

[¶ 70,501] United States v. McGraw-Edison Company, General Electric Company, Hubbard and Company, Joslyn Mfg. and Supply Co., Ohio Brass Company, H. K. Porter Company, Inc. and Westinghouse Electric Corporation.

In the United States District Court for the Eastern District of Pennsylvania. Civil No. 27723. Dated October 1, 1962.

Case No. 1505 in the Antitrust Division of the Department of Justice.

Sherman Act

Collusive Bidding—Restrictive Practices—Lightning Arrester Products—Consent Judgment.—A manufacturer of lightning arrester products was prohibited by a consent judgment from submitting collusive bids, exchanging price information, fixing prices, discriminating in prices or terms of sale, refusing to sell products, tying-in sales of products, and allocating markets. Also, the manufacturer was required to submit non-collusion affidavits with bids to governmental agencies and to review and determine individually its prices.

See Department of Justice Enforcement, Vol. 2, ¶ 8834.10.

For the plaintiff: Lee Loevinger, Assistant Attorney General, W. D. Kilgore, Jr., Baddia J. Rashid, Donald G. Balthis, John E. Sarbaugh and John J. Hughes, Attorneys, Department of Justice.

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For the defendant: Jones, Day, Cockley & Reavis, by Robert W. Poore, for Ohio Brass Company.

Final Judgment

GANEY, Circuit Judge [*In full text*]: Plaintiff, United States of America, having filed its complaint herein on February 17, 1960, and the plaintiff and the undersigned defendant, Ohio Brass Company, by their respective attorneys, having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, without this Final Judgment constituting evidence or an admission by any party signatory hereto with respect to any such issue, and this Court having determined pursuant to Rule 54(b) of the Federal Rules of Civil Procedure that there is no just reason for delay in entering a Final Judgment as to all of plaintiff's claims asserted in said complaint against such defendant,

Now, Therefore, before the taking of any testimony, without trial or adjudication of any issue of fact or law herein and upon consent of the parties signatory hereto as aforesaid, the Court hereby determines that the proceeding herein is terminated as to the said defendant and directs entry of Final Judgment as to all of plaintiff's claims herein against that defendant (provided that the making and entry of this Final Judgment shall be without prejudice to plaintiff filing and prosecuting claims for damages, if any, resulting from activities alleged in the complaint herein) and as to that defendant it is hereby

Ordered, adjudged and decreed as follows:

I

[Sherman Act]

The Court has jurisdiction of the subject matter of this action and of the defendant signatory hereto. The complaint states claims upon which relief may be granted against that defendant under Section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[Definitions]

As used in this Final Judgment:

(A) "Lightning arrester" means a protective device, for limiting surge voltages on apparatus by discharging or by-passing

surge current and for preventing continued flow of follow current to ground, and accessories used with such a device, such as brackets, bracket assemblies, backer straps, terminal covers, back plates and clamps;

(B) "Lightning arrester products" means distribution, intermediate and station lightning arresters;

(C) "Person" means any individual, partnership, firm, corporation, association, trustee or any other business or legal entity; and

(D) "Manufacturer" means a person who manufactures or assembles, or proposes in good faith to manufacture or assemble, within the United States in its own plant regularly maintained for that purpose.

III

[Applicability]

The provisions of this Final Judgment applicable to the consenting defendant shall apply also to each of its subsidiaries, successors and assignees, and to their respective officers, directors, agents, servants and employees, and to all other persons in active concert or participation with such defendant who shall have received actual notice of this Final Judgment by personal service or otherwise. Such defendant is ordered and directed to take such steps as are reasonably appropriate to procure compliance by its subsidiaries, officers, directors, agents, servants and employees with the terms of this Final Judgment. For the purpose of this Final Judgment such consenting defendant and its subsidiaries, officers, directors, agents, servants and employees, or any of them, shall be deemed to be one person. This Final Judgment shall not apply to or require sales of lightning arrester products for use outside the United States except for sale of such products by the consenting defendant to or for the use of the plaintiff or any instrumentality or agency thereof.

