

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

WHEELABRATOR-FRYE, INC.,

and

PULLMAN INCORPORATED,

Defendants.

CIVIL ACTION NO. 80-2346

FILED: 9/15/80

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), the United States files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I

NATURE AND PURPOSE OF THE PROCEEDING

On September 15, 1980, the United States filed a civil antitrust complaint under Section 15 of the Clayton Act, 15 U.S.C. § 25, challenging the acquisition of Pullman, Inc. (Pullman) by Wheelabrator-Frye, Inc. (WFI) as a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. The complaint alleges that the acquisition of Pullman by WFI would substantially lessen competition in the United States in two markets -- the design, engineering and sale of electric arc furnaces and and the design, engineering and construction of tall industrial and power plant chimneys. The complaint seeks an order by the Court for an injunction to prevent the acquisition of Pullman by WFI. The proposed Final Judgment seeks an order by the Court for the divestiture of the chimney business and the

divestiture of the electric arc furnace business of either WFI or Pullman. An Order of the Court requires that WFI and Pullman, until final resolution of the case, hold these businesses separate and continue the normal business operations of each. The Court's Order would not preclude the sale of WFI's chimney business and Pullman's furnace business to Union Boiler Company, Nitro, West Virginia under a letter of intent entered into before this action was commenced.

The United States and Pullman and WFI have stipulated that the proposed Final Judgment may be entered after compliance with the Antitrust Procedures and Penalties Act. Entry of the proposed Final Judgment will terminate the action, except the Court will retain jurisdiction to construe, modify, or enforce the proposed Judgment. The Order will be dissolved upon entry of the proposed Final Judgment.

## II

### EVENTS GIVING RISE TO THE ALLEGED VIOLATION

In August 1980, WFI entered into an agreement to merge with Pullman. The merger was to take place in two steps. First, WFI would purchase up to four million shares of Pullman common stock at \$52.50 per share. Second, WFI would exchange 1.1 shares of WFI stock for each untendered share of Pullman common stock and effect a merger. In the event Pullman is unable to fulfill its obligations under the merger agreement, WFI has an agreement with Pullman to purchase its engineering and construction divisions for \$200 million.

WFI, through Whiting Corporation, and Pullman, through its Swindell Division, are both engaged in the design and engineering of electric arc furnaces. Electric arc furnaces are used by primary steel makers and by iron and steel foundries as a melting device. Electric arc furnaces are used in integrated primary steel mills.



steel-making capacity normally provided by open-hearth furnaces and basic oxygen furnaces. Electric arc furnaces are used in "mini" and "midi" steel mills as the primary steel making furnace. Electric arcs are also used by specialty steel alloy makers and iron and steel foundries and others. There is no alternative to an electric arc furnace in a mini or midi steel mill.

During the 1972-1977 period, Pullman's and WFI's sales of electric arc furnaces accounted for approximately 24% and 16% of total U.S. sales of electric arc furnaces, respectively. Only two other firms are significant competitors in the design, engineering and sale of electric arc furnaces.

WFI, through the Rust Chimney Division of Rust Engineering, and Pullman, through the Chimney Operations Unit of Pullman Power Products, are both engaged in the design, engineering and construction of tall reinforced concrete chimneys. These chimneys are built for industrial plants and electric power plants and range in size from 250 feet to over 1000 feet. The average tall chimney project costs approximately \$2 million and can range anywhere from \$0.5 million to \$7 million. In 1979, Pullman's and WFI's sales of tall reinforced concrete chimneys accounted for approximately 37% and 10% of the dollar value of contracts awarded, respectively. Only two other domestic firms design, engineer and construct tall reinforced concrete chimneys.

### III

#### EXPLANATION OF THE PROPOSED FINAL JUDGMENT

This case was brought because WFI's acquisition of Pullman (or its engineering and construction divisions) would substantially lessen competition in the design, engineering and sale of electric arc furnaces and the design, engineering and construction of tall reinforced concrete chimneys. The object of the proposed Final Judgment

is to prevent this from occurring by requiring the divestiture of Rust Chimney and the divestiture of either Whiting's Metallurgical Division or Pullman-Swindell's Industrial Furnace Group at WFI's option, within 12 months of the date of WFI's merger with Pullman or the date of WFI's acquisition of Pullman's engineering and construction divisions. If the divestiture is not accomplished within 12 months, one trustee will be appointed to sell Rust Chimney and a separate trustee will be appointed to sell either Whiting's Metallurgical Division or Pullman-Swindell's Industrial Furnace Group, at the trustee's option. As of the date the complaint in this action was filed, WFI had entered into a letter of intent to sell Pullman's Industrial Furnace Group and Rust Chimney to Union Boiler Company, Nitro, West Virginia.

