UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff,* v. THE MANITOWOC COMPANY, INC., GROVE INVESTORS, INC., and NATIONAL CRANE CORP., *Defendants.*	Case No. 1:02CV01509 Judge Royce C. Lamberth Deck Type: Antitrust

UNITED STATES'S CERTIFICATE OF COMPLIANCE WITH
THE ANTITRUST PROCEDURES AND PENALTIES ACT

The United States of America hereby certifies that it has complied with the provisions of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA"), and states:

1. The Complaint, proposed Final Judgment ("Judgment"), and Hold Separate Stipulation and Order ("Hold Separate Order"), by which the parties have agreed to the Court's entry of the Final Judgment following compliance with the APPA, were filed on July 31, 2002. The United States filed its Competitive Impact Statement on the same date.

2. Pursuant to 15 U.S.C. § 16(b), the proposed Judgment, Hold Separate Order, and Competitive Impact Statement were published in the *Federal Register* on August 22, 2002 (67 Fed. Reg. 54469). A copy of the *Federal Register* notice is attached hereto as Exhibit 1.

3. Pursuant to 15 U.S.C. §16(b), the United States furnished copies of the Complaint, Hold Separate Order, proposed Judgment, and Competitive Impact Statement to anyone requesting them.

4. Pursuant to 15 U.S.C. § 16(c), a summary of the terms of the proposed Judgment, Hold Separate Stipulation and Order, and Competitive Impact Statement was published in *The Washington Post*, a newspaper of general circulation in the District of Columbia, during a seven-day period in August 2002 (August 14th - August 20th). A copy of the Proof of Publication from *The Washington Post* is attached hereto as Exhibit 2.

5. On October 25 and October 31, 2002, defendants filed with this Court declarations that describe their communications with employees of the United States concerning the proposed Final Judgment, as required by 15 U.S.C. § 16(g).

6. The sixty-day public comment period specified in 15 U.S.C. § 16(b) began on August 22, 2002 and ended on October 21, 2002. During that period, the United States received only two comments on the proposed settlement. The United States evaluated and responded to each comment, and published the comments and its responses in the *Federal Register*, pursuant to 15 U.S.C. §§ 16 (b) and (d). 67 Fed. Reg. 70620 (Nov. 25, 2002). Copies of the comments and the United States's responses are attached hereto as Exhibits 3 and 4, and they are summarized below.

A. Busey Truck Equipment Comment

Busey Truck, a forklift truck dealer, noted that defendant Manitowoc has consistently failed to provide product support for its line of unloaders and tailgators, and that Manitowoc did not respond to Busey's unsolicited offer to buy this product line from Manitowoc.

In its response, the United States pointed out that the Complaint in this case charged that a combination of Manitowoc and Grove would substantially reduce competition in medium- and heavy-lift boom trucks. The proposed Judgment would resolve the serious competitive concerns

by requiring defendants to divest either Manitowoc's or Grove's boom truck business. The gravamen of Busey Truck's complaint, however, is Manitowoc's apparent unwillingness to sell its unloader and tailgator product lines. There is no competitive justification for requiring a divestiture of Manitowoc's unloader and tailgator product lines. Unloaders and tailgators are small material handling vehicles similar to forklifts that are primarily used for loading and unloading delivery trucks and in warehouse stocking operations. The United States is unaware of any evidence that suggests a combination of Manitowoc and Grove would adversely affect competition in production and sale of unloader and tailgator products. Unloaders and tailgators are, at best, minor complements to, not competitive alternatives for, medium- and heavy-lift boom trucks. Divestiture of Manitowoc's unloader and tailgator product lines is not required either to cure an alleged violation or to ensure the viability of the divested boom truck assets.

B. Citizens for Voluntary Trade Comment

Citizens for Voluntary Trade ("CVT") is a nonprofit association that purportedly provides supporters of capitalism and individual rights an opportunity to participate in public policy discussions related to antitrust and government regulation of business. In its comment, CVT asserted that the Court should not require defendants to divest either Manitowoc's or Grove's boom truck business until after the United States demonstrates that defendants' combination actually will result in higher prices charged to purchasers of medium- and heavy-lift boom trucks. Even then, CVT contends, the Court should not order a divestiture since consumers can simply decide not to purchase boom trucks. In essence, CVT's argument is that the antitrust laws are an unnecessary (and perhaps unconstitutional) government infringement on defendants' (and consumers') contracting freedom, and in that context, the boom truck business

divestiture ordered by the proposed Judgment is an unauthorized government "taking" of defendants' private property.

