Mr. Eccles
1-17-49

UNITED STATES OF AMERICA
BEFORE THE
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

IN THE MATTER OF
TRANSAMERICA CORPORATION

STATEMENT AND ORDER
ON MOTIONS TO DISQUALIFY AND TO
DISMISS COMPLAINT

On December 1, 1948, respondent filed with the Board a motion to disqualify Marriner S. Eccles and Lawrence Clayton, members of this Board, and on December 7, 1948, three motions to dismiss the complaint. The motions were orally argued by counsel for respondent and the solicitor for the Board on December 13, 1948. Supporting briefs were filed by counsel for respondent on December 13 and 27, 1948, and letters in the nature of briefs on January 4 and January 13, 1949. A brief in opposition was filed by the solicitor for the Board on January 5, 1949. Having fully and carefully considered the motions, and the arguments and briefs of counsel, the Board is of the opinion that the motions must be dismissed in part and in all other respects denied, as hereafter stated.

In so far as respondent objects to Governor Eccles participating in this proceeding, no consideration of the merits of respondent's motion to disqualify is necessary. On December 1, 1948, promptly after the motion was filed, Governor Eccles publicly announced that he had disqualified himself. Respondent's motion to disqualify Governor Eccles is therefore moot, and is dismissed for that reason.

Respondent's motion to disqualify Governor Clayton assumes that the Board has authority to take the action requested. We cannot agree with this assumption. Members of the Board of Governors of the Federal Reserve System are "appointed by the President, by and with the advice and consent of the Senate, * * * for terms of fourteen years" (12 U.S.C. sec. 241), and the powers of the Board are set forth in detail in the Federal Reserve Act (12 U.S.C. sec. 248), the Clayton Act (15 U.S.C. sec. 21) and numerous other statutes. No statute relating to the Board, however, either expressly or by implication, authorizes or directs the Board to disqualify itself or any member from participating in any Board action or proceeding, and no statute provides for the appointment of substitute members, or authorizes any other Government agency to exercise the powers of the Board, in the event that a member or a majority of members disqualify. In addition to this, the Administrative Procedure Act, designed as a comprehensive regulation of procedure before administrative agencies, is significantly silent with respect to disqualifying any agency or any member of an agency from participating in the agency's decision.

In the circumstances, the Board is of the opinion that it has no authority to disqualify Governor Clayton from participating in this proceeding. See Federal Trade Commission v. Cement Institute, 333 U.S. 683, 700-703 (1948); Marquette Cement Mfg. Co. v. Federal Trade Commission, 147 F. 2d 589, 591-593 (C.C.A. 7, 1945); Loughran v. Federal Trade Commission, 143 F. 2d 431, 433 (C.C.A. 8, 1944); Montana Power Co. v. Public Service Commission, 12 F. Supp. 946, 948-950 (D. Mont., 1935). See also concurring opinion upon denial of petition for rehearing in Jewell Ridge Coal Corp. v. Local No. 6167, 325 U.S. 897 (1945).

If the Board is mistaken in this, however, it is further of the opinion, and therefore holds, that the affidavits submitted by respondent in support of its motion do not warrant Governor Clayton's disqualification.

Affidavits of disqualification must set forth facts, as distinguished from mere conclusions. Beland v. United States, 117 F. 2d 958, 960 (C.C.A. 5, 1947), cert. denied 313 U.S. 585; State v. Chapman, 1 S. D. 414, 47 N.W. 411, 412-413 (1890). And such facts must be sufficient both to overthrow the presumption in favor of the integrity of the official sought to be disqualified and reasonably to warrant a strong inference that he possesses personal bias and prejudice of such character as is calculated seriously to impair his impartiality, sway his judgment and preclude his dealing fairly with the parties. See Eisler v. United States, 170 F. 2d 273, 278 (App. D. C., 1948); Benedict v. Seiberling, 17 F. 2d 831, 836 (N.D. Ohio, 1926); Ex Parte N. K. Fairbank Co., 194 F. 978, 990 (M. D. Ala., 1912); State v. Chapman, supra; 48 C.J.S. Judges sec. 82 b. Examined in the light of these principles, it seems clear that respondent's affidavits are wholly insufficient to sustain its charge of personal bias and prejudice on the part of Governor Clayton.

Respondent makes two contentions in this connection.

