formed decision of the appeal and that the respondent's request for oral argument should be denied:

It is ordered, That hearing examiner's rulings excluding Commission Exhibits for Identification 397 through 403(b) be, and they hereby are, reversed.

It is further ordered, That the interlocutory appeal be, and it hereby is, otherwise denied.

CAPITOL RECORDS DISTRIBUTING CORPORATION

Docket 8029. Order and opinion, Mar. 1, 1961

Interlocutory order remanding motion to amend complaint for determination of the hearing examiner.

OPINION OF THE COMMISSION

By the COMMISSION:

Counsel in support of the complaint, by motion filed December 5, 1960, requested the Commission to amend the complaint in this proceeding. By order entered January 9, 1961, the Commission, after noting that the motion should have been addressed to and ruled on by the hearing examiner, referred the matter to the examiner "for appropriate disposition." The substitute hearing examiner, apparently misunderstanding the purport of the referral, has now certified the motion back to the Commission, having observed that in his opinion the authority to grant or deny the motion resides only in the Commission. In an effort to set at rest some of the confusion and uncertainty which seems to exist among the hearing examiners and counsel appearing before them concerning the authority of hearing examiners to amend complaints, the Commission is here expressing its views on this subject for the benefit of all concerned.

The rule providing for the allowance of amendments to pleadings by hearing examiners (§3.9, Rules of Practice) is relatively new in the Commission's practice. It was included for the first time in the Rules published in the Federal Register on May 6, 1955, and made effective May 21, 1955. Prior to that time, all amendments of complaints of whatever nature were made by the Commission itself. It was the Commission's position, based on the language of Section 5(b) of the Federal Trade Commission Act,[1] that this was mandatory for the reasons that the authority to issue complaints was vested solely

1 "Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be in the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint."

in the Commission; that a substantive amendment was tantamount to the issuance of a new complaint; and that, consequently, amendment power must be exercised by the Commission and was nondelegable.

In 1954 and 1955, however, this question was reconsidered. In this connection, it was noted that the legislative history of the Federal Trade Commission Act indicated no intention to set up Section 5 as a legal strait jacket. When introduced in the House, for example, the measure provided simply for notice of hearing. The Senate changed this to "complaint," and in the Senate version of the bill there was no mention of the public interest. In the closing days of the debate, Senator Lane expressed the fear that the Commission would while away its time in minor channels among small traders and that it would solemnly sit in judgment "in the effort to ascertain whether a man had taken an unfair advantage of his competitor by crossing his honey bees with lightening bugs in order that they might gather honey at night while those of the competitor were asleep" without ever "reaching the larger and more dangerous combinations which have secured a strangle hold on the food lockers of every poor family in the country." [2] Subsequently, the reference to the public interest was added in joint conference. This, apparently, was simply an additional guiding yardstick for the Commission, and there is no evidence that it was intended as a prohibition against reasonable delegation of authority by the Commission, for, as Section 3 of the Act expressly provides, "The Commission may, by one or more of its members, or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the United States."

The Commission was also convinced that the Supreme Court's decision in *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197 (1938), while not dispositive of the question insofar as the practice in this agency was concerned, did throw some light on the general subject. The original complaint in that case related to an employer's discharge of five employees and alleged unfair labor practices in the employment of industrial spies and undercover operatives and in a number of particulars. During the course of the hearing the hearing examiner allowed amendments of the complaint to add another employee to those alleged to have been wrongfully discharged and to supply an omitted allegation that the other unfair labor practices had affected commerce. At the close of the evidence, the examiner also granted a motion to conform the pleadings to the proof. The Supreme Court held that the amendments "were discretionary rulings which afford no ground for challenging the validity of the hearing." This holding, we think, is significant, even though the statute under which the Labor Board

[2] *Trust Debates*, Volume 2, p. 1135.

operates expressly provides for delegation of the Board's authority to issue complaints and to make amendments, for the Court in its decision made no mention of the statute and may well have intended its language to be applicable to administrative proceedings generally.