The proposed Final Judgment provides that there is no admission by any party with respect to any issue of fact or law. Under the provisions of Section 2(e) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(e), the entry of the proposed Final Judgment is conditioned upon a determination by the court that the proposed Final Judgment is in the public interest.

Rust Chimney is defined in the proposed Final Judgment as all the assets, including engineering drawings, of the Rust Chimney Division of the Rust Engineering Company, a subsidiary of WFI. It includes the exclusive right to use the name Rust Chimney for three years from the date of sale, provided that the name is used in conjunction with the name of the purchaser, and also provides that WFI shall not use the name Rust Chimney for five years from the date of sale.

Metallurgical is defined in the proposed Final Judgment as all the assets, including engineering drawings of the Metallurgical Division of Whiting Corporation, a WFI subsidiary. It includes the exclusive right to use the name Whiting Furnace for a period of three years from the date of sale, provided that the name is used in conjunction with the name of the purchaser and also provides that WFI shall not use the name Whiting Furnace for five years from the date of sale.



Industrial Furnace is defined in the proposed Final Judgment as all the assets, including engineering drawings, of the Industrial Furnace Group of the Pullman-Swindell Division, a division of Pullman, Inc. It includes the exclusive right to use the names Swindell-Furnace, and Swindell-Dressler Furnace for a period of three years from the date of sale, provided the name is used in conjunction with the name of the purchaser, and also provides that WFI shall not use the names Swindell-Furnace or Swindell-Dessler Furnace for five years from the date of sale.

The provisions of the proposed Final Judgment apply to both WFI and Pullman and each of their subsidiaries, as well as each of their officers, directors, agents, employees and attorneys.

The sale of Rust Chimney and Whiting's Metallurgical Division or the Industrial Furnace Group of Pullman-Swindell must be made to a person who represents that he intends to continue to operate these businesses and has the capacity to do so. WFI must report to the United States the details of any proposed divestiture, and the United States can request additional information. The United States has 30 days to object to WFI in writing to any proposed divestiture. If the United States objects, the proposed divestiture can not be consummated unless the United States withdraws its objection or the Court approves the divestiture. If the United States does not object, the proposed divestiture shall be submitted to the Court for approval.

If WFI has not divested Rust Chimney within ten months from the date of the merger or acquisition of Pullman's engineering and construction divisions, the selection of a trustee to sell Rust Chimney will be promptly initiated. This provision also applies if the divestiture of either the Whiting Metallurgical

Division or the Industrial Furnace Group of Pullman-Swindell is not accomplished within ten months. A separate trustee will be appointed to sell the Rust Chimney Division and the furnace businesses. The trustees will be appointed by the Court from a list of 6 persons, half nominated by WFI and half nominated by the United States.

The proposed Final Judgment gives the Rust Chimney trustee the power and authority to sell Rust Chimney. The furnace trustee is given the power and authority to sell either Whiting's Metallurgical Division or Pullman-Swindell's Industrial Furnace Group, but not both, at the furnace trustee's option. The power and authority of the trustee to sell shall be at whatever price and terms are obtainable, subject to the Court's approval. Each trustee shall have complete access to the books, records and facilities which he or she has responsibility to sell. The trustees will be paid by WFI at whatever terms and conditions the Court sets. WFI will receive the proceeds from the sales of the businesses, less expenses incurred by the trustees for the sale and the trustees' fee for their services. The proposed Final Judgment bars WFI from reacquiring any business previously divested.

