

Trade Regulation Reporter - Trade Cases (1932 - 1992), United States v. The American Society of Mechanical Engineers, Inc., and The National Board of Boiler and Pressure Vessel Inspectors., U.S. District Court, S.D. New York, 1972 Trade Cases ¶74,028, (Sept. 11, 1972)

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United States v. The American Society of Mechanical Engineers, Inc., and The National Board of Boiler and Pressure Vessel Inspectors.

1972 Trade Cases ¶74,028. U.S. District Court, S.D. New York. Civil No. 70 Civ. 3141. Entered September 11, 1972. Case No. 2120, Antitrust Division, Department of Justice.

Sherman Act

Trade Restraints—Certification and Registration—Boilers and Pressure Vessels— Exclusion of Foreign Products.—A consent decree required associations which certify and register boilers and pressure vessels to make their respective stamps available on a nondiscriminatory basis to foreign manufacturers who meet the safety and technical standards applicable to U. S. producers. Nondiscriminatory registration was also required. Procedures for enabling foreign manufacturers to acquire certification and registration must be established.

For plaintiff: Walker B. Comegys, Acting Asst. Atty. Gen., Baddia J. Rashid, Robert B. Hummel, Wilbur L. Fugate, Bernard M. Hollander, Charles F. B. McAleer, L. Barry Costilo, Adrian C. May, Jr., and Stephen F. Sonnett, Attys., Dept. of Justice.

For defendants: Devereux Milburn, of Carter, Ledyard & Millburn, for The American Society for Mechanical Engineers, Inc.; Dennis D. Grant, of Bricker, Evatt, Barton & Eckler and John R. Hupper, of Cravath, Swaine & Moore, for The National Board of Boiler and Pressure Vessel Inspectors.

Final Judgment

EDELSTEIN, D. J.: Plaintiff, United States of America, having filed its Complaint herein on July 22, 1970, and the plaintiff and defendants having appeared by their respective attorneys, and having consented to the entry of this Final Judgment

Now, Therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein and without this Final Judgment constituting evidence or an admission by any party hereto with respect to any such issue; and upon the consent of the parties hereto, it is hereby

Ordered, Adjudged and Decreed as follows:

I.

[Jurisdiction]

This Court has jurisdiction of the subject matter of this action and of each of the parties hereto. The Complaint states claims for relief against defendants under Sections 1 and 2 of the Act of Congress of July 2, 1890, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies" (15 U. S. C. §§ 1, 2), commonly known as the Sherman Act.

II.

[Definitions]

As used in this Final Judgment:

(A) The term "ASME" means The American Society of Mechanical Engineers, Inc.

- (B) The term “National Board” means the National Board of Boiler and Pressure Vessel Inspectors.
- (C) The term “ASME BPV Code” means the ASME Boiler and Pressure Vessel Code.
- (D) The term “Symbol Stamp” means the die issued by the ASME for imprinting on boilers or pressure vessels their manufacturer's certification that such boiler or pressure vessel has been manufactured and inspected in conformity with applicable ASME BPV Code requirements.
- (E) The term “Certificate of Authorization” means the certificate issued by the ASME which authorizes a manufacturer to stamp with the Symbol Stamp a boiler or pressure vessel which conforms with the applicable ASME BPV Code requirements.
- (F) The term “National Board Stamping” means the stamping applied to a boiler or pressure vessel by the manufacturer with prior authorization from the National Board and with the acceptance of an inspector who holds a valid National Board Commission which stamping indicates that such boiler or pressure vessel conforms with applicable ASME BPV Code requirements and with National Board requirements for such stamping.
- (G) The term “National Board Commission” means the certificate issued by the National Board which indicates that the holder is qualified to inspect boilers and pressure vessels to ascertain their conformity to applicable ASME BPV Code requirements and is permitted to accept an authorized manufacturer's stamping of conforming boilers and pressure vessels with the Symbol Stamp and with the National Board stamping.
- (H) The term “Jurisdictional Enforcement Authority” means the boiler and pressure vessel law enforcement authority of a jurisdiction which has adopted and administers one or more Sections of the ASME BPV Code as its legal standard for the object or matters covered by such Section or Sections.
- (I) The term “boiler” means a closed vessel in which water is heated, steam is generated, steam is superheated, or any combination thereof, under pressure or vacuum for use external to itself by the direct application of heat. The term “boiler” includes fired units for heating or vaporizing liquids other than water where these units are separate from processing systems and complete within themselves. For purposes of this Final Judgment, the term “boiler” is limited to those of such objects as fall within the applicable Sections of the ASME BPV Code.
- (J) The term “pressure vessel” means a vessel in which pressure is obtained from an external source or by the application of heat from a direct or indirect source. For purposes of this Final Judgment, the term “pressure vessel” is limited to those of such objects as fall within the applicable Sections of the ASME BPV Code.
- (K) For purposes of this Final Judgment the terms “boiler” and “pressure vessel” shall be deemed to include boiler or pressure vessel appurtenances or devices which fall within the scope of the applicable Sections of the ASME BPV Code.
- (L) For the purpose of this Final Judgment the term “domestic manufacturer” means a manufacturer of boilers or pressure vessels whose manufacturing plant is located in the United States, its territories and possessions, or Canada, without regard to whether such plant is located in a jurisdiction that has adopted any Section of the ASME BPV Code as a legal standard.
- (M) For the purpose of this Final Judgment the term “foreign manufacturer” means any manufacturer of boilers or pressure vessels who is not a domestic manufacturer.
- (N) The term “foreign-made boiler or pressure vessel” means a boiler or pressure vessel manufactured in a manufacturing plant located outside of the United States, its territories and possessions, or Canada.
- (O) The term “domestically-made boiler or pressure vessel” means a boiler or pressure vessel manufactured in the United States, its territories and possessions, or Canada.