First, it asserts that Governor Clayton was formerly associated in business with or employed by Governor Eccles, and later served as assistant to Governor Eccles while the latter was chairman of the Board. But this does not warrant respondent's conclusion that Governor Clayton is incapable of exercising, or will not exercise, his own independent and impartial judgment upon either the facts or the law. Certainly, respondent has not pointed to any action on the part of Governor Clayton which justifies its assertion of subordination and subservience to the views of Governor Eccles, and the Board believes that it may be said of Governor Clayton and its other members, as has been said of cabinet officers, that officials "charged by Congress with adjudicatory functions * * * are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." United States v. Morgan, 313 U.S. 409, 421 (1941).

Respondent's second contention as to Governor Clayton is that he has developed a "feeling of bitterness" against a member of respondent's board of directors and executive committee, Mr. L. M. Giannini, and against

the corporations with which Mr. Giannini is associated. This, it is said, resulted from the fact that in 1940 and the early part of 1941, while Governor Clayton was an employee of the Board, he sought, and failed to obtain, a position with the Bank of America. "Within one year thereafter," i.e., February 1942, respondent continues, the Board "adopted a consistently adverse and punitive attitude toward Transamerica," as evidenced by certain alleged "unauthorized", "unprecedented and discriminatory" acts and the advocacy by Governor Eccles of certain alleged "discriminatory legislation."

The "attitude" and acts of which respondent complains, however, were the "attitude" and official acts of the Board. They were not the "attitude" or acts of Governor Clayton. They occurred long prior to the date on which he became a member of the Board, and they evidence no bias or prejudice toward respondent on the part of Governor Clayton, of any other member of the Board or of the Board itself. See Federal Trade Commission v. Cement Institute, 333 U.S. 683, 700-702 (1948); Oregon Shipbuilding Corp. v. N.L.R.B., 49 F. Supp. 386, 388 (D. Ore., 1943).

As for Governor Clayton's negotiations for a position with the Bank of America, respondent's evidence shows that the negotiations were terminated in February 1942. It does not show that they were terminated on a note of "bitterness," nor does it warrant respondent's conclusion that Governor Clayton is biased or prejudiced. On the contrary, as shown by respondent's evidence, after the acts of which respondent complains, Governor Clayton, on February 2, 1943, replied to a communication from respondent's board chairman, Mr. A. P. Giannini, in a letter unmistakably friendly and cordial in tone.

In its briefs filed December 27, 1948, and January 13, 1949, but not otherwise, respondent requests that the Board, after disqualifying Governors Eccles and Clayton, re-examine its files "with a view to determining whether they substantiate a reasonable belief that Transamerica has violated Section 7." Such action, respondent asserts, is "essential to due process." This contention is without merit and the request is denied.

The Board is satisfied that the evidence in its files warranted the conclusion that it had "reason to believe" that respondent had violated section 7, and that such conclusion is free of any taint of bias or prejudice. Moreover, due process does not require, nor does the Clayton Act authorize, judicial review of the Board's initial determination to issue a complaint. See Ostler Candy Co. v. Federal Trade Commission, 106 F. 2d 962, 965 (C.C.A. 10, 1939), cert. denied 309 U. S. 675; 15 U.S.C. sec. 21. Such determination is administrative, not judicial in character, and is in no sense a prejudgment of the facts. The Board's authority to issue an order of divestment depends upon the evidence to be adduced in support of the Board's complaint. Such authority may not, and it will not, be exercised upon the basis of the evidence on which the complaint was issued, except in so far as such evidence becomes a part of the record.

Turning now to respondent's several motions to dismiss, respondent contends that if the Board is authorized to institute this proceeding, section 11 of the Clayton Act (15 U.S.C. sec. 21) is unconstitutional and void as in contravention of the Fifth Amendment to the Constituion of the United States. The argument is that, since, as respondent asserts, the Act does not authorize the Board to issue subpoenas, it follows that the Act does not provide for a fair hearing, and any order of divestment entered under the complaint will deprive respondent of its property without due process of law. This motion must be dismissed for two reasons.

First, it is premature. Assuming, as respondent contends, that the Board has no subpoena power, it by no means follows either that respondent will be unable to obtain and offer all the evidence and testimony it desires, or that a divestment order is certain to issue. The Act under which the Board is proceeding provides a plain, adequate and exclusive remedy for any prejudice which respondent may suffer by reason of the Board's asserted lack of the power to issue subpoenas, MacFadden Publications v. Federal Trade Commission, 37 F. 2d 822 (App. D. C., 1930), and a mere supposed or threatened injury does not warrant the dismissal of an administrative proceeding. Anniston Manufacturing Co. v. Davis, 301 U. S. 337, 352-353 (1937); Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 50-51 (1938).