IV

[Practices Prohibited]

The consenting defendant is enjoined and restrained from directly or indirectly entering into, adhering to or claiming or maintaining any right under any contract, agreement, arrangement, understanding, plan or program with any other manufacturer or

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seller of lightning arrester products in the United States to:

(A) Eliminate or suppress unreasonably competition in the manufacture, distribution or sale of lightning arrester products;

(B) Allocate or divide territories, markets, fields or customers for the manufacture or sale of lightning arrester products; provided, however, that this subsection (B) shall not prohibit the consenting defendant from accepting or granting, without more, otherwise lawful patent, trade secret or technical information licenses;

(C) Fix or maintain prices, pricing methods, or any terms or conditions for the sale of any lightning arrester product to any third person;

(D) Exchange information concerning prices, pricing methods or other terms and conditions of sale (other than information released to the trade generally) at or upon which any lightning arrester product is to be sold to any third person;

(E) Submit noncompetitive, collusive or rigged bids or quotations for supplying any lightning arrester product to any third person;

(F) Bid or quote, refrain from bidding or quoting, or communicate an intention to bid or quote or to refrain from bidding or quoting, on any lightning arrester product to be sold to any third person;

(G) Hinder, restrict, limit or prevent any person from purchasing any lightning arrester product from any third person (except as may result from any bona fide purchase or sale agreement, without more); or

(H) Hinder, restrict, limit or prevent any person from selling any lightning arrester product to any third person (except as may result from any bona fide purchase or sale agreement, without more).

V

[Refusal to Sell, Discrimination]

The consenting defendant is enjoined and restrained from directly or indirectly:

(A) Communicating to or exchanging with any manufacturer or seller of any lightning arrester product any prices applicable to any such product except with or after the release of such prices to the trade generally, or except in connection with bona fide purchase or sale negotiations;

(B) Continuing to be a member of or participating in the activities of any associa-

tion or other organization with knowledge that any of the activities of such association or other organization are being carried on in a manner which, if the association or other organization were a consenting defendant herein, would violate the provisions of this Final Judgment;

(C)(1) Refusing to sell or quote on, subject to defendant's regularly established terms and conditions of sale, any lightning arrester product to any manufacturer of electrical equipment (produced for general resale to others) in which such product is incorporated or to which such product is physically connected, for incorporation in, connection to and resale with or for the repair of such equipment, so long as such product is being sold or offered for sale by such defendant to any other manufacturer of the same type of equipment for the same purpose;

(2) Discriminating in any such sales by selling any such product in quantities, or at prices, terms and conditions of sale for the same quantities, not at the same time available to other such manufacturers; provided, however, that in any suit or proceeding hereafter instituted by the plaintiff against the defendant charging a violation of this subsection (2), such defendant may rebut a *prima facie* case made by the plaintiff by showing that its lower price to a purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or did not have the effect of substantially lessening competition;

Provided that in any of the foregoing cases such prospective purchaser is financially able, and is not delinquent in his account, to purchase such product and such defendant is able in accordance with its usual and customary production and delivery scheduling procedures to supply such product to the purchaser at or about the time requested by the purchaser.

(D) Conditioning the sale to any person of any lightning arrester product, as ordinarily sold (except for repair or replacement purposes) by such defendant to other persons in the same commercial class, upon the purchase from such defendant of any other item of electrical equipment.

Provided, however, in any instance in which such defendant reasonably believes that the use intended to be made of the lightning arrester product will expose such defendant to a substantial risk of liability, nothing in subsections (C) and (D) of this

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Section V shall be deemed to prohibit such defendant from requiring as a term of sale that the purchaser agree in writing to hold such defendant harmless and to give a reasonably adequate bond (or, at the purchaser's option, to maintain reasonably adequate insurance) to secure such agreement insofar as it relates to claims by third persons.

VI

[Price Review]

(A) The consenting defendant is ordered and directed, not later than one year following the effective date of this subsection (A), individually and independently (1) to review and determine its book prices for lightning arrester products based upon lawful considerations, and (2) to announce such prices determined under (1) above; provided, however, that the price review, determination and announcement referred to above shall not be required with respect to any lightning arrester products as to which such defendant, within one year following the effective date of this subsection (A), files with this Court, with a copy sent to the Assistant Attorney General in charge of the Antitrust Division, an affidavit stating that such defendant, prior to the effective date of this subsection (A) and subsequent to February 17, 1960, reviewed, determined and announced the price of the product in accordance with the requirements of this subsection (A); and provided, further, that nothing contained in this subsection (A) shall prevent such defendant from deviating from, modifying, or otherwise changing the prices announced in accordance with this subsection (A).

(B) The consenting defendant hereto is ordered and directed to send a copy of this Final Judgment not later than one hundred and eighty (180) days following the effective date of this subsection (B) to each of the Federal, State and local agencies and any other governmental awarding authorities to which sales pursuant to bids submitted by such defendant, a record of which is maintained in its headquarters sales office, of any lightning arrester product were made by such defendant between January 1, 1959 and February 17, 1960, provided that some or all of the defendants consenting to a Final Judgment herein may arrange collectively to send a single such copy to each such purchaser to which such sales were made by one or more of such defendants.

