

Commodity Futures Trading Commission
CEA CASES

NAME: RALPH W. MOORE

CITATION: 8 Agric. Dec. 146

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(A. D. 1992)

In re Ralph W. Moore. CEA Doc. No. 47. Decided February 2, 1949.

Disciplinary Proceedings Under Commodity Exchange Act -- Motion to Dismiss Complaint on Pleadings -- Certification of Questions by Referee to Secretary -- Effect of Failure to Object to Answer -- Right of Referee to Entertain Motion to Dismiss -- Moot Question -- Proceeding Remanded to Referee

Where the respondent in a disciplinary proceeding under the Commodity Exchange Act moved to dismiss the complaint on the pleadings, and the referee held that section 0.10 (b) of the rules of practice, which provides that "any motion will be entertained except a motion to dismiss on the pleadings," was unlawful and void, that he was authorized to entertain such a motion, that section 0.9 (b) of the rules of practice did not require anything more by way of answer to a complaint than is required under section 900.52a (b) of the rules of practice under the Agricultural Marketing Agreement Act, and that the motion be denied on the merits, upon certification to the Secretary for the purpose of determining whether the referee's ruling should be stricken from the record and whether the respondent's answer met all of the requirements of the rules of practice, such certification being based upon reissuance of the rules of practice subsequent to the referee's ruling, it is held that:

(1) the certification presents no question that need be decided at this stage of the proceeding; (2) there is no issue on the question of the sufficiency of respondent's answer because complainant has not objected to the answer filed; (3) the questions of the sufficiency of the answer and the right of the referee to entertain the motion to dismiss seem moot since, while entertaining the motion, the referee denied it; and (4) the proceeding should be remanded to the referee for continuation of the hearing and for post-hearing procedures. *

* Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions. -- Ed.

Administrative Proceeding -- Right of Respondent to Test Validity of Complaint Prior to Hearing Upon Merits -- Inapplicability of the Due Process Clause

It does not appear to be a requirement of due process of law under the Fifth Amendment of the Federal Constitution that a respondent in an administrative proceeding be afforded an opportunity to test the validity of a complaint and to get a decision upon the validity prior to a hearing upon the merits. *

* Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions. -- Ed.

Right of Secretary to Entertain Motion to Dismiss Complaint on Pleadings -- Question not Decided

Even if rule 0.10 (b) should be literally construed to prohibit the Secretary and the Judicial Officer from passing upon a motion to dismiss a complaint, a question which is not decided here, a respondent could accomplish the same

result by other motions after the complainant's case is put in evidence or seek dismissal upon the whole case for the same reasons that may be urged in a motion to dismiss prior to hearing. *

* Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions. -- Ed.

Mr. Benj. M. Holstein for complainant. Mr. Ben I. Melnicoff, of Washington, D. C., for respondent. Mr. Jack Bain, Referee.

Decision by Thomas J. Flavin, Judicial Officer

DECISION AND ORDER ON CERTIFICATION FROM REFEREE BACKGROUND

In this disciplinary proceeding under the Commodity Exchange Act (7 U. S. C. Chapter 1), the referee assigned to the proceeding from the Office of Hearing Examiners, Jack W. Bain, filed a certification to the Secretary on December 21, 1948, of matters described hereinafter. Complainant filed a statement in connection with the certification on December 23, 1948, and respondent also filed a memorandum on January 3, 1949.

The questions involved arise out of section 0.10 (b) of the rules of practice (17 CFR, Cum. Supp., 0.10 (b)) which provides: "Any motion will be entertained except a motion to dismiss on the pleadings." The complaint in the proceeding was issued on May 28, 1948. On July 26, 1948, respondent filed a motion to dismiss the complaint upon several grounds. Complainant answered the motion by referring to section 0.10 (b) of the rules of practice pointing out that such a motion could not be entertained. The referee set down the motion for oral argument and extensive oral argument was held before him on August 12, 1948. On August 31, 1948, the referee issued his ruling holding (1) that he could entertain the motion because he thought section 0.10 (b) of the rules of practice unlawful and void because the prohibition extends to the Secretary and the Judicial Officer as well as the referee and (2) that the motion to dismiss be denied upon the merits. In connection with his decision upon the latter point, he ruled that respondent was apparently alarmed needlessly by the language of the complaint and the rules of practice as to type of answer called for and he held that reasonable admission or denial of the facts alleged is all that is required, likening respondent's responsibility in this connection to that of a Department agency when it is a respondent in a proceeding such as one under Section 8c (15) (A) of the Agricultural Adjustment Act (1933), as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (7 U. S. C. 601 et seq.). After respondent's motion for a bill of particulars was denied, respondent filed an answer on October 8, 1948.