In response, the United States reminded CVT that the appropriate legal standard for assessing the proposed Judgment is whether its entry would be in the "public interest." To make that determination the Court, *inter alia,* must carefully review the relationship between the relief in the proposed Judgment and the allegations of the government's Complaint. Applying that standard, the Court's entry of the proposed Judgment surely would be "within the reaches" of the public interest ((*United States v. Bechtel Corp., Inc.,* 648 F.2d 660, 666 (9th Cir.), *cert. denied,* 454 U.S. 1083 (1981)), for it would alleviate the serious competitive concerns regarding the proposal to combine two of the nation's three major boom truck producers by requiring defendants promptly to divest one of their boom truck businesses. To require the government to prove the allegations of its Complaint before the Court rules on the appropriateness of the parties' agreed-upon relief would effectively turn every government antitrust case into a full-blown trial on the merits of the parties' claims, and seriously undermine the effectiveness of antitrust enforcement by use of consent decrees.[1]

---

[1]Significantly, the United States has alleged that defendants' acquisition, if consummated, would essentially create a duopoly in production and sale of medium- and heavy-lift boom trucks, with post-merger market shares and concentration similar to that in *FTC v. H.J. Heinz Co.,* 246 F.3d 708 (D.C. Cir. 2001), a proposed acquisition the Court of Appeals for the District of Columbia Circuit found to be presumptively unlawful. 246 F.3 at 715-17, 724-25. Compare post-merger HHI market concentration of 5285 in *Heinz* (246 F.3d at 715-16) with the alleged post-merger concentration of "about 4900 points" in this case (Complaint ¶18). And contrary to CVT's insistence that the government present evidence that boom truck prices will actually increase as a result of this acquisition, "Section 7 does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of [collusive practices] in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable, is called for." *Hospital Corp. of America v. FTC,* 807 F.2d 1381, 1389 (7th Cir. 1986) (citation omitted). As the

As to CVT's suggestions that the antitrust laws constitute an unconstitutional infringement upon freedom to contract and the ordered divestiture is an unauthorized "taking" of property, the Supreme Court has consistently held, in a line of cases stretching as far back as *Standard Oil,* that it is not the antitrust laws that impair individual freedom to contract, but private agreements or acts that unduly diminish competition and tend to raise prices to consumers. By purging our nation's economy of such private restraints on competition, the antitrust laws protect and enhance, not undermine, individual freedoms, and these laws do not otherwise contravene the Constitution. *See United States v. Standard Oil Co.,* 221 U.S. 1, 52-70, *esp.* 58, 68-70 (1911). *See also United States v. E.I. du Pont de Nemours & Co.,* 366 U.S. 316, 327 (1961) ("If the Court concludes that other measures will not be effective to redress a violation, and that complete divestiture is a necessary element of effective relief, the Government cannot be denied the latter remedy because economic hardship, however severe, may result. . . . This proposition is not novel; it is deeply rooted in antitrust law and has never been successfully challenged.")

7. The public comments did not persuade the United States to withdraw its consent to entry of the proposed Judgment. At this stage, with the United States having published its proposed settlement and filed and arranged to publish its responses to public comments, and defendants having certified their pre-settlement contacts with government officials, the parties have fulfilled their obligations under the APPA. Pursuant to the Hold Separate Stipulation and

---

Court of Appeals for the District of Columbia Circuit observed in *Heinz,* "[N]o court has ever approved a merger to duopoly under similar circumstances." *FTC v. Heinz,* 246 F.3d at 717.

Order the Court entered on July 31, 2002, and 15 U.S.C. §16(e), this Court may now enter the Final Judgment, if it determines that the entry of the Final Judgment is in the public interest.

8. For the reasons set forth in the Competitive Impact Statement and its Motion for Entry of Final Judgment, the United States strongly believes that the Final Judgment is in the public interest and urges the Court to enter the Final Judgment without further proceeding.

Dated: November 25, 2002.

Respectfully submitted,

/s/

Anthony E. Harris
U.S. Department of Justice
Antitrust Division, Litigation II Section
1401 H Street, NW, Suite 3000
Washington, DC 20530
(202) 307-6583

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I, Anthony E. Harris, hereby certify that on November 25, 2002, I caused copies of the foregoing United States's Certificate of Compliance with Provisions of the Antitrust Procedures and Penalties Act and United States's Motion for Entry of the Final Judgment to be served on defendants The Manitowoc Company, Inc., Grove Investors, Inc., and National Crane Corp. by facsimile and by mailing these documents first-class, postage prepaid, to duly authorized legal representatives of those parties, as follows:

Counsel for Defendant The Manitowoc Company, Inc.

Darryl S. Bell, Esquire
Quarles & Brady LLP
411 East Wisconsin Avenue
Suite 2040
Milwaukee, WI 53202-4497
Telephone: (414) 277-5123

Counsel for Defendants Grove Investors, Inc. and National Crane Corp.

Michael L. Weiner, Esquire
Skadden Arps Slate Meagher & Flom LLP
Four Times Square
New York, NY 10036
Telephone: (212) 735-3000

Dated: Nov. 25, 2002.

/s/
Anthony E. Harris, Esquire
U.S. Department of Justice
Antitrust Division
1401 H Street, NW, Suite 3000
Washington, DC 20530
Telephone: (202) 307-6583