

Trade Regulation Reporter - Trade Cases (1932 - 1992), United States v. The International Nickel Company of Canada, Limited, and The International Nickel Company, Inc., U.S. District Court, S.D. New York, 1948-1949 Trade Cases ¶62,280, (Jul. 2, 1948)

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United States v. The International Nickel Company of Canada, Limited, and The International Nickel Company, Inc.

1948-1949 Trade Cases ¶62,280. U.S. District Court, S.D. New York. Civil Action No. 36-31. July 2, 1948. 581 F2d 419

Sherman Antitrust Act

Consent Judgment—Monopoly.—A consent judgment entered in an action charging a Canadian corporation and its American subsidiary with monopolization and restraint of trade in nickel ores, nickel and nickel products requires defendants to sell, for a period of twenty years, basic nickel raw materials to producers of rolling mill products containing nickel, and to present to certain technological libraries copies of an existing manual describing methods and processes employed by the subsidiary in the production of rolling mill products.

For plaintiff: Herbert A. Bergson, Assistant Attorney General; John F. X. McGohey, United States Attorney; Sigmund Timberg, Manuel M. Gorman, J. Francis Hayden, Special Assistants to the Attorney General.

For defendants: Sullivan & Cromwell, George C. Sharp; Isseks, Meyers & Verdon, Ernest S. Meyers.

Final Judgment

The plaintiff, United States of America, having filed its complaint herein on May 16, 1946, and the defendants having appeared and filed their answer to such complaint denying any violation of law; and all parties hereto by their attorneys having severally consented to the entry of this final judgment herein; and the defendant The International Nickel Company of Canada, Limited, a foreign corporation, having consented to accept jurisdiction of this Court solely for the purposes of this judgment;

Now THEREFORE, without trial or adjudication of any issue of fact or law herein, and without any admission by the defendants with respect to any such issue, and before the taking of any testimony herein, and upon the consent of all the parties hereto, it is hereby

ORDERED, ADJUDGED AND DECREED, as follows:

[*Jurisdiction*]

I

This Court has jurisdiction of the subject matter of this action and all the parties hereto and the complaint states a cause of action against the defendants under Sections 1 and 2 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", commonly known as the Sherman Act.

[*Terms Defined*]

II

When used in this final judgment, the following terms have the meanings assigned respectively to them below:

(a) "Inco Ltd." means the defendant The International Nickel Company of Canada, Limited, a corporation organized and existing under the laws of the Dominion of Canada, its successors and assigns.

(b) "Inco Delaware" means the defendant The International Nickel Company, Inc., a corporation organized and existing under the laws of the State of Delaware, and any subsidiary or division of Inco Ltd. which at the time is producing rolling mill products in the United States.

(c) "Nickel-bearing materials" means nickel ores, concentrates, mattes and speisses, used or intended to be used in whole or in part for their nickel content or the production of nickel.

(d) "Rolling mill products" means rolled or extruded metallic nickel and rolled or extruded nonferrous alloys of nickel the nickel content of which is above fifty (50) per centum, in the usual commercial forms, including, but without limitation to, sheets, strips, bars, rods and tubing, and machined forgings of metallic nickel or of such alloys of nickel; and, if at the time Inco Delaware is producing and marketing in the United States any sheets, strips, bars, rods, or tubing made of metallic nickel or of alloys of nickel the nickel content of which is above fifty (50) per centum by any process employed as a substitute for rolling or extrusion, the term "rolling mill products" shall also mean such products made by such process; and if at the time Inco Delaware is producing and marketing in the United States any articles made of metallic nickel or of alloys of nickel the nickel content of which is above fifty (50) per centum which are more advanced than "rolling mill products" as above defined and which are not made from "rolling mill products" as above defined, the term "rolling mill products" shall also mean such articles; provided, however, that "rolling mill products" shall not include any cast product or any product of a kind produced primarily for use as a source of nickel, such as for remelting, dissolving or plating. For the purposes of this definition "non-ferrous alloys of nickel" means alloys which contain less than ten (10) per centum of iron; and also alloys containing ten (10) per centum or more of iron which Inco Delaware at the time is producing and marketing in the United States.

(e) "Rolling mill producer." means any person, other than Inco Delaware, engaged or about to engage in the production of rolling mill products in the United States but, except as defendants may elect otherwise, shall not include any person that is or controls, or is controlled by or is under common control with, a person engaged in the business of marketing on a commercial scale nickel-bearing material, nickel oxide or unwrought metallic nickel.

(f) "Rolling material" means (1) such kinds of unwrought metallic nickel in the usual commercial forms, including, but without being limited to, shot, ingots, cathodes, bricks, cubes and powder and (2) such kinds of nickel-copper matte or other material (such as a nickel oxide sinter) the metal content of which is likewise predominantly of nickel, as Inco Ltd. and its other subsidiaries may at the time be providing to Inco Delaware for the production by it in the United States of rolling mill products; provided, however, that "rolling material" shall not mean any material to the extent that it is used by Inco Delaware for experimental production or for the production of a product to be further processed and primarily sold outside the United States by Inco Ltd. or any of its subsidiaries.

