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CLAYTON ACT QUANTITY LIMIT PROCEEDINGS

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In spite of its broad powers over commercial practices under the Federal Trade Commission and Clayton Acts,[1] the formal regulatory work of the Federal Trade Commission was, until 1949, confined to a quasi-judicial process of deciding individual cases of violations of those statutes. The practical effect of the accumulation of rulings over three decades is much the same as that of quasi-legislative rule-making, to be sure, in that general principles can be deduced from the body of Federal Trade Commission decisions and stated almost as a precise code.[2] This has been done in the Code of Federal Regulations.[3] Yet such "principles of decision," though having an authoritative and statutory ring to them, are technically not administrative rules. The commission's complaints, therefore, do not allege that the respondent has violated a particular rule promulgated by the commission. Rather they charge that he has committed certain acts which are "unfair methods of competition" or "unfair or deceptive acts or practices" in interstate commerce, within the meaning of the Federal Trade Commission Act,[4] or which constitute a violation of one or more of the sections of the Clayton Act administered by the commission.[5] Thus the commission's work differs in form from that of certain other agencies which are required by their statutes to formulate rules.[6]

The Robinson-Patman Act,[7] which amended the Clayton Act in

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[1]38 Stat. 717 (1914), 15 U. S. C. § 41 (1946), as amended, 52 Stat. 111 (1938), 15 U. S. C. § 44 (1946); 38 Stat. 730 (1914), 15 U. S. C. § 12 (1946), as amended, 49 Stat. 1526 (1936), 15 U. S. C. § 12-26 (1946).

[2]For the quasi-legislative function of the Federal Trade Commission see Federal Trade Commission v. Raladam Co., 283 U. S. 643, 51 S. Ct. 587, 75 L. ed. 1324 (1931); Rathbun v. United States, 295 U. S. 602, 55 S. Ct. 869, 79 L. ed. 1611 (1935); Sears Roebuck v. Federal Trade Commission, 258 Fed. 307 (C. C. A. 7th, 1919).

[3]16 Code Fed. Regs. c. 1 (1938).

[4]Sec. 5; 52 Stat. 111 (1938), 15 U. S. C. § 45 (1946).

[5]Secs. 2, 3, 7; 49 Stat. 1526 (1936), 15 U. S. C. § 13; 38 Stat. 731 (1914), 15 U. S. C. § § 14, 18 (1946).

[6]See 21 and 27 Code Fed. Regs., setting forth the elaborate rules formulated by the Food and Drug Administration of the Federal Security Agency and by the Alcohol Tax Unit of the Bureau of Internal Revenue, Treasury Department, with regard to standards, quality, and labeling.

[7]49 Stat. 1526 (1936), 15 U. S. C. § 13 (1946).

1936, conferred upon the Federal Trade Commission a new kind of power, the authority to make substantive rules setting quantity limits for commodity price differentials under specified conditions. The power is narrow in the scope of its application but sufficiently deep within that limited scope to have raised, as will be seen shortly, some vexing problems within the first few months of its attempted exercise. It was not invoked for some thirteen years, until September 28, 1949, when the commission gave notice that it would conduct a hearing on the establishment of quantity limits for replacement rubber tires.[8]

The Clayton Act prescribes no procedure for the establishment of quantity limits, beyond requiring "due investigation and hearing to all interested parties,"[9] and it was to the Administrative Procedure Act of 1946[10] that the commission looked for a pattern of procedure that would satisfy prevailing ideas of administrative propriety.

Problems Presented

At least three questions of administrative law[11] are posed by this tentative venture of the Federal Trade Commission into the field of substantive rule-making:

1. Does the procedure adopted meet all requirements of the Administrative Procedure Act?

2. At what stage in a quantity limit proceeding will affected parties be deemed to have exhausted their administrative remedy for the purpose of obtaining judicial review?

3. Can judicial review, when obtained, include an examination of the economic data and conclusions underlying the limits that the commission has imposed?

Nature and Purpose of Quantity Limits

Some familiarity with the concept of quantity limits and the purpose they serve is essential to an analysis of the problems raised.

Section 2 of the original Clayton Act of 1914[12] forbade price discrimination between different purchasers of commodities, where such discrimination might substantially lessen competition or tend to

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[8]Fed. Reg., October 4, 1949.

[9]Sec. 2(a); 49 Stat. 1526 (1936), 15 U. S. C. § 13(a) (1946).

[10]60 Stat. 237 (1946), 5 U. S. C. § § 1001-1011 (1946).

[11]Apart from the administrative law aspects, there is a basic constitutional question of the power of Congress to control the price structure of industries not declared to be affected with a public interest, without the justification of economic depression, war, or other national catastrophe.

[12]38 Stat. 730 (1914), 15 U. S. C. § 13(a) (1946).

create a monopoly in any line of commerce. That prohibition was limited by a proviso permitting, among other things, discrimination on account of differences in the quantity of the commodity sold.