(C) The consenting defendant is ordered and directed for a period of ten (10) years from the effective date of this subsection (C) at least annually to notify each Federal, State and local governmental agency to which such defendant has, within the preceding year, submitted a successful sealed bid for any lightning arrester product, that such defendant has been ordered, and such defendant is hereby so ordered, for such period plus one year, to submit a statement in the form set forth in the Appendix hereto with each sealed bid for a lightning arrester product submitted to such agency in response to an invitation to bid which requests such a statement.

VII

[Permissive Provisions]

Nothing contained in this Final Judgment shall be deemed to prohibit the consenting defendant,

(A) Where in order to sell or offer to sell electrical equipment which includes any lightning arrester product any person must have an item or items of electrical equipment (i) which it does not itself manufacture or assemble to combine with items of such equipment which it does itself manufacture, assemble or purchase from others, (ii) or if it does manufacture or assemble such an item, the item is of such a type or quality that it cannot competitively sell or offer to sell its own item, (iii) or where such person could not singly perform the contract contemplated by such sale or offer to sell:

(1) from formulating or submitting, in combination with any person, a bona fide joint bid or quotation, where such joint bid or quotation is denominated as such or known to the purchaser to be such; or

(2) from conducting bona fide negotiations for or entering into any lawful agreement with any person for a bona fide purchase from or sale to each other,

provided, that each party to the transaction is free to sell or offer to sell on terms independently determined by it;

(B) Where required directly or indirectly by a governmental agency, from formulating or submitting in combination with any person a bona fide joint bid or quotation which is denominated as such or known to the purchaser to be such;

(C) From entering into, creating, carrying out or implementing by lawful conduct

any otherwise lawful contract, agreement, arrangement, understanding, plan or program with any reseller relating to the sale of any lightning arrester product purchased from the defendant;

(D) From lawfully contracting with any person for the supply to or by such person of any lightning arrester product embodying the proprietary design of, or specially designed for, the purchaser upon terms prohibiting the supplier from selling equipment embodying such design to all others (except that the purchaser may authorize sales for repair or replacement purposes); or

(E) From entering into, creating, carrying out or implementing by lawful conduct any otherwise lawful contract, agreement, arrangement, understanding, plan or program with its parent corporation, The Ohio Brass Company, a corporation of New Jersey.

VIII

[Inspection and Compliance]

For the purpose of determining or securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the consenting defendant made to its principal office, be permitted, subject to any legally recognized privilege:

(A) Reasonable access during the office hours of such defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of such defendant relating to any matters contained in this Final Judgment; and

(B) Subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview officers or employees of such defendant, who may have counsel present, regarding any such matters.

The consenting defendant, upon the written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and upon reasonable notice made to its principal office shall submit such written reports, under oath if it is requested, with respect to any of the matters contained in this Final Judgment as from time to time may be necessary and

requested for the enforcement of this Final Judgment. No information obtained by the means provided in this Section shall be divulged by any representative of the Department of Justice to any person except 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 for the purpose of securing compliance with this Final Judgment, or as otherwise required by law. If any such information is divulged to a duly authorized representative of the Executive Branch, outside the Department of Justice, such information shall be given after notice to the defendant and on the condition that it will not be revealed to any person outside of such representative's Department or Agency except where required by regulation or statute or pursuant to court process.

IX

[Jurisdiction Retained]

Jurisdiction is retained for the purpose of enabling any of the parties consenting to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction of or carrying out of this Final Judgment, or for the modification of any of the provisions thereof, and for the purpose of enabling the plaintiff to apply to this Court for the enforcement of compliance therewith and the punishment of violations thereof.

X

[Effective Date]

All of the provisions of this Final Judgment shall become effective upon entry hereof.

Appendix

Affidavit

The undersigned hereby certify to their best knowledge and belief that:

(1) The bid to (name of recipient of bid) dated has not been prepared by (name of defendant) in collusion with any other seller of lightning arrester products, and

(2) The prices, terms or conditions of said bid have not been communicated by the undersigned nor by any employee or agent of (name of defendant),

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to any other seller of lightning arrester
products and will not be communicated to
any such seller prior to the official open-
ing of said bid,
in violation of the Final Judgment in Civil
No. 27723 entered by the United States Dis-
trict Court for the Eastern District of Penn-
sylvania on , 1962.

Dated: ,

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Signature of person responsible
for the preparation of the bid

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Signature of person supervising
the above person, where feasible