III.

[*Applicability*]

The provisions of this Final Judgment shall apply to each defendant, its committees, subcommittees and any other subdivision or branches thereof; its respective officers, directors, employees, agents acting as such,

successors and assigns, and to those persons in active concert or participation with either defendant who have actual notice of this Final Judgment; provided, however, that this Final Judgment shall in no way limit the conduct of official duties of any member of the National Board, when such duties are performed solely within the scope of his authority as the chief boiler inspector or boiler law enforcement officer of any state of the United States, political subdivision of any state, or province of Canada, and when required by law in such jurisdiction.

IV.

[*Stamps and Certification*]

The defendants are jointly and severally enjoined and restrained from directly or indirectly treating foreign manufacturers or foreign-made boilers or pressure vessels differently from domestic manufacturers or domestically-made boilers or pressure vessels with respect to issuance of Symbol Stamps or Certificates of Authorization, authority to use National Board Stamping, registration of manufacturer's data reports, or commissioning of the inspectors of such products, except as otherwise specified in Sections V and VI of this Final Judgment.

V.

[*Establishment of Procedures*]

(A) Defendant ASME is ordered and directed to establish in writing, publish as provided in Section VII (B) hereof, and place into effect within 90 days after the effective date hereof, a fair, reasonable and nondiscriminatory procedure enabling foreign manufacturers who meet the requirements of the ASME to qualify for and receive ASME Certificates of Authorization and Symbol Stamps on an equal basis with domestic manufacturers; providing, however, that ASME may require that:

(1) Any inspection pursuant to the ASME BPV Code of boilers or pressure vessels to be imprinted with the Symbol Stamp shall be conducted by an inspector holding a valid National Board Commission.

(2) Each product that the foreign manufacturer stamps with the Symbol Stamp also bear the duly authorized stamping of the National Board; and that the foreign manufacturer file manufacturer's data reports with the National Board for each product to which the foreign manufacturer has applied National Board stamping.

(B) The procedure established pursuant to paragraph V (A) may include initial plant surveys and follow-up, investigative and renewal inspections of foreign manufacturers, but, subject to distinctions necessitated by distance, language, or measurement units, only under the same standards, in the same manner, and to the same extent that such surveys and inspections are applied to domestic manufacturers.

The number of persons conducting these surveys and inspections and their qualifications shall be substantially the same as in the case of domestic manufacturers' plants of similar size and organization producing similar products. Foreign manufacturers will be charged the same rate for time expended by ASME and National Board members of survey and inspection teams as is charged to domestic manufacturers. Whenever practicable, surveys and inspections in geographically related areas will be scheduled to minimize major travel costs to the manufacturer by prorating such costs among several manufacturers.

(C) Nothing contained in this Final Judgment shall be considered as approval or disapproval by plaintiff of the present rules, procedures and standards of ASME with respect to boilers or pressure vessels made by domestic manufacturers; and nothing in this Final Judgment shall be considered as requiring ASME to continue any of its activities with respect to its Certificate of Authorization, Symbol Stamps or BPV Code, so long as any discontinuance is not done for the purpose of restricting competition.

VI.

[*Establishment of Procedures*]

Defendant National Board is ordered and directed to publish, as provided in Section VII (C) hereof, within 90 days after the effective date hereof, a procedure which provides that:

(A) All applications by qualified manufacturers for authorization to use National Board stamping be considered without regard to whether the applicant is a domestic or foreign manufacturer.