That the Congress in enacting the Administrative Procedure Act must have entertained the same view is shown by the legislative history of that Act. In Section 7, broad powers of delegation to hearing officers are provided, which, however, do not expressly include the power to amend complaints. However, when the bill, S. 7, was before the Congress, the Attorney General addressed the following comment to the Chairmen of the House and Senate Judiciary Committees, to which no objection was made:

> Section 7(b): The agency may delegate to a hearing officer any of the enumerated powers with which it is invested. The enumeration of the powers of hearing officers is not intended to be exclusive.[3]

And the Senate Judiciary Committee, in reporting the bill, had previously indicated an intent to follow the recommendations of the Attorney General's Committee on Administrative Procedure, which had criticized the Commission for its failure to delegate its powers.[4] Furthermore, Section 7(b) of the Act expressly provides, *inter alia*, that hearing officers shall have authority, subject to the published rules of the agency and within its powers, " to * * * (9) take any other action authorized by agency rule consistent with the Act." Thus, under the terms of the Act, the limitations on an agency's power to delegate are: (1) The power delegated must be within the power of the agency; (2) The delegation must be by agency rule; and (3) The action must be consistent with the terms of the Administrative Procedure Act.

Acting under this authority, the Commission, in 1955, amended its Rules of Practice to expressly empower its hearing examiners, "upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties," to "allow appropriate amendments to pleadings." The only limitation was and is that an amendment of a complaint must be "reasonably within the scope of the proceeding initiated by the original complaint." Whether or not, in view of other provisions of the Administrative Procedure Act, the Commission might have extended this delegation to the *issuance* of complaints is not here material. This the Commission, in any event, has not chosen to do. (See §3.3, Rules of Practice, providing for the commencement of an adjudicative proceeding by the issuance and service of a complaint "by the Commission.") Thus,

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[3] Administrative Procedure Act, Legislative History, 79th Congress, 2nd Session, Senate Document No. 248 (1946), pp. 228 and 410.

[4] "The statement of the powers of administrative hearing officers is designed to secure that responsibility and status which the Attorney General's Committee stressed as essential (Final Report, pp. 43–53, particularly at pp. 45–46 and 50)." *Id.*, p. 29.

under the Commission's present practice, the *issuance* of a complaint, or even an amended or supplemental complaint, is regarded as an administrative function to be exercised by the Commission itself. On the other hand, the allowance of *amendments* to complaints already issued is viewed as a quasi-judicial function, the performance of which, subject only to the limitation noted, is vested in the hearing examiner. In this case, therefore, as in all similar cases, the question for decision is whether the requested amendment is or is not "reasonably within the scope of the proceeding initiated by the original complaint."

The extremities of the concept enunciated by this statement of limitation have never been specifically stated. Certainly there are many proposed amendments, such as those intended to merely clarify the allegations of a complaint, or to add examples of practices alleged to be unlawful, or to correct typographical errors or omissions, or to specify dates, which are not excluded from those to be ruled on by the examiner. It is doubtful, however, that the formulation of any inflexible standard applicable to all types of amendments is possible. Subject to the principle that the Commission reserves to itself the discretionary determination of when there is reason to believe the law has been violated and when the public interest requires the institution of a proceeding, as well the authority to frame the charges, the question of whether requests for material amendments are within the intendment of the rule delegating authority to hearing examiners must, of necessity, depend on the particular circumstances of each case.[5]

In the case now before the Commission, the complaint alleges, in part, that Capitol Records Distributing Corporation, a Delaware corporation, is engaged in the sale and distribution of phonograph records. It further alleges that in the course and conduct of this

[5] For examples of prior treatments of this subject, see Docket 6486, *The Goodyear Tire and Rubber Company,* Order Affirming Hearing Examiner's Order Amending Complaint, issued October 26, 1956, recognizing the examiner's authority to amend a complaint by adding as a party respondent a subsidiary of the original respondent; Docket 7344, *The Grand Union Company,* Order Granting Interlocutory Appeal, and accompanying opinion, issued October 14, 1957, remanding a proceeding to the examiner to entertain a motion to substitute as parties respondent subsidiaries of the original respondent; Docket 6961, *Hafner Coffee Company.* Order Remanding Motion for Amendment to Hearing Examiner, issued June 4, 1958, directing the examiner to rule on a motion to substitute an individual for a nonexistent corporation erroneously named in the original complaint; Docket 7207, *Forster Mfg. Co., Inc.,* Order Denying Respondents' Interlocutory Appeal, issued September 10, 1959, affirming the examiner's authority to amend a complaint so as to clarify the allegations. And for examples of situations in which the Commission in the exercise of its administrative responsibility has itself directed the issuance of amended and supplemental complaints, see Docket 6458, *Food Fair Stores, Inc.,* Order Disposing of Interlocutory Appeal, issued March 12, 1957; Docket 6459, *Giant Food Shopping Center,* Order Disposing of Interlocutory Appeal, issued May 8, 1957; Docket 6914, *Waltham Watch Company,* Order in Disposition of Motion Certified by Hearing Examiner, issued March 26, 1958; and Docket 7195, *Hoving Corporation,* Order Disposing of Motion Certified by Hearing Examiner, issued March 9, 1959.

