

**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

**FILED
MAR 08 2000**

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, <i>DOJ</i>)	
)	
Plaintiff,)	
)	
v.)	Civil No: 99 2706
)	
HARSCO CORPORATION,)	Filed:
PANDROL JACKSON LIMITED,)	
PANDROL JACKSON INC.)	
)	
Defendants.)	

FINAL JUDGMENT

WHEREAS, plaintiff, the United States of America, and defendants Harsco Corporation (“Harsco”), Pandrol Jackson Limited, and Pandrol Jackson Inc. (collectively “Pandrol”), by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting any evidence against or an admission by any party with respect to any issue of law or fact herein; and having consented that this Final Judgment shall settle all claims made by plaintiff in its Complaint filed October 14, 1999;

AND WHEREAS, defendants have agreed to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, the essence of this Final Judgment is, in the event of the acquisition of certain assets of Pandrol by Harsco, the prompt and certain divestiture of the identified assets to assure that competition is not substantially lessened;

AND WHEREAS, plaintiff requires defendant Harsco to make a divestiture for the purpose of establishing a viable competitor in the manufacture and sale of switch and crossing grinding equipment and services specified in the Complaint;

AND WHEREAS, defendant Harsco has represented to the plaintiff that the divestiture ordered herein can and will be made and that defendants will later raise no claims of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

NOW, THEREFORE, before the taking of any testimony, and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

I.

JURISDICTION

This Court has jurisdiction over each of the parties hereto and over the subject matter of this action. The Complaint states a claim upon which relief may be granted against defendants, as hereinafter defined, under Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

II.

DEFINITIONS

As used in this Final Judgment:

A. “Harsco” means defendant Harsco Corporation, a Delaware corporation with its corporate headquarters in Camp Hill, Pennsylvania, and includes its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, joint ventures, directors, officers, managers, agents, and employees.

B. “Charter” means defendant Charter plc, a United Kingdom corporation, with its corporate headquarters in London, England, and includes its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, joint ventures, directors, officers, managers, agents, and employees.

C. “Pandrol” means defendant Pandrol Jackson Limited, a United Kingdom corporation, with its corporate headquarters in Surrey, England and defendant Pandrol Jackson Inc., with its corporate headquarters in Ludington, Michigan, both of which are indirectly owned by Charter, and their successors and assigns, and their subsidiaries, divisions, groups, affiliates, partnerships, joint ventures, directors, officers, managers, agents, and employees; Pandrol submit to the jurisdiction of this Court solely for purposes of this action to permit the contemplated sale of assets of Harsco; nothing contained herein shall be deemed an admission of personal jurisdiction or an appointment of any agent for service of process for any other purpose.

D. “Switch and Crossing Grinding Equipment” means rail grinders and any related equipment used to remove surface irregularities and restore the profile of the rail used in transit systems,

railroad track switches and railroad track crossings, thereby providing longer rail life and reducing the wear on rolling stock and track components.

E. “Switch and Crossing Grinding Services” means switch and crossing grinding services provided commercially to railroads and transit systems.

F. “Switch and Crossing Grinding Assets” means all of the assets acquired by Harsco from Pandrol related to the Switch and Crossing Grinding Equipment manufactured by Pandrol and to the Switch and Crossing Grinding Services provided by Pandrol inclusive of all tangible and intangible assets used in the manufacture and sale of Switch and Crossing Grinding Equipment and the providing of Switch and Crossing Grinding Services, including all intellectual property rights, technical information, know-how, trade secrets, blueprints, licenses, permits, product trade names (other than the “Jackson” name), product trade dress, tooling, existing inventory and work in progress, accounts receivable, pertinent correspondence, files and databases, books of account, customer lists, supplier lists, advertising materials, contracts with third parties (to the extent assignable), but not including any manufacturing or assembly facility, or any real estate owned or leased by Harsco or Pandrol.

III.

APPLICABILITY

A. The provisions of this Final Judgment apply to the defendants, their successors and assigns, subsidiaries, directors, officers, managers, agents, and employees, and all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

B. Defendant Harsco shall require, as a condition of the sale of all or substantially all of its assets or of its Switch and Crossing Grinding Equipment and Services business, that the purchaser or purchasers agree to be bound by the provisions of this Final Judgment.

IV.

