"WORK OF A TRIAL EXAMINER"

ADDRESS

of

EDWARD C. JOHNSON

Trial Examiner

Before the

S. E. C. Local #5

UNITED FEDERAL WORKERS OF AMERICA

Washington, D. C.
May 16, 1939

In recent years we have witnessed the rapid growth of quasi-judicial agencies or so-called Administrative Tribunals. The Securities and Exchange Commission is an example, and a good one, of an Administrative Tribunal. In our own S.E.C. when a case has reached the stage where it becomes necessary to hold a hearing the Commission designates a Trial Examiner to preside, administer oaths, subpoena witnesses, compel their attendance, take testimony and to perform all duties in connection therewith which are authorized by law. The question which at once arises is - just why is a Trial Examiner necessary? In the first place the Commissioners themselves are entirely too busy to preside at every case set down for a hearing. During the past 10 months I am advised that the Commission set down for hearing over 300 cases which were presided over by Trial Examiners. You can then readily see that the Commissioners would have little time for anything else if they were called upon to listen to all of the testimony in these proceedings. Therefore as a matter of internal organization the Trial Examiners are subordinated to no one else in the Commission other than the Commissioners themselves. In reality we Trial Examiners are delegated by the Commissioners to preside at hearings in their stead in order to ascertain the facts in contested matters, simplify these facts, concisely state them, and then make our report of these facts direct to the Commission.

At this time it might be appropriate to ask just why it has become necessary in our complex economic set-up to have Administrative Tribunals presided over by Commissioners or Trial Examiners instead of looking to the Courts and Judges to adjudicate the matters which come before us. In years past the Courts were the tribunals to which we appealed, and yet, there is a vital difference existing between the Courts and Administrative Agencies as they now exist. Professor Brown of Washington University has aptly described these differences in the following language: "A Court of Justice is essentially passive, acting only when its jurisdiction is appealed to, undertaking on its own part none of the burden of preparing and presenting the cause, and rendering its decision only on the case as presented by the parties litigant." Now, the function of most administrative tribunals is much more dynamic than this. They are not mere substitutes for Courts of law. The Administrative Tribunals are invested by legislative mandate with the positive duty of executing and carrying into effect certain public policies and orders.

In some respects the S.E.C. is similar to a court in that it not only investigates and prosecutes, but decides issues before it. The issuance of Stop Orders might be said to be a judicial function. And yet the Commission exercises legislative as well as administrative functions. As an example of the former (legislative) the rule making provisions may be cited and of the latter (administrative) the enforcement of the various Acts which we administer.

The Supreme Court has already said 1/ that there is nothing unconstitutional in uniting in one body these three powers. The S.E.C. doesn't sit still and wait for cases to be brought to it in order to decide issues that have already been framed by litigants on the outside. This Commission maintains staffed Regional Offices throughout the country

---

1/ *Prentis* vs *ACL.*, 211 U.S. 210.

for the purpose of seeing that the mandate of Congress as contained in the 3 Acts we administer, is effectively carried out. The average Court Docket contains cases involving the usual real estate transactions, contracts, wills, divorce matters and the like. Granting to the judges of these Courts superior knowledge in such matters, we cannot concede in the same breath nor would many of the Judges have us assume that they are experts in the Public Utility field or in other matters over which the S.E.C. has jurisdiction. The Supreme Court has already recognized such agencies as the S.E.C. as a body of experts, 2/ administering remedial legislation 3/ which should be broadly construed in the national interest of investors and consumers as opposed to the narrow individual interest of litigants prevailing in our Courts of law. The judges of these Courts simply do not have the time to become experts in all matters over which Administrative Agencies have jurisdiction and it is because of this that there has grown the necessity of seeking advice from such expert tribunals as the S.E.C.

Expert knowledge is to be had only through that continuous supervision of a field of activity by trained individuals who have spent long periods of time in the study of problems peculiar to that field. Then too the cost of appearing before such Tribunals is less and more prompt action is had than the traditional resort by litigants to the Courts with their sometimes interminable appeals.