Secondly, as an administrative agency created by Congress, the Board's duty is to enforce, not to nullify, the acts committed to it to administer. Hence, it has no authority to pass upon the constitutional question raised by respondent. Engineers Public Service Co. v. S. E. C., 138 F. 2d 936, 951-953 (App. D. C., 1943); Panitz v. District of Columbia, 112 F. 2d 39, 41-42 (App. D. C., 1940); Matter of Rite-Form Corset Co., Pike and Fischer, Administrative Law 33c.51-7 (N.L.R.B., 1947); Simon Siegel Co.v. Heaton, Pike and Fischer, Administrative Law 41b.1-28 (U.S. Dept. Agric., 1946); Matter of East Ohio Gas Co., Pike and Fischer, Administrative Law 48e.1-2 (F.P.C., 1939). See also Pike and Fischer, Administrative Law, Decision Notes 18, 381, 431, 732, 813.

Respondent's third motion asks dismissal of the complaint on the ground of improper venue and insufficiency of the allegations of the complaint.

As to venue, the contention is that this is a "proceeding under the antitrust laws" within the meaning of section 12 of the Clayton Act (15 U.S.C. sec. 22), and it must therefore be brought, as that section requires, within the "judicial district" of which respondent is an inhabitant or where it may be found or transacts business. Since respondent is not a District of Columbia corporation and does no business in the District, it follows, respondent asserts, that no hearing may be lawfully convened in the District and the notice of hearing appearing in the Board's complaint is therefore null and void. The Board does not agree with this contention.

It has been held repeatedly that section 12 is a liberalizing provision, intended materially to enlarge the jurisdiction of Federal district courts, being "designed to aid plaintiffs by giving them a wider choice of venues, and thereby to secure a more effective,* * * enforcement of antitrust prohibitions." United States v. National City Lines, 334 U.S. 573, 586 (1948); United States v. Scophony Corporation, 333 U. S. 795, 804-808 (1948); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 371-374 (1927). That being true, it would be anomalous indeed if, at the same time, the section had been intended to narrow and restrict the localities in which hearings might be held by administrative agencies. That such was not the purpose of the section seems obvious; and the Board believes it clear that the word "proceeding," as used in section 12, was employed in the same sense as that in which it was used in sections 5, 13, 15, 16 and 25 (15 U.S.C. secs. 16, 23, 25, 26; 28 U.S.C. sec. 390), namely, to refer to court proceedings.

Administrative proceedings under the Act are governed by section 11, which specifically fixes the venue of actions brought by the Board to enforce, or by a respondent to set aside, a Board order, but which contains no provision limiting the venue of the Board's hearings. On the contrary, the section provides in that connection only that the Board shall issue a complaint "stating its charges * * * and containing a notice of a hearing * * * at a place therein fixed." In the opinion of the Board, this means that in the reasonable exercise of its discretion, the Board may notice a complaint for hearing and take testimony thereon at any place within the United States. If such had not been the intention of Congress, it would have been a simple matter indeed for it to have specified the venue of proceedings before the Board, as it specified the venue of court proceedings to enforce or set aside the Board's orders.

The Board's conclusion that section 12 has no application here is entirely consistent with section 5 (a) of the Administrative Procedure Act, which imposes upon administrative agencies in respect of venue the duty only to fix "places for hearings" with "due regard * * * for the convenience and necessity of the parties" (5 U.S.C. sec. 1004 (a)). And the Board is further fortified in this view by the fact that the Federal Trade Commission -- as the Board officially notices from the Commission's public records -- has long exercised the power, in proceedings under the Clayton Act, to hold hearings at places other than those specified in section 12. No court has ever held the Commission's practice improper. Nor has Congress, in any of its numerous amendments of the Act, ever indicated its disapproval of the practice.

Respondent's objections to the sufficiency of the Board's complaint are, in substance, a mere restatement in motion form of the position taken by respondent in its "Demand for More Definite Statement of Matters of Fact and Law Asserted", which, by reference, respondent incorporates in its motion to dismiss for improper venue and insufficiency of the complaint.

