Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

C
FCC 72R-324

91907

In the Matter of:	)	
	)	
Petitions filed by the	)	DOCKET NO. 19143
Equal Employment Opportunity	)	
Commission (EEOC) et al.	)	

MEMORANDUM OPINION AND ORDER

Adopted November 10, 1972 ; Released November 14, 1972

By the Review Board: Board Member Berkemeyer absent

1. On November 19, 1970, the American Telephone and Telegraph Company (AT&T) requested permission from the Commission to increase its long distance telephone rates in the 48 contiguous states in order to raise its rate of return from 7.5% to 9.5%. On December 10, 1970, the Equal Employment Opportunity Commission (EEOC) filed a petition to intervene, opposing AT&T's request on grounds that the company discriminates in employment against women, blacks, Spanish-surnamed Americans, and other minorities. The Commission found no "logical or functional relationship" between rate levels and the company's employment policies; therefore, it denied EEOC's request to intervene in the rate increase matter. 1/ However, the Commission did believe that EEOC had raised substantial questions as to AT&T's employment practices with respect to women and minority groups, and, by Memorandum Opinion and Order, released April 27, 1971, 2/ designated the matter for hearing to explore the alleged discriminatory practices as possible violations of the Commission's policy against discrimination in employment by communications common carriers 3/ and possible violations of the Civil Rights Act of 1964. 4/ The issues specified by the Commission were:

(a) Whether the existing employment practices of AT&T tend to impede equal employment opportunities in AT&T and its

1/ Based on other grounds, the Commission did order a hearing on the lawfulness of AT&T's proposed increase in rates. See American Telephone and Telegraph Company, 27 FCC 2d 151 (1971).

2/ 27 FCC 2d 309, 20 RR 2d 1181.

3/ See In the Matter of Rule Making to Require Communications Common Carriers To Show Nondiscrimination in Their Employment Practices, 24 FCC 2d 725, 19 RR 2d 1862 (1970).

4/ New York Telephone Company and New Jersey Bell Telephone Company were made parties to the proceeding by Commission Order, FCC 71-327, released April 14, 1972.

operating companies contrary to the purposes and requirements of the Commission's Rules and the Civil Rights Act of 1964.

(b) Whether AT&T has failed to inaugurate and maintain specific programs, pursuant to Commission Rules and Regulations, insuring against discriminatory practices in the recruiting, selection, hiring, placement and promotion of its employees?

(c) Whether AT&T has engaged in pervasive, system-wide discrimination against women, Negroes, Spanish-surnamed Americans, and other minorities in its employment policies?

(d) Whether, and in what manner, any of the employment practices of AT&T, if found to be discriminatory, affect the revenues or expenses of AT&T, or otherwise affect the rates charged by that company for its interstate and foreign communication services, and if so, in what ways this is reflected in the present rate structure?

(e) To determine, in light of the evidence adduced pursuant to the foregoing issues, what order, or requirements, if any, should be adopted by the Commission?

2. On May 8, 1972, the first day of field hearings in New York City, the Administrative Law Judge responded to fears expressed by employee-witnesses that the companies named in this proceeding would take retaliatory actions against them if they testified. The Judge stated that he "will direct that both the Bell System and New York Telephone, that if any person who testifies in this proceeding is subsequently discharged because of -- during the pendency of this proceeding that the parties and myself are to be immediately notified for whatever reason the discharge occurred." Preceding his directive, the Judge stated that he was "simply acting on the basis that the information has been expressed, and I think it affects the outcome of the proceeding, and I want to remove that fear, whether its true or not,...." Following the hearings, the Presiding Judge issued a written Memorandum Opinion and Order (FCC 72M-657, released May 18, 1972), in which he confirmed and explained his oral order, and ordered New York Telephone Company (NYT), New Jersey Telephone Company (NJT), and/or AT&T to "...notify all parties herein, if any employee who testified in this proceeding (or whose name had been presented to the companies as a prospective witness) is proposed to be discharged or disciplined, for whatever reason, prior to taking such action; and provided further, that if the disciplinary action included discharge from employment or suspension of pay, the prior notice shall be not less than fifteen days." 5/ Now before the Review Board are: an appeal by respondent

5/ The Judge also ordered, "that in view of the important question of law and policy presented and confirming oral approval given on the record, parties hereto may file appeals to this order under Section 1.301(b) of the Rules...".