(B) Any properly completed National Board approved standard form manufacturer's data report, completed in the English language and the then current United States measurement system covering any boiler or pressure vessel which bears authorized National Board stamping, be accepted without regard to whether the applicant is a domestic or foreign manufacturer.

(C) National Board Commissions be issued to all persons who qualify therefor under the National Board Bylaws, and uniform procedures without regard to citizenship or place of residence.

(D) All registration, application and renewal fees charged to manufacturers or National Board Commission applicants be computed on the same basis as in the case of domestic manufacturers and inspectors.

National Board is further ordered and directed to include in such publication and continue in effect the following provisions:

(1) If an inspector applicant through no fault of his own experiences difficulty in arranging to take the inspector written examination, approved by the National Board and given by a Jurisdictional Enforcement Authority, upon written notification to the National Board to such effect, the National Board shall arrange for the applicant to be examined by one such Jurisdictional Enforcement Authority. Failing that, the National Board itself shall promptly examine the applicant at his expense in Columbus, Ohio, U. S. A. For the purpose of this provision inconvenience to the applicant with regard to the time or place the test is customarily administered by the Jurisdictional Enforcement Authority involved shall not be deemed to be a difficulty which is not the fault of the applicant.

(2) Any initial surveys and any unannounced follow-up inspections, investigative reviews or renewal reviews of foreign manufacturers required in connection with authorization to use National Board Stamping or the Symbol Stamp shall be conducted on the basis of the same standards, in the same manner, and to the same extent as such surveys, inspections and reviews are applied to domestic manufacturers, except to the extent differences are necessitated by distance, language, or units of measurement.

(E) Nothing contained in this Final Judgment shall be considered as approval or disapproval by plaintiff of the present rules, procedures, and standards of National Board with respect to boilers or pressure vessels made by domestic manufacturers; and nothing in this Final Judgment shall be considered as requiring National Board to continue any of its activities with respect to commissioning of inspectors, registering of manufacturers' data reports or authorizing the use of National Board stamping, so long as any discontinuance is not done for the purpose of restricting competition.

VII.

[Notification of Members]

(A) Within 90 days from the date of entry of this Final Judgment, defendants shall take all action to effect all changes in their respective constitutions, rules, regulations, and policies necessary to implement the requirements of this Final Judgment.

(B) Within 90 days from the date of entry of this Final Judgment ASME shall send a copy of this Final Judgment and all changes pursuant to paragraph (A) above, to its officers, the members of the Boiler and Pressure Vessel Committee, and any other ASME committee, ASME subcommittee, ASME section or other ASME group known to have responsibilities or interest in the Symbol Stamp, the ASME BPV Code, or other matters governed by this Judgment. Within 120 days after the date of entry of this Final Judgment a copy of it and all changes pursuant to paragraph (A) shall be sent to the general membership. It will be sufficient if the membership is so informed by reproducing the material verbatim in a journal or other mailing ordinarily sent to the general membership.

(C) Within 120 days of entry of this Final Judgment National Board shall send a copy of this Final Judgment and all changes pursuant to paragraph (A) above to each of its members.

(D) Within 120 days from the date of entry of this Final Judgment, the respective defendants shall file with this Court, and serve upon plaintiff, an affidavit as to the fact and manner of compliance with paragraphs (A) through (C) above.

VIII.

[*Inspection and Compliance*]

(A) For the purpose of determining or securing compliance with this Final Judgment, and for no other purpose, 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, upon reasonable notice to each defendant made to its principal office, be permitted, subject to any legally recognized privilege:

(1) Access during the office hours of each defendant to the records required to be preserved by this Final Judgment, and, all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or control of defendant relating to any of the matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of each defendant and without restraint or interference by it, to interview any officer or employee of either defendant, each of whom may have counsel present, regarding any such matters.

(B) Defendants, upon the written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, shall submit written reports relating to any of the matters contained in this Final Judgment.

(C) No information obtained by the means provided in this Section VIII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of plaintiff 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.

IX.

[*Retention of Records*]

All records, including, but not limited to, all correspondence, memoranda and reports concerning applications and inquiries, made during the 10 years following entry of this Final Judgment, to the respective defendants by foreign manufacturers with respect to issuance of a Symbol Stamp or Certificate of Authorization, authority to use National Board Stamping, or registration of data reports, or by foreign inspectors with respect to issuance of National Board Commissions shall be maintained by them for at least five years from the date on which the defendants took action or otherwise passed on such applications and inquiries. All negative decisions with respect to foreign applicants regarding any of the foregoing matters shall be supported in writing with specified reasons therefor.

X.

[*Retention of Jurisdiction*]

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