The motion in this respect must be denied for the reasons set forth in the Board's statement and order of September 21, 1948, denying the demand referred to. We also point out, however, that in considering the sufficiency of a complaint in a proceeding such as this, "it is necessary to bear in mind that the nature of the proceeding is not punitive but preventive and in the interest of the general public. * * * It does not require the particularity of pleading in an indictment, declaration at law, or a bill in equity, for no security against double jeopardy or principle of res judicata commands the utmost of precision. Matters of evidence need not be recited in the complaint and a detailed knowledge of the Board's case in advance 'is of slight value in a trial by hearings at intervals.'" Consumers Power Co. v. N.L.R.B., 113 F. 2d 38, 42-43 (C.C.A. 6, 1940); E. B. Muller & Co. v. Federal Trade Commission, 142 F. 2d 511, 519 (C.C.A. 6, 1944); Locomotive Finished Material Co. v. N.L.R.B., 142 F. 2d 802, 804 (C.C.A. 10, 1944); A. E. Staley Manufacturing Co. v. Federal Trade Commission, 135 F. 2d 453, 454 (C.C.A. 7, 1943). See also N.L.R.B. v. Express Publishing Co., 312 U. S. 426, 431-432 (1941). Nothing in section 5 (a) of the Administrative Procedure Act (5 U.S.C. sec. 1004 (a)) was intended to change this rule. See Attorney General's Manual on the Administrative Procedure Act (1947) 46-47, 129.

Respondent's final motion is based upon the contention that the Board has no jurisdiction or authority to enforce section 7 of the Clayton Act, and the complaint should be dismissed for that reason. The argument has been pressed earnestly and at length, but in the Board's opinion it finds a complete answer in the language of the statute and cannot be sustained.

It is said that jurisdiction is lacking because respondent is not a bank, is not engaged in commerce and is not in competition with any banks named in the complaint. Even if these facts are true, they neither defeat the Board's jurisdiction, nor constitute a defense to its charge. For the second paragraph of section 7, in language which cannot be misunderstood, prohibits any corporation from acquiring the stock of two or more other corporations engaged in commerce, where the effect may be to lessen competition between the acquired corporations or to restrain commerce or tend to monopoly. Nothing in the Act provides, or lends any support to the contention, that if the acquired corporations are banks the acquiring corporation must also be a bank, or that the acquiring corporation must itself be engaged in commerce or in competition with the corporations whose stock it acquires. See Fruit Growers' Express v. Federal Trade Commission, 274 F. 205 (C.C.A. 7, 1921). Such a construction of the paragraph would make it merely repetitive of the first paragraph of section 7 and deprive it of all independent force and effect. That such was not the intent of Congress is obvious from the language of the paragraph, as well as from its legislative history. 51 Cong. Rec. 9073, 14313, 14317, 15940; H. R. Rep. No. 627, 63rd Cong., 2nd Sess. (1914) 17; H. R. Rep. No. 627 (Part 2), 63rd Cong., 2nd Sess. (1914) 6 (minority report).

Respondent also asserts that jurisdiction is lacking because the complaint does not allege that any banks mentioned in the complaint have violated any provision of the Clayton Act. But no such allegation is necessary. The Board's complaint is directed against Transamerica Corporation, and nothing in the Act provides or implies that the legality of the acquisitions here in question depends upon whether or not the acquired corporations have themselves violated the Act.

Respondent further argues that section 7 is not applicable to banks. But here again the words of the Act, as well as its legislative history, furnish a complete answer. The language of section 7 is all inclusive -- "No corporation shall acquire * * * the stock * * * of two or more corporations engaged in commerce * * *." These words are not susceptible of a construction making them inapplicable to banks. Efforts to exempt banks from the application of section 7 were rejected by Congress (51 Cong. Rec. 14317 et seq., 14473 et seq.), and section 11 of the Act specifically directs the Board "to enforce" the Act "where applicable to banks, banking associations and trust companies" (15 U.S.C. sec. 21).

There is no merit to respondent's contention that banks are necessarily excluded from section 7 because they are not engaged in interstate commerce and therefore are not subject to regulation by Congress under the commerce clause of the Constitution. Since the complaint alleges that the banks referred to are engaged in commerce, we must, for the purpose of considering a motion to dismiss, accept the allegation as true. Moore v. Chesapeake & Ohio Ry., 291 U.S. 205, 209-211 (1934); Hart v. B. F. Keith Vaudeville Exchange, 262 U.S. 271, 273 (1923); Swartz v. Forward Association, 41 F. Supp. 294, 295 (D. Mass., 1941). See also National Candy Co. v. Federal Trade Commission, 104 F. 2d 999, 1003 (C.C.A. 7, 1939), cert. denied 308 U.S. 610. Further than this, we are not prepared to say as a matter of law that banks cannot be engaged in interstate commerce and be regulated accordingly. To do so, we believe, would require us not only to disregard recent court decisions to the contrary, but also to ignore facts of which we might well take official notice. See N.L.R.B. v. Northern Trust Co., 148 F. 2d 24, 26, 28 (C.C.A. 7, 1945) cert. denied 326 U. S. 731; Rosenberg v. Semeria, 137 F. 2d 742, 743 (C.C.A. 9, 1943), cert. denied 320 U.S. 770; N.L.R.B. v. Bank of America, 130 F. 2d 624, 626 (C.C.A. 9, 1942), cert. denied 318 U.S. 791. See also United States v. South-Eastern Underwriters Association, 322 U.S. 533, 546-553 (1944).