The commission's proceeding against the Goodyear Tire and Rubber Company in 1935[13] shows the kind of abuse which quantity limits were designed to rectify and illustrates, too, the commission's difficulties under the language of the original Clayton Act. The tire company was charged with price discrimination on the following set of facts:[14]

From 1926 to 1933 Goodyear had maintained an arrangement with Sears Roebuck and Company whereby it provided Sears with all of the latter's tire requirements, the tires thus sold being advertised and marketed by Sears under its own brand names and through its own retail outlets. Throughout the period of the agreement, 19,000,000 tires were furnished to Sears, with Goodyear realizing thereon a net profit of about $7,700,000. In the same eight years Goodyear earned a net profit of about $20,400,000 on its direct sales of equal volume to other retail outlets. The difference of about $12,700,000 was found by the commission to represent a price discrimination to the injury of Goodyear's retailer-customers other than Sears, for the reason that the difference in net return to the tire company was not, according to the company's own accounting methods, explained by savings in the cost of transportation and selling. The commission, while recognizing that quantity discriminations should be permitted to some extent, when they involve an actual economic utility worthy of preservation, held that the quantity exception of the proviso in the Clayton Act permitted, not unrestrained price discriminations under the guise of discounts for greater quantities, but only those differentials having a reasonable relation to differences in cost.

The commission recognized further that quantity sales may be more economical than small ones, but it condemned the principle of quantity discounts based on annual sales unless there was a demonstrable cost justification for them. Otherwise, the commission reasoned, a large manufacturer might, by disposing of its whole output to a single dealer or a few, set into motion a trend toward monopoly or

[13]22 F. T. C. 232.

[14]Since this article does not undertake to discuss the merits of quantity limits, or to refute the plausible arguments which can be marshaled against the imposition of such limits in a particular industry, the statement of facts given here is necessarily sketchy. It is intended merely as an illustration—for those who may be unfamiliar with the concept of quantity limits in trade regulation—of the general evil against which Congress acted in adopting the quantity-limits proviso of the Robinson-Patman Act.

achieve an unreasonable restraint of trade—evils for the correction of which the Clayton Act was enacted. In due course the commission issued its order to cease and desist.

Upon judicial review, the commission's order was set aside,[15] the court holding that Section 2 of the Clayton Act did not empower the commission to forbid price discrimination on account of quantity, even when the discrimination did not reflect differences in cost, and indeed there was no such explicit provision in the original statute.

Meanwhile, the commission had recommended to Congress, with other suggested modifications, a change to repair the deficiency in the language of Section 2, declaring:

> That unless the price discrimination permitted "on account of quantity" shall make "only due allowance" therefor, Section 2 of the Clayton Act may be readily evaded by making a small difference in quantity the occasion for a large difference in price. If the section is to have any vitality it must either be interpreted and enforced to that effect or it should be amended to that effect.[16]

A number of bills proposing changes in Section 2 of the Clayton Act, to this and other purposes, received final expression in the Robinson-Patman Act, approved June 19, 1936. That statute changed the original provision respecting quantity limits so as to reach discriminations based on volume of purchase, where the result would be the destruction of small traders, however efficient, to the competitive advantage of their huge—though not necessarily more efficient—rivals.

The amended Section 2 prohibits price discrimination. In the case of discriminations based on quantities, however, it allows an absolute defense, to be made out by a showing that the discrimination merely reflects differences in cost of manufacture, sale, or delivery resulting from the differing quantities sold or delivered.

From this amendment curing the defect of the original Clayton Act with respect to discriminations based on quantity, the commission drew new vigor for its regulation of discriminatory pricing methods. Numerous orders to cease and desist from unjustifiable quantity discounts were issued, and one of these successfully withstood a test in the Supreme Court of the United States.[17] In that

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[15]The Goodyear Tire & Rubber Co., Inc. v. Federal Trade Commission, 101 F. (2d) 620 (C. C. A. 6th, 1938), *certiorari denied,* 308 U. S. 557, 60 S. Ct. 74, 84 L. ed. 468 (1939).

[16]Sen. Doc. 4, 74th Cong., 1st Sess. (1936).

[17]Federal Trade Commission v. Morton Salt Co., 334 U. S. 37, 68 S. Ct. 822, 92 L. ed. 1196 (1948), *reversing* Morton Salt Co. v. Federal Trade Commission, 162 F. (2d) 949 (C. C. A. 7th, 1947).

case, the Court reviewed the legislative history of the Robinson-Patman Act and held that discounts in the wholesale prices of packaged salt, unjustified by related savings in the cost of manufacture or distribution, for quantities so great that only five national grocery chains could qualify for them, were clearly of the evil at which the amendment was directed.

It is settled law, therefore, that the Federal Trade Commission may order the cessation, in particular cases, of economically unjustifiable quantity discounts under Section 2(a) of the Clayton Act, where such discounts are, or are likely to be, harmful to competition in interstate commerce. Cost justification remains, in theory, a defense to a charge of this species of price discrimination,[18] but it is significant —perhaps of the imperfection of existing cost accounting technic— that there has been as yet no successful attempt by a respondent to a commission proceeding to demonstrate factually that his quantity discounts are a consequence of actual economies in his methods of sale or distribution.