The proposed Final Judgment requires Pullman to continue the normal business operations of Pullman-Swindell's Industrial Furnace Group and to maintain its personnel, assets, and working capital at a level commensurate with its business activity until it merges with WFI or WFI acquires its engineering and construction divisions. After the merger with Pullman or acquisition of Pullman's engineering and construction division, WFI must continue the normal business operations of Rust Chimney separately from the Pullman Chimney business until Rust Chimney is sold. WFI also must operate Whiting's Metallurgical Division separately from Pullman-Swindell's Industrial



Furnance Group until one of them is sold. In the meantime, WFI must maintain the personnel, assets and working capital of each business at a level commensurate with its level of business activity.

WFI is not allowed, without the consent of the United States to employ any person who is an employee of one of the divested businesses for a period of three years from the date of divestiture. The consent of the United States shall not be unreasonably withheld.

WFI must maintain records of its efforts to accomplish the divestiture, including the identification of persons to whom the businesses have been offered or persons expressing interest in purchasing each business, and the terms and conditions of each offer to sell or purchase. WFI must file with the Court every three months, until divestiture is completed, an affidavit with relevant documents to demonstrate its efforts to comply with the proposed Final Judgment.

To determine and secure compliance with the proposed Final Judgment, duly authorized representatives of the Department of Justice, upon written request of the Attorney General or Assistant Attorney General in charge of the Antitrust Division and upon reasonable notice to WFI or Pullman, shall be permitted access during office hours to inspect and copy all records and documents of the defendants which relate to any matters contained in the proposed Final Judgment and to interview officers or employees of the defendants. Any information or document obtained in this manner may only be divulged to duly authorized representatives of the Executive Branch of the United States or in the course of legal proceedings to which the United States is a party or for the purpose of securing compliance with the proposed Final Judgment. If any trade secrets or other confidential research, development or commercial information or documents are furnished by the defendants to the United States, the United States must give defendants 10 days notice

prior to divulging such material in any legal proceeding (other than a Grand Jury proceeding) to which the defendant is not a party.

#### IV

##### REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorney fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage actions. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against the defendants.

#### V

##### PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment may be entered by the Court after compliance with the provisions of the Antitrust Procedures and Penalties Act, provided that the United States has not withdrawn its consent. The Act conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The Act provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the government written comments regarding the proposed Final Judgment. Any person who wants to comment should do so within the statutory sixty (60) day comment period. The United States will evaluate the comments,



determine whether it should withdraw its consent, and respond to the comments. The comments and the response of the United States will be filed with the Court and published in the Federal Register. Written comments should be submitted to:

Anthony V. Nanni  
Chief, Trial Section  
U.S. Department of Justice  
Antitrust Division, Room 3266  
10th & Pennsylvania Avenue, N.W.  
Washington, D. C. 20530

The proposed Final Judgment provides that the Court will retain jurisdiction over this action, and that the parties may apply to the Court for such orders as may be necessary or appropriate for its modification or enforcement.

## VI

### ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States actually considered only one alternative to divestiture. That alternative would have required WFI and Pullman to license their technology and know-how in chimneys and electric arc furnaces. This alternative was rejected since there has been no significant entry into either of these highly concentrated markets for quite some time. This indicates that mere licensing of technology and know-how would probably be inadequate to prevent a lessening of competition in these markets as a result of this merger. Thus, divestiture was seen as the only practical way to prevent a lessening of competition in these markets. The United States did consider asking for divestiture of the Chimney Operations Unit of Pullman Power Products. However, since the divestiture of either Rust Chimney or Pullman's Chimney Operations Unit would prevent a lessening of competition in the tall chimney market, the United States agreed that Rust be the unit divested.

The proposed Final Judgment will dispose of the United States claim for injunctive relief. The only alternative available to the Department of Justice is a trial of this case on the merits.

Such a trial would require a substantial expenditure of public funds and judicial time. Since the relief the Department of Justice would expect to obtain after winning a trial on the merits is substantially similar to that in the proposed Final Judgment, the United States believes that entry of the proposed Final Judgment is in the public interest.

VII

DETERMINATIVE DOCUMENTS

Pursuant to 15 U.S.C. § 16 (b), there are no determinative documents. Consequently none are filed with this Competitive Impact Statement.

Respectfully submitted,

Peter E. Halle

PETER E. HALLE

David A. Blotner

DAVID A. BLOTNER

Attorneys  
U. S. Department of Justice

Dated: