

Opinion

IN THE MATTER OF
FLORIDA CITRUS MUTUAL ET AL.

Docket 6074. Order and opinions, May 10, 1954

Before *Mr. J. Earl Cox* and *Mr. Everett F. Haycraft*, hearing examiners.

Mr. Fletcher G. Cohn and *Mr. Lewis F. Depro* for the Commission.

Mabry, Reaves, Carlton, Anderson, Fields & Ward and *Mr. Counts Johnson*, of Tampa, Fla., and *Mr. Robert E. Freer*, of Washington, D. C., for respondents.

Mr. A. Y. Milam, of Jacksonville, Fla., for Florida State Chamber of Commerce, intervenor.

Mr. William H. Dial, of Orlando, Fla., for Florida Bankers Ass'n, intervenor.

ORDER SUSTAINING APPEAL OF COUNSEL IN SUPPORT OF COMPLAINT,
REVERSING INITIAL DECISION, AND REMANDING CASE TO HEARING
EXAMINER

This matter coming on to be heard by the Commission upon an appeal, filed by counsel in support of the complaint, from the hearing examiner's initial decision dismissing the complaint herein without prejudice; and

The Commission having decided, for the reasons set forth in the written opinion which is being issued simultaneously herewith, that said initial decision was improvidently issued:

It is ordered, That the appeal of counsel in support of the complaint be, and it hereby is, sustained.

It is further ordered, That the hearing examiner's initial decision filed June 12, 1953, be, and it hereby is, vacated and set aside.

It is further ordered, That this case be, and it hereby is, remanded to the hearing examiner with instructions to proceed in accordance with the Commission's opinion.

Commissioner Howrey dissenting in part but concurring in the result, and Commissioner Mead not participating.

OPINION OF THE COMMISSION

MASON, Commissioner:

This matter is before the Commission on appeal by Government counsel from a hearing examiner's order dismissing the complaint.

The initial decision of the examiner granting the respondents' motion to dismiss prior to trial is reversed. The case is remanded for disposition in accord with this opinion.

The facts of record are as follows :

The complaint herein, issued December 15, 1952, charges respondents with violation of Section 5 of the Federal Trade Commission Act. Amongst other things, it charges respondents agreed with shippers, canners, packers and concentrators of citrus fruits to fix the prices and control the interstate shipments of said fruits, and to restrain the trade of other growers.

The complaint states that said practices are beyond the protection and immunities from Federal antitrust jurisdiction granted to agricultural marketing cooperatives by the Capper-Volstead Act¹ and other related Federal statutes. Under these Acts growers are permitted to form marketing associations through which they may perform all of the necessary practices incident to the processing, sale, shipment, marketing and distribution of their products so long as they do not include in such efforts the participation of third parties, that is, in this matter the said handlers, etc., to whom title to the products passes from respondents.

One of the averments of this complaint was that the Commission had "reason to believe" it was in the public interest to bring suit against respondents for an alleged conspiracy to fix prices and restrain trade.

At first respondents filed a general denial. This answer has not been withdrawn and still controverts the essential allegations in the complaint. After some delay, during which efforts to adjust or settle the issues were attempted and failed, the respondents tendered a motion to dismiss, challenging only the Commission's averment that the suit was in the public interest.

From the state of the record it is difficult to determine whether respondents wish to stand on their presumption of innocence and await the introduction of evidence by the Government, or seek confession and avoidance, as they do by their motion to dismiss. All we are certain of is that respondents feel the case lacks public interest. This is a feeling common to all defendants.

In issuing the complaint herein the Commission, acting in its administrative capacity, made the preliminary determination that there were reasonable grounds to believe respondents had conspired to restrain trade and that it appeared to the Commission the proceeding would be to the interest of the public (Section 5 (b)). That it was in the public interest for the Commission to challenge said alleged conspiracy was a natural sequitur. On this basis a complaint was filed on December 15, 1952.

¹ Act of Congress, Feb. 18, 1922, 7 U. S. C. A. 291, 292.

Prior to the issuance of the complaint and prior to trial, the administrative discretion of the Commission regarding the existence of public interest is not subject to review. After trial, it is subject to review by the courts. The respondents' motion to dismiss on the ground of a lack of public interest, therefore, does not present an issue on which a hearing examiner has authority to rule. An examiner has no power to sit in judgment on the discretionary decisions of the Commission within the range of the administrative process. Even courts are limited to challenge only the abuse of administrative discretion.¹ To hold otherwise would subvert the very policy of the Act from which the Commission derives its discretionary powers. And the Commission has not delegated to its examiners any authority to substitute their discretion for that of the Commission.