The commission's power with reference to quantity limits does not, however, stop at the ordinary adversary proceeding to determine whether some individual has violated Section 2(a) of the Act. Long in disuse, the "proviso to the proviso" in Section 2(a) received its first breath of life in 1949 when the commission, conformably to the Administrative Procedure Act of 1946, amended its Rules of Practice and its General Procedures to include therein a Procedure for Establishing Quantity Limits.[19]

Section 2(a) of the Clayton Act deserves patient reading. Briefly considered in its application to quantity limits, the section forbids price discrimination in specified circumstances but provides in the first proviso a defense by cost justification. That is followed by a second proviso:

> *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, *as to particular commodities or classes of commodities,* where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in

[18]"Such discounts, like all others, can be justified by a seller who proves that the full amount of the discount is based on his actual savings in cost. The trouble with this phase of respondent's case is that it has thus far failed to make such proof." Federal Trade Commission v. Morton Salt Co., 334 U. S. 37, 48, 68 S. Ct. 822, 829, 92 L. ed. 1196, 1205 (1948).

[19]16 Code Fed. Regs., c. 1, Pts. 2 and 7 (1938); Fed. Reg., Jan. 14, 1949.

> any line of commerce; *and the foregoing* [the defense of cost justification] *shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established.* (Italics supplied.)

By cloaking the commission with the power to regulate quantity discounts as to "commodities or classes of commodities" the Congress has effectively delegated a quasi-legislative power to the commission, which consequently is not limited to a case-by-case method of correction when it acts to eliminate an industry-wide abuse in quantity discounts.

As the second italicized portion in the proviso quoted above indicates, the defense of cost justification, though still available to a respondent in an ordinary adversary hearing on a complaint of price discrimination, cannot be raised by a respondent to a complaint alleging violation of a quantity limit established by the Commission.

The drafters of the Robinson-Patman Act were quite willing that provable cost justification, in the ordinary case of price discrimination, should be a complete defense. A previous version of the statute[20] had gone so far as to fix a definite maximum limit of one car lot, beyond which price differentials should be illegal. The proponents of this feature were inspired by precedents set in other administrative agencies. It had long been a practice of the Interstate Commerce Commission to forbid rate differentials keyed to quantities exceeding single carloads,[21] and the Grain Futures Act of 1922, as amended in 1936,[22] authorized the administrative fixing of limits in commodity trading.

Price differentials actually traceable to differences in cost to the seller manifestly are only an *apparent* price "discrimination," for they are free of the taint of unjust dealing. That they may, nevertheless, present a genuine peril to competition, where only a handful of purchasers can buy in the volumes necessary for receiving the most favorable discount, was perceived years ago by the Interstate Commerce Commission when it held:

> ... to give greater consideration to trainload traffic than to carload traffic would create preferences in favor of large shippers and be to the prejudice of small shippers and the public.[23]

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[20]S. 3154, 74th Cong., 2d Sess. (1936).

[21]Rickards v. A. C. L. Ry., 23 I. C. C. 239 (1912); Ananconda Copper Mining Co. v. C. & E. Ry., 19 I. C. C. 592 (1910); Planters Compress Co. v. Rys., 11 I. C. C. 382, 402 (1905); Providence Coal Co. v. Providence & Western Ry., 1 I. C. C. 363 (1887).

[22]49 Stat. 1491 (1936), 7 U. S. C. § 6(a) (1946).

[23]Ananconda Copper Mining Co. v. C. & E. Ry., 19 I. C. C. 592 (1910).

The Senate Committee Report on the proposal to add the quantity limit proviso to the Clayton Act[24] commented:

> This proviso is added by recommendation of your committee. It is designed to enable, when necessary, the determination of quantity limits as to various commodities, beyond which quantity price differentials shall not be permitted, even though supported by differences in cost. It rests upon the principle that where even an admitted economy is of a character that is possible only to a very few units of overshadowing size in a particular trade or industry, it may become in their hands nonetheless the food upon which monopoly feeds, a proboscis through which it saps the lifeblood of its competitors; and that in forbidding its use and foregoing its benefits, the public is but paying a willing price for its freedom from monopoly control. A similar limitation has been applied without challenge for nearly half a century in the field of transportation, in refusing to extend freight rate differentials beyond the car lot quantity.[25]

Hence the quantity limit proviso, considered along with its legislative history, constitutes a legislative declaration that in the case of certain commodities price differentials based on quantities may be an evil tending to monopoly. These commodities are in no way enumerated by the statute, which, instead, authorizes the Federal Trade Commission to discover them and to establish corrective limits.

Under the quantity limits proviso, the commission has the whole and highly variegated field of interstate commerce in which to wield its authority. The power is discretionary: the commission may defer its exercise, as it has done for thirteen years; it may move to set limits for a single commodity, as it has done in the past year; or it may conceivably take upon itself the ambitious task of fixing limits for numerous commodities.

At any rate, Congress has prescribed a remedial procedure for an evil that it has condemned and described in abstract terms, leaving it to an administrative vicar to determine the location and extent of the evil, and to apply the remedy.

