

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 78-1108
)	
RMI COMPANY; CRUCIBLE, INC.;)	Filed: January 3, 1983
LAWRENCE AVIATION INDUSTRIES,)	
INC.; MARTIN MARIETTA)	
ALUMINUM, INC.; and TITANIUM)	
METALS CORPORATION OF)	
AMERICA,)	
)	
Defendants.)	

COMPETITIVE IMPACT STATEMENT

The United States of America, Plaintiff herein, has this day submitted a proposal for a consent judgment in this proceeding. The proposed Final Judgment, if entered by the Court, would terminate this action as to the only remaining defendant, Martin Marietta Aluminum, Inc. ("MMA"). Plaintiff hereby respectfully submits this Competitive Impact Statement pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. §16.

I

Nature and Purpose of the Proceeding

This is a civil antitrust action brought under Section 4 of the Sherman Act (15 U.S.C. §4) to prevent and restrain violation of Section 1 of said Act. Originally named as

defendants were five companies engaged in the production and sale of titanium mill products.

As originally framed, the Complaint alleged that, beginning at least as early as 1970 and continuing until approximately 1976, the defendants and their co-conspirators engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce, in violation of §1 of the Sherman Act. This combination and conspiracy consisted of a continuing agreement, understanding and concert of action, the substantial terms of which were to raise, fix, maintain and stabilize the prices of titanium mill products. The Complaint also alleged that the combination and conspiracy charged may recur, and asked the Court to permanently enjoin each defendant and all persons acting on its behalf from continuing, maintaining or renewing the alleged combination and conspiracy or from engaging in any other combination or conspiracy with a similar purpose or effect.

On July 29, 1980, this Court entered a consent judgment terminating the action as to all defendants except MMA, which had declined to join in that settlement. On August 19, 1980, the Court granted a motion by MMA for partial summary judgment; the order dismissed the Complaint insofar as it alleged price fixing by MMA on sheet, strip or plate, or activities occurring prior to December, 1973. The United States appealed from that order, but the appeal was dismissed as not ripe. On June 8,

1982, the Court certified the partial summary judgment order as final under Rule 54(b) of the Federal Rules of Civil Procedure. An appeal from that order by the United States was pending when the settlement agreement between MMA and the Government was reached.

The Complaint was filed on September 28, 1978. The same day a Grand Jury for the Western District of Pennsylvania returned an indictment charging four of the defendants herein (RMI Company, Crucible, Inc., Lawrence Aviation Industries and Martin Marietta Aluminum, Inc.) and five of their employees (J. William Price, Jr., Andrew N. Eshman, Robert E. Thomas, Gerald Cohen and George Herman) with a felony violation of §1 of the Sherman Act, 15 U.S.C. §1, based on the same facts that gave rise to this action. This indictment named Titanium Metals Corporation of America ("TMCA") and certain of its employees as unindicted co-conspirators. One defendant entered a plea of guilty and was sentenced before trial. Six defendants entered pleas of nolo contendere before trial 1/ and were sentenced thereon. The remaining two defendants entered pleas of nolo contendere after three days of trial. The court sentenced the individual defendants to a total of 15 years imprisonment, of which all but 195 days was suspended. Fines for all corporate and individual defendants totalled \$1,242,500.

1/ Two defendants - MMA and its employee defendant, George Herman - pled to a superseding felony information as part of a Rule 11 plea agreement with the Government. As to them a motion for severance was granted and thereafter the indictment was dismissed.

II

The Nature of the Alleged Violation

Titanium is a silvery-gray semiprecious metal used predominantly in aircraft and aerospace applications. The titanium is extracted from ore and converted into a material called sponge. This sponge is then melted to form ingots, which in turn are made into mill products - bar, billet, plate, sheet and strip. It is these mill products that were alleged to have been the object of the price-fixing conspiracy charged. The mill product producers originally named as defendants in the Complaint accounted for the great majority of all titanium mill products produced during the period of the conspiracy.

