is satisfied from the entire record of the proceeding that the respondents have acted pursuant to agreement or understanding it will very probably issue an order to cease and desist since such action to cut off the source of supply of a competitor is clearly an unfair method of competition.19/ On the other hand, if it is not satisfied that an allegation of agreement or understanding has been proved, it will order that the complaint be dismissed.

In the event the Commission decides upon the entire public record 20/ after considering the briefs and oral argument, that the activities have been carried out pursuant to agreement or understanding, it will direct the trial examiner to prepare and submit to it, tentative draft of findings of fact. The draft of findings prepared by the trial examiner pursuant to the Commission's instruction is then carefully reviewed and frequently revised by the Commission and an order to cease and desist based thereon is prepared. Thereupon, both findings of fact and order are served upon the respondents.

Nature and Enforcement of Orders

As stated previously, orders of the Commission direct respondents to cease and desist from a practice considered unlawful. These orders are preventive rather than punitive. The Commission has no authority to impose any penalties whatsoever upon a respondent.21/

Prior to the enactment of the recent Wheeler-Lea Amendment, orders of the Commission could become final only upon a further order of one of the circuit courts of appeals of the United States, either upon application by the Commission for enforcement or by the respondent for review, and there was no limit on the time within which a petition for enforcement or for review might be presented to the courts. Since the amendment, an appeal from an order under Section 5 of the Federal Trade Commission Act must be filed

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19/ Compare the following cases:
El Paso Wholesale Grocers Ass'n., et al. v. Commission, 227 Fed. 657.
Nat'l. Harness Mfrs. Ass'n. v. Commission, 261 Fed. 170, 268 Fed. 705.
Arkansas Wholesale Grocers Ass'n. v. Commission 18 Fed. (2d) 866.

20/ In deciding a formal case in which hearing has been held the Commission never consults or considers its preliminary investigational files.

21/ Although it may refer to the Attorney General facts coming to its attention indicating violation of Section 3 of the Robinson-Patman Act or of Section 14 of the Federal Trade Commission Act, both of which carry punishment of fine and imprisonment. However, these penalties can only be imposed by the courts in an action instituted by the Attorney General, to which the Commission is in no way a party.

within sixty days after service. Failure to file a petition for review within the sixty-day period results in an order under Section 5 becoming final. This does not apply to orders under the Clayton Act, which still can become final only through an order of the circuit courts.

In reviewing a Commission order, either upon petition for review by a respondent or for enforcement by the Commission, the circuit court may modify, affirm, or set aside the order and order the respondent to obey it to the extent to which it is affirmed. The statute provides that the findings of the Commission as to the facts, if supported by evidence, shall be conclusive. 22/

Orders of the Commission under the Clayton Act may be enforced only by the courts; and punishment for violation of such orders may be imposed only through exercise by the court of its power to punish as contempt disobedience of its order affirming or commanding obedience to the order of the Commission.

Under the amended Federal Trade Commission Act, a violation of a final order subjects a respondent to forfeiture of a civil penalty of not more than five thousand dollars for each violation which may be recovered in a civil action brought by the United States in the Federal District Courts. 23/

The Commission has fared exceedingly well, particularly in recent years, in actions in the courts to review its orders.

From January 1, 1933, to date, a period of nearly 7 years, 102 Commission cases have been disposed of by the Federal Courts, of which number 97 were decided favorably to the Commission. Of the five remaining cases, only two were out and out reversals, the other three being contempt proceedings in cases in which Commission's orders had been previously affirmed. The Commission has been reversed by the Supreme Court of the United States but once in more than 8 years, and then (in a Section 7 Clayton Act case) by a 5 to 4 opinion reversing a decision of a Circuit Court of Appeals. During this period, the Supreme Court has decided 6 cases in favor of the Commission, reversing unfavorable decisions by Circuit Court of Appeals.

Since the approval of the Wheeler-Lea amendment on March 21, 1938, the Commission has instituted injunction proceedings in 11 cases to enjoin the dissemination of false advertisement of food, drugs, devices and cosmetics, and has succeeded in obtaining injunctions in all of such proceedings.

22/ In Section 5, FTCA, findings of fact are conclusive if supported by "evidence"; in Section 11, Clayton Act, if supported by "testimony."

23/ See Paragraph (d) of Section 5, FTCA, which provides that the jurisdiction of the circuit court of appeals to modify, affirm, enforce or set aside Commission orders shall be exclusive.

The courts have quite generally commended the Commission's procedure as according a full and fair hearing and as adequately safeguarding the rights of respondents. In no case has the Commission been held to have acted in an arbitrary or unreasonable manner, although, of course, there have been cases where the courts have modified the Commission's findings of facts or its interpretations of the law.

While the Act makes the Commission's findings of fact conclusive if supported by evidence, whether a practice is "unfair," and therefore within the Commission's jurisdiction, is a question of law and subject to the review of the court. The process of determining what practices are within the scope of the standard contained in Section 5 has been described as one of "judicial inclusion and exclusion."

The earlier cases held that, as the statute required only that the proceeding appear to the Commission to be in the interest of the public, the courts might not look behind the complaint in this respect.24/

In F. T. C. vs. Klesner, 280 U. S. 19, the Supreme Court, however, in sustaining the setting aside of the Commission's order, appears to have reached its own conclusion, as a matter of law, that there was no public interest in that particular Commission proceeding.

CONCLUSION

In conclusion may I say that the Commission's procedure is not complex and the ordinary practitioner, appearing before the Commission for the first time, will not, I can assure you, find himself in an alien atmosphere. While the administrative machinery of the Commission is necessarily different from that encountered in the courts, no effort has been spared to insure a full and fair hearing and to preserve the rights of respondents.

24/ Hills Bros. v. F. T. C., 9 Fed. (2d) 481; John Moir v. F. T. C. 12 Fed. (2d) 22. But see, contra, John Bene & Sons v. F. T. C., 299 Fed. 468.

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