Adoption of the Quantity Limit Procedure

After passage of the Robinson-Patman Act amending the Clayton Act, many independent tire dealers continued to complain to the commission that the higher prices charged them by the tire manu-

[24]Sen. Rep. 1502, 74th Cong., 2d Sess. (1936).

[25]The quoted extract is also noteworthy as evidence that the quantity limits proviso was aimed at industrial bigness *per se*.

facturers were driving them out of business. Some of these grievances were presented to the Small Business Committee of the House of Representatives, which thereupon recommended that the Federal Trade Commission and the Department of Justice take appropriate action, failing which, strengthening amendments to the anti-trust laws would be urged.[26]

On July 7, 1947, the Federal Trade Commission took a preliminary step toward the fixing of quantity limits for replacement rubber tires by adopting a resolution that the rubber tire industry be investigated to determine whether quantity limits should be established for that commodity. Within the ensuing year, after study of the data which it had obtained, it decided that conditions in the rubber tire industry did in fact warrant a proceeding under the quantity limits proviso. Simple as such an action might have been in the contemplation of the authors of the proviso, twelve years earlier, the Administrative Procedure Act of 1946 was now a reality obliging the commission to devise a procedure that would in every way conform to that new expression of desirable standards of administrative action.

The Administrative Procedure Act[27] clearly distinguishes the two main administrative functions, rule-making and adjudication, requiring on the whole fewer safeguards of "due process" in the rule-making process than in adjudication. The Act recognizes that certain kinds of rule-making demand the formal minimum safeguards of adjudication: hearing under a presiding officer; casting of burden of proof on the proponent of the rule; opportunity to all interested persons to present oral or documentary evidence, to submit rebuttal evidence and to cross-examine; preparation of transcript of testimony, exhibits, and pleadings as exclusive basis for final action, etc.[28] On the other hand, the Act prescribes far less stringent requirements for the more general case of rule-making: notice of the proposed action in the Federal Register; opportunity to interested persons to present their views in writing, though not necessarily to present the same orally; full consideration to be accorded by the agency to all relevant matters presented in its formulation of the rules; and incorporation in such rules of a brief general statement of their basis and purpose.[29]

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[26]Annual Report No. 1, Reporting Activities of the Select Committee on Small Business, House of Representatives, Pursuant to House Resolution 18, 80th Cong., 1st Sess. (1947) 5.

[27]60 Stat. 237 (1946), 5 U. S. C. § § 1001-1011 (1946).

[28]Secs. 2 (c, d), 4, 5, 7, 8; 60 Stat. 237 (1946), 5 U. S. C. § § 1001 (c, d), 1003, 1004, 1006 and 1007 (1946).

[29]Sec. 4 (a,b); 60 Stat. 237 (1946), 5 U. S. C. § 1003 (a, b) (1946).

Summary of the Procedure Adopted

The Federal Trade Commission's Procedure for Establishing Quantity Limits[30] provides that proceedings for formulating a quantity limit rule may be initiated either by the commission on its own motion or by the motion of interested parties (paragraph (a)). At any time an interested party may request or petition for establishment of a quantity limit rule for any commodity or class of commodity, or for revision or repeal of a previously fixed rule, stating his interest and setting forth relevant facts (paragraph (b)). In its discretion the commission may thereupon conduct a non-public investigation to obtain information about existing quantity differentials and the competitive conditions prevailing in the industry in question. Data elicited in the course of the investigation are not to be disclosed except in composite form so as not to reveal business secrets (paragraph (c)). The commission's full powers of subpoena and requirement of special reports from corporations under its organic statute are invoked by the Procedure, with rights preserved to witnesses to retain copies of documents produced and transcript of testimony given (paragraph (c) (1, 2)), and to be accompanied and advised by counsel (paragraph (c) (3).

If the commission is convinced by the facts thus discovered that "available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly"[31] in the line of commerce under investigation, it is then to draft a proposed quantity-limit rule (paragraph (d) (1)) for publication in the Federal Register and to be otherwise made available to interested persons. Notice of the proposed rule is to include the rule, amendment, or repeal proposed, the purpose to be accomplished, the authority under which the rule is proposed, and the ultimate facts supporting the rule (paragraph (d) (2)).

Interested persons may present views, data, and argument *in writing* and request time for oral argument. Oral argument is permitted, however, only in the commission's discretion (paragraph (d) (3)).

After considering the results of its investigation and the views presented by interested persons, the commission will, if it deems such action necessary, promulgate a quantity-limit rule, to be published in the Federal Register and to become effective no sooner than thirty days after publication (paragraph (e)).

[30] 16 Code Fed. Regs. C.1, Pt. 2, § 2.30 (1938); Federal Trade Commission Rules of Practice, Rule XXX.

[31] The language of the quantity limits proviso, Section 2(a) of the Clayton Act, 49 Stat. 1526 (1936), 15 U. S. C. § 13 (1946).

Amendment or repeal of a quantity limit rule is accomplished by the same procedure as that prescribed for formulating new rules (paragraph (f)).