Now For Our Procedure: The General Counsel of this Commission in an address delivered recently before the Association of American Law Schools has described the proceedings taken by this Commission when a case is set down for hearing. He said the hearings are public before a Trial Examiner. The testimony is stenographically reported and becomes a part of the record. Counsel to the Commission represents the Commission and the respondents are represented by Counsel of their own selection. I want to say right here that Commission's Counsel receive no more consideration in the presentation of their case than Counsel for the respondents do. Commission's Counsel are obliged to prove their case in accordance with the spirit and purpose of the well known rules of evidence (as distinguished from the technical rules of common law evidence) even though there is no jury present. Although it has been said that we Trial Examiners have the peculiar privilege of applying the spirit of the rules of evidence and not precisely the letter thereof I am not quite able to concur with Dean Wigmore when he suggests that we Trial Examiners might adopt the "popular" theory instead of the "technical" view as to admitting evidence for the reason that any findings of fact made by the Trial Examiner must be based on legally competent evidence. It is true that at times, since we have no jury to contend with, we do, to a limited degree liberalize the application of the strict rules of common law evidence. The degree of liberalization of the rules of evidence would depend to a certain extent upon whether we are acting judicially (as in a stop order hearing), legislatively or administratively (for the purpose of taking testimony upon which remedial legislation is to be based). I believe that the substance and reason at the base of the common law rules of evidence should be honored.

2/ *Keppel Case*, 291 U.S. 304.

3/ *New Haven* vs. *ICC*, 200 U.S. 361.

However, I do not urge, but, on the contrary suggest, that the technical rules of evidence should not be blindly followed. The proof should be reliable and authentic and every care should be taken to restrict findings to those points upon which the record contains substantial authentic evidence. By all means the accent should be on authenticity rather than technical common law competency of evidence. In at least one Supreme Court decision, which has often been quoted with approval, involving the Interstate Commerce Commission, Mr. Justice Lamarr as early as 1913 said: 4/ "The Commission is an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties." Indeed, in doing this, the Supreme Court in the same decision 5/ added the warning that "the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended * * * (trial examiners) Commissioners cannot act upon their own information as could jurors in primitive days."

The Commission has formulated rules of practice providing the basic conditions for the conduct of fair hearings, such as adequate notice of hearing, opportunity to appear and to present evidence, cross examination, objections and exceptions to rulings on evidence and the like. It will thus be seen from the foregoing that careful provision is made in the conduct of our hearings to safeguard the substantive rights and procedural remedies of the litigating parties and that to a very large extent the hearings conducted before a Trial Examiner are modelled after judicial hearings.

As Trial Examiner our duty is to preside over the hearings. We have the necessary authority over the deportment of those in the hearing room. (We can't, however, put a witness in jail for contempt for refusing to answer a question. If the Commission thinks the witness should answer then the Commission can appeal to the Courts and if the Courts sustain the Commission in its belief that the answer is material and relevant to the proceedings then the Court orders the witness to answer and if the witness still refuses to answer he can then be cited for contempt.) The Trial Examiner's further duty is to rule on the admissibility of evidence and to control matters of procedure at the hearing and to pass on motions addressed to pleadings in certain respects.

After the hearing has been concluded our rules of practice provide that each party may file with the Trial Examiner a statement in writing setting forth such party's request for specific findings. These requested findings may be accompanied by a brief in support thereof. Proposed findings and the brief supporting them are served on all parties. Ten days after the receipt of the transcript of testimony the Trial Examiner must file with the Commission his Advisory report containing findings of fact which as Dean Landis of the Harvard Law School has said should "focus (or narrow) the issue". These findings are likewise sent to all interested parties.

4/ *Interstate Commerce Commission* vs *Louisville & N.R. Co.*, 227 U.S.

5/ Ibid.

If any interested party feels aggrieved at the Trial Examiner's findings then within 5 days he may except to the Commission in writing to the findings or any part of them or he may except to the failure of the Trial Examiner to make certain specific findings. Briefs may be filed in support of such exceptions and upon written request of any party the Commission usually grants him an opportunity to orally argue his case before the Commission.

Upon the completion of the oral argument the Opinion Section of the General Counsel's office, which by this time has the entire record before it, and which is in no way connected with either the Trial Examiner or the attorney who presented the case, proceeds to draft an opinion for the Commission. Copies of this first draft opinion are sent to the various members of the Commission for their consideration and at a later time the Commissioners together with members of the opinion writing section discuss the proposed draft opinion. At these conferences the Commission may either adopt, modify, amend or write an entirely new opinion themselves. Of course, it is needless to say that every order of the Commission must be supported by findings of fact basic as well as ultimate and the reasons for every determination must be formulated in the Commission's opinion. And as Mr. Justice Frankfurter recently said April 17, 1939, in the Rochester Telephone Case, "So long as there is warrant in the record for the judgment of the expert body it must stand." Therefore the Commissioners are fully acquainted with the record before they render their decision and insofar as I can see every requirement of the famous case of *Morgan* vs. *Wallace* has more than been met in giving fair play to all parties before us.

---oOo---