On November 30, 1948, a special session of the hearing was held for the purpose of obtaining the testimony of a witness who was to leave the country shortly thereafter. On December 7, 1948, complainant filed the following exceptions to the referee's decision and ruling upon respondent's motion to dismiss:

"In order to save any rights which the complainant may have in this or any future proceeding under the Commodity Exchange Act, the complainant respectfully excepts to the referee's decision insofar as it holds (1) that Section 0.10 (b) of the Rules of Practice under the Commodity Exchange Act (17 CFR 0.10 (b)) is unlawful and void, (2) that the referee has jurisdiction to entertain a motion to dismiss on the pleadings, and (3) that Section 0.9 (b) of the Rules of Practice under the Commodity Exchange Act (17 CFR 0.9 (b)) does not require

anything more by way of answer than is required under Section 900.52a (b) of the Rules of Practice (7 CFR, 1947 Supp., 900.52a (b) under the Agricultural Marketing Agreement Act of 1937, as amended; and insofar as it necessarily implies that the referee may disregard, amend, modify, abrogate, or set aside a rule or regulation issued by the Secretary of Agriculture under authority vested in him by statute."

A prehearing conference was held before the referee on December 9, 1948, and on December 14, 1948, the hearing opened. Respondent moved that, in view of the exceptions filed by complainant to the referee's ruling upon the motion to dismiss, the matter be certified to the Secretary. The referee denied this motion. The referee's certification of December 21, 1948, recites this action by him but goes on to say (1) that the Federal Register of December 18, 1948, reached his office on December 21, 1948, and that he then first learned that the rules of practice were reissued by the Acting Secretary on December 15, 1948, with no change in the provisions concerning answers and motions to dismiss, (2) that whether or not the reissuance of the rules constitutes a reversal of the referee's ruling, it complicates the situation, and (3) that before continuance of the proceeding, the respondent should have something more final than the referee's ruling. Accordingly, the certification reads:

"I am, therefore, certifying the proceeding 'to the Secretary' as that term is used in the rules of practice, with specific reference to whether my entertaining and ruling upon the motion to dismiss the complaint should be stricken from the record, and whether respondent's answer meets all the requirements of the rules of practice, as amplified by the complaint itself."

Complainant's statement filed in connection with the certification points out that the question of the referee's jurisdiction to entertain a motion to dismiss is moot insofar as this proceeding is concerned and that there is no claim that respondent's answer is insufficient. The statement also contends that the reissuance of the rules of practice was sponsored by the Division of the Federal Register as part of the 1949 Edition of the Code of Federal Regulations and is entirely coincidental

and unrelated to the referee's ruling. Respondent's memorandum takes the general position that the referee's ruling is correct insofar as he upheld respondent's right to challenge the legal sufficiency of the complaint, that such a right exists under the act and the due process clause of the Fifth Amendment, and that respondent is entitled to a ruling as to whether its answer is sufficient.

DECISION AND ORDER

I do not believe that the certification presents any questions that need be decided, if at all, at this stage of the proceeding. As to the question of the sufficiency of respondent's answer, there is no issue, as far as this proceeding is concerned, because the complainant has not objected to the sufficiency of the answer filed. On the question as to whether the referee should have entertained and ruled upon the motion to dismiss, the facts are that, while he entertained the motion, he denied it. The hearing has commenced, the questions of the sufficiency of the answer and the right of the referee to entertain a motion to dismiss seem moot as far as this proceeding is concerned and if any considerations of general practice and procedure of the Department are involved, these would be best studied upon the basis of the whole record of the proceeding. This observation applies to whatever complications, if any, are raised by the reissuance of the rules of practice which, in my opinion, carried no intention of overruling the referee's holding that the pertinent rule of practice is null and void. Accordingly, the proceeding is remanded to the referee for continuation of the hearing and for post-hearing procedures.

One further observation might be made, however. It does not appear to be a requirement of due process of law under the Fifth Amendment that a respondent in an administrative proceeding be afforded an opportunity to test the validity of

a complaint and to get a decision upon the validity prior to a hearing upon the merits. Certainly that is not the universal practice of the courts in court proceedings nor is it the prevailing procedure of all administrative agencies.
n1 Even if rule 0.10 (b) should be literally construed to prohibit

the Secretary and the Judicial Officer from passing upon a motion to dismiss a complaint, a question which is not decided here, a respondent could accomplish the same result by other motions after the complainant's case is put in evidence or seek dismissal upon the whole case for the same reasons that may be urged in a motion to dismiss prior to hearing.

n1 *Interstate Commerce Commission.* -- Rules of Practice § 1.70 (49 CFR, Cum. Supp., 1.70). "*Authority of Officers.* * * * An officer shall have no power to decide any motion to dismiss the proceeding or other motion which involves final determination of the merits of the proceedings."

Federal Communications Commission. -- Rules of Practice § 1.844 (h) (47 CFR, 1947 Supp., 1.844 (h)). "*Authority of presiding officers* * * * but no such [presiding] officer shall be empowered to decide any motion offered in the course of a hearing to dismiss the proceeding or to decide any other motion which involves a final determination of the merits of the proceedings."

Federal Power Commission. -- Rules of Practice § 1.12 (18 CFR, 1947 Supp., 1.12). "*Motions* * * * (d) Rulings on * * * Provided, however, That no motion made before or during a hearing, a ruling upon which would involve or constitute a final determination of the proceeding, shall be ruled upon by a presiding officer except as a part of either his initial or recommended decision submitted after the conclusion of the hearing.">ENDFN>

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