## HAFNER COFFEE CO.

*Docket 6961. Order and Opinion, June 4, 1958*

Order remanding motion for amendment of complaint to hearing examiner for his determination.

OPINION OF THE COMMISSION

By the COMMISSION:

This matter is before the Commission on a motion filed by counsel in support of the complaint requesting the hearing examiner, in effect, (1) to permit the substitution of Simon Hafner, an individual, as the party respondent in lieu of Hafner Coffee Company, a corporation, and (2) to issue and direct service on Mr. Hafner of an amended complaint. The hearing examiner, being of the opinion that he had no authority to entertain the motion, certified it to the Commission for consideration.

In stating that he has no authority to issue and direct the service of an amended complaint the hearing examiner was correct. However, to the extent that he stated or implied that he has no authority to allow an amendent of an outstanding complaint he was in error. The difference lies in the distinction between the issuance of a complaint, which the Commission reserves to itself and in the performance of which it exercises the administrative function of determining when there is reason to believe the law has been violated and, in the case of proceedings under the Federal Trade Commission Act, when the public interest requires action, as well as that of framing the charges, and the amendment of a complaint already issued, the authority to accomplish which the Commission has expressly delegated to its hearing examiners under the conditions and subject to the limitations prescribed in § 3.9 of its Rules of Practice. Thus, a hearing examiner, when presented with a motion for amendment of a complaint, should consider it, and if it meets the requirements of § 3.9(a)(1) he may, in the exercise of his discretion, allow it, being careful, however, that the action he takes is but an exercise of his quasi-judicial power to permit the amendment of an outstanding complaint and not an impingement on the Commission's administrative responsibility to issue a new or substitute complaint.

Under section 3.9(a)(1) of the Rules, the only limitation on a hearing examiner's authority to allow an amendment of a complaint is that the amendment must be one which is reasonably within the scope of the proceeding initiated by the original complaint. Whether or not this is so must of necessity depend on the circumstances of each case. In this case, the pertinent facts are that the Commission, on November 26, 1957, issued the complaint, alleging violation by

"Hafner Coffee Co., a corporation" of section 2(d) of the Clayton Act, as amended. On April 18, 1958, an answer to the complaint was filed by Simon Hafner, "an individual trading and doing business as Hafner Coffee Co., a sole proprietorship, incorrectly termed a corporation, as respondent herein." In his answer, Mr. Hafner admitted in part and denied in part the allegations of the complaint, and stated, among other things, that "Hafner Coffee Co. is not a corporation but is a sole proprietorship constituting the individual business of Simon Hafner." On May 7, counsel in support of the complaint filed his motion for amendment.

The essence of the complaint is that in connection with the operation of the business of Hafner Coffee Co. certain alleged violations of law have occurred. The Commission, it appears, was under the impression that Hafner Coffee Co., the party engaged in the practices, was a corporation, and accordingly so designated the party respondent. It developed, however, that Hafner Coffee Co. is not in fact a corporation but a trade name under which Mr. Hafner, an individual carries on the same business. The sole purpose of the amendment is to correct this misnomer. No new or different acts or practices are alleged. No changes in the circumstances which led the Commission to issue the complaint are present. No different determinations with respect to the belief that a violation of law has occurred are necessary. The Commission's previous actions on all these questions remain unchanged, and the proposed amendment, while it would redesignate the respondent, is actually only an effort to correctly identify the party engaging in the activities dealt with and thus effectuate the Commission's purpose in issuing the complaint. In these circumstances, the amendment is clearly one "reasonably within the scope of the proceeding initiated by the original complaint," and consideration of it is well within the authority conferred upon the hearing examiner by the rule.

The situation here differs materially from that existing in *Waltham Watch Company, et al.*, Docket No. 6914, cited by the hearing examiner. In that case, the original corporate respondent, Waltham Watch Co., a Massachusetts corporation, was shown to have changed its name to Waltham Precision Instrument Co., and to have gone out of the business with which the complaint was concerned. This business had been taken over by a new corporation, Waltham Watch Co., a Delaware corporation, which was not a party to the proceeding and whose operation of the business was said to be different from that of the respondent. These and other changes in circumstances raised questions as to the adequacy of the complaint and required a complete reappraisal of the facts, with the result that the Commission, after

considering them anew, issued and caused to be served an amended and supplemental complaint in which allegations appropriate in the light of the new developments were made.

One further point perhaps needs clarification. The motion of counsel in support of the complaint requesting the amendment was served on Mr. Hafner on May 9, who, on May 19, requested an extension to May 26 within which to file an answer. In the meantime, on May 13, the hearing examiner had entered his order certifying the motion to the Commission. In view of the disposition to be made of this matter, it is here noted that while section 3.9(a)(1) of the rules refers to a move for amendment of a complaint as an "application for amendment," it is nevertheless a motion within the meaning of section 3.8(e) and is subject to the provisions thereof, including the right of a party to answer.

The motion for amendment of the complaint will be remanded to the hearing examiner for appropriate action in conformity with the foregoing views.

ORDER REMANDING MOTION FOR AMENDMENT TO HEARING EXAMINER

The hearing examiner, by order filed on May 13, 1958, having certified to the Commission a motion for amendment of the complaint, theretofore filed by counsel in support of the complaint; and

The Commission, for the reasons set forth in its accompanying opinion, having determined that said motion should have been considered and ruled upon by the hearing examiner:

*It is ordered*, That the aforesaid motion be, and it hereby is, remanded to the hearing examiner for appropriate action in conformity with the Commission's opinion.

## WARD BAKING CO.

*Docket 6833. Order and Opinion, June 23, 1958*

Order vacating initial decision dismissing complaint in section 2(d) Clayton Act proceeding and remanding matter to hearing examiner for further consider-