business, the company has indulged in certain acts and practices which are charged to be unlawful. In essence and aside from the unnecessary and redundant facts alleged to be the history of the shift from live to recorded performances, the increase of sales of records through "exposure," etc., the acts and practices so characterized consist of a course of conduct in which the respondent secretly induces or influences disc jockeys and others to enhance the popularity of records in which the respondent has a financial interest by "exposing" or playing such records on programs broadcast over radio and television stations. The means or method by which this is alleged to be accomplished is the negotiation for and disbursement of "payola," defined as, among other things, "the payment of money or other valuable consideration to disc jockeys," etc. The amendments requested are (1) the addition of Capitol Records, Inc., a California corporation, as a party respondent, which company, it is alleged, owns all the capital stock of the present respondent and participates in the control of its activities, and (2) a redefinition of "payola" to include without qualification the practice of influencing or attempting to influence disc jockeys and others to broadcast records on any basis other than on their own independent choice, and a restatement of the theory on which such practice is alleged to be deceptive to the public and therefore unlawful.

Such amendments, it seems to us, obviously relate only to details. The subject matter of the action and therefore "the scope of the proceeding" is the alleged practice of deceiving the public by secretly contriving to have records in which the respondent has a financial interest selected and played on broadcast programs on a basis other than their own merits. Clearly, the requested amendments, involving only the addition of a party respondent whose financial interest in the records and whose participation in the practices are alleged to be the same as those of the original respondent, and a restatement of the method employed in effectuating the practice alleged to be unlawful, are so related to the subject matter of the proceeding as to be well within its "scope." The fact that they are not strictly within the original complaint is immaterial, for if they were, no amendment would be needed. They do not, however, purport to cover any new or different practices. No changes are alleged in any of the circumstances which led the Commission to issue the complaint. No different determinations are necessary with respect to the belief that a violation of law has occurred or that the public interest required the initiation of the proceeding. The Commission's prior action on these questions will remain unchanged. The motion for the amendments, while seeking the addition of a respondent and clarification of the pleading, actually is only an attempt on the part of counsel to describe more accurately the situation the

Commission itself intended to deal with when it issued the complaint originally. As such, it is a procedural step looking to a ruling by the trier of the facts in the exercise of his quasi-judicial function, and, thus, falls within the category of actions which the Commission has delegated to its hearing examiners.

This matter will be remanded to the examiner for an exercise of his sound discretion in determining whether in the circumstances the motion should be granted or denied.

ORDER REMANDING RECORD TO HEARING EXAMINER

The hearing examiner, by order entered January 24, 1961, having certified the record herein to the Commission for such action as the Commission may deem appropriate with respect to a motion to amend the complaint, filed by counsel in support of the complaint; and

The Commission, for the reasons set forth in the accompanying opinion, being of the view that the motion is one which should be ruled upon by the examiner:

It is ordered, That the record be, and it hereby is, remanded to the hearing examiner for such ruling.

H. P. HOOD & SONS, INC., ET AL.

Docket 8273. Order, Mar. 2, 1961

Order denying motion to disqualify hearing examiner currently presiding in factually related case.

This matter having been considered by the Commission upon the motion and affidavit of counsel for respondent The Great Atlantic & Pacific Tea Company, Inc., requesting that the hearing examiner duly assigned to this proceeding be disqualified and removed by reason of the fact that he had previously been assigned to and is currently engaged in presiding over adjudicative hearings in a factually related case; and

It appearing that pursuant to §3.15(f)(2) of the Commission's Rules of Practice the hearing examiner was served with a copy of the motion and that he has not elected to disqualify himself; and

It further appearing that respondent's motion and affidavit make no claim that the hearing examiner is biased or prejudiced or that he is not fully capable of conducting the duties of a presiding officer in this case, but, on the other hand, said motion and affidavit contain only speculation and conjecture that the hearing examiner will be unable to keep separate in his mind the facts adduced in the two factually related cases, thus depriving respondent of a fair hearing; and

The Commission having concluded that the hearing examiner's