[*Sale of Raw Materials Required*]

III

Inco Ltd. and Inco Delaware are hereby ordered and directed for a period of twenty years after the date of entry of this judgment:

(a) Subject to the provisions of Section IV, upon the request of rolling mill producers, to offer to sell and to sell rolling material to them for the production of rolling mill products within the United States, and for a reasonable inventory for such purpose, without any condition or restriction on the use of, sale or marketing of rolling mill products produced therefrom.

(b) To sell any rolling material sold to rolling mill producers pursuant to subparagraph (a) of this Section III at a price and other terms of sale as favorable as the prevailing current price and other terms of sale for the same kind of material then being charged by the defendants and their subsidiaries to other unaffiliated, non-governmental consumers in the United States; or if the particular kind of rolling material is not being sold on a commercial scale by the defendants and their subsidiaries to such other consumers, at a price not exceeding:

(i) if it is a sintered rolling material containing more copper than is contained in nickel oxide sinter then being sold to such other consumers as aforesaid but containing by weight substantially the same percentage of oxygen and substantially the same aggregate percentage of nickel and copper, the prevailing price per pound of nickel content then currently being charged on such sales of such nickel oxide sinter plus, per pound of copper content in excess of the approximate average amount in such nickel oxide sinter, a fair United States market price for refined copper, or

(ii) if it is some other rolling material, the prevailing price per pound of nickel content then currently being charged on sales of the most nearly comparable material to such other consumers as aforesaid, reasonably adjusted for the estimated saving or increased expense experienced by Inco Delaware in converting such rolling material into rolling mill products of a kind for which such rolling material is primarily suited, plus the market price for any additional metals of value contained,

and in each such case on as favorable other terms of sale as those generally being granted by the defendants and their subsidiaries to such other consumers.

[*Obligations Qualified*]

IV

The obligations set forth in Section III of this final judgment shall be subject to the following:

(a) At any time when the total quantity of any kind of rolling material which Inco Ltd. and Inco Delaware may decide to offer to sell for the production of rolling mill products in the United States by rolling mill producers and to deliver to Inco Delaware's plants for the production of such products, is or may be insufficient to provide both to all rolling mill producers and to Inco Delaware the full amounts which they may desire for such purpose, subparagraph (a) of Section III shall (in so far as the quantity which Inco Ltd. and Inco Delaware are to offer to sell and to sell is concerned) be construed to require only the following: that with respect to the aforesaid total quantity of such kind of rolling material Inco Ltd. and Inco Delaware shall in good faith endeavor without discrimination to share such total quantity, on the basis of relative bona fide needs for the production of rolling mill products in the United States, as between (i) the amount sold to all rolling mill producers in the aggregate pursuant to said subparagraph (a) on the one hand, and (ii) the amount delivered to Inco Delaware's plants for their own production of rolling mill products in the United States on the other hand. The determination of such relative bona fide needs may be made by Inco Ltd. and Inco Delaware in advance from time to time for periods not exceeding one year. Nothing in this judgment shall affect or limit the right of Inco Ltd. and Inco Delaware to determine the total quantity of rolling material and of each kind thereof which they may offer to sell for the production of rolling mill products in the United States by rolling mill producers and deliver to Inco Delaware's plants for the production of such products.

(b) Inco Ltd. and Inco Delaware need not sell during any calendar year to any rolling mill producer (i) who does not notify Inco Delaware during the previous November of his desire to purchase rolling material under Section III during such year; or (ii) who does not upon request contract with Inco Delaware for such year, or if relative bonafide needs are then being determined pursuant to sub-paragraph (a) of this Section IV and are being determined for a period of less than a year then for such period, to purchase the rolling material which may be sold to him pursuant to Section III, or such part thereof as Inco Delaware may desire to have covered by contract.

(c) Deliveries of rolling material need be made only in carload shipments distributed reasonably uniformly through the year. Sales of rolling material need not be made to any rolling mill producer who does not undertake to buy for the production of rolling mill products in the United States a minimum during the calendar year of 108 short tons of nickel contained. At the election of Inco Ltd. or Inco Delaware any sale may be made by Inco Ltd. or any of its subsidiaries.