NYT from presiding Judge's Order regarding employee-witnesses in this proceeding, filed May 25, 1972; and appeals by AT&T and New Jersey Bell Telephone Company, filed May 25, 1972 and May 26, 1972, respectively, adopting and incorporating by reference NYT's appeal. 6/

3. In their appeals, respondents argue, in essence, that the Judge lacked the authority to issue his Order. Respondents characterize the Order as an "injunction", which, they maintain, traditionally has fallen within the general equitable powers exercised solely by local, state, and federal courts. According to respondents, Congress has made it clear in legislation granting administrative agencies their powers that such agencies cannot issue injunctions, and that injunctive relief when required must be obtained from the courts. For example, respondents continue, the EEOC was not empowered by Congress to issue preliminary injunctions against employers threatening employees with retaliation for challenging the employers' employment practices; however, in Title VII of the Civil Rights Act of 1964 (Section 706(f)(2)), Congress authorized the EEOC to seek temporary equaitable relief in the courts. To further emphasize their point, respondents note that Congress, realizing that employers could take retaliatory actions against employees in labor relation disputes, provided the National Labor Relations Board with the power to petition the courts for injunctive relief and did not vest the NLRB itself with the power to issue preliminary injunctions (citing 29 U.S.C. Section 160(j), National Labor Relations Act, Section 10(j)). Furthermore, respondents argue, the Judges's Order is contrary to the legislative scheme for dealing with the problem of retaliation; the scheme Congress developed in legislation like the Civil Rights Act and the NLRB is intended to protect and accomodate the interests of both the employee and the employer. Respondents insist that the Judge's Order requiring them to retain employee-witnesses for fifteen days on the payroll after their services are deemed undesirable by respondents imposes an undue burden on them contrary to Congress's statutory scheme and could also possibly endanger the public. In this regard, respondents maintain that the Commission's anti-discrimination rules (see note 3, supra) are intended to "complement, rather than conflict with any action by other agencies especially created to enforce the policy of equality in employment." In "complementing" the EEOC's efforts, respondents argue, the Commission cannot confer upon itself powers which are in the exclusive domain of the courts. Finally, respondents take the position that the Judge's reliance on Section 1.243(f) of the Commission's Rules as authority for his Order is

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6/ Also before the Review Board are the following related pleadings: (a) request for permission to exceed length of pleading limitation, filed June 14, 1972, by the Common Carrier Bureau; (b) Common Carrier Bureau's opposition, filed June 16, 1972; (c) opposition, filed June 16, 1972, by Equal Employment Opportunity Commission; and (d) reply, filed June 23, 1972, by NYT.

improper. That section authorizes the Presiding Judge to "regulate the course of the hearing, maintain decorum, and exclude from the hearing any person engaging in contemptuous conduct or otherwise disrupting the proceeding." 7/ Respondents argue that Section 1.243(f) is a procedural rule exclusively and has been used by Administrative Law Judges only to maintain the "decorum" of Commission proceedings. 8/ Moreover, respondents maintain, the subject matter of the instant Order falls outside the scope of the Commission's expertise and, in the past, the Commission has refused to rule upon such matters. 9/ Respondents therefore request that the Judge's Order be reversed.

4. In opposing respondents' appeals, the Common Carrier Bureau 10/ states that the issue "is not whether the Judge has the power to issue orders of an injuctive nature, but whether the particular exercise of that power in issuing this interlocutory order is authorized." The Bureau believes that the Order was within the Judge's powers. In the Bureau's opinion, the Judge's Order is not an "injunction" because it does not require the respondents to perform some act,

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7/ Respondents also cite Section 556(c) of the Administrative Procedure Act, which delineates the following powers of Administrative Law Judges:

(1) administer oaths and affirmations;
(2) issue subpoenas authorized by law;
(3) rule on offers of proof and receive relevant evidence;
(4) take depositions or have depositions taken when the ends of justice would be served;
(5) regulate the course of the hearing;
(6) hold conferences for the settlement or simplification of the issues by consent of the parties;
(7) dispose of procedural requests or similar matters;
(8) make or recommend decisions in accordance with Section 557 of this rule; and
(9) take other action authorized by agency rule consistent with this subchapter.