Respondent's final contention is that the Board's jurisdiction under section 11 is limited to the enforcement of section 8. We believe this argument unsound.

In so far as here pertinent, section 11 provides "That authority to enforce compliance with sections two, three, seven, and eight of this Act by the persons respectively subject thereto is hereby vested * * * in the Board of Governors of the Federal Reserve System where applicable to banks, banking associations and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce" (15 U.S.C. sec. 21). Respondent lays great emphasis upon the words "persons respectively subject thereto," and argues that since banks are mentioned only in section 8, they are "subject" only to that section. But this argument assumes -- and erroneously so -- that banks are not subject to section 7, which, as heretofore stated, applies without exception to all corporations.

In addition to this, we point out that the word "person," as used in the Clayton Act, includes "corporations and associations," as well as individuals (15 U.S.C. sec. 12), and that the enforcing agencies are directed by section 11 to issue a complaint against "any person * * * violating * * * any of the provisions of sections two, three, seven and eight." But, while sections 2, 3 and 8 apply to all persons, section 7 is limited to corporations. Hence, it seems obvious that the words "persons respectively subject thereto," as used in section 11, were employed merely for the sake of grammatical precision, and they mean simply that compliance with sections 2, 3, 7 and 8 is to be required only of those "persons" subject respectively to those sections.

Thus construed, the phrase "persons respectively subject thereto" is assigned its natural meaning and the Board is vested with authority to enforce section 7 where the "character of commerce" concerned involves, or relates to, the business of "banks, banking associations and trust companies." See Fruit Growers Express v. Federal Trade Commission, 274 F. 205, 207 (C.C.A. 7, 1921). Under no other construction of the Act is it possible to give effect to the intent of Congress to commit to each of the several enforcement agencies mentioned in section 11, the duty to enforce the Act in the particular field in which it has peculiar competence.

Little need be said of respondent's argument that the Board's own construction of the Clayton Act has been to the effect that the Board has no jurisdiction to enforce section 7. Considered in the light of its attendant circumstances, the course of conduct to which respondent refers in this connection was not a construction of the Act by the Board and it neither warrants nor supports respondent's conclusion. Since section 7 contains merely a limited and conditional rather than an absolute prohibition, the Board's failure previously to proceed under section 7 cannot be regarded as a disclaimer of its authority to proceed in a matter in which it has concluded that it has "reason to believe" it should proceed; nor did its failure to proceed previously cause its authority to "evaporate". See Federal Trade Commission v. Bunte Brothers, 312 U.S. 349, 352 (1941).

ORDER

For the reasons set forth in the foregoing statement, it is ORDERED that:

1. Respondent's Motion to Disqualify Marriner S. Eccles and Lawrence Clayton be, and it hereby is, dismissed in so far as it relates to Marriner S. Eccles, and be, and it hereby is, in all other respects denied.

2. Respondent's Motion to Dismiss for Lack of Due Process of Law be, and it hereby is, dismissed.

3. Respondent's Motion that Complaint Be Dismissed and Notices of Hearing Quashed and Vacated for Improper Venue, Insufficiency of Allegations and Failure to Comply with Administrative Procedure Act be, and it hereby is, denied.

4. Respondent's Motion that Complaint Be Dismissed for Lack of Jurisdiction be, and it hereby is, denied.

This 17th day of January, 1949.

By the Board.

(Signed) S. R. Carpenter
Secretary

(SEAL)

Governors Eccles and Clayton took no part in the consideration or decision of the motions referred to in the foregoing statement and order.

Transamerica Decision

BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM

Statement for the Press

For immediate release. January 17, 1949.

Mr. Joseph J. Smith, Jr., of the law firm of Hogan & Hartson of Washington, D. C., has been retained as special counsel by the Board of Governors of the Federal Reserve System, effective January 1, 1949, to advise it in connection with matters relating to the Transamerica proceeding coming before the Board for consideration.