DISCOVERY IN ADMINISTRATIVE ADJUDICATIVE PROCEEDINGS

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Recently in the matter of L. G. Balfour Co., FTC Docket No. 8435 (May 10, 1963) the Federal Trade Commission stated that its adjudicative hearings were not to be conducted according to the "sporting theory" of litigation but according to the principle that both sides would enter the hearing with full knowledge of the case in support of the complaint and of the defenses to be asserted. Although the principle of full disclosure through discovery has, at least since the adoption of the Federal Rules of Civil Procedure in 1938, become firmly entrenched in litigation conducted in our federal and in most state courts, it has not, in spite of the Administrative Procedure Act, become a guiding principle in administrative adjudicative proceedings. The techniques of discovery in those agencies whose adjudicative hearings closely resemble court litigation, and to which discovery could usefully be applied, such as, for example, the Securities and Exchange Commission, the National Labor Relations Board and the Federal Trade Commission, have not made extensive use of the principles of discovery. Respondents that have requested extensive discovery were told that it was not required since

adjudicative proceedings were conducted at intervals, often with long breaks between hearings and at various places within the United States, depending upon the location of evidence, and thus adequate opportunity to defend was available without discovery. Recently, however, the Federal Trade Commission has changed its adjudicative hearing procedures. Adjudicative hearings before the Federal Trade Commission are now continuous, court-type hearings held in one place and involving only brief recesses of the type involved in court litigation rather than hearings at intervals in various locations.

I would like to confine my remarks this afternoon to a discussion of the extent to which the Federal Trade Commission's change in adjudicative hearing procedures has led to the promulgation of rules providing for discovery and to the use of discovery techniques in Federal Trade Commission adjudicative hearings. I am presently counsel in a proceeding now pending before the Federal Trade Commission which involves the very subject upon which I have been asked to speak to you today. Therefore, in large part, I will confine my remarks to what has happened. That is, I feel that my role here today is primarily a reporter rather than advocate or analyst.

In July 1961, the Federal Trade Commission announced that it was changing its adjudicative hearing proceedings from hearings at

intervals to continuous court-type hearings. It also announced that, among the other changes in its rules it had also adopted rules which would allow for "pre-hearing conferences" and "use of the principles of discovery" in its adjudicative hearings. Questions concerning the extent of the use of the principles of discovery which would be allowed respondents did not quickly arise because the Commission allowed respondents, against whom complaints had already been issued at the time the new rules became effective, to choose between the old interval hearing procedure and the new continuous hearing procedure. Apparently most respondents chose the interval procedure. Thus, many of the questions under these new rules are just now beginning to arise. (In fact, the Federal Trade Commission may this very day be issuing a decision which will clarify the use which a respondent may make of discovery procedures before the Federal Trade Commission.) 1/

Among the new rules adopted by the Commission since July 1961, which provide for discovery between the parties, are the following:

> Rule 3.8, which provides for pre-hearing conferences and procedures for simplification and clarification of the issues, and for the issuance of a pre-hearing order which "shall control the subsequent course of the proceeding, unless modified at the hearing to prevent

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1/ In fact, by order dated September 24, 1963 the Commission issued an order in the matter of Topps Chewing Gum, Inc., FTC Docket No. 8463 stating that the examiner was using erroneous standards in

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determining whether to authorize depositions. This material was used by Mr. Kintner in remarks before the Administrative Law Committee of the Federal Bar Association at its Annual Convention in Philadelphia, September 24, 1963.

manifest injustice," Rule 3.11, which concerns discovery of documents between the parties, and Rule 3.13 which provides for requests for the admission of facts and the genuineness of documents.

These rules in and of themselves and especially given the continuous hearing rule, it cannot be denied, contemplate full exchange of information between counsel supporting the complaint and counsel for the respondent. If there was any doubt about this point, the Commission eliminated it in its May 10, 1963 decision in L. G. Balfour Co. (although their precise holding in that decision was on a relatively narrow question). In the Balfour decision the Commission pointed out that, even prior to the adoption of the continuous hearing rule it had permitted certain discovery by a respondent from complaint counsel concerning the nature of the case to be presented against it. The Commission, in Balfour, stated that:

> "Prior to amendment of the Rules, hearings in adjudicative proceedings were held at uncertain intervals and in different locales. Under this type of practice there was little need to afford respondents the right to pre-trial discovery for they were customarily afforded an ample interval to prepare their defenses subsequent to the close of the case in chief. But the revised rules now require that, insofar as it is possible and practical, the hearings must be held in one place and continue without interval until all evidence, in support of and in opposition to the complaint, has been received. Thus, respondents must now be prepared to offer their evidence immediately after the close of the case in chief and, accordingly, must be afforded all of the rights necessary for them to prepare before trial. To provide for this

> changed circumstance and to assure that the Federal Trade Commission's hearings were not conducted under the 'sporting theory' of litigation where the goal is to surprise and confound your opponent . . . [discovery rules were provided]."