An examiner's cardinal function is to sit in a judicial capacity. He may (subject to review by the Commission) dismiss a complaint if in his opinion the facts alleged do not state a cause of action. This is an initial adjudicatory function delegated to the examiner. His decision to dismiss a complaint is based upon his review of the facts and his review of the law. But he may not search into the mental processes of the Commission to determine whether it rightfully concluded the public interest justified complaint, for to do so he would have to examine the statements, affidavits, reports, etc., of the Commission's investigators on which the averments in the complaint are founded.

To students of Government polity there are quite obvious reasons why the Commission cannot delegate these administrative functions to an examiner.

In the first place the criteria as to the quantum and quality of evidence used by the Commission in establishing the averment in the complaint is that it has "reason to believe" and that a proceeding appears to be in the public interest. These criteria are different from those used by a hearing examiner of the Commission when trying issues controverted by the pleadings in the trial of a case. Then to establish the element of guilt the final decision must be based on the "preponderance of the evidence."

But there is, however, another more compelling reason why we cannot have examiners exercising the above administrative function. Unfair acts and practices in commerce are not easy to detect. Most of them are uncovered by competitors or consumers injured by the alleged illegal practices of the proposed respondents. To publicly arraign injured parties or other informants against alleged law vio-

¹ See *F. T. C. v. Klesner*, 280 U. S. 19.

lators prior to the presentment of complaint would discourage the institution of any corrective proceedings.

The Commission's original administrative determination of public interest is predicated on evidence presented to it by its investigating attorneys. This preliminary marshalling of evidence is not subject to public scrutiny and necessarily has not met the test of an adversary proceeding. It is fundamental to the Anglo-American system of jurisprudence that in the initiatory stage in any proceeding, whether civil or criminal, the issuance of a complaint is of necessity based on *ex parte* presentations. If the Commission had to litigate the question of public interest prior to trial of its complaint in the manner the hearing examiner here seeks to innovate, the orderly trial of the controverted issues would be gutted. Nor may the examiner sort out and try any single averment in a complaint to the exclusion of all others that are at issue. This applies with special force to the question of public interest, for the answer to that question lies in the totality of all the facts in the case.

Turning now to the question of mootness presented by the proposed pretrial "adjustment"—so much of the transcript of the hearings was taken up with this subject that it is in the interest of clarity that the Commission comments on matters not properly part of the official record.

It seems to us that the adjustment or settlement contemplated in the Administrative Procedure Act is addressed to the speedy disposition of causes where both the prosecution and the respondents can agree to its terms. It is true these efforts to adjust or settle are under the aegis of the hearing examiner, and certainly his good offices and interest in developing such proposed settlements can do much toward expediting the course of justice. In such pretrial proposed settlements, the hearing examiner's preliminary endorsement or rejection will be considered by the Commission in its final decision. In this connection the Commission has noted with approval the recent recommendations on this subject adopted by the President's Conference on Administrative Procedure.

But settlements or adjustments are, as their name implies, agreements. If a settlement proposed by a respondent does not come forward with the approval of the bureau involved, the examiner has no more authority to force dismissal of the case prior to trial than he would have to force a cease and desist order on the respondent prior to trial.

The Commission is fully cognizant of its authority to dismiss a complaint at any time during the course of a proceeding. While it would be impossible to certify that the intimate details of all pending trials

are closely followed by the entire membership of the Commission, it would be equally difficult to assume that in a matter of such magnitude as the instant case, the proposals for dismissal submitted by counsel for respondents and by the then acting counsel in support of the complaint were not given the most careful consideration at the highest level.

The distinguished counsel representing respondents were fortified in their endeavors through petitions to intervene by the State of Florida, the Chamber of Commerce of the State of Florida, and the Florida Bankers Association. This veritable armamentary of support would command the respectful attention of any agency of Government, but the fact remains that the irregular procedures thus far followed have not presented evidence sufficient to persuade the Commission in its administrative capacity to accept the proposed settlement.

Respondents (in support of their motion to dismiss) averred that in May of 1952 the alleged unlawful practices were abandoned, that the subject of the complaint is moot, and that the alleged conspiracy no longer exists because it failed to accomplish its goal.

When properly introduced as a part of the respondents' defense, this may be proof of the present non-existence of an illegal practice. However, the public interest is concerned with more than the fortuitous abortion of an illegal combination in restraint of trade. To say that wrongful acts will not be repeated because in the past they proved unfeasible does not meet the burden of the Commission's responsibility.

