UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

Plaintiff, :

v. :

UNITED TECHNOLOGIES CORPORATION :

Defendant. :

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78 CIV. 580

Filed: September 11, 1980

COMPETITIVE IMPACT STATEMENT

The Government, pursuant to Section 2(b), of the Antitrust Procedures and Penalties Act (15 U.S.C. § 16(b)), files this Competitive Impact Statement in connection with the proposed consent judgment submitted for entry in this civil antitrust proceeding.

I

NATURE AND PURPOSE OF THE PROCEEDING

On November 13, 1978, the Government filed a civil antitrust complaint under Section 15 of the Clayton Act (15 U.S.C. § 25) to prevent and enjoin defendant United Technologies Corp. ("United") from carrying out a tender offer to acquire approximately 50 percent of the issued and outstanding common shares of Carrier Corp. ("Carrier") in alleged violation of Section 7 of the Clayton Act (15 U.S.C. § 18). The complaint alleged that the effects of such acquisition might be to substantially lessen competition in the manufacture and sale of 1) unitary and applied heating and air conditioning systems because Carrier would be entrenched as a leader in those markets by its access to United's broad technological resources; and 2) magnet wire in that it would create a structure conducive to reciprocal dealing.

The court's entry of the proposed consent judgment will terminate this action, except that the court will retain jurisdiction over the matter for possible further proceedings to construe or carry out the judgment, to modify any of its provisions, to enforce compliance with the judgment, or to punish violations of any of its provisions.

II

THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

Prior to United's tender offer Carrier was the 191st largest industrial corporation in the United States with sales of $1.3 billion.

The complaint alleges that Carrier is a leader in the manufacture and sale of unitary heating and air conditioning systems in the United States. Unitary heating and air conditioning systems are generally contained within a single metal unit manufactured and assembled at the plant, and are used in residential and commercial structures. Total domestic sales of such systems were approximately $1.5 billion in 1977. During that year, Carrier's sales were about $316 million, about twice the size of its nearest competitor in the production of such systems. In 1977 it produced about 20% of the residential unitary systems and 32% of the commercial unitary systems sold in the United States. As noted in the complaint, the manufacture and sale of unitary equipment is a relatively concentrated market in which the four top producers, including Carrier, account for 50% of total industry sales.

Carrier is also a dominant producer of applied heating and air conditioning systems, which are integrated central systems used in large multistory commercial structures. The complaint alleges that Carrier produced approximately 45% of the applied systems sold in the United States in 1977. Total industry sales of applied systems in 1977 were about

$220 million. As alleged in the complaint, the applied market is highly concentrated with three producers, including Carrier, accounting for about 90% of total industry sales.

In 1977, United had net sales of over $5.5 billion making it the 34th largest industrial corporation in the United States. A producer of aircraft engines and rockets, as well as a variety of other products, United, through its Essex Controls Division, also manufactures appliance control devices, including control devices used with heating and air conditioning equipment. Control devices serve to improve the performance and efficiency of heating and air conditioning systems. United's expenditures for research and development were approximately $385 million in 1977. United has a corporate policy of promoting and coordinating research and development among its divisions.

The complaint states that producers of heating and air conditioning systems, including Carrier, are engaged in research and development efforts to improve the reliability and efficiency, especially the energy efficiency, of those systems. The complaint alleges that the acquisition of Carrier by United "would create a firm possessing financial and broad-based technological resources far in excess of the resources possessed by the vast majority of Carrier's competitors in unitary and applied systems." Access to such resources through the acquisition would entrench Carrier in its position as a leading company in those markets.

The complaint, in a second count, alleges that Carrier is a significant purchaser of fan and hermetic motors, which are used in heating and air conditioning systems. In 1978, Carrier accounted for approximately 9% of total domestic purchases of fan motors and 14% of total domestic purchases of hermetic motors. United is a leading manufacturer of magnet

wire, accounting for about 25% of the approximately $500 million of annual industry sales of magnet wire in the United States. Magnet wire is an essential component of the fan and hermetic motors purchased by Carrier.

The complaint alleges that the effect of the combination of Carrier, a purchaser of fan and hermetic motors, with United, a leading manufacturer of magnet wire, may be to create a structure conducive to reciprocal dealing and thereby lessen competition in the manufacture and sale of magnet wire, an already concentrated market in which four companies, including United, predominate.

At the time the complaint was filed, November 13, 1978, the Government also filed a motion seeking to preliminarily enjoin the tender offer.* A hearing on the Government's (and Carrier's) motions for a preliminary injunction commenced the following day, November 14, 1978, and concluded on November 23, 1978. The court denied the motions for a preliminary injunction. In a full written opinion, the court held that the Government (as well as Carrier) had "failed to show a probability of success in proving that Carrier will receive substantial competitive advantages through access to United's technology so as to entrench Carrier by raising barriers to entry and by dissuading smaller firms from aggressively competing." As for the Government's reciprocity count, the court held that the proof "had not demonstrated a likelihood of success on the merits in proving a market structure conducive to

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*On September 25, 1978, Carrier had filed a private antitrust action seeking to prevent the tender offer and also a motion to preliminarily enjoin the tender offer. Its motion had been scheduled by the court to be heard on November 14, 1978.

reciprocity - - - -". The court noted, however, that the Government had raised serious questions going to the merits on several issues, which required determination upon a full trial.

The court's ruling was appealed to the Second Circuit Court of Appeals and was sustained on December 18, 1978. On February 9, 1979, the District Court, after full arguments, issued a hold separate order requiring United to maintain Carrier as a separate corporate entity with its own research and development activities appropriate to a corporation of its size. The court, however, did not bar United from acquiring the remaining outstanding shares of Carrier stock. In July 1979, the remaining outstanding shares of Carrier stock were acquired by United.

The Government and United have engaged in various types of pretrial discovery. Concurrently, upon the proposal of United, extensive settlement negotiations have been conducted. These negotiations have resulted in the proposed final judgment which is the subject of this statement.

III

EXPLANATION OF THE PROPOSED CONSENT JUDGMENT

The Government and United have stipulated that the proposed judgment may be entered by the court at any time after compliance with the Antitrust Procedures and Penalties Act. The judgment provides that there has been no admission by any party with respect to any issue of fact or law. Under Section 2(e) of the Antitrust Procedures and Penalies Act, entry of the judgment is conditioned upon a determination by the court that its entry will be in the public interest.

The proposed judgment provides important relief in three areas: a) it requires United to grant to any person who makes a written application within ten years of the entry of the

judgment a license to practice the patents, related know-how necessary to practice the patents and unpatented heating and air conditioning Trade Secrets which United, owns or may acquire within seven years of the entry of the judgment, and which - in the case of patented technology - has been licensed to or used by Carrier and - in the case of related know-how and Trade Secrets - has been used by Carrier to make heating and air conditioning equipment or components; b) it restricts United from acquiring any other domestic manufacturer of heating and air conditioning equipment for a period of ten years; and c) it imposes certain duties and restrictions upon United designed to prevent the occurrence of reciprocity effects and reciprocal dealing.

United may restrict the use of any licenses which it grants under the judgment to the manufacture and sale of heating and air conditioning equipment or components for use on such equipment produced by the person who has received the license from United.

The technology covered by the judgment consists of patents and the related know-how necessary to practice such patents, as well as non-patented Trade Secrets.*

The judgment requires United to identify in writing the technology which is licensed to or used by Carrier to make heating and air conditioning equipment or components and which is therefore available for licensing to

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*The decree defines Trade Secret to mean:

> any written information that discloses any unpatented invention, process, formula, method or computer software which is treated as secret by defendant . . . is unobvious . . . and is novel in that it has no commercial equivalent that is used by, or is commercially available to, any of Carrier's competitors. . . .

other persons. For this purpose, United must, within 15 days of the entry of the judgment, file with the court and submit to approximately seventy companies which have been designated by the Government and are associated with the heating and air conditioning industry, a listing of all patents, related know-how information and Trade Secrets which are available for licensing under the judgment. Thereafter, United must identify any additional patents, related know-how or Trade Secrets which become available for licensing in written reports to be filed with the court within forty-five days after such technology has been used by Carrier or within fifteen days after a written license to use such technology has been granted to Carrier. United is also required to send copies of the reports it has filed with the court to those persons who have been or are designated by the Government as well as any other person who requests to be placed on United's mailing list for this purpose.

Under the proposed judgment, any person who wishes to obtain the technology in question must apply to United for a license. The prospective licensee may be required to pay a royalty or fee for the use of the patent, related know-how or Trade Secret. United must, within 20 days of receiving a written application, notify the prospective licensee of the amount of royalty or fee it considers reasonable. If United and the prospective licensee are unable to agree upon a reasonable amount, United must apply to the court for a determination of what constitutes a reasonable royalty or fee. In any such court proceeding, the burden of proving the reasonableness of the royalty or fee it is seeking shall be on United. The licensing agreement shall include a provision at the option of the licensee that it is cancellable at any time after one year by the licensee upon 30 days notice to United.

The proposed judgment also sets forth several safeguards designed to prevent United from exploiting any reciprocal structure in the [illegible] industry created by the acquisition and to discourage reliance upon that structure by suppliers of

fan and hermetic motors to Carrier and customers of magnet wire from United. Among these safeguards are provisions prohibiting United from issuing to its personnel who have primary purchasing responsibilities any lists of domestic customers and sales by United to such customers. United is also barred from issuing to its personnel who have primary sales responsibilities any lists of domestic suppliers and purchases by United from such suppliers. United must submit annual reports to the Government for ten years from the entry of the judgment setting forth by vendor the unit and dollar amount of Carrier's purchases of fan and hermetic motors and United's sales of magnet wire in dollars and pounds to each of its customers. This data will enable the Government to monitor the effects of the reciprocal structure on the purchase of motors by Carrier and the sales of magnet wire by United.

In addition, United is prohibited, for ten years, from acquiring, without the prior consent of the Government or the approval of the court, any assets or stock of any other manufacturer of heating and air conditioning equipment in the United States.

The judgment also provides methods for determining United's compliance with its terms. The Government, for ten years from the entry of the judgment, has the right to inspect the books and records of United; to inverview employees and agents of United; and to request written reports under oath from United with respect to any matters contained in the proposed judgment.

THE COMPETITIVE EFFECTS OF THE PROPOSED JUDGMENT

The proposed consent judgment is designed to prevent the occurrence of the anticompetitive effects of the acquisition alleged in the complaint. The main thrust of count one of the complaint is that Carrier will be entrenched as the

leading seller of unitary and applied heating and air conditioning equipment as a result of the transfer of technology from United. The proposed judgment protects against this anticompetitive danger by mandating that any technology, subject to the judgment, that is transferred by United to Carrier be made available for a reasonable royalty or fee to any person for use in the manufacture in the United States of heating and air conditioning equipment or components made for such person's heating and air conditioning equipment. Thus, it eliminates the primary competitive advantage which it was alleged that Carrier would obtain from the acquisition. Additionally, by giving such persons the opportunity to avail themselves of United's technology (provided it has been licensed to or used by Carrier), the judgment may affirmatively stimulate competition in research and development to improve the performance and efficiency of heating and air conditioning equipment and components, including controls, because companies other than Carrier will be able to add United's store of knowledge to their own and use it to produce newer, better and more efficient products.

The provision of the judgment that prohibits United from acquiring any other domestic manufacturer of heating and air conditioning equipment without the consent of the Government or the approval of the court will likewise protect against the entrenchment of Carrier in the heating and air conditioning industry by preventing it from increasing its share of the market through an anticompetitive acquisition.

The proposed judgment also affords effective relief with respect to the second count of the complaint, which states that United's acquisition of Carrier would create a structure conducive to reciprocal dealing. The judgment provides substantial safeguards to prevent United from exploiting any such structure. In addition, the existence of the judgment and its

publication should aid significantly in preventing motor manufacturers from relying on any such structure in deciding from what source to buy magnet wire.

The Government believes that the proposed judgment will prevent the occurrence of the anticompetitive effects set forth in the complaint, and that, therefore, the disposition of this proceeding without further litigation is appropriate and in the public interest.

V

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED JUDGMENT

As provided by the Antitrust Procedures and Penalties Act, any person who believes that the proposed judgment should be modified may submit written comments relating to the proposed judgment to Ralph T. Giordano, Chief, New York Office, Antitrust Division, United States Department of Justice, Room 3630, 26 Federal Plaza, New York, New York 10278, within the 60-day period provided by the Act. These comments and the Government's responses to them will be filed with the court and published in the Federal Register. All such comments will be given due consideration by the Government, which remains free to withdraw its consent to the proposed judgment at any time prior to its entry. Additionally, the proposed judgment provides that the court retains jurisdiction over this action, and that the parties may apply to the court for interpretation, modification, or enforcement of its provisions.

VI

ALTERNATIVE RELIEF PROPOSALS CONSIDERED BY THE GOVERNMENT

Among the alternative relief considered by the Government was the complete divestiture of Carrier. While the complaint does not explicitly pray for this remedy, it did seek

inter alia to enjoin United's tender offer. Issuance of such an injuction would have prevented United's acquisition of Carrier. The court having refused to preliminarily enjoin the acquisition, an alternative remedy to that prayed for by the complaint is the divestiture of Carrier.

However, in view of the court's opinion in refusing to preliminarily enjoin the acquisition, United's refusal to consider a settlement based on the divestiture of Carrier, and the likelihood that meaningful relief could be obtained without such divestiture, it was concluded that the divestiture of Carrier did not constitute a basis for a negotiated judgment. The Government also concluded that an attempt to obtain divestiture of Carrier by going to trial was not justified in that effective and meaningful relief short of divestiture could be obtained from United without incurring the risks inherent in litigation. Moreover, even were the Government to overcome at a full trial the problems found by the court in its decision on the motion for a preliminary injunction and to prevail on the merits, the court might not grant divestiture. Rather, the court might choose to require only injunctive relief tailored to the specific nature of the violation, similar to that set forth in the proposed consent judgment.

Nearly every provision of the proposed judgment was thoroughly negotiated both as to substance and language. The present proposal differs in three major respects from the judgment originally proposed by the Government to United. The changes are as follows:

1. Proposed Divestiture of Essex Controls Division

The Essex Controls Division (Essex), a division of the Essex Group, Inc., a United subsidiary, produces and sells a wide range of controls, both ordinary mechanical and

electro-mechanical devices as well as more advanced electronic controls, to manufacturers of appliances, including heating and air conditioning equipment. Its sales of electronic controls applicable to heating and air conditioning equipment represent only a fraction of its total sales; in 1978, Essex's sales of such electronic controls were approximately $500,000 out of total sales of about $100 million. Its sales of conventional, non-electronic controls applicable to heating and air conditioning equipment were approximately $13.4 million in 1978. Essex was not then and is not now a leader in the sale or the development of electronic controls for appliances, including heating and air conditioning equipment.

The Government initially proposed the divestiture of Essex as an additional safeguard to prevent the entrenchment of Carrier through a transfer of technology from United. While Essex itself was regarded as only a limited source of technology in view of the nature of its business and its position in the controls industry,* the concept was that it might possibly act as a conduit of the heating and air conditioning technology possessed or developed by United. The Government proposed the divestiture of the entire Essex Controls Division, rather than the small part of its business which pertained to heating and air conditioning, in order to maintain Essex as a viable entity and thereby facilitate divestiture.

During the settlement negotiations, United agreed to stronger technology transfer provisions, covering a longer

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*Essex Controls' manufacturing capabilities do not significantly advantage Carrier in that Carrier already has facilities which produce some of its electronic controls. Air conditioning manufacturers may also contract with small microprocessor firms to produce electronic controls designed by such manufacturers.

period of time, than it had originally offered. Such an agreement made the divestiture of Essex unnecessary to effectively protect against the entrenchment of Carrier through United's technology. Moreover, as noted, Essex's sales of electronic controls applicable to heating and air conditioning equipment are quite low and represent only a fraction of its total sales. Essex is not a leader in the sale or development of such controls. Hence, the Government concluded that the divestiture of Essex was not required in order to obtain effective relief in this matter.

2. Period of On-Going Technology Subject to Licensing

The proposed judgment provides for the licensing of technology made available to Carrier since its acquisition by United as well as technology (on-going technology) made available within seven years of the entry of the judgment. The Government had initially sought ten years of on-going technology but concluded that seven years would provide sufficient relief against any anticompetitive entrenchment potentialities.

In stating that the ten years of on-going technology initially proposed by the Government was inappropriate, United argued that its review of prior Government antitrust consent judgments indicated that the scope of the licensing provisions proposed in the instant matter was unprecedented, even in cases involving predatory conduct.

While it is difficult to determine with precision the exact number of years of on-going technology required to adequately protect against the entrenchment of Carrier through United's technology, the Government has concluded that seven years provides ample protection. In this respect, it should be noted that the licensing provisions of the proposed judgment cover almost nine years in that they include

any technology made available to Carrier at any time since its acquisition in January 1979 by United as well as during the seven year period from the entry of the judgment. It is also noteworthy that the scope of the licensing provisions set forth in the proposed judgment is, in part, considerably more extensive than that provided in any other Government antitrust consent judgment of which we are aware.

3. Definitions of Categories of Technology Subject to Licensing

The categories of technology to which the licensing provisions in the proposed final judgment apply are set forth with somewhat greater specificity than in the Government's initial proposal. The changes, resulting from discussions with United and industry sources, will facilitate compliance with and enforcement of the judgment.

REMEDIES AVAILABLE TO POTENTIAL PRIVATE PLAINTIFFS

Section 4 of the Clayton Act (15 U.S.C. § 16) 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 such person has suffered as well as costs and reasonable attorney fees. Entry of the proposed judgment in this proceeding will neither impair nor assist the bringing of any such private actions. Under Section 5(a) of the Clayton Act (U.S.C. § 16(a)), the proposed judgment would have no prima facie effect in any lawsuits which may be pending or hereafter brought against United.

Carrier had opposed the United tender offer in a private antitrust suit. That suit was dropped after United acquired