DIVESTITURE

A. Defendant Harsco is hereby ordered and directed, in accordance with the terms of this Final Judgment, within thirty (30) calendar days after the filing of the Hold Separate Stipulation and Order in this case, to sell the Switch and Crossing Grinding Assets as a viable ongoing business to a purchaser acceptable to the United States in its sole discretion.

B. Defendant Harsco shall use its best efforts to accomplish said divestiture as expeditiously as possible. The United States, in its sole discretion, may extend the time for the divestiture for an additional period not to exceed thirty (30) calendar days.

C. In accomplishing the divestiture ordered by this Final Judgment, defendant Harsco shall make known promptly, by usual and customary means, the availability of the Switch and Crossing Grinding Assets. Defendant Harsco shall inform any person making an inquiry regarding a possible purchase that the sale is being made pursuant to this Final Judgment and provide such person with a copy of this Final Judgment. Defendant Harsco shall also offer to furnish to all prospective purchasers, subject to customary confidentiality assurances, all information regarding these assets customarily provided in a due diligence process, except such information as is subject to attorney-client privilege or attorney work-product privilege. Defendant Harsco shall make such information available to the United States at the same time that such information is made available to any other person.

D. As customarily provided as part of a due diligence process, defendant Harsco shall permit prospective purchasers of the Switch and Crossing Grinding Assets to have access to personnel and to make inspection of such assets and any and all financial, operational, or other documents and information.

E. Defendant Harsco shall not interfere with any negotiations by any purchaser to employ any current or former Pandrol employee who works or has worked at, or whose principal responsibility concerns or has concerned, any aspect of the Switch and Crossing Grinding Assets.

F. Defendant Harsco shall not take any action, direct or indirect, that would impede in any way the operation of any business connected with the assets to be divested, or take any action, direct or indirect, that would impede the divestiture of any such asset.

G. Defendant Harsco shall warrant to the purchaser of the Switch and Crossing Grinding Assets that the assets will be operational on the date of sale.

H. Unless the United States otherwise consents in writing, the divestiture pursuant to Section IV, whether by defendant Harsco or by trustee appointed pursuant to Section VI of this Final Judgment, shall include the entire Switch and Crossing Grinding Assets. Such divestiture shall be accomplished by selling or otherwise conveying the assets to a purchaser or purchasers in such a way as to satisfy the United States, in its sole discretion, that the assets can and will be used by the purchaser as a viable ongoing business, engaged in the switch and crossing grinding business. The divestiture, whether pursuant to Section IV or Section VI of this Final Judgment, shall be made to a purchaser who, as demonstrated to the United States's sole satisfaction: 1) has the capability and intent of competing effectively in the switch and crossing grinding business; 2) has or soon will have the

managerial, operational, and financial capability to compete effectively in the switch and crossing grinding business; and 3) is not hindered by the terms of any agreement between the purchaser and defendant Harsco which gives defendant Harsco the ability unreasonably to raise the purchaser's costs, lower the purchaser's efficiency, or otherwise interfere with the ability of the purchaser to compete.

V.

NOTICE OF PROPOSED DIVESTITURE

Within two (2) business days following execution of a definitive agreement, contingent upon compliance with the terms of this Final Judgment, to effect, in whole or in part, the proposed divestiture pursuant to Section IV or VI of this Final Judgment, defendant Harsco or the trustee, whichever is then responsible for effecting the divestiture, shall notify the United States of the proposed divestiture. The notice shall set forth the details of the proposed transaction and shall list the name, address, and telephone number of each person not previously identified who offered to, or expressed an interest in or a desire to, acquire any ownership interest in the business to be divested that is the subject of the binding contract, together with full details of same. Within fifteen (15) calendar days of receipt by the United States of a divestiture notice, the United States, in its sole discretion, may request from defendant Harsco, the proposed purchaser, or any other third party additional information concerning the proposed divestiture and the proposed purchaser. Defendant Harsco and the trustee shall furnish any additional information requested from them within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from the defendant Harsco, the proposed purchaser, and any third party,

whichever is later, the United States shall provide written notice to defendant Harsco and the trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice to defendant Harsco (and the trustee, if applicable) that it does not object, then the divestiture may be consummated, subject only to defendant Harsco's limited right to object to the sale under Section VI(B) of this Final Judgment. Upon objection by the United States, a divestiture proposed under Section IV or Section VI may not be consummated. Upon objection by defendant Harsco under the provision in Section VI(B), a divestiture proposed under Section VI shall not be consummated unless approved by the Court.