Enforcement of quantity limits follows the commission's usual procedure of investigation, issuance of complaint, hearings, argument, deliberation, and issuance of an order to cease and desist (paragraph (g)).

Comment on the Procedure

It will be readily seen that the procedure summarized above fully meets the succinct requirements of the quantity-limit proviso of Section 2(a) of the Clayton Act. How far it fulfills the demands of the Administrative Procedure Act is a question calling for a more detailed consideration.

Section 2(a) of the Administrative Procedure Act defines "rule-making" as

> ... agency process for the formulation, amendment, or repeal of a rule,

and "rule" as

> ... the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency,

including

> ... the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, *prices,* facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or *practices bearing on any of the foregoing.* (Italics supplied.)

Quantity limit rules are clearly an "agency statement of general or particular applicability and future effect, designed to implement, interpret, or prescribe law," which includes "the approval or prescription for the future of ... prices ... or practices bearing" thereon. Consequently it was concluded by the drafters of the procedure that any proceeding to fix quantity limits would constitute a "rule-making," within the intent of Section 4 of the Administrative Procedure Act.

Section 4(b) of the Administrative Procedure Act provides two alternative procedures for substantive rule-making, the choice of which is governed by the statute under which the rule is to be made. One of these is an "informal" process, whereby opportunity is afforded to interested persons to participate by submitting "written data, views

or arguments, with or without opportunity to present the same orally in any manner," the agency to consider all relevant data thus presented and to incorporate in any rules adopted "a concise general statement of their basis and purpose." This informal process was intended to provide an administrative analogue to the Congressional hearing, as Representative Walter intimated in his presentation of the committee report on the Administrative Procedure Bill.[32]

The second, and stricter, method of administrative rule-making, which might be termed the "formal" process, is prescribed—also in Section 4(b)—for cases in which the statute authorizing the rule requires that the rule be made "on the record after opportunity for an agency hearing." Where a formal proceeding is thus indicated, a characteristically quasi-judicial procedure is to be observed, in compliance with the provisions of Sections 7 and 8 of the Act.

The drafters of the quantity limit procedure believed that the fixing of quantity limits was essentially an "informal" rule-making for the following reasons:

1. Section 2(a) of the Clayton Act, though prescribing a "hearing" as a necessary preliminary to the fixing of quantity limits, does not require such a hearing to be "on the record," and therefore does not, within the language of Section 4(b) of the Administrative Procedure Act, call for the formal hearing described in Sections 7 and 8. Furthermore, the legislative history of the Administrative Procedure Act would indicate that the formal method of rule-making was intended only where the basic statute clearly contemplates, by its terms, a quasi-judicial proceeding. In this regard, it was recalled that an earlier measure to codify administrative procedure, introduced in 1941,[33] had provided that "where legislation specifically requires the holding of hearings prior to the making of rules, formal rule-making hearings shall be held." That provision was adversely criticized by a Department of Agriculture spokesman who testified on the bill, for the reason that various existing acts providing for hearings included such a requirement simply for the purpose of allowing interested parties to express their views, while the formal process, where actually intended, was explicitly described, as in the case of formal rule-making under the Federal Food, Drug and Cosmetic Act.[34]

2. In 1945, the Secretary of Agriculture, in reporting to Congress on the final version of the proposed Administrative Procedure Act,

[32]92 Cong. Rec. 5648, 5650 (May 24, 1946).
[33]S. 674, 77th Cong., 1st Sess. (1941).
[34]Senate Hearings on S. 674, 77th Cong., 1st Sess. (1941) pp. 79-81, 1515, 1520.

commented that subsection (b) of Section 4 was no longer objectionable, since it had been redrafted to relax application of the procedural requirements of Sections 7 and 8 (providing for a formal rule-making process) in cases where though a hearing is required by statute the agency is not limited to the hearing record in making its final determination.[35] Presumably the Congress concurred in this view, for the subsection underwent no further change.

3. The legislative history of the Robinson-Patman Act lends further support to the view that a formal adversary is not a prerequisite to the establishment of quantity limits. In 1936 Representative Utterback proposed an amendment which was not adopted.[36] That amendment would have added to the quantity limit proviso the language italicized below:

> ... the Federal Trade Commission, after due investigation and hearing to all interested parties, *following insofar as applicable the procedure and subject to the recourse of the courts provided in section 11 of this act,* may issue an order fixing and establishing quantity limits....

Rejection of the proposed amendment was interpreted to show Congressional disapproval of formal hearings in the establishment of quantity limits.

Opposition to the Procedure

Members of the rubber tire industry who would be placed at a disadvantage by quantity limits on price brackets in their sales of rubber tires have consistently opposed the adoption of an informal procedure, arguing that quantity limits partake of the nature of *rates,* which the Supreme Court has decided[37] can be set only after a full-dress adversary hearing. In support of the commission's final decision to draft an informal procedure stands the *Yakus* decision of the Supreme Court[38] which distinguishes between public utility rate-making, to which an adversary hearing is essential, and the fixing of maximum prices to be charged in wartime by merchants who are legally free to select their customers and even to refuse to sell at all. It was concluded by the Court that an informal hearing would afford due process of law in the latter case.