The Commission, in Balfour, did not state what the consequences of denying discovery to a respondent in a continuous hearing context would be. It implied, however, that such denial would be unlawful for it said that the new rules providing for discovery made possible the use of continuous hearings. Indeed, in Balfour, the Commission discussed decisions under its old rules which involved respondents' requests for discovery. For example, the Commission cited its decision in the matter of Joseph A. Kaplan & Sons, 57 FTC 1537, in which a respondent sought to take depositions of witnesses prior to commencement of the hearing but subsequent to the issuance of a complaint against it. The Commission ruled that it could not permit such depositions prior to commencement of the hearing -- indeed, prior to completion of the case in support of the complaint because, prior to completion of complaint counsel's evidence no one could know, the Commission said, what was relevant. Since depositions are permissible only as to relevant matters and since prior to completion of the case in support of the complaint it was not known what was relevant, depositions were not to be permitted. In addition, the Commission stated, since its hearings were at intervals, the respondent

had sufficient opportunity to develop evidence to rebut the evidence presented by complaint counsel.

The implication of the Commission's reasoning in Kaplan was that adjudicative hearings were loose and amorphous and that the complaint was only a general guide. This in fact was the nature of most FTC hearings, prior to the changes in its rules. Respondent could not thus prepare in advance to meet the evidence to be presented against it but had sufficient opportunity after completion of the case in support of the complaint to develop rebuttal evidence. The Second Circuit, in Standard Distributors, Inc. v. FTC, 211 F. 2d 7 (2nd Cir., 1954) appeared to follow the Commission's reasoning as expressed in Kaplan, or at least did not give serious consideration to a claim that there was illegality involved in not permitting discovery prior to commencement of the hearing under the interval hearing procedure. (The Commission in its Balfour decision also cited the Standard Distributors, Inc. decision) All this has been changed by the new Commission rules, as we have seen in the Balfour decision.

Rule 3.8 provides for the issuance of a prehearing order which presumably would provide for precise definition of issues and corresponding limitation of the evidence which may be presented at the hearing. In an order dated July 2, 1962 the Commission in the matter of Topps Chewing

Gum, Inc., Docket No. 8463, stressed the hearing examiner's role in defining the issues and limiting the scope of the proceeding. Presently, in Topps Chewing Gum, an appeal is pending before the Commission requesting that it direct the examiner to define all issues and limit the scope of the proceeding in accordance with rule 3.8 and its continuous hearing rule.

In Rule 3.11 the Commission has provided that:

> "Upon motion of any party showing good cause . . . the hearing examiner may order any party to produce and permit the inspection and copying of non-privileged documents. . . which constitute or contain evidence relevant to the subject matter involved and which are in the possession, custody or control of such party . . . ".

This rule was promulgated to be effective on August 1, 1963 although it reflects the prior practice which had begun to develop since adoption of the continuous hearing procedure. This rule raises two questions: First, which documents are non-privileged, and secondly, may a respondent resist a hearing examiner's order issued under Rule 3.11 in the courts? As to the latter question, the Commission has provided in its Rule 3.12 that "If . . . any party fails to comply with an order of the examiner for the production of documents or other physical evidence under 3.11, or with a pre-hearing order entered under 3.8(c) such refusal or failure may be considered a contempt of the Commission." If such

refusal is made, rule 3.11 further provides that "the Commission will . . . make such orders in regard to the refusal or failure to comply as the circumstances require." In considering rules 3.11 and 3.12, the question which immediately arises is can the Commission punish a respondent for such refusal or failure to produce documents or comply with a similar pre-hearing order of the hearing examiner without a court order enforcing such production? Another question which arises is whether it would be proper for the Commission to draw inferences against a respondent for refusal or failure to follow such orders of the hearing examiner as a federal court could under Rule 37(b)(2) under the Federal Rules of Civil Procedure, when the law gives a respondent a right to have the court pass upon the enforcement of a subpoena issued pursuant to Section 9 of the Federal Trade Commission Act? These are questions which arise from rules 3.11 and 3.12 and I will not attempt much more than to state them here today. I would merely add that, if properly used, these rules would seem to be within the spirit of the disclosure required for a continuous, court-type hearing. Yet, because the Commission is not a court but an administrative agency, there seem to be substantial legal obstacles to requiring a respondent, upon penalty of contempt, to produce documents without court review which is presently provided for in Section 9 of the Federal Trade Commission Act. It seems, however,

that in appropriate circumstances the Commission could draw inferences against a respondent for failure to produce documents. (See Charles of the Ritz v. FTC, 143 F.2d 676, 678-679 (2nd Cir. 1944). However, where the refusal to produce trade secrets is based on the injury which would be caused thereby and further explanation is provided, unfavorable inferences would not appear to be appropriate. (See Evis Mfg. Co. v. FTC, 287 F.2d 831, 845-847 (9th Cir. 1961).

This brings us to the second question raised by Rule 3.11. It has been largely clarified in the Commission's Balfour decisions and in its decision in the matter of The Grand Union Co., FTC Docket No. 8458. The essence of these decisions is that, although documents which the Commission collects in its pre-complaint investigation are considered to be confidential under its rules unless good cause is shown for publication, the commencement of a complaint and the requirement of a continuous hearing require not only that the documents which complaint counsel intends to use as evidence at the hearing will be disclosed to the respondent prior to hearing, but also, as in Grand Union, reports of industry witnesses will also be disclosed to respondent, even though complaint counsel does not intend to use such documents at the hearing, if relevant to the issues in the hearing and necessary for defense. Problems arise because much information that is supplied to the Commission in its pre-complaint investigation is surrounded by requests for secrecy and confidentiality.

(Indeed, the Commission may be prohibited by Section 6(f) of the Federal Trade Commission Act from disclosing some of the information disclosed to it on a confidential basis for by the terms of the statute it may only "make public . . . information obtained by it . . . [through its powers under the Act], except trade secrets and names of customers . . ."). In Grand Union the hearing examiner required complaint counsel to produce to respondent 180 6(b) reports which competing food chains had filed with the Commission, although complaint counsel sought to introduce at the hearing a tabulation which was based on only twenty of the reports. The Commission denied complaint counsel's interlocutory appeal from the hearing examiner's order requiring production of all 180 6(b) reports. However, in balancing the interests of the witness-competitors in keeping certain information confidential, with the respondent's need to adequately prepare its defense, the Commission conditioned examination of the 6(b) reports as follows:

> (1) Only one photocopy of such reports is to be made which is for use only of counsel actually engaged in preparing the defense.
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> (2) The information contained in the reports is not to be disclosed to the respondent.
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> (3) Disclosure of the information may be made to other persons, only upon approval of the hearing examiner, and only upon a showing that such disclosure is necessary for respondent's defense.

(4) Upon termination of the proceeding all copies are to be returned to the Commission. 2/

It would seem that the Commission has afforded a reasonable solution of the problem raised by the interest of a witness in maintaining privacy of business secrets from competitors, and in the interest of a respondent in defending himself.

Since the Commission has clarified the meaning of privilege as used in 3.11, it would appear that rule 3.13 which concerns requested admission can operate similarly to the way it operates under the Federal Rules of Civil Procedure.

Discovery, however, extends to third party-witnesses as well as to the parties themselves.

The Commission, at least since 1955, has had a rule which allowed the taking of depositions of witnesses. It had been rarely used, however, in interval hearings in accordance with the principles expressed in the Commission's Kaplan decision. With the adoption of continuous hearings the question of prehearing depositions of witnesses arose. In a July 2, 1963 decision in Topps Chewing Gum, Inc., the Commission stated that:

2/ See the Commission's February 11, 1963 decision in Grand Union, FTC Docket No. 8458.

> "Properly used, depositions afford a valuable method for the preparation of the respondent's defense, thereby making possible the continuous hearings contemplated by the Commission's Rules. Cf. L. G. Balfour Company, Dkt. 8435, Order Directing Disclosure of Documents, May 10, 1963."

Prior to August 1, 1963 the Commission's rule 4.10 provided that depositions could be taken upon a showing of good cause. In the above referenced decision, the Commission also commented upon the meaning of "good cause" for the taking of a deposition as follows:

> "Depositions may be taken only upon a showing of good cause. As we recently had occasion to point out in Balfour, supra, with regard to a similar requirement under Section 1.163 of the Commission's Rules, 'It is neither necessary nor desirable to frame a firm rule of general application defining with particularity the elements of a showing of good cause . . .' In general, a determination of good cause for the taking of depositions requires a showing of the relevancy and usefulness for defensive purposes of the information sought and of the need for eliciting it by deposition rather than by testimony at the hearings, together with appropriate consideration of claims of confidentiality, basic fairness to the parties, and the paramount need for avoiding delay.
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> "Moreover, if the dangers of delay, confusion and an unwieldy record are to be avoided, depositions must be strictly limited to the questions actually in issue in the proceeding. This requires a clear delineation of the issues to be tried before depositions are permitted."

Effective August 1, 1963 the Commission modified its deposition rule. It provided in its new rule 3.10(a) as follows:

> "(a) At any time during the course of a proceeding, whether or not issue has been joined, the hearing examiner, in his discretion, may order that the testimony of a witness be taken by deposition and that the witness produce documentary evidence in connection with his testimony. Such order may be entered upon a showing that the deposition will constitute or contain evidence relevant to the subject matter involved and that the taking of the deposition will not result in any undue burden to any other party or in any undue delay of the proceeding."

Prior to August 1, 1963 the Commission's deposition rules provided for virtual unlimited use of a deposition at hearing by the party taking it without regard to the availability or non-availability of witnesses. Subsequent to August 1, 1963 with the promulgation of rule 3.10(e) the use of Commission depositions at hearings is made to closely conform with Rule 26, Federal Rules of Civil Procedure, so that depositions may presently be used at Commission hearings for impeachment purposes and if the witness is unavailable or more than 100 miles from the place of hearing, or otherwise in "the interest of justice . . . [but] with due regard to the importance of presenting the testimony of witnesses orally in open hearing. . .". (Rule 3.10(e)(2)).

The hearing examiner in Topps Chewing Gum, Inc. has ruled that under the new Commission deposition rule, the standards which govern the use of depositions at hearings delimit the scope of depositions which may be taken. This ruling is presently on appeal before the Commission. 1/

1/ The Commission by order dated September 24, 1963 informed the (continued on back)

examiner that his ruling which provides that depositions may be authorized only if the witness will be unavailable at the hearing is erroneous. The Commission therefore directed the examiner to reconsider the deposition requests in light of this ruling.

If the examiner is upheld in this position, I feel that substantial questions would be raised concerning the legality of the continuous hearing procedures, as the Commission has itself indicated in its decisions in Balfour and Topps. This ruling of the examiner is also contrary to the trend of adapting Commission adjudicative proceedings as closely as is possible to court proceedings under the Federal Rules of Civil Procedure.

The Commission's deposition rule provides that in authorizing depositions consideration also be given to factors of delay, burdensomeness to a witness and confidentiality of trade secrets.

As to the latter point, case by case handling to balance a witness' desire and need for confidentiality with a respondent's desire and need to defend himself in the same manner as such balancing has been achieved in regard to production of information collected by the Commission in its pre-complaint investigation is desired. It would be expected that burdensomeness to witnesses would be defined, as it is under the Federal Rules of Civil Procedure, in terms of a showing of clear need by a respondent for the information in defense of the charges.

Delay, as the Commission stated in its July 2, 1963 decision in Topps, has to do primarily with requiring that depositions be strictly limited to the issues in the proceeding. This would mean that normally depositions should follow a prehearing order which defines the issues.

In the Commission's July 2, 1963 decision in Topps, in defining the term "good cause" for the taking of a deposition, the Commission stated that permission to take depositions required "a showing of the relevance and usefulness for defensive purposes of the information sought and of the need for eliciting it by deposition rather than by testimony at the hearings." In its new rule 3.10 concerning depositions, the Commission abandoned the term "good cause" and more specifically defined the factors which relate to whether a deposition should be authorized. The above-quoted provision was not included in new rule 3.10, in my view because it does not comport with the structure of this rule which appears to permit the taking of depositions although they will not be used at the hearing. In Topps, however, the complaint counsel has requested permission to file an interlocutory appeal with the Commission in order to challenge the taking of certain depositions because he claims that no showing was made that the testimony could not be elicited at trial, and thus, the Commission may provide us with a definitive answer on whether this is a factor to be considered in connection with the taking of depositions. 4/

Primarily, my remarks have dealt with discovery by respondents. This is natural considering the precomplaint investigative powers of the Federal Trade Commission. Interval hearings provided an opportunity

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4/ Although complaint counsel's argument was raised before the Commission, they did not make reference to it, in directing, as indicated in prior footnotes, that the examiner's ruling on depositions is erroneous.

for respondents to balance the investigatory powers of the Commission. Elimination of interval hearings, in a sense, removes certain rights of respondent, which are reinstated through allowance of discovery.

In Balfour, the Commission recognized that its new continuous hearings practice raises "a series of problems and questions which have arisen concerning the latitude or scope of discovery permitted respondents". I have tried to discuss some of them today. As with most changes of legal rules and procedures, clarification for the many questions involved in the change, will come on a case by case basis over a period of time.