The Government contended and would have been prepared to offer evidence at trial that representatives of TMCA, RMI, Lawrence Aviation, and Crucible began discussing and agreeing on prices for various titanium mill products in 1970, and continued this activity until 1976. The Government also contended and would have been prepared to offer evidence that in 1973 the conspiracy was joined by representatives of MMA, who also remained in the conspiracy until 1976. The primary focus of the conspiracy was on price lists issued and/or used by the original defendants; in all, more than 100 price lists were subject to agreement among those companies. In addition, TMCA and RMI on one occasion reached agreement on prices they would submit in response to a request for a sealed bid.

The original defendants had telephone conversations and face-to-face meetings and exchanged price lists through the mails. There were no group sessions, however. All contacts were one-on-one, involving representatives of only two companies. Some people involved had no contact with some others of their co-conspirators. Moreover, the only company involved in every price list agreement was TMCA; none of the other companies made all the mill products that were the subject of agreement. For example, MMA made only bar and billet.

MMA contended that the Government could not prove that MMA was involved in a single conspiracy with all defendants covering all titanium mill products. As noted above, pursuant to a motion for partial summary judgment by MMA, the Court dismissed the Complaint insofar as it alleged price fixing by MMA on sheet, strip or plate, or activities occurring prior to December, 1973. An appeal by the Government from that order, as certified under Rule 54(b) of the Federal Rules of Civil Procedure, was pending when the settlement agreement between MMA and the Government was reached.

The conspiracy ended in 1976. On November 2, 1976, TMCA approached the Department of Justice and confessed that certain of its employees had been engaged in fixing prices. The investigation leading to the filing of the indictment and complaint was begun on the basis of the information provided by TMCA.

III

Explanation of Proposed Consent Judgment

The proposed Final Judgment, if entered by the Court, will terminate this action as to the only remaining defendant, MMA [hereafter referred to as "defendant"]. The Court will retain jurisdiction over this matter for such further proceedings as may be required to interpret, modify or enforce the proposed judgment.

A. Scope of the Judgment

The proposed consent judgment is, by its terms, in effect for 10 years from the date of entry. Pursuant to Section III, the decree applies to defendant and to each of its officers, directors, agents, employees, subsidiaries, successors and assigns and to all other persons in active concert with any of them who receive actual notice of this Final Judgment. In addition, pursuant to Section V of the decree, the judgment will apply to any party that purchases or otherwise acquires all or substantially all of the assets used by defendant in the manufacture and/or sale of titanium. Excepted, however, are lawful transactions solely within the defendant company or among the defendant and certain related companies. Also excepted are activities outside the United States, its territories and possessions which do not directly or indirectly affect the commerce of the United States.

B. Prohibited Conduct

Section IV(A) of the proposed decree enjoins the defendant from entering into or otherwise participating in any agreement to fix prices or other terms or conditions of sale of titanium mill products, defined in the decree as titanium bar and billet, or to submit non-competitive bids for titanium mill products. Section IV(B) prohibits defendant from directly communicating to or exchanging with any other person engaged in the manufacture and/or sale of titanium any price or term or condition of sale. This section also prohibits defendant from communicating such information to any association or other body comprised of or organized by titanium mill product producers. Section IV(B) does contain a proviso, however, to the effect that these prohibitions shall not preclude the defendant from independently negotiating for, entering into or carrying out a bona fide sale or purchase. This exception was necessary because the titanium industry is one in which, historically, many companies that compete in the manufacture of mill products also maintain customer/supplier relationships with regard to intermediate manufacture, raw materials, and/or the mill products themselves.

C. Defendant's Affirmative Obligations

Sections VI and VII of the proposed decree impose certain affirmative obligations on defendant which are designed to ensure, to the extent possible, that its employees comply with the terms of the decree and with the strictures of the federal antitrust laws.

Section VI requires that the defendant furnish a copy of the decree to each of its officers and directors, and to each of its employees and agents who are engaged in, responsible for, or have authority over pricing or selling titanium mill products made or sold in the United States. Copies of the decree are also to be furnished to each of those individuals' successors.

Under Section VII, the defendant is required, for the duration of the proposed Final Judgment, to furnish a copy of the decree annually to each of its directors, each officer having management responsibility for manufacture, pricing or sale of titanium mill products and to each employee and agent engaged in or having responsibility for or authority over pricing or sale of titanium mill products. In addition, the defendant must each year submit to these individuals a written directive setting forth the company's policy of compliance with the Sherman Act and with this Final Judgment, meet in groups or individually with each of these persons to review the antitrust laws and terms of the Final Judgment, meet individually with

each person to discuss problems related to compliance with the antitrust laws or the decree,^{2/} and receive from each of these individuals a signed certificate acknowledging that the individual has received and understands the decree and has been advised of the consequences of noncompliance. The defendant is also required to file each year with the United States a sworn statement setting forth all steps it has taken to discharge its obligations under this section of the decree and listing all individuals covered by the program.

D. Effect of the Proposed Judgment on Competition

The prohibitions contained in Section IV of the Judgment are designed to ensure that the defendant will act independently in determining the prices, terms and conditions at which it will sell or offer to sell titanium mill products. The affirmative obligations of Sections VI and VII are directed toward reminding the defendant's employees of their obligations under the decree in order to avoid a repetition of behavior that occurred in the titanium mill products industry during the conspiracy period. Compliance with the proposed Judgment will prevent price collusion by the defendant in the sale of titanium mill products.

^{2/} An exception is made for directors, for whom a group meeting is permissible.

E. Effect of the Proposed Judgment on
the Government's Damage Claims

The Department of Defense and other parts of the United States Government are purchasers of aircraft and other items containing titanium mill products. On December 30, 1981, the United States brought an action in the Eastern District of New York seeking damages from all of the original defendants in this case, including MMA. The United States has reached an agreement with MMA terminating that action as to MMA only, in exchange for a money payment to the U.S. The damage action continues against the other defendants. The United States' damage claims are therefore not compromised in any way by the entry of the Judgment.

IV

Remedies Available to Private Plaintiffs

Any potential private plaintiff who might have been damaged by the alleged violation will retain the same right to sue for monetary damages and any other legal or equitable remedies that they would have had were the proposed consent judgment not entered. As to these plaintiffs, however, the statute of limitations, which has been tolled during the pendency of this action pursuant to 15 U.S.C. §16(i) will begin to run again (with regard to suits against the defendant) one year after entry of this Final Judgment. Moreover, pursuant to Section 5(a) of the Clayton Act (15 U.S.C. §16(a)), this

Judgment may not be used as prima facie evidence against the defendant in private litigation.

V

Procedure Available For Modification
of the Proposed Consent Judgment

The proposed Final Judgment is subject to a stipulation between the Government and the defendant which provides that the Government may withdraw its consent to the proposed Judgment any time before the Court has found that entry of the proposed Judgment is in the public interest. By its terms, the proposed Judgment provides for the Court's retention of jurisdiction of this action in order to permit any of the parties to apply to the Court for such orders as may be necessary or appropriate for the modification of the Final Judgment.

As provided by the Antitrust Procedures and Penalties Act (15 U.S.C. §16), any person wishing to comment upon the proposed Judgment may, with the 60-day comment period, submit written comments to the United States Department of Justice, Attention: John W. Clark, Chief, Special Trial Section, Antitrust Division, Washington, D. C. 20530. Such comments and the Government's response to them will be filed with the Court and published in the Federal Register. The Government will evaluate all such comments to determine whether there is any reason for withdrawal of its consent to the proposed Judgment.

VI

Alternatives to the Proposed Consent Judgment

This proceeding as constituted does not involve any unusual or novel issues of fact or law which might make litigation a more desirable alternative than entry of the proposed consent judgment. The proposed judgment includes all the relief requested in the Complaint, as limited by the Court's August 19, 1980 order, and in addition imposes affirmative obligations on defendant designed to ensure compliance therewith.

VII

Determinative Documents

No materials and documents of the type described in Section (b) of the Antitrust Procedures and Penalties Act (15 U.S.C. §16(b)) were considered in formulating this proposed Judgment.

Respectfully submitted,

/s/ Robert W. Wilder
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/s/ Patricia G. Chick
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