UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff,* v. THE MANITOWOC COMPANY, INC.; GROVE INVESTORS, INC.; and NATIONAL CRANE CORP., *Defendants.*	Case No. 02CV0159 Judge: Royce Lamberth DECK TYPE: Antitrust DATE STAMP: July 31, 2002

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgement submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On July 31, 2002, the United States filed a civil antitrust suit alleging that the proposed acquisition by The Manitowoc Company, Inc. ("Manitowoc") of Grove Investors, Inc. ("Grove") would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. The Complaint alleges that a combination of Manitowoc and Grove would substantially lessen competition in the development, production, and sale of medium- and heavy-lift boom trucks in North America. Combining Grove and Manitowoc, the largest and third largest producers of medium- and heavy-lift boom trucks, would result in a single firm -- Manitowoc -- with a market share of over 60 percent, and two firms with a combined share of over 90 percent, of North American sales of medium- and heavy- lift boom trucks. This reduction in competition would lead to higher prices

and reduced product quality and innovation for medium- and heavy-lift boom trucks to the detriment of consumers. Accordingly, the prayer for relief in the Complaint seeks: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act, and (2) a permanent injunction that would prevent Manitowoc from acquiring control of or otherwise combining its assets with Grove and its boom truck subsidiary, National Crane Corp.

At the same time the Complaint was filed, the United States filed a proposed settlement that would permit Manitowoc to complete its acquisition of Grove, but require defendants to divest either Manitowoc's or Grove's boom truck business in such a way as to preserve competition in North America. The settlement consists of a Hold Separate Stipulation and Order and a proposed Final Judgment.

According to the terms of the settlement, defendants must divest either Manitowoc's or Grove's boom truck business to a person acceptable to the United States, in its sole discretion, within one hundred and fifty (150) calendar days after the filing of the Complaint in this matter, or within five (5) days after notice of entry of the Final Judgment, whichever is later. The United States, in its sole discretion, may extend the time period for divestiture by an additional period of time, not to exceed 30 days. If defendants do not complete the divestiture within the prescribed time period, then the United States may nominate, and the Court will appoint, a trustee who will have sole authority to divest either the National Crane or the Manitowoc boom truck business.

The parties have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the APPA. Entry of the proposed Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATIONS OF THE ANTITRUST LAWS

A. *The Defendants and the Proposed Transaction*

Manitowoc, based in Manitowoc, WI, is a publicly held conglomerate with three principal lines of business: production and sale of commercial refrigeration equipment, construction and repair of lake-going freighters, and production and sale of various types of stationary and mobile cranes. In 2001, Manitowoc reported approximately $1.2 billion in total revenues.

Grove makes and sells all types of mobile cranes, including hydraulic truck-mounted, all-terrain, and rough-terrain cranes. A Grove subsidiary, National Crane, makes boom trucks and knuckleboom cranes. In 2001, Grove reported revenues in excess of $713 million.

On March 19, 2002, Manitowoc and Grove announced an agreement pursuant to which Manitowoc would acquire Grove and assume its liabilities in a transaction valued at approximately $270 million. This transaction would combine the nation's largest and third largest producers of medium- and heavy- lift boom trucks, and in the process, substantially lessen competition in the already highly concentrated North American market for medium- and heavy-lift boom trucks.

B. The Effects of the Transaction on Competition in the Sale of Medium- and Heavy- Lift Boom Trucks

1. Relevant market: North American production and sale of medium- and heavy- lift boom trucks.

The Complaint alleges that the development, production, and sale of medium- and heavy-lift boom trucks is a relevant product market within the meaning of Section 7 of the Clayton Act. A "boom truck" is a stiff boom telescopic crane mounted on a standard flat-bed commercial truck chassis. This general-purpose mobile crane has a broad range of applications in the construction, petroleum, and utility industries. Although boom trucks are produced in many models and sizes, their nominal load lift ratings generally distinguish them as either light-, medium-, or heavy-lift cranes. A combination of highly desirable features sets medium- and heavy-lift boom trucks apart from all other types of cranes or lifting devices. These features include an ability safely to haul loads and travel at highway speeds from site to site, exceptional load lift (from 15 tons to 40 tons) and reach (40 feet to over 100 feet) capability, overall versatility, and general ease of use.

Medium- and heavy-lift boom trucks offer an appealing package of versatility and performance at attractive prices -- a combination unmatched by any other type of crane (*e.g.*, knuckleboom, hydraulic truck, all-terrain, rough-terrain, tower, and lattice boom cranes; service vehicles; or boom trucks with lower nominal lift rating capability) or lifting device (*e.g.*, fork-lift trucks, aerial manlift vehicles). For that reason, prospective customers would be willing to pay a significant premium over current prices before seriously considering any other type of crane or lifting device. Medium- and heavy-lift boom trucks thus are a relevant product market in which to assess the competitive effects of a combination of Manitowoc and Grove.[1]

[1] The basic competitive analysis (*i.e.*, three to two reduction in major competitors in an already highly concentrated market) would not change appreciably if one were to examine individual models by load lift capability (concluding perhaps that models within a certain range of load lift capability comprise a relevant product, *e.g.*, 15-17 ton boom trucks), rather than, as in this case, considering larger boom trucks collectively as a single market for "medium and heavy lift boom trucks."

The Complaint alleges that the sale of medium- and heavy- lift boom trucks in North America is a relevant geographic market within the meaning of Section 7 of the Clayton Act. Over 99 percent of medium- and heavy- lift boom trucks sold in North America are produced by firms located in either the United States or Canada. Although a very few medium-lift boom trucks have been imported from a single firm in Japan, historically, foreign producers have not developed and produced a sufficiently wide range of different models of boom trucks, and have not established a reputation for quality, safety, and reliability or the extensive distribution networks that would enable them to attract significant sales of medium- and heavy- lift boom trucks away from North American firms. A small but significant and nontransitory increase in prices of North American medium- or heavy-lift boom trucks would not precipitate a significant loss of sales to imported products. North America thus is a relevant geographic market in which to assess the competitive effects of Manitowoc's proposed acquisition of Grove.

2. Anticompetitive effects of the acquisition.

The Complaint alleges that in this highly concentrated market for medium- and heavy-lift boom trucks, a combination of Manitowoc and Grove likely would: (i) substantially lessen competition in development, production, and sale of medium- and heavy-lift boom trucks in North America; (ii) eliminate actual and potential competition between Manitowoc's and Grove's medium- and heavy-lift boom truck businesses; and (iii) increase prices and reduce current levels of quality and innovation for medium- and heavy-lift boom trucks.

Specifically, the Complaint alleges that Grove (via National Crane) and Manitowoc are, respectively, the nation's largest and third largest producers of medium- and heavy-lift boom trucks. There is only one other major producer of medium- and heavy-lift boom trucks. Combined, the three largest competitors command over 90 percent of all sales of medium- and

heavy-lift boom trucks in North America. Three small firms (two North American and one Asian) produce somewhat specialized products that account for less than ten percent of unit sales of medium- and heavy-lift boom trucks in North America. Individually and collectively, however, these small firms do not have the production capacity, strong reputation for safety and reliability, or extensive distribution networks necessary to attract sufficient sales away from the much larger market incumbents, and hence effectively constrain any post-merger exercise of market power.[2]

Manitowoc's acquisition of Grove is likely to diminish competition substantially by creating conditions conducive to: (a) the two remaining major competitors engaging in tacit or explicit coordinated pricing to the detriment of consumers since neither would have to worry about competition from Grove; and (b) Manitowoc unilaterally increasing its prices for medium- and heavy-lift boom trucks.

Significant new entry into development, production and sales of medium- and heavy-lift boom trucks would be difficult, time consuming, and hence unlikely to deter (or constrain) an exercise of market power after the acquisition by Manitowoc of Grove. To be successful in this industry, a new competitor[3] must not only construct a production facility and establish a large network of dealers to provide sales, service, and customer support for its products, it must also develop a strong reputation for producing high quality, safe, and reliable boom trucks. Successful

[2]These small rivals would be unable to quickly and easily expand their sales of medium- and heavy-lift boom trucks for many of the same reasons why significant new entry would be difficult, time-consuming and unlikely, post-merger. *See* p. 7, below.

[3]Entry into the production and sale of medium- and heavy-lift boom trucks may be de novo (*i.e.,* by a new producer) or lateral (*e.g.,* by an established maker of other types of cranes or lifting devices).

new entry would require a substantial capital investment in the form of sunk costs[4], which would be large relative to the size of the North American boom truck industry and the risk of any expected profits. Considering the time required, expense, investment risks, and expected returns, it is highly unlikely that following a combination of Manitowoc and Grove, new market entry would occur on such a magnitude and scale as to displace sufficient sales from the two remaining major incumbent producers of medium- and heavy-lift boom trucks to constrain a post-merger exercise of market power.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment will preserve competition in the sale of medium- and heavy-lift boom trucks in North America. The Judgment requires that within one hundred and fifty (150) calendar days after the filing of the Complaint in this matter, or within five (5) days after notice of entry of the Final Judgment, whichever is later, Manitowoc must sell its own or Grove's boom truck business to an acquirer acceptable to the United States. The United States may extend this time period for divestiture for one additional period, not to exceed 30 days. Defendants must use their best efforts to divest either the Manitowoc or Grove boom truck business as expeditiously as possible, and until the ordered divestiture takes place, the defendants must cooperate with any prospective purchasers.

If Manitowoc does not accomplish the ordered divestiture within the prescribed time period, the United States will nominate, and the Court will appoint, a trustee to assume sole power

[4] The term "sunk costs" as used in this context includes the costs of acquiring tangible and intangible assets that cannot be recovered through the redeployment of these assets outside the relevant market, *i.e.*, costs uniquely incurred to enter the production and sale of medium- and heavy- lift boom trucks in North America and that cannot be recovered upon exit from that industry.

and authority to complete the divestiture. Defendants must cooperate fully with the trustee's efforts to divest either boom truck business to an acquirer acceptable to the United States and periodically report to the United States on their divestiture efforts.

If the trustee is appointed, the defendants will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is completed. After his or her appointment becomes effective, the trustee will file monthly reports with the parties and the Court, setting forth the trustee's efforts to accomplish the divestiture. At the end of six months, if the divestiture has not been accomplished, the trustee and the parties will make recommendations to the Court, which shall enter such orders as appropriate to carry out the purpose of the trust, including extending the trust and the term of the trustee's appointment.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act (15 U.S.C. § 15) provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act (15 U.S.C. § 16(a)), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against defendant.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The parties have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not

withdrawn its consent. The APPA conditions entry of the decree upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with the Court and published in the Federal Register. Written comments should be submitted to:

J. Robert Kramer II
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
1401 H Street, NW, Suite 3000
Washington, D.C. 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against defendants Manitowoc and Grove. The United States could have continued the litigation to seek preliminary and permanent injunctions against Manitowoc's acquisition of Grove. The United States is satisfied, however, that the divestiture of the assets as proposed in the Final Judgment will establish, preserve, and ensure competition in the relevant market. To this

end, the United States is convinced that the proposed relief, once implemented by the Court, will prevent Manitowoc's acquisition of Grove from having adverse competitive effects.

VII. STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the court *may* consider--

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e) (emphasis added). As the United States Court of Appeals for the District of Columbia Circuit has held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States v. Microsoft*, 56 F.3d 1448 (D.C. Cir. 1995).

In conducting this inquiry, "the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."[5] Rather,

[5]119 Cong. Rec. 24598 (1973). *See* United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass.1975). A "public interest" determination can be made properly on the basis of the

> absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 CCH Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988), quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981); *see also Microsoft*, 56 F.3d 1448 (D.C. Cir. 1995). Precedent requires that

> the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest.*" More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[6]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it

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Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See* H.R. 93-1463, 93rd Cong. 2d Sess. 8-9, *reprinted in* (1974) U.S. Code Cong. & Ad. News 6535, 6538.

[6]United States v. Bechtel, 648 F.2d at 666 (citations omitted)(emphasis added); *see* United States v. BNS, Inc., 858 F.2d at 463; United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); United States v. Gillette Co., 406 F. Supp. at 716. *See also* United States v. American Cyanamid Co., 719 F.2d at 565.

mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'"[7]

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States alleges in its Complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Since the "court's authority to review the decree depends entirely on the Government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that the Court "is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States might have but did not pursue. *Id.*

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: July 31, 2002.

Respectfully submitted,

/s/
Anthony E. Harris
Illinois Bar No. 1133713
U.S. Department of Justice

[7] United States v. American Tel. and Tel. Co., 552 F. Supp. 131, 150 (D.D.C. 1982) (citations omitted) , *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983) *quoting* United States v. Gillette Co., supra, 406 F. Supp. at 716; United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky 1985).

Antitrust Division, Litigation II Section
1401 H Street, NW, Suite 3000
Washington, DC 20530
(202) 307-6583