[*Manual To Be Made Available to Competitors*]

V

Inco Delaware is hereby ordered and directed to present to the libraries of Massachusetts Institute of Technology, Cambridge, Mass., Columbia University, New York, N. Y., University of Pennsylvania, Philadelphia, Pa., University of Michigan, Ann Arbor, Mich., University of Illinois, Urbana, Ill., University of Alabama, University, Ala., Texas A. & M. College, College Station, Tex., Colorado School of Mines, Golden, Colo., California Institute of Technology, Pasadena, Calif., and University of Washington, Seattle, Wash., a copy of the written manual heretofore prepared by Inco Delaware and submitted to the Department of Justice descriptive of processes and methods used by Inco Delaware in its commercial practice as of October 1947 in the production of rolling mill products from sinter and nickel-copper matte at its Huntington, W. Va. rolling mill, and entitled

"Nickel-Copper Matte and Sinter
Processes and Methods of Producing
Rolling Mill Products—October 1947
The International Nickel Company, Inc.
Huntington Works"

and to provide 300 copies of such manual to the Library of Congress of the United States.

[*Sales on Condition Prohibited*]

VI

Inco Ltd. and Inco Delaware and their officers, directors, agents and employees and any persons acting or claiming to act under, through or for any of them, be and they hereby are severally and jointly enjoined and restrained from selling nickel-bearing materials or rolling material to any producer of nickel-bearing materials or rolling material on the express or implied condition that such producer shall not import all or any part of its production of nickel-bearing materials, of rolling material or of rolling mill products into the United States, its territories or possessions, or selling rolling material to any producer of rolling mill products on the express or implied condition that such producer shall not import rolling mill products produced by it into the United States, its territories or possessions. This Section VI shall not be deemed to adjudicate or determine the legality or illegality of nor shall it apply to agreements, under takings or understandings between Inco Ltd. and any of its subsidiaries or between any such subsidiaries.

[*Inspection to Secure Compliance*]

VII

For the purpose of securing compliance with this judgment and for no other purpose, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or an Assistant Attorney General, and on reasonable notice to the defendants, be permitted, subject to any legally recognized privilege (1) access, during the office hours of Inco Delaware, to all its books, ledgers, accounts, correspondence, memoranda and other of its records and documents in its possession or under its control relating to any matters contained in this judgment; (2) access at reasonable times to such records and documents of Inco Ltd. as may be then located in the United States in the possession or under the control of Inco Ltd. relating to any matters contained in this judgment; and (3) subject to the reasonable convenience of the defendants and without restraint or interference from them, to interview such of their officers or employees as may be in the United States, who may have counsel present, regarding any such matters; and upon such request the defendants shall submit such reports in writing with respect to the provisions of Sections III, IV and VI of this judgment as might from time to time be reasonably necessary to the enforcement of this judgment; provided, however, that no information obtained by the means provided in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department except in the course of legal proceedings in which the United States is a party for the purpose of enforcing or securing compliance within this judgment, or as otherwise required by law.

[*Acts Not Violative of Judgment*]

VIII

None of the defendants, their officers, directors, agents or any persons acting or claiming to act under, through or for any of them shall be in contempt of this judgment for doing anything outside the United States which is required, or for not doing anything outside the United States which is unlawful, under the laws of the government of the dominion, province, country or state in which Inco Ltd. or any of its subsidiaries may be incorporated or chartered or in the territory of which Inco Ltd. or any such subsidiaries may be doing business. In any such case Inco Ltd. shall advise the plaintiff thereof as promptly as is practicable and thereupon the plaintiff may apply to this Court, with full opportunity to the defendants to be heard, for such relief consistent with the provisions of this judgment as the Court may deem appropriate.

[*Vacation of Judgment*]

IX

This Court shall enter an order dismissing the complaint herein and vacating this judgment in its entirety upon the petition of the plaintiff (a) at any time after January 1, 1957, or (b) at any time after the obligations of the defendants under Section III shall have become inoperative by reason of the fact that Inco Delaware is not using rolling material provided by Inco Ltd. or its other subsidiaries for the production of rolling mill products in the United States; and in any new proceeding instituted by the plaintiff under the Sherman Act after the entry of any such order this judgment shall not be deemed a bar to the granting of appropriate relief or to the defendants' interposing any defense other than that such relief is barred by this judgment.

Without limiting the provisions of Section X hereof, Inco Ltd. or Inco Delaware shall be entitled to have Sections III and IV hereof vacated upon a showing to the Court upon 30 days' notice to the Attorney General that Inco Ltd. and its subsidiaries in the sale of rolling material are in substantial competition with nickel containing material produced by others and either sold in the United States or sold for use in the United States, provided that an application for such purpose shall not be made oftener than once every two years.

[*Jurisdiction Retained*]

X

Jurisdiction of this cause is retained for the purpose of enabling only the Attorney General or Inco Ltd. or Inco Delaware to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this judgment; for the modification or termination of any of the provisions thereof (and in the event any laws, requirements or requests of any government or governmental body make observance of this judgment unduly burdensome or are inconsistent with the terms of this judgment the right of the defendants to apply for such relief as the Court may deem appropriate is hereby expressly recognized); and for the enforcement of compliance with this judgment, and for the punishment of violations thereof.