Commissioner Elman dissented and has filed a dissenting statement.

MISSISSIPPI RIVER FUEL CORPORATION

Docket 8657. Order, April 20, 1966

Order denying respondent's request to appeal from hearing examiner's order denying its motion to dismiss complaint as to Richter Concrete Corporation.

ORDER DENYING REQUEST FOR PERMISSION TO FILE INTERLOCUTORY APPEAL

This matter is before the Commission upon the request of the respondent for permission to file under § 3.20 of the Commission's Rules of Practice an interlocutory appeal from the hearing examiner's order, filed March 23, 1966, denying its motion to dismiss the complaint as to Richter Concrete Corporation (Richter), and upon the answer thereto filed by complaint counsel.

Permission to file an interlocutory appeal under § 3.20 "will not be granted except in extraordinary circumstances where an immediate decision by the Commission is clearly necessary to prevent detriment to the public interest."

The argument which respondent states it would make if it were granted permission to appeal and which it made to the examiner is that Richter (which the complaint alleges was acquired in violation of Section 7 of the Clayton Act, as amended) was not and is not engaged in "commerce" as that term is defined by the Clayton Act, as amended, and that the ready-mixed concrete manufacturing business in Cincinnatti, Ohio, is not a "line of commerce" within the purview of the Clayton Act, as amended. It would argue that as a matter of law these elements of "commerce" must be involved for the Commission to exercise jurisdiction and that since they are not and the Commission is thus lacking in jurisdiction, its proceeding as to Richter would be useless, futile and expensive.

The issues raised here are highly controverted. This is apparent both from the arguments made to the examiner and those now made to the Commission. The parties disagree on the applicability and the significance of cases which relate to the issues, such as *Foremost Dairies, Inc.*, 60 F.T.C. 944 (1962), and *Lone Star Cement Corporation* v. *Federal Trade Commission*, 339 F. 2d

505 (9th Cir. 1964). Moreover, it is not altogether clear that there is agreement on what the record will show as to the facts when it is completed. Respondent itself recognizes that the factual circumstances may be crucial since it suggests that the court in *Lone Star Cement Corporation* v. *Federal Trade Commission, supra,* which rejected, in similar circumstances, the asserted proposition that the Commission was without jurisdiction, would have reached a different result on somewhat different facts. Presumably it would argue that such different facts are here present. Finally, we note that in ruling upon respondent's motion the hearing examiner held that its stipulation discloses that Richter is engaged in commerce within the meaning of Section 7 of the Clayton Act.

In the situation, we believe it would be inappropriate to decide such basic issues as have been presented on a fragmented or partial record. It is in no way a useless or futile act to continue a proceeding so that fundamental issues may be disposed of in light of all the facts. See also *Lone Star Cement Corporation* v. *Federal Trade Commission, supra.*

Respondent has not justified its request to file an interlocutory appeal as required by § 3.20. Accordingly,

It is ordered, That respondent's request for permission to file an interlocutory appeal from the hearing examiner's order issued March 23, 1966, denying its motion to dismiss as to Richter Concrete Corporation, be, and it hereby is, denied.

L. G. BALFOUR COMPANY

Docket 8435. Order and Opinions, April 22, 1966