

Trade Regulation Reporter - Trade Cases (1932 - 1992), United States v. Foster-Wheeler Corporation (Allis-Chalmers Manufacturing Company, and Westinghouse Electric Corporation), U.S. District Court, E.D. Pennsylvania, 1962 Trade Cases ¶70,587, (Nov. 21, 1962)

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United States v. Foster-Wheeler Corporation (Allis-Chalmers Manufacturing Company, and Westinghouse Electric Corporation).

1962 Trade Cases ¶70,587. U.S. District Court, E.D. Pennsylvania. Civil Action No. 28229. Dated November 21, 1962. Case No. 1551 in the Antitrust Division of the Department of Justice.

Sherman Act

Collusive Bidding—Restrictive Practices—Condensers—Consent Judgment.—Manufacturers of condensers were each prohibited by a consent judgment from submitting collusive bids, exchanging price information, fixing prices, tying-in sales of products and allocating markets. Also, each manufacturer was required to submit non-collusion affidavits with bids to governmental agencies and to review and determine its prices individually.

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.

For the defendants: Schnader, Harrison, Segal & Lewis, by W. Bradley Ward, and Edward W. Mullinix, for Allis-Chalmers Mfg. Co., and Cravath, Swaine & Moore, by George B. Turner, for Westinghouse Electric Corp.

Final Judgment

GANEY, Circuit Judge [*In full text*]: Plaintiff, United States of America, having filed its complaint herein on June 29, 1960, and the plaintiff and the undersigned defendants [Allis-Chalmers Mfg. Co. and Westinghouse Electric Corp.] 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 the defendants signatory hereto,

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 defendants signatory hereto and directs entry of Final Judgment as to all of plaintiff's claims herein against those defendants, and as to those defendants 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 defendants signatory hereto. The complaint states claims upon which relief may be granted against those defendants under Section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraint and monopolies," commonly known as the Sherman Act, as amended.

II

[Definitions]

As used in this Final Judgment:

(A) “Condensers” means liquid cooled steam surface condensers used with turbine-generator units and, except for the purposes of subsections (B) and (C) of Section VI hereof, the auxiliaries and accessory equipment when sold for use therewith, including air ejectors, circulating pumps and condensate pumps;

(B) “Person” means any individual, partnership, firm, corporation, association, trustee or any other business or legal entity; and

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

III

[Applicability]

The provisions of this Final Judgment applicable to any 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. Each 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 each 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 sales of condensers for use outside the United States except for sales of such condensers by any consenting defendant to or for the use of the plaintiff or any instrumentality or agency thereof.

IV

[Prohibited Practices]

Each of the consenting defendants 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 seller of condensers in the United States to:

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

(B) Allocate or divide territories, markets, fields or customers for the manufacture or sale of condensers; provided, however, that this subsection (B) shall not prohibit a 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 condenser 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 condenser is to be sold to any third person;

(E) Submit non-competitive, collusive or rigged bids or quotations for supplying any condenser 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 condenser to be sold to any third person;

(G) Hinder, restrict, limit or prevent any person from purchasing any condenser 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 condenser to any third person (except as may result from any bona fide purchase or sale agreement, without more).

V

[Tying-in Sales]

Each of the defendants is enjoined and restrained from directly or indirectly:

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

Continuing to be a member of or participating in the activities of any association 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 any of the provisions of this Final Judgment;

(C) Conditioning the sale to any person of any condenser 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 condenser will expose such defendant to a substantial risk of liability, nothing in this subsection (C) 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) Each of the consenting defendants 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 condensers 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 condenser 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 June 29, 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 any such defendant from deviating from, modifying, or otherwise changing the prices announced in accordance with this subsection (A).

(B) Each of the consenting defendants 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 of any condenser were made by such defendant between January 1, 1958 and June 29, 1960, provided that some or all of the consenting defendants may arrange collectively to send a single such copy to each such purchaser to which sales were made by one or more of such defendants.

(C) Each of the consenting defendants is ordered and directed for a period of ten (10) years from the effective date of this subsection (C) annually to notify each Federal, State and local governmental agency to which such defendant has, within the preceding year, submitted a sealed bid for any condenser, that such defendant has been ordered, and each 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 condenser 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 any of the consenting defendants:

(A) Where in order to sell or offer to sell electrical equipment which includes a condenser any person must have an item or items of equipment (i) which it does not itself manufacture or assemble to combine with items of 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 submit its own bid or quotation 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 condensers purchased from the defendant; or

(D) From lawfully contracting with any person for the supply to or by such person of any condenser 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).

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 any 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.

A 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 Dates*]

Except as herein provided, the provisions of this Final Judgment shall become effective upon entry hereof. Subsection V(C) and Section VI of this Final Judgment shall not become effective until entry of a Final Judgment, not subject to further appeal, against the last remaining defendant in this action; provided, however, that upon motion of any party consenting hereto, on thirty (30) days' notice to the other parties, and for good cause shown, this Court may enter an order making any or all of such Section or subsection effective as to any or all of the consenting defendants at any earlier or later date the Court may deem appropriate.

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 condensers, 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) .>, to any other seller of condensers and will not be communicated to any such seller prior to the official opening of said bid,

in violation of the Final Judgment in Civil No. 28,229 entered by the United States District Court for the Eastern District of Pennsylvania on>, 1962.

Dated:>, 1962

.....>

Signature of person responsible for the preparation of the bid

.....>

Signature of person supervising the above person, where feasible