8/ According to respondents, Administrative Law Judges have, pursuant to the power conferred by Section 1.243(f), postponed hearing dates (WMOZ, Inc., 5 RR 2d 732 (1965)); granted continuances (Selma Television, Inc., 3 FCC 2d 63, 7 RR 2d 546 (1965)); determined the order of evidence (Charles W. Jobbins, 5 FCC 2d 167, 8 RR 2d 874 (1969); closed the record (Sports Network, Inc. v. American Telephone & Telegraph Co., 7 FCC 2d 42, 9 RR 2d 630 (1967); and directed production of a document (Milton Broadcasting Co., 16 FCC 2d 820, 15 RR 2d 909 (1969)).

9/ Citing Radio 14, Inc., 33 FCC 2d 402, 23 RR 2d 743 (1972); A.A. Schmidt and James Broadcasting Co., Inc., 14 RR 2d 1156 (1967).

10/ The Common Carrier Bureau's unopposed request for permission to exceed the length of the pleading limitation in Rule 1.301(b)(5) will be granted.

such as reinstating any employee-witness, nor does the Order serve as a temporary injunction intended to maintain the status quo until a full hearing on the matter can be held to take some final action. The Bureau submits that the Judge can issue orders injunctive in nature, 11/ and, in support, cites the Administrative Procedure Act (5 U.S. C. Section 551(b)) which states that an "'order' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." The Bureau, however, believes that the Judge's Order is more properly characterized as a demand for information and/or as a protective order. Moreover, the Bureau continues, under the Commission's Rules and Regulations, the Judge has authority to order the production of relevant evidence during the proceedings. In the Bureau's opinion, the Judge's Order will insure the reporting of retaliatory acts which are encompased within the issues designated for hearing in this proceeding, 12/ and, should the respondents retaliate, this would reflect upon their good faith compliance with Title VII of the Civil Rights Act. See paragraph 1, supra. According to the Bureau, Rule 1.243(f) has not been used by Presiding Judges solely to preserve the decorum of the hearing; rather the rule has been used to order the taking of depositions 13/ and to compel foreign nationals who are principals of an applicant to the proceeding to appear. 14/ The Bureau further argues that the Supreme Court, in United States v. Morton Salt, 338 U S. 632 (1950), held that presiding Judges in federal administrative agencies have the power to "investigate [respondents' conduct] upon mere suspicion when the hearing process is threatened by contemptuous conduct," or "even just because he wants assurance that it [the proceeding] not" be threatened. Intimidation of witnesses, the Bureau asserts, is not only recognized as a form of contempt but also as an interference with the dignity of the court and obstruction of justice. Further authority to support

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11/ In this regard, the Bureau submits that Section 1.301(b) of the Rules characterizes interlocutory rulings of the Judge as "orders". Section 1.301(b) specifies:

> Except as provided in paragraph (a) of this section, appeals from interlocutory rulings of the presiding officer shall be allowed only if allowed by the presiding officer...The request shall be filed within 5 days after the order is released... [Bureau's emphasis.]

12/ See paragraph 1, supra.

13/ Citing, Harriman Broadcasting Co., 8 FCC 2d 274, 10 RR 2d 1 (1967).

14/ Citing, American Broadcasting Corp., Inc., 23 FCC 2d 142, 19 RR 2d 47 (1970), review denied, FCC 70-784, released July 22, 1970.

the Judge's Order is derived from Section 219(b) of the Communications Act, the Bureau maintains. 15/ In this case, the Bureau asserts, the Commission has indicated that it has an independent responsibility to effectuate the strong national policy against discrimination in employment, citing In the Matter of Rule Making to Require Communications Common Carriers to Show Nondiscrimination in Their Employment Practices, supra. The Rule Making statement makes it clear that the Commission can and must look into such matters, the Bureau concludes.

5. In its opposition, EEOC, like the Common Carrier Bureau, argues that the Judge has the authority to issue his Order under Commission Rule 1.243(f). As respondents note, presiding Judges have employed Rule 1.243(f) to postpone hearing dates, determine the order of evidence, and direct production of documents; therefore, EEOC maintains, the Rule certainly can be employed by the Judge to protect "the most vital process of [the] hearing -- the gathering of evidence through the testimony of witnesses." EEOC notes that Commission Rule 1.313 16/ gives the Judge authority to issue a protective order to protect witnesses in discovery proceedings before hearing "from annoyance, expense, or embarrassment." If the Judge can protect witnesses before a hearing, EEOC insists, he can do so during the hearing. The Order further provides a monitoring mechanism of the respondents should they take retaliatory action against the employee-witnesses, thereby providing evidence relevant to the issues in the proceeding, EEOC continues. EEOC argues that if, as respondents suggest, Congress has indicated in Title VII and the NLRA that the issuance of protective orders are vested solely in the courts and if the FCC does not have enabling legislation in order to secure a protective order from the courts, then the Commission would have no means to protect the testimonial process during the hearings; therefore, it must be implied, EEOC argues, that Rule 1.243(f) includes the power to protect witnesses. Section 706(f)(2) of the Civil Rights Act of 1964 does not provide an adequate alternative to the Judge's Order because it provides judicial remedy for actual violations of anti-discrimination laws, EEOC maintains. Furthermore, EEOC argues, employing Section 706(f) would require the hearing be adjourned, a petition filed with EEOC, and EEOC filing for judical relief. This would not only delay the instant proceeding, but would remove the conduct of the proceeding from the hands of the Administrative Law Judge and vest it in the EEOC and the courts. The Order does not endanger the public safety nor the companies' security, EEOC asserts. Under the Order, the respondents are free to

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15/ Section 219(b) of the Act authorizes the Commission to:

> by general or special orders require any such carriers...to file periodical and/or special reports concerning any matters with respect to which the Commission is authorized or required by law to act...

16/ Section 1.313 is entitled "Protective Orders" and reads in part:

> The use of the procedures set forth in Section 1.311 - 1.325 is subject to control by the presiding officer, who may issue any order consistant with the provisions of those actions which is appropriate and just for the purpose of protecting parties and deponets as of providing for the proper conduct of the proceeding.

discharge any employee-witness; however, they must give all parties to the proceeding notice of the discharge and must continue to pay the employee during the fifteen days. EEOC concludes that the respondents' assertions that they have no intention of retaliating against the employee-witnesses is "irrelevant." The Judge's Order was intended to allay the fears of the employee-witnesses that the companies would take retaliatory action against them for testifying, EEOC maintains, and was not a determination that respondents had or would take retaliatory actions.

6. In reply, respondents object to the absence in the Order of a reimbursement provision to cover the situation where the company discharges an employee, pays him for the fifteen days, and after investigation of the discharge, the company is found to be justified in its actions. Without a reimbursement provision, respondents argue, the order consitutes a "taking of Respondents' property". Respondents note that Section 706(f)(2) of Title VII provides that preliminary relief "shall be issued in accordance with Rule 65 of the Federal Rules of Civil Procedure." That Rule provides that the party seeking injunctive relief must post security to compensate the party who may be found to have been wrongfully enjoined or restrained. Without appropriate provision for reimbursement, respondents argue, the Order is "wholly unjustifiable". In response to the Bureau's and EEOC's arguments that the Order is necessary to "protect the integrity" of the hearing by providing protection for the witnesses, respondents assert that the employees are provided with the following means of protection: (a) the EEOC has the power to seek emergency relief in the court, under the Civil Rights Act; (b) a federal criminal statute (18 U.S.C. Section 1505) proscribes a penalty of up to five years imprisonment and a fine of up to $5,000 or both for any person who "injures any...witness in his person or property...on account of his testifying" before any federal agency; and (c) EEOC or the Common Carrier Bureau could utilize the FCC's subpoena power to compel a witness to testify. The respondents disagree with EEOC that, since no provision has been made by Congress for the FCC to seek relief in the courts, it has inherent power to grant the desired relief on its own. Respondents believe it would be easier to imply that the FCC has authority to seek relief in the courts, citing FTC v. Dean Foods Co., 384 U.S. 597, 605-608 (1969), where the Court found such implied authority.

7. The Review Board cannot agree with respondents that the Administrative Law Judge abused his discretion or acted without authority in ordering the telephone companies to give all parties to the proceeding notice of any disciplinary action taken against any employee-witness in this proceeding, and, should the disciplinary action be discharge or suspension of pay, a fifteen day advance notice. By its terms, Section 1.243(f) of the Commission's Rules confers upon the presiding officer the authority "to regulate the course of the hearing", and it is well established that this authority is plenary and "invests the presiding officer with great latitude". Selma Television, Inc., 3 FCC 2d at 64, 7 RR 2d at 548. See also Tinker, Inc., 4 FCC 2d 372, 7 RR 2d 677 (1966); Chronicle

Broadcasting Co., 20 FCC 2d 728, 17 RR 2d 1094 (1969). 17/ As both the Bureau and EEOC point out, encompassed within the Judge's authority to conduct the hearing is the preservation of evidence. Cf. Bunker Ramo Corp. v. Western Union Telegraph Co., 31 FCC 2d 449, 22 RR 2d 843 (1971). In issuing the Order under consideration, the Judge explained that it was intended to allay the fears the witness-employees had expressed during the hearing that the companies would retaliate against them for testifying. 18/ In our view, the Judge made clear in his Order that he was not determining whether the respondents had, in fact, or actually would take retaliatory action against the employee-witnesses. 19/ The Order was intended as a procedural device to provide some protection for the witnesses, thereby insuring that a full and complete airing of the issues can take place at the hearing. In this regard, we note that the Commission, in Tinker, Inc., supra, encouraged presiding officers to be innovative in conducting hearings to assure a meaningful and efficient hearing record. The Commission stated, "It is commendable for [an Administrative Law Judge] to exercise firm control of the course and conduct of a proceeding and to adopt such innovations in procedure as are consistent with the statutes, the Rules of the Commission, the rights of the parties, and adapted to achieve expedition of proceedings, the full disclosure of facts and the attainment of justice." 4 FCC 2d at 374, 7 RR 2d at 680. (Emphasis supplied.) We believe the Judge's Order is in keeping with the spirit of Tinker and is consistent with the general tenor of Section 1.243(f); therefore, it will not be disturbed. 20/ See Charles W. Jobbins, supra; Selma Television, Inc., supra; and WMOZ Inc., supra.

8. ACCORDINGLY, IT IS ORDERED, That the request of the Chief, Common Carrier Bureau, for permission to exceed length of pleading limitation, filed June 14, 1972, IS GRANTED, and the opposition pleading IS ACCEPTED; and

9. IT IS FURTHER ORDERED, That the appeal by Respondent New York

17/ "[Administrative Law Judges] are delegated broad responsibility for the management of the hearings assigned to them. It is their obligation to see that these proceedings move forward in an orderly fashion with due regard for equity and fairness to all participating parties." 20 FCC 2d at 728, 17 RR 2d at 1095.

18/ The Judge explained in his Order that some employees had testified at the beginning of the hearings that they were unwilling to testify out of fear of retaliation by their employers--the telephone companies.

19/ The fact that the Judge did not find that the respondents had, in fact, retaliated against any employee-witnesses - a point respondents make several times in their pleadings - is really immaterial in light of the true nature of the Order which is to protect the witnesses and insure a free flow of evidence at the hearing.

20/ We do not agree with respondents that a lack of a reimbursement provision renders the Judge's Order unjustified. At this time, it is purely conjectural that respondents would have to discharge an employee with pay. However, should this problem arise, the parties could seek further clarification from the Presiding Judge.

Telephone Company from Presiding Judge's Order regarding employee-witnesses in the proceeding, filed May 25, 1972; the appeal by Respondent American Telephone and Telegraph Company from Presiding Judge's Order regarding employees who have appeared as witnesses in the proceeding, filed May 25, 1972; and the appeal by Respondent New Jersey Bell Telephone Company from the Presiding Judge's Order regarding employees who appeared as witnesses in this proceeding, filed May 26, 1972, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary