Mr. Eccles

COPY

San Francisco
August 31, 1949.

Mr. S. R. Carpenter, Secretary,
Board of Governors of the
Federal Reserve System,
Washington 25, D. C.

Dear Sam:

On Monday I was served with copies of the Exception and Appeal, Affidavit, and Brief filed with the Board by Counsel for Transamerica.

I am sending you herewith for filing in the case a short Memorandum in reply to these papers. I also enclose several additional copies with the request that each of the Board members be furnished a copy as well as Joe Smith and George Vest.

Very truly yours,

(signed) Leonard

J.Leonard Townsend,
Solicitor.

Enclosures.

UNITED STATES OF AMERICA

BEFORE THE

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

In the Matter of
TRANSAMERICA CORPORATION

MEMORANDUM

As the record in the above-entitled matter shows, Respondent, on July 8, 1949, filed with the Board its request that the full Board hear and consider Respondent's motion, made at the conclusion of the Board's case, to dismiss the complaint for alleged failure of proof. On July 19, 1949, the Board unanimously denied this request (Governors Eccles and Clayton not participating) and directed that the Motion be referred to the Hearing Officer for disposition.

On August 3rd and 4th, 1949, arguments on the Motion to Dismiss were heard by the Hearing Officer. Counsel for Respondent argued all day August 3rd, consuming approximately six hours. The Board's Solicitor argued during the morning of August 4th, taking approximately three hours. Counsel for Respondent argued in rebuttal for one hour in the afternoon session of August 4th. The matter was then taken under advisement by the Hearing Officer.

On August 16, 1949, the Hearing Officer served upon Counsel for both sides notice of his ruling denying the Motion to Dismiss and setting September 19, 1949 as the date for

resumption of hearings.

Counsel for Respondent have now filed with the Board their exception to the ruling of the Hearing Officer and have attempted to appeal to the Board from both the ruling denying the Motion to Dismiss and the order setting September 19th as the date upon which the hearings shall be resumed. An affidavit and brief were submitted in support of Respondent's position on these matters.

First, as to the attempted appeal from the ruling denying the Motion to Dismiss. When the Board referred the Motion to Dismiss to the Hearing Officer for disposition, it did so with the statement, inter alia, that "Neither due process of law, nor any statute applicable to this proceeding, requires the Board to hear or determine an interlocutory Motion to Dismiss for failure of proof." The Board's Solicitor assumes that the Board did not intend this statement as merely an idle remark, but on the contrary, as indicating that, in referring the matter to the Hearing Officer for disposition, it did so only after a full consideration of applicable legal principles and with the intention that its action in this regard should be final. What the Board said then seems to the Solicitor to be equally applicable now and dispositive of Counsel's attempted appeal:

> "The Hearing Officer ... is thoroughly familiar with the record. It does not appear that consideration by him of respondent's motion to dismiss would unduly delay the proceeding, and it might serve a useful purpose. Hence, in the exercise of its discretion, and in keeping with the policy implicit in Secs. 5(c), 7(b) and 8(a) of the Administrative Procedure Act (5 U.S.C.A. Sec. 1004 (c), 1006 (b), 1007 (a)), the Board is referring respondent's motion to dismiss to the Hearing Officer for consideration, for such hearing, if any, as he may deem appropriate, and for disposition."

Nothing contained in Respondent's brief should in any wise alter this view. The so-called "authority for the appeal" referred to in the first section of Counsel's brief is no authority at all. The references therein to the provisions of the Administrative Procedure Act all deal with the "recommended decision" or "initial decision" of the officer who presides at the trial. That means the "decision" which is rendered at the conclusion of the trial, when all the evidence has been received. And the same is true of Counsel's reference to the Board's Rules of Practice (Resp. Br. p.3, et seq.). Except for Rule IV, which merely deals with continuances, changes, and extensions of time, all of them deal with the procedure to be followed after the case has been completed and have no reference whatever to procedure at purely interlocutory stages of the hearing.

Counsel argues that the Hearing Officer failed to comply with Rule VI of the Board's Rules of Practice because he failed to make a report to the Board in disposing of Respondent's Motion to Dismiss. Again, the flaw in Counsel's contention is patent. The report referred to in Rule VI is, of course, the one which the Hearing Officer must make at the conclusion of the case. No such report is contemplated or required in dealing with purely interlocutory decisions. Counsel's contention, carried to its logical conclusion, would lead to the absurd result that the Hearing Officer must file a report to the Board every time he overrules an objection to the admission of evidence or rules on some other matter of an equally interlocutory nature during the course of the trial.

Much space in Respondent's brief is devoted to expounding the alleged vital "nature of the Motion to Dismiss". Of course such a motion is vital; but it is still interlocutory

and decisions on interlocutory motions in any kind of proceeding, judicial or administrative, are simply not appealable. And it is no answer to this statement for Counsel merely to indulge in the somewhat insulting remarks concerning the Board's alleged reason for referring the Motion to Dismiss to the Hearing Officer for decision, and concerning the Hearing Officer's alleged failure to give appropriate consideration to Respondent's motion. (See discussion commencing on page 6 of Counsel's brief, wherein the Board is pictured as having felt that "it would be too much trouble for the Board to review its Solicitor's evidence on the merits"; and that commencing on page 14 wherein Counsel asserts that the Hearing Officer, notwithstanding the recitation to the contrary appearing in his notice of August 16th, did not in fact weigh the evidence or give consideration to the basic issues involved in the case.)

The remainder of Counsel's brief is largely a reargument of the points stated in its Motion to Dismiss, which have already been ruled upon by the Hearing Officer. These require no discussion unless or until the Board should reverse its previous decision to leave to the Hearing Officer the disposition of the purely interlocutory phases of the case. The Board's Solicitor respectfully requests that the Board refuse to change its ruling on this subject.

Next, as to the attempted appeal from the ruling of the Hearing Officer setting September 19th as the date for the resumption of the hearing. This, too, is a purely interlocutory matter and one upon which it was within the power of the Hearing Officer to rule. Rule IV of the Board's Rules of Practice provides, inter alia, as follows: "Each hearing shall begin at the time and place ordered by the Board, but thereafter may be

successively adjourned to such time and place as may be ordered by the Board or by the trial examiner."

There is certainly nothing in this record which requires the Board at this stage of the proceeding to entertain an appeal from the Hearing Officer's ruling on the trial date. Only a clear abuse of discretion on the part of a hearing officer would seem to justify such action. Of course, there is not even a shadow of such a showing here. Nor could there be, considering the fact that, while the complaint has been issued for over a year and two months, actual trial of the issues has consumed only 46 days. Time and again the Hearing Officer, both on and off the record, has indicated to Counsel for both sides that he expected Counsel to put to fruitful use the periods during which the case, for one reason or another, was in recess. (For remarks of this character <u>on</u> the record, see Transcript at pages 2935, 3815, and 3461.) And when we consider that the Hearing Officer fixed a date for the resumption of hearings more than 30 days from his decision on the Motion to Dismiss -- a period in excess of that actually required by Section 11 of the Clayton Act for the commencement of the trial of the <u>entire case</u> -- it would be patently absurd to charge the Hearing Officer with an abuse of discretion in setting a date so far in advance for the resumption of hearings here.

The Board's Solicitor respectfully requests that the Board refuse to entertain Respondent's appeal because it is obviously nothing more than a contrived effort to stall the hearings and thus postpone final judgment on the merits of this case.

Respectfully submitted,

Leonard Townsend
Solicitor.

August 31, 1949