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[35]Excerpt of Secretary of Agriculture's Report to Chairman of Senate Committee on the Judiciary, quoted in Legislative History of the Administrative Procedure Act, Office of the Solicitor, Department of Agriculture (mimeographed, no date) at p. 49.

[36]H. R. Rep. 8442, 74th Cong., 2d Sess. (1936).

[37]Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S. 88, 33 S. Ct. 185, 57 L. ed. 431 (1912).

[38]Yakus v. United States, 321 U. S. 414, 64 S. Ct. 660, 88 L. ed. 834 (1944).

Section 2(a) of the Clayton Act expressly reserves to businessmen the right to select customers.[39] It would therefore appear that the fixing of quantity limits resembles more closely the setting of price ceilings, which was the issue in the *Yakus* case, than the rates charged by concerns affected with a public interest, which are obliged to serve all comers.

Pursuant to its promulgated Procedure, the commission published on September 28, 1949, notice of a hearing on fixing limits for replacement rubber tires. Appended thereto was a summary of the economic data from which the commission had concluded that such action was necessary.[40]

On November 7, 1949, a large mail order and chain store house filed a "motion for hearing,"[41] with the four major tire manufacturers soon following suit. This was no mere prayer for an opportunity to present oral argument on the merits of quantity limits for tires, as provided for in the promulgated Procedure. Rather it was a flat challenge of the validity of that Procedure and a demand for a formal adversary hearing as a matter of right.

After alleging the company's interest in the proceeding, the motion argued on this wise:

1. The proposed rule would in substance be a cease-and-desist order against the chain store operators and others similarly situated, banning quantity discounts beyond certain limits. Hence a formal hearing is just as necessary as if the proceeding were being held under a formal complaint, with the affected parties named as respondents.

2. Due process is denied in that the data in support of the proposed rule have not been fully disclosed to the affected parties, who are thus deprived of opportunity to examine and cross-examine and to rebut unfavorable testimony. Moreover, the chain store company has no chance to present its own witnesses or to subpoena witnesses and documents otherwise unavailable, which are necessary to the company's defense that existing differentials in price are not promotive of monopoly.

3. Without a complete written record of evidence and proceedings as an exclusive basis for the limits ultimately to be adopted, judicial review of whether the evidence considered by the commission

[39]"...nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade...."

[40]Federal Trade Commission File 203-1; Fed. Reg., October 4, 1949.

[41]The motion was filed by Montgomery Ward & Company, one of the main beneficiaries of quantity discounts in rubber tires.

supports the rule and whether the commission's findings are grounded in the evidence, will be impossible.

The commission did not dignify with formal action what it apparently considered to be a procedural irregularity and denied the "motions" informally by letter.

Next, the protesting parties filed petitions on December 5, 1949, and shortly thereafter, praying the commission to amend its rules to provide a formal adversary hearing in quantity limit proceedings that would include the procedural safeguards enumerated in Sections 7 and 8 of the Administrative Procedure Act. The commission denied these petitions a few days later without assigning grounds for its action.

Court Attack on the Procedure

On December 29, 1949, came the first collateral challenge to the commission's authority to fix quantity limits under its promulgated procedure. The tire manufacturers which had unsuccessfully petitioned for changes in the procedure brought actions in the district court.[42] Seizing upon the commission's denial of their petitions as a "final action" reviewable under the Administrative Procedure Act and alleging irreparable injury should they be obliged to acquiesce in the instant proceeding before the commission, the companies sought:

1. A judgment declaring that in the fixing of quantity limits the commission is subject to Sections 4, 7, and 8 of the Administrative Procedure Act, i.e., that only the formal, adversary rule-making is appropriate.

2. A permanent injunction against all further proceedings by the commission under its existing Procedure and against the commission's further proceeding in the rubber-tire matter under the notice of hearing issued pursuant to the challenged procedure.

3. An interlocutory injunction against any further proceedings in the matter, pending trial on the merits.

The grounds supporting the prayer for this relief were substantially those urged in the petitions for the amendment of the Procedure.

Non-Reviewability of the Proceeding

It is hard to discover any reviewable "final action" in the proceedings to the present. No legally palpable injury has occurred, or

[42]The Goodyear Tire & Rubber Co., Inc. v. Federal Trade Commission, United tates District Court for the District of Columbia, Civil Action 5455-'49.

The commission's motion to dismiss plaintiff's motion for a preliminary injunction for want of jurisdiction has been sustained.

can occur, from the mere promulgation of the Procedure for Establishment of Quantity Limits or from the initiation of any proceedings pursuant to its terms, and the Supreme Court has repeatedly held that until administrative actions "impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process," they are not reviewable.[43]

Procedural irregularities are of course subject to judicial review along with review of a *final* administrative action asserted to impose a legal wrong on an affected party.[44] But only rarely—and then with reluctance—have instances of such irregularities been reviewed by the courts without clear statutory authorization for such interference.[45] It is equally questionable whether a declaratory judgment can be properly rendered at this stage. The Supreme Court has recently held that the declaratory judgment, like other forms of equitable relief, should be withheld in cases of contingent questions, particularly where governmental action is involved, unless the need for equitable relief is "clear, not remote or speculative."[46]

Had the protesting companies awaited actual establishment of quantity limits, there might then have been brought into being the type of final action contemplated by the Administrative Procedure Act. Yet even then it could be plausibly argued that since there is no penalty for violation of quantity limits until the commission has issued a formal cease-and-desist order after complaint and hearings, no detriment could be suffered by the companies. Apprehensive though

[43]Chicago and Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U. S. 103, 68 S. Ct. 431, 92 L. ed. 568 (1948); Rochester Telephone Corp. v. United States, 307 U. S. 125, 59 S. Ct. 754, 83 L. ed. 1147 (1939); United States v. Los Angeles & S. L. R. Co., 273 U. S. 299, 47 S. Ct. 413, 71 L. ed. 651 (1927); United States v. Illinois Central R. Co., 244 U. S. 82, 37 S. Ct. 584, 61 L. ed. 1007 (1917).

[44]In re Electric Bond & Share Co., 73 F. Supp. 426 (S. D. N. Y. 1946); see also Morgan v. United States, 298 U. S. 486, 56 S. Ct. 906, 80 L. ed. 1288 (1936).

[45]"Where administration intention is expressed but has not come to fruition (Ashwander v. Tennessee Valley Authority, 297 U. S. 288 [56 S. Ct. 466, 80 L. ed. 688 (1936)]), or where that intention is unknown (Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U. S. 412, 429, 430 [57 S. Ct. 772, 81 L. ed. 1193 (1937)]), we have held that the controversy is not yet ripe for equitable intervention...." Eccles v. Peoples Bank of Lakewood Village, 333 U. S. 426, 68 S. Ct. 641, 92 L. ed. 784 (1948). See also Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 58 S. Ct. 459, 82 L. ed. 638 (1938); Transamerica Corp. v. McCabe, 80 F. Supp. 704 (D. C. D. C. 1948).

Even a preliminary order which has the effect of prohibiting or requiring conduct by persons subject to its operation, provided that certain further administrative action is consummated, has been held not reviewable. East Ohio Co. v. Federal Power Commission, 115 F. (2d) 385 (C. C. A. 6th, 1940).

[46]Eccles v. Peoples Bank of Lakewood Village, 333 U. S. 426, 68 S. Ct. 641, 92 L. ed. 784 (1948).

these parties may be over the probable effect of quantity limits on their future business dealings, it can scarcely be contended that injury has occurred or is imminent.[47]

There being adequate provision for the review of all matters bearing on the rights of parties in Clayton Act proceedings, a collateral, non-statutory review *in vacuo* of the bare Procedure, before that Procedure has received concrete application, would be both premature and in derogation of the quasi-legislative power which that Act delegates to the Federal Trade Commission.[48]

Conclusion

In any consideration of the problem at hand it should be constantly borne in mind that the quantity limits proviso in the Clayton Act is *skeleton* legislation which can become effective law only through administrative implementation. That implementation must take the form of agency rule-making, though not necessarily the form of an adversary proceeding. In a sense, adverse interests are at stake in all legislation but it is hardly to be suggested that the guarantee of due process requires a legislative body, in its consideration of new laws, to treat as litigants all who may be adversely affected. No more, then, should administrative rule-making be limited to adversary proceedings for its conduct, where they are not prescribed by statute and where adequate judicial review is provided in the statute occasioning the rule-making to curb administrative zeal and misinterpretation. Due process is fully afforded by granting, to interested members of the public, the opportunity of participating by making known their views to the rule-making body for its guidance.[49]

The preliminary proceeding by which the Federal Trade Commission drafted its quantity limit procedure involved no particular party; hence no judicial review can be had until a particular commodity or class of commodity has been regulated. Any defects in the

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[47]"Obviously, the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the new holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits often prove to have been groundless, but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact." Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 58 S. Ct. 459, 82 L. ed. 638 (1938).

[48]Aircraft & Diesel Corp. v. Hirsch, 331 U. S. 752, 67 S. Ct. 1493, 91 L. ed. 1796 (1947); Transamerica Corp. v. McCabe, 80 F. Supp. 704 (D. C. D. C. 1948).

[49]But there is no *constitutional* right to a hearing in a legislative or quasi-legislative proceeding. See Bowles v. Willingham, 321 U. S. 503, 64 S. Ct. 641, 88 L. ed. 892 (1944); Willapoint Oysters v. Ewing, 174 F. (2d) 676 (C. A. 9th, 1949).

intramural proceeding of the commission must await the judicial review of a final action adversely affecting some person or persons before they can be brought to the scrutiny of the courts. At that time, any procedural shortcomings will be fully reviewable in an inquiry of whether the commission has properly exercised its delegated authority. It would be highly impractical, however, for a court to undertake a premature examination of the due-process aspects of administrative rules until those rules have become operative and productive of legal injury, and even then the aggrieved must first have exhausted his administrative remedy.

The legislative history of the quantity limits proviso in Section 2(a) of the Clayton Act—far from indicating that a formal adversary proceeding was intended—shows merely a Congressional concern that the commission conduct a fair investigation of all pertinent data before setting quantity limits, much as Congress itself would have done had it undertaken to fix limits by statute. The commission's Procedure, therefore, appears fully to satisfy the minimum requirements of the Administrative Procedure Act by providing an adequate informal rule-making process in accordance with Section 4.

Judicial determination of the economic considerations of quantity limits established by the commission is probably excluded by the doctrine that the wisdom or expediency of legislation is not a matter for judicial inquiry. Assuming the constitutionality of the quantity limits, only the question of whether the commission has correctly exercised the power delegated is open to review.[50]

If the Federal Trade Commission should be obliged to conduct quantity-limit proceedings with the same solemnity as at present observed in its formal docket cases, it is doubtful whether the commission would find it practicable to seek further to exercise its quantity-limit powers, for then whatever advantage might be gained in eliminating cost justification as a defense would be offset by the sheer unwieldiness of the proceedings. In formal rule-making hearings, a far greater number of interested parties might be expected to appear and to demand their right to present evidence, to rebut the commission's data, and to make protracted cross-examinations than would ordinarily participate in a proceeding by formal complaint, where cumulative and immaterial evidence could be more readily excluded. Furthermore, quantity limits, once established, are not self-enforcing,

[50]Nebbia v. New York, 291 U. S. 502, 56 S. Ct. 505, 78 L. ed. 940 (1934); United States v. Carolene Products Co., 304 U. S. 144, 58 S. Ct. 778, 82 L. ed. 1234 (1938); Board of Trade of City of Chicago v. Olsen, 262 U. S. 1, 43 S. Ct. 470, 67 L. ed. 839 (1923).

for they possess no sanctions beyond the issuance of a formal complaint by the commission against a violator.[51] If quantity limits should be violated, therefore, there still would remain to be traveled the tortuous road of investigation, complaint, hearing, testimony and cross-examination, interlocutory appeals, final argument, deliberation by the commission, preparation of findings, issuance of an order to cease and desist, and court affirmance, before steps could be taken to penalize an offender.

That is not to say, however, that a broader opportunity might not be accorded interested parties to make certain that their views, data, and arguments will, in fact, receive the full consideration of the rule-makers. Despite the apparent dichotomy of the Administrative Procedure Act in its provisions for the informal and formal types of rule-making, there is nothing in that statute which would exclude a procedure falling within the intermediate "gray zone" between the full-dress adversary hearing and rule-making on the basis of written submittals.

Interesting in this regard is a hearing procedure now employed by the Department of Agriculture in the exercise of its powers to fix limits in commodity trading.[52] As promulgated,[53] that procedure enables any interested party to request establishment, amendment or rescission of a limit. Such a person does not acquire legal status *ipso facto,* but he has the right to appear, to testify, and to file statements. Ten days' notice to all persons who would be affected by such a limit—and an even shorter period in case of emergency—is provided, with appropriate publication in the Federal Register. Hearings are conducted by a presiding officer, "in such a way as to afford to interested persons a reasonable opportunity to be heard on matters relevant to the issues involved and so as to obtain a clear and orderly record." All concerned are given "reasonable opportunity" to offer pertinent evidence, and the presiding officer is empowered to restrict the evidence according to relevancy but otherwise is not bound by the technical rules. Affidavits are admissible.

Particularly noteworthy is the latitude allowed in the Commodity Trading Limits Procedure for questioning. Every witness is subject to questioning by the presiding officer or other representative of the department, who presumably may inquire as to points raised by any

[51]Orders issued under the Clayton Act, unlike those issued under the Federal Trade Commission Act, do not become final until they have been judicially affirmed (Section 12).

[52]49 Stat. 1491 (1936), 7 U. S. C. § 6(a) (1946).

[53]17 Code Fed. Regs., Part O (1938).

of the interested parties, and even cross-examination by private parties is permitted when expressly authorized by the presiding officer.

Testimony is reported verbatim, and supporting materials and written argument are embodied in the record as numbered exhibits.

The presiding officer is not bound, however, to consider solely the record in preparing his findings of fact, conclusions, and proposed final order.

The legality of this procedure has apparently not been tested in the courts, but it is fairly safe to assume that it would fulfill even the requirements of Sections 7 and 8 if liberally followed.

It can thus be seen that there is a middle ground between the two extreme solutions proposed by the Federal Trade Commission, on the one hand, and members of the tire industry, on the other. Administrative agencies having become an indispensable part of our political structure, they should take especial pains to avoid the appearance of acting by fiat, particularly in matters growing out of knotty economic complexities. The parties against whom administrative writs are to run have every right to be assured that their points of view will be fairly and fully considered, and it is doubtful that a system of written submittals and limited oral argument, without the salutary cross-pollination of ideas achieved in the open forum, can inspire the highest confidence in the final action.