VI.

APPOINTMENT OF TRUSTEE

A. In the event that defendant Harsco has not divested the Switch and Crossing Grinding Assets within the time period specified in Section IV of this Final Judgment, the Court shall appoint, on application of the United States, a trustee selected by the United States in its sole discretion, to effect the divestiture of such assets. The trustee shall have the right, in its sole discretion, and upon notice to the defendant Harsco and approval of the United States, to require the divestiture of additional related assets reasonably necessary to divest the Switch and Crossing Grinding Assets as a viable stand-alone business. In any such event, all of the obligations of the defendant Harsco under the Final Judgment shall apply to the additional assets as well.

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to divest the assets. The trustee shall have the power and authority to accomplish the divestiture of the assets at the best price then obtainable upon a reasonable effort by the trustee, subject to the

provisions of Sections IV and VI of this Final Judgment, and shall have such other powers as the Court shall deem appropriate. Subject to Section VI (C) of this Final Judgment, the trustee shall have the power and authority to hire at the cost and expense of the defendant Harsco any investment bankers, attorneys, or other agents reasonably necessary in the judgment of the trustee to assist in the divestiture, and such professionals and agents shall be accountable solely to the trustee. The trustee shall have the power and authority to accomplish the divestiture at the earliest possible time to a purchaser or purchasers acceptable to the United States, in its sole discretion, and shall have such other powers as the Court shall deem appropriate. Defendant Harsco shall not object to a divestiture by the trustee on any ground other than the trustee's malfeasance. Any such objections by defendant Harsco must be conveyed in writing to the United States and the trustee within ten (10) calendar days after the trustee has provided the notice required under Section V of this Final Judgment.

C. The trustee shall serve at the cost and expense of defendant Harsco, on such terms and conditions as the Court may prescribe and shall account for all monies derived from the sale of the assets sold by the trustee, and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to defendant Harsco and the trust shall then be terminated. The compensation of such trustee and of any professionals and agents retained by the trustee shall be reasonable in light of the value of the divested assets and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture, and the speed with which it is accomplished.

D. Defendant Harsco shall use its best efforts to assist the trustee in accomplishing the required divestiture, including its best efforts to effect all necessary regulatory approvals. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facilities relating to the assets to be divested, and defendant Harsco shall develop such financial or other information relevant to the assets to be divested customarily provided in a due diligence process as the trustee may reasonably request, subject to customary confidentiality assurances. Defendant Harsco shall permit prospective purchasers of the Switch and Crossing Grinding Assets, or other assets being sold by the trustee, to have reasonable access to personnel and to make such inspection of physical facilities and any and all financial, operational or other documents and other information as may be relevant to the divestiture required by this Final Judgment.

E. After its appointment, the trustee shall file monthly reports with the plaintiff, defendant Harsco, and the Court setting forth the trustee's efforts to accomplish the divestiture ordered under this Final Judgment; provided, however, that to the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in any of the assets to be divested, and shall describe in detail each contact with any such person during that period. The trustee shall maintain full records of all efforts made to sell the assets to be divested.

F. If the trustee has not accomplished such divestiture within six (6) months after its appointment, the trustee thereupon shall file promptly with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture, (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished, and (3) the trustee's recommendations; provided, however, that to the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the plaintiff and defendant Harsco, who shall each have the right to be heard and to make additional recommendations consistent with the purpose of the trust. The Court shall enter thereafter such orders as it shall deem appropriate in order to carry out the purpose of the trust which may, if necessary, include extending the trust and the term of the trustee's appointment for a period of time requested by the United States.

VII.

AFFIDAVITS

A. Within twenty (20) calendar days of the filing of the Hold Separate Stipulation and Order in this matter and every thirty (30) calendar days thereafter until the divestiture has been completed pursuant to Section IV or VI of this Final Judgment, defendant Harsco shall deliver to the United States an affidavit as to the fact and manner of compliance with Section IV or VI of this Final Judgment. Each such affidavit shall include, *inter alia*, the name, address, and telephone number of each person who, at any time after the period covered by the last such report, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the assets to be divested, and shall describe in detail each

contact with any such person during that period. Each such affidavit shall also include a description of the efforts that defendant Harsco has taken to solicit a buyer for any and all of the Switch and Crossing Grinding Assets and to provide required information to prospective purchasers, including the limitations, if any, on such information.

B. Within twenty (20) calendar days of the filing of the Hold Separate Stipulation and Order in this matter, defendant Harsco shall deliver to plaintiff an affidavit which describes in detail all actions defendant Harsco has taken and all steps defendant Harsco has implemented on an ongoing basis to preserve the Switch and Crossing Grinding Assets, pursuant to Section VIII of this Final Judgment and the Hold Separate Stipulation and Order entered by the Court. The affidavit also shall describe, but not be limited to, defendant Harsco's efforts to maintain and operate the Switch and Crossing Grinding Assets as an active competitor, maintain the management, staffing, sales, marketing and pricing of such assets, and maintain the assets in operable condition at current capacity configurations. Defendant Harsco shall deliver to plaintiff an affidavit describing any changes to the efforts and actions outlined in defendant Harsco's earlier affidavit(s) filed pursuant to Section VII.B. within fifteen (15) calendar days after the change is implemented.

C. Until one year after such divestiture has been completed, defendant Harsco shall preserve all records of all efforts made to preserve the Switch and Crossing Grinding Assets and to effect the ordered divestiture.

VIII.

HOLD SEPARATE ORDER

Until the divestiture required by the Final Judgment has been accomplished, defendant Harsco shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendant Harsco shall take no action that would jeopardize the sale of the Switch and Crossing Grinding Assets.

IX.

FINANCING

Defendant Harsco is ordered and directed not to finance all or any part of any acquisition made pursuant to Sections IV or VI of this Final Judgment.

X.

NOTIFICATION OF FUTURE ACQUISITIONS

Unless such transaction is otherwise subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. §18a (the "HSR Act"), defendant Harsco, without providing advance notification to Department of Justice, shall not directly or indirectly acquire any assets of or any interest, including any financial, security, loan, equity or management interest, in any person that, at any time during the twelve (12) months immediately preceding such acquisition, was engaged in the manufacture or sale of Switch and Crossing Grinding Equipment or the provision of Switch and Crossing Grinding Services. Such notification shall be provided to the Department of Justice in the same format as, and per the instructions relating to the Notification and Report Form set forth in the Appendix to Part 803 of Title

16 of the Code of Federal Regulations as amended. Notification shall be provided at least thirty (30) days prior to acquiring any such interest, and shall include, beyond what may be required by the applicable instructions, the names of the principal representatives of the parties to the agreement who negotiated the agreement, and any management or strategic plans discussing the proposed transaction. If within the 30-day period after notification, representatives of the Department of Justice make a written request for additional information, defendant Harsco shall not consummate the proposed transaction or agreement until twenty (20) days after submitting all such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the HSR Act and rules promulgated thereunder. This Section shall be broadly construed and any ambiguity or uncertainty regarding the filing of notice under this Section shall be resolved in favor of filing notice.

XI.

COMPLIANCE INSPECTION

For purposes of determining or securing compliance with the Final Judgment and subject to any legally recognized privilege, from time to time:

A. Duly authorized representatives of the United States Department of Justice, upon written request of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendant Harsco made to its principal office, shall be permitted:

- 1) Access during office hours of defendant Harsco to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of defendant Harsco, who

may have counsel present, relating to the matters contained in this Final Judgment; and

- 2) Subject to the reasonable convenience of defendant Harsco and without restraint or interference from it, to interview, either informally or on the record, its officers, employees, and agents, who may have counsel present, regarding any such matters.

B. Upon the written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, defendant Harsco shall submit such written reports, under oath if requested, with respect to any matter contained in the Final Judgment and the Hold Separate Stipulation and Order.

C. No information or documents obtained by the means provided in Sections VI, VII, or XI of this Final Judgment shall be divulged by a representative of the United States to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by defendant Harsco to the United States, defendant Harsco represents and identifies in writing the material in any such information or documents as to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and defendant Harsco marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then ten (10) calendar days' notice shall be given by the United States to defendant Harsco prior to divulging such

_____/s/
United States District Judge

