

MISSOURI PORTLAND CEMENT COMPANY

Docket 8783. Opinion and Order, Aug. 13, 1969

Order denying respondent's motion to dismiss complaint on grounds of alleged prejudgment and remanding case to hearing examiner.

ORDER AND OPINION DENYING MOTION TO DISMISS COMPLAINT

This matter is before the Commission upon the hearing examiner's certification of the respondent's motion to dismiss the complaint, filed July 17, on the grounds of alleged prejudgment of the Commission, and complaint counsel's reply thereto filed July 31, 1969.

Respondent argues that the following points are evidence of the Commission's asserted prejudgment:

1. The claimed adoption of the staff economic Report on Mergers and Vertical Integration in the Cement Industry published in April 1966 (Economic Report);
2. The public hearings of the Commission on the cement industry held in 1966;
3. The adoption of the Commission's Enforcement Policy with Respect to Vertical Mergers in the Cement Industry; and
4. The Commission's asserted reliance upon the Economic Report in specific adjudicative proceedings.

The complaint in this matter was issued June 10, 1969, subsequent to the completion of the hearings in the cement industry in 1966 and to the issuance of a document on January 3, 1967, entitled "Enforcement Policy With Respect To Vertical Mergers In The Cement Industry." The issue here is similar to that of the alleged bias of the Commission in the case of *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948). In that case Marquette Cement Manufacturing Company charged that the Commission had previously prejudged the issues and to support such charge introduced exhibits which were mainly copies of Commission reports made to Congress or the President under Section 6 of the Federal Trade Commission Act. As to this, the Court said:

These reports as well as the testimony given by members of the Commission before congressional committees, make it clear that long before the filing of this complaint the members of the Commission at that time, or at least some of them, were of the opinion that the operation of the multiple basing point system as they had studied it was the equivalent of a price fixing restraint of trade in violation of the Sherman Act. We therefore decide this contention, as did the Circuit Court of Appeals, on the assumption that such an opinion had been formed by the entire membership of the Com-

mission as a result of its prior official investigation. But we also agree with the court's holding that this belief did not disqualify the Commission. (*Id.* at 700.)

The Court reasoned in part that " * * * the fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of respondents' basing point practices," (*Id.* at 701.) The Court further stated:

Yet if Marquette is right, the Commission, by making studies and filing reports in obedience to congressional command, completely immunized the practices investigated, even though they are "unfair," from any cease and desist order by the Commission or any other governmental agency.

There is no warrant in the Act for reaching a conclusion which would thus frustrate its purposes. If the Commission's opinions expressed in congressionally required reports would bar its members from acting in unfair trade proceedings, it would appear that opinions expressed in the first basing point unfair trade proceeding would similarly disqualify them from ever passing on another. See *Morgan v. United States*, 313 U.S. 409, 421. Thus experience acquired from their work as commissioners would be a handicap instead of an advantage. Such was not the intent of Congress. For Congress acted on a committee report stating: "It is manifestly desirable that the terms of the commissioners shall be long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience." Report of Committee on Interstate Commerce, No. 597, June 13, 1914, 63rd Cong., 2d Sess. 10-11. (*Id.* at 701-702.)

See also *Pangburn v. Civil Aeronautics Board*, 311 F.2d 349 (1st Cir. 1962); *All-State Industries of North Carolina, Inc., et al.*, Docket No. 8738 (order issued March 18, 1968) [73 F.T.C. 1242]; *Lehigh Portland Cement Company v. Federal Trade Commission*, 291 F. Supp. 628 (D.C.E.D. Va. 1968); *Lehigh Portland Cement Company*, Docket No. 8680; *Marquette Cement Manufacturing Company*, Docket No. 8685; and *Mississippi River Fuel Corporation*, Docket No. 8657 (order issued February 6, 1967) [71 F.T.C. 1618].

Respondent, of course, will have an opportunity for a full and complete hearing before the hearing examiner and the Commission in accordance with the Administrative Procedure Act. The burden of proving the allegations of the complaint will be upon complaint counsel and this in no way will be diminished or affected by the Commission's aforementioned statement of enforcement policy. Thus, there is no issue here of unfairness.

The Commission rejects the charges made by the respondent of prejudgment of the issues in this proceeding. Accordingly,

It is ordered, That respondent's motion to dismiss the com-