Prior to the passage of the Federal Trade Commission Act the public interest might have to wait on the successful culmination of unlawful combinations, but the Commission's function is prophylactic, not punitive. It projects its action in the future and, while we need not proceed against illegal actions dead and buried, there is nothing to prevent our proceeding against respondents who have in the past violated the law, even though at the time of suit they may have desisted of their own accord, if there is reason to believe there may be a resumption of the illegal practices. Whether this desistance came through penitance or because the acts proved unprofitable might be considered by the Commission in determining the need for future protection of the public interest by a cease and desist order.

At any rate, in the instant case, whether or not the public interest requires a cease and desist order or may be satisfied with a dismissal rests not on the present existence or non-existence of an illegal restraint so much as it does on the entire context surrounding all actions of the respondents. This context only can be determined through a complete disclosure of the facts encompassed in the complaint.

The appeal of counsel in support of the complaint is granted and the case remanded with instructions to proceed in accordance with this opinion.

Chairman HOWREY dissenting in part but concurring in result.

This case is before us on a procedural and jurisdictional question. The merits are not now involved.

I agree that the case should be remanded to the hearing examiner but for reasons quite different from those expressed in the opinion of the Commission.

The Commission has, I believe, committed fundamental error and, perhaps without fully realizing it, dealt a serious blow to administrative law and procedural due process.

The statutory issue of public interest has been removed from the adjudicatory processes of the Commission and made a matter of administrative discretion. This has been done without so much as a passing nod to statutes, rules of practice, and Supreme Court decisions which, I think, clearly require a contrary decision. If the basic issue of public interest can be removed from the hearing table and determined by the Commission, as plaintiff instead of judge, upon the basis of information contained in secret files, so can any other issue.¹

It was just this sort of bureaucratic action that the Administrative Procedure Act was designed to stop.

Because of the philosophy which apparently underlies the Commission's opinion I feel compelled to deal with the matter at some length.

The respondents are the Florida Citrus Mutual, a non-profit cooperative marketing association, its directors, officers and members.

The complaint charges that respondents, in violation of Section 5 of the Federal Trade Commission Act, were "parties to a combination * * * to fix prices and control the distribution of citrus fruits and citrus products moving in interstate commerce from the State of Florida." The complaint alleges that the challenged practices went beyond the protection and immunity of the Capper-Volstead Act which permits producers of agricultural products to act together in

¹ The Commission states the basic proposition that "Prior to the issuance of the complaint and prior to trial the administrative discretion of the Commission regarding the existence of public interest is not subject to review." Based on this premise, which would seem to have no application to the instant case, the Commission holds that "The respondents' motion to dismiss on the ground of lack of public interest, therefore, does not present an issue on which a hearing examiner has authority to rule."

The complaint in this case had long since issued, answers had been filed, and the case had been at issue for more than four months before the motion to dismiss was filed. The **matter became adjudicatory in nature**, and the Administrative Procedure Act came into play, immediately after the complaint issued and the case was assigned to a hearing examiner.

collectively processing and marketing their products, providing this group activity is done through the medium of associations operated for the mutual benefit of their producer members.²

The Capper-Volstead Act has been construed as an exception to the antitrust laws insofar as collaboration among members is concerned. This immunity ends, however, at the point where they commence to act in concert with other persons who are not farmers—where, for example, they combine or agree with distributors and others to eliminate competition at successive stages in the marketing process.³

After answer was filed and issues joined, and after intervention on behalf of respondents by the State of Florida, the Florida State Chamber of Commerce, and the Florida Bankers Association, respondents filed a motion to dismiss upon the grounds (1) that the complaint was “improvidently issued” and the public interest required dismissal, and (2) that the issues were moot.

Respondents’ contentions rest primarily on the claim that the challenged practices were abandoned prior to the issuance of the complaint.

Two basic questions are presented on appeal:

1. Does the hearing examiner have the power, on preliminary hearing, to entertain a motion to dismiss a complaint upon the ground of lack of public interest?
2. If so, does the record on the preliminary hearing show that the practices were abandoned and that there is no likelihood of their resumption?

The hearing examiner, before hearing the merits, took several days of testimony on the issues raised by the motion. Some of the evidence

² Act of February 18, 1922, 7 U. S. C. 291, 292. The Capper-Volstead Act provides: “Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.”

It provides further:

“If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, * * *

³ *United States v. Borden Company*, 308 U. S. 188 (1939); *United States v. Maryland and Virginia Milk Producers Assn., Inc., et al.*, 179 F. 2d 426 (1949), cert. den. 338 U. S. 831 (1949).

adduced at this preliminary hearing dealt with the merits. This, of course, cannot be considered by the Commission at this time except as it may bear on the question of public interest. "On a motion to dismiss it is settled law that the complaint should be construed in the light most favorable to the plaintiff, with all doubts resolved in his favor and the allegations accepted as true. * * * No matter how unlikely it may seem that the pleader will be able to prove his case, he is entitled * * * to an opportunity to try."⁴

The facts relevant to the question of abandonment are summarized below:

Florida Citrus Mutual was chartered in 1948 and began operation on March 25, 1949. It has approximately 7,000 members and functions through its board of directors. The Board selects the officers and elects an executive committee which acts for the Board. The Board also elects an advisory committee, the membership of which includes both growers and handlers (shippers, processors, and canners). Some of the latter are not members of the association and are not engaged in the production of citrus products within the meaning of the Capper-Volstead Act.

Each member of the association must be a grower who has signed a contract to sell his citrus products only through handlers affiliated by contract with Mutual. Handlers are divided into three separate groups determined by the type of contract under which they operate—the "A" contract is for canners and concentrators who purchase raw fruit for processing, the "B" contract is primarily for handlers engaged in the packing and shipping of fresh fruit, and the "C" contract for intermediary handlers.

Mutual attempted to accomplish its objectives of stabilizing an admittedly distressed citrus industry through (1) its information service, (2) minimum or floor pricing, and (3) proration or allotment of shipments.

As part of its information service, price statistics were compiled and sent to members, shippers, processors, and other agencies. An attempt was made to keep members and all other segments of the industry fully informed on current market prices and trends and other items of interest to the citrus industry.

In November 1949, at a time of declining prices, Mutual established a minimum price for fresh fruit and on fruit for processing. These prices held until the market improved and gradually reached a rela-

⁴ *United States Guarantee Co. v. Mountaineer Engineering Co.*, 12 FRD 520 (D. C. W. D. Pa. 1952). See also *Delaware Floor Products, Inc. v. Franklin Distributors, Inc., et al.*, 12 FRD 114; *Cool v. International Shoe Co.*, 142 F. 2d 318 (C. A. 8, 1944); *Shapiro v. Royal Indemnity Co.*, 100 F. Supp. 801 (D. C. W. D. Pa. 1951); *Continental Collieries, Inc. v. Shober*, 130 F. 2d 631 (C. A. 3, 1942).

tively satisfactory level; it remained stable until April 1950. In the fall of 1950, price minima were again established and were again followed by increasing fruit prices, which maintained a satisfactory level until April 1951.

In the year 1951 further attempts were made to establish minimum prices. These moves, unlike the previous ones, were not successful in stabilizing prices. Handlers refused either to pay or maintain the minimum prices established by the association.

Early in 1952 Mutual undertook a mandatory proration program under which shipments of fresh fruit were to be strictly limited. Mutual's effort in this direction is shown by a motion adopted by its executive committee authorizing "a compulsory allotment of 1,100 cars of oranges and 700 cars of grapefruit for interstate shipment, effective 12:01 A. M., February 4, 1952, to 12:00 P. M., February 9, 1952, and that such an allotment be prorated over the entire industry, based upon the performance of each shipper for the last three years." These attempts at compulsory proration were not very successful. In lieu thereof a so-called voluntary allotment program was adopted which is still in effect.

The Department of Agriculture made a series of studies of the Florida Citrus Industry and the operation of Mutual. Three reports were published, one in October 1950, one in May 1951, and the third in June 1952. They largely parallel each other insofar as recommendations are concerned. In the 1952 report the Department commented on the three primary features of Mutual's program, as follows:

"Information Services. For the past three seasons Mutual has operated a successful market information service. Under present conditions the association can probably make its greatest contribution by continuing to operate an accurate and complete market information service.

"Minimum pricing. Experience with other commodity programs and the past experience of Mutual indicate that Mutual should not continue to operate a minimum price program."

* * * * *

"* * * The vast differences of ownership and ways of doing business made it impossible for Mutual's minimum price program to succeed. There was no effective way for grower-handlers and cooperatives to conform to the minimum price program requirements."

* * * * *

"Proration (orderly distribution to the fresh fruit market). Mutual's proration program has been operated primarily on a voluntary basis. This program has been helpful in getting an orderly distribu-

tion of citrus to the fresh fruit market; however, the difficulties of developing an equitable base have made it impossible for the program to be fully successful."

* * * * *

"If Mutual were a marketing agency which fully controlled the sale of almost 100 percent of the fruit, it could effectively allocate the movement of fresh fruit from the State. However, indications are that there is little likelihood that the association could become a central sales agency for all of Florida citrus."⁵

In mid-March 1952, when Mutual was convinced that its mandatory programs could not be successful, its president appointed a committee known as the Citrus Industry Planning Committee to consider and recommend to the directors a new program. At a meeting on May 21, 1952, Mutual released a report of this committee which said that a "necessary condition to maintaining a floor price is that control or ownership of the packed or processed product be in the hands of a central agency owned and controlled by growers. Since the industry is not so organized, it follows that it is not possible, under present conditions, to enforce successfully a floor price and it is misleading for the industry to try."

The Board at the same meeting adopted a new program which included the following:

"Use a voluntary allotment program, as needed, to assist in orderly movement to the fresh fruit markets.

* * * * *

"Make economic studies on price and release information to the industry of the justifiable minimums for raw fruit for processing and FOB packed fresh fruit as indicated by such studies.

"Use every means possible to develop accurate market information and promptly and currently disseminate such information to growers, handlers and the trade."

For the purpose of his decision on the motion to dismiss the hearing examiner construed the pricing and proration activities of Mutual, prior to May 1952 (to the extent they were binding on both growers and handlers), as beyond the provisions of the Capper-Volstead Act and in violation of section 5 of the Federal Trade Commission Act. He held, however, that Mutual ceased all illegal activities in May 1952, six months before the complaint was issued; that such cessation was in good faith and not because of the Federal Trade Commission investigation; that there was no reasonable probability that such illegal practices would be resumed in the future because of their

⁵ The record indicates that Mutual controls about 85 percent of the Florida citrus crop but that some of its members do not always keep in step with the association's program.

economic futility and because economic compulsion had induced their abandonment. From this he concluded that the public interest did not require further prosecution of the proceeding and ordered the complaint dismissed.

Implicit in this holding is the assumption or decision by the hearing examiner that other practices challenged by counsel supporting the complaint, for example, the handler contracts and the voluntary allotment program, were legal and proper. This latter ruling seems to us to be one on the merits improperly made at this time. Before discussing this question, however, let us consider the jurisdiction or power of the examiner to hear and decide the motion to dismiss.

I

Section 7 (b) of the Administrative Procedure Act provides that "Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken * * *, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issue * * *, (7) dispose of procedural requests of similar matters, (8) make decisions or recommend decisions * * *, and (9) take any other action authorized by agency rule * * *"⁶

Rule X of the Commission's Rules of Practice provides that "During the time a proceeding is pending before a trial examiner all motions * * * shall be addressed to and ruled upon by him * * *" This clearly includes motions to dismiss inasmuch as the rule goes on to state "When a motion to dismiss is granted as to all charges of the complaint in regard to one or more respondents, or is granted as to any part of such charges in regard to any or all respondents the trial examiner shall forthwith render * * * an initial decision dismissing the complaint as to such charges or such respondents."

The enumerated powers of the examiner should be liberally construed in the light of the history and intent of the Administrative Procedure Act. It was the general statutory purpose to enhance the status and role of hearing officers.⁷ The Senate Report said "This subsection [7b—Hearing Powers] is designed to assure that the presiding officer will perform a real function * * * The agency itself—

⁶ 5 U. S. C. 1006 (b).

⁷ See Attorney General's Manual on the Administrative Procedure Act, p. 74 (1947); Final Report of Attorney General's Committee on Administrative Procedure, pp. 43-53, particularly at pp. 45-46 and 50 (1941). See also First Report of the President's Conference on Administrative Procedure, Recommendations adopted Nov. 23-24, 1953, pp. 12, 32-33.

which must ultimately either decide the case, or consider reviewing it, or hear appeals from the examiner's decision—should not in effect conduct hearings from behind the scenes where it cannot know the detailed happenings in the hearing room and does not hear or see the private parties.”⁸ The House Report used substantially the same language.⁹

“It was intended that the hearing examiner stand in somewhat the same relationship to the agency as does a trial judge to an appellate judge.”¹⁰

The courts, since the passage of the act, have placed increasing reliance on the hearing examiner's initial decision. In the *Universal Camera* case, for example, the Supreme Court referred to the examiner's special competence to determine questions involving credibility of witnesses. The Court emphasized that the “evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's.”¹¹

Under the Commission's Rules of Practice, as modified since the enactment of the Administrative Procedure Act, the hearing examiner's initial decision becomes final unless it is set aside on appeal or is reviewed by the Commission on its own motion.¹² He must of necessity therefore consider and decide all the material and justiciable issues presented by the record whether they be ones of fact, law, jurisdiction or discretion.

In short, the jurisdiction of the presiding officer, insofar as adjudicatory matters are concerned, is largely coequal with that of the Commission itself.

The real question before us then seems to be whether “public interest” is an issue to be adjudicated or whether it is a matter of administrative discretion to be decided before the complaint issues and not thereafter questioned except by the Commission acting in its administrative capacity.

Section 5 (b) of the Federal Trade Commission Act provides that “Whenever the Commission shall have reason to believe that any * * * person, partnership or corporation has been or is using any unfair

⁸ Administrative Procedure Act, Legislative History, Sen. Doc. 248, 79th Cong., 2d Sess. 207 (1946).

⁹ Ibid., p. 269.

¹⁰ “The Status of the Trial Examiner in Administrative Agencies” Harv. L. Rev., Vol. 66, p. 1065 (1953).

¹¹ *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474, 496 (1951). See also *Folds v. F. T. C.*, 187 F. 2d 658 (C. A. 7, 1951) and *Minneapolis-Honeywell Regulator Co. v. F. T. C.*, 191 F. 2d 786 (C. A. 7, 1951) cert. den. 344 U. S. 206, in which the United States Court of Appeals for the Seventh Circuit relied heavily on the hearing examiner's initial decision in reversing the Commission's decision.

¹² Rule XXII.

method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve * * * a complaint stating its charges in that respect * * *.”¹³

Section 5 then goes on to provide for notice, hearing, the taking of testimony, findings, order, and review by the courts.

This would seem to make “public interest” not only an issue to be adjudicated in the same manner as any other issue but also, like interstate commerce, a jurisdictional prerequisite.¹⁴

It is true that the Commission’s decisions have not generally dealt with “public interest” as such except in the most cursory manner. This is probably due to the fact that the phrase lacks specificity and is rather nebulous in character. But the issue is there nonetheless and is necessarily adjudicated in every case arising under section 5 of the Federal Trade Commission Act.

The Commission in the instant case has confused its administrative duties with its adjudicatory responsibilities. This, of course, is one of the grave dangers against which an administrative agency must always be on guard. In its administrative capacity the Commission ordered the issuance of the complaint because it had “reason to believe” that the statute may have been violated. But it did not thereby and must not in any case prejudge any of the issues raised by the complaint. When the Commission assumes its adjudicatory role the decision on all issues, including that of public interest, must be decided on the public record and not on information hidden in its private investigative files.¹⁵

It may be helpful, at the risk of repetition, to consider the question of public interest as coming to bear at two stages: (1) as justifying the issuance of a complaint, and (2) as justifying a cease and desist order. The Commission’s decision to issue a complaint is, as we have indicated, a matter of administrative discretion. The Commission’s decision to issue an order, on the other hand, is adjudicatory and reviewable in the courts. In considering the issue of “public interest” after complaint, the hearing examiner is looking toward the second stage. It is his duty to make a decision that will stand up before the Commission and in court. The Commission’s decision to issue a complaint merely means that it is at that time, in its administrative capacity, of the opinion that the public interest requires a proceeding. It cannot mean that the Commission is of the opinion, in its adjudicatory capacity, that it is to the interest of the public to issue an order,

¹³ 15 U. S. C. 45 (b).

¹⁴ *F. T. C. v. Klesner*, 280 U. S. 19 (1929).

¹⁵ See sections 5, 7 and 8 of the Administrative Procedure Act, 5 U. S. C. 1004, 1006, 1007.

for that would be to prejudge the case and do violence to fundamental principles of administrative and constitutional law.

It is well settled that the Commission can and should dismiss a proceeding at any time when it appears there is a lack of public interest. *F. T. C. v. Klesner*, 280 U. S. 19 (1929). The Commission has regularly dismissed complaints on this basis.¹⁶

In the *Klesner* case the Court said: "The specific facts established may show, as a matter of law, that the proceeding which is authorized is not in the public interest, within the meaning of the Act. If this appears at any time during the course of the proceeding before it, the Commission should dismiss the complaint. If, instead, the Commission enters an order, and later brings suit to enforce it, the Court should, *without enquiry into the merits*, dismiss the suit." (Italic supplied.)

In *Moretrench Corp. v. F. T. C.*, 127 F. 2d 792 (C. A. 2, 1942), Judge Learned Hand observed that the *Klesner* case, *supra*, "did indeed decide that the public interest in the controversy was a justiciable issue * * *." ¹⁷

Counsel supporting the complaint urge, however, that regardless of the Commission's right in this respect, the hearing examiner has no such power.

As indicated above I believe that the jurisdiction of the hearing examiner is the same as that of the Commission insofar as adjudicatory matters are concerned. Furthermore the hearing examiner has long

¹⁶ See, for example, *In the Matters of Wildroot Co., Inc.*, Docket 5928, June 30, 1953; *Denver Chemical Mfg. Co.*, Docket 5755, March 25, 1954; *Metal Lath Mfgs. Assn.*, Docket 5449, 1954.

¹⁷ The following decisions have also cited the *Klesner* case with approval and have treated the existence of public interest in a proceeding under the Federal Trade Commission Act as a justiciable issue:

Motion Picture Advertising Service Co. Inc. v. F. T. C., 194 F. 2d 633 (C. A. 5, 1952), *reversed on other grounds* 344 U. S. 392 (1953). See also, statement of Justice Frankfurter in his dissent in the same case on page 404.

Branch v. F. T. C., 141 F. 2d 31 (C. A. 7, 1944).

Royal Milling Co. v. F. T. C., 58 F. 2d 581 (C. A. 6, 1932), *reversed on other grounds* 288 U. S. 212 (1933).

Flynn & Emrich Co. v. F. T. C., 52 F. 2d 836 (C. A. 4, 1931).

F. T. C. v. Raladam, 283 U. S. 643, 646 (1931).

In the *Royal Milling Co.* case *supra*, the lower court set aside the Commission's order for lack of public interest in the proceeding. This was reversed by the Supreme Court of the United States, which held that the proceeding was in the interest of the public. In its opinion the Court stated:

"To sustain the orders of the Commission, three requisites must exist: (1) that the methods used are unfair; (2) that they are methods of competition in interstate commerce; and (3) that a proceeding by the Commission to prevent the use of the methods appears to be in the interest of the public." (*F. T. C. v. Royal Milling Co.*, 288 U. S. 212, 216 (1933).) (The second requirement was changed by the Wheeler-Lea Act to permit, as an alternative, a showing that they are "unfair or deceptive acts or practices in commerce," 52 Stat. 111 (1938).)

See also *Standard Oil Co. v. F. T. C.*, 282 Fed. 81 (C. A. 3, 1922), *affirmed* 261 U. S. 463 (1923).

been under a Commission directive to include in his decision a finding on the question of "public interest." The language usually employed is:

"* * * and said hearing examiner, having duly considered the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order."¹⁸

Manifestly the examiner cannot make a finding on public interest without considering the question.

Counsel supporting the complaint also question the wisdom of ruling on the "public interest" issue prior to a hearing on the merits. They suggest that public interest cannot be determined until all the facts are in the record. There is much to be said for the argument and certainly restraint should be exercised in ruling on such motions before counsel in support of the complaint have closed their case-in-chief. As I have indicated, public interest lacks specificity and cannot be directly measured; it is usually determined from all the facts and circumstances of the particular case. However, this is not to say that such motions should never be granted. In exceptional instances, like the *Klesner* case, for example,¹⁹ the hearing examiner should by all means consider and decide the matter on a preliminary motion. This is consistent with recent decisions of the Commission, with court cases, and with the best interests of the public—which include economies resulting from early focusing on the decisive issue and speedy disposition of cases.

In the *Eastman Kodak* case the Commission broadly interpreted Rule X of its Rules of Practice and held that the hearing examiner had jurisdiction, prior to hearing the merits, to entertain a motion to dismiss because of the failure of the complaint to state a cause of action.²⁰

The conclusion that "public interest" is lacking flies no more in the face of the complaint, and is no more of an attack on the Commission's prerogatives, than a conclusion that its complaint is faulty.

II

The other question we are called upon to decide is whether the examiner, while acting within the scope of his authority, reached the right or wrong decision.

¹⁸ In the *Matters of Mink Traders Association, Inc., et al.*, Docket 5844, 1952; and *Associated Greeting Card Distributors of America, et al.*, Docket 5983, 1954.

¹⁹ See *F. T. C. v. Klesner*, 280 U. S. 19 (1929).

²⁰ In the *Matter of Eastman Kodak Co.*, Docket 6040 (Sept. 25, 1953).

From the partial record now before the Commission it appears that respondents have abandoned their mandatory minimum price program and their compulsory allotment program. It seems equally clear that they have not abandoned their contracts with handlers, nor their voluntary allotment program. Counsel for respondents claim that the latter are entirely proper and within the provisions of the Capper-Volstead Act. Counsel supporting the complaint vigorously deny this. They say that the contracts, particularly the "B" contract, and the voluntary allotment program are two of the principal activities on which they rely to support the allegations of the complaint that the Federal Trade Commission Act has been violated. These conflicting positions seem to us to present issues which go to the merits of the case, and which can only be decided after regular hearings.

Under the provisions of the contracts Mutual has the power, according to the examiner, to control its handlers in various respects which would be violative of the law. The "B" contract requires a handler to sell, ship, and distribute fresh fruit according to "rules, regulations, orders and instructions" issued by Mutual. If he fails to do so he is required to pay Mutual 25¢ per box as liquidated damages.²¹

The examiner held that "The mere existence of a power * * * is not something against which the Federal Trade Commission proceeds, and the contracts go no farther than to give Mutual a power which has not been exercised, so far as the record discloses at least since May 1952."

This assumes, without adequate proof or the type of hearing required by the Administrative Procedure Act,²² that the voluntary allotment program is entirely proper. As we have indicated, counsel supporting the complaint challenge this assumption. They refer to a newsletter of November 21, 1952, approved by Mutual's Board of Directors, which says, "It will give widespread publicity to the names of shippers who stay within the allotments and furnish these names to the officers of its Grower Councils. In that way, all grower members of Mutual can know who cooperated in this effort." They say that whether an allotment program is compulsory or voluntary is immaterial; that the issue is whether there was an agreement or combination in restraint of trade. They cite *Arkansas Wholesalers Grocers Assn., et al. v. Federal Trade Commission*, 18 F. 2d 866 (C. A. 8, 1927), cert. den. 275 U. S. 533, which held that a "restraint produced by peaceable

²¹ Mutual claims that the "B" handlers are "marketing agents in common" within the meaning of the Capper-Volstead Act; that title does not pass to such agents but remains in the growing number. Counsel supporting the complaint deny this and point to a Mutual letter which states: "of the 186 B contracts presently effective there are 135 contracts that would be classified as independents, in other words, handlers who purchase part or all of their supplies for cash."

²² 5 U. S. C. 1004.

persuasion is as much within the prohibition as one accomplished by force or threats of force."

Counsel supporting the complaint urge further that the operation of the voluntary allotment program and a comparison between it and the compulsory program can only be demonstrated and made in a full hearing on the merits. With this I agree.

Furthermore, the continued existence of a large number of handler contracts, which the examiner says gives Mutual the power to do wrong, is not consistent with the viewpoint that there is no likelihood of resumption of the illegal practices. Counsel for respondents claim that the handlers having "B" contracts are "marketing agents in common" specifically authorized by the Capper-Volstead Act.²³ This may or may not be the case—we don't know, and, of course, cannot decide without evidence.

In the *Wildroot* case the Commission held that where the practices had been stopped and there was no likelihood of resumption, that where everything that could be accomplished by a cease and desist order had already been accomplished by cooperative effort, the present public interest was adequately served by dismissing the complaint, without prejudice. But there was no uncertainty in that case about abandonment. The challenged practices had been stopped and the management had filed an affidavit to the effect that the company had no intention of resuming such practices. And there was "no reason to doubt respondent's . . . declaration that it has already ceased and will permanently refrain from use of the practices complained of by the Commission."²⁴

In the instant case the record does not establish that all the questioned practices have been abandoned and there is no clearcut declaration by respondents against resumption. In the latter connection the hearing examiner said that the compulsory programs were abandoned because of their economic futility; that "no representations of respondent or their counsel in this respect would be as convincing or as binding as the economic compulsion which induced the abandonment." This statement overlooks, it seems to me, the fact that the price stabilization programs were relatively successful in the years 1949 and 1950, although entirely unsuccessful in 1951 and the first part of 1952.

The questions raised by the motion to dismiss, other than the jurisdiction of the hearing examiner, should not in my opinion be foreclosed. I would permit them to be renewed and reargued when the matter comes before the Commission on a full record.

²³ See footnote 21.

²⁴ In the *Matter of Wildroot, Inc.*, Docket 5928, June 30, 1953.

IN THE MATTER OF

PAUL TENNENBAUM TRADING AS TENEN QUILT
COMPANYDECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT AND THE WOOL PRODUCTS LABELING ACT

Docket 6151. Complaint, Dec. 14, 1953—Decision, May 11, 1954

Where an individual engaged in the manufacture and interstate sale and distribution of wool products as defined in the Wool Products Labeling Act—

- (a) Misbranded certain of said products within the intent and meaning of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder in that certain quilts or comforters, labeled as containing "All New Material Consisting of ALL WOOL" or "All New Material Consisting of ALL WOOL BATTING," did not contain all new material or "All Wool"; and
- (b) Misbranded certain of said products in that they were not stamped, tagged, or labeled as required under the provisions of said Act and Rules:

Held, That such acts and practices were in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. J. Earl Cox*, hearing examiner.

Mr. George E. Steinmetz and *Mr. John J. McNally* for the Commission.

Mr. Samuel Rosenthal, of Newark, N. J., for respondent.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated May 11, 1954, the initial decision in the instant matter of hearing examiner J. Earl Cox, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint in this proceeding charges that the respondent, Paul Tennenbaum, trading as Tenen Quilt Company of 16 Main Street, Newark, New Jersey, has violated the Wool Products Labeling Act of 1939, and the Rules and Regulations promulgated thereunder, and has engaged in acts and practices which constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act. Specifically, it is alleged in the complaint that the respondent has manufactured, offered for sale, and sold in interstate commerce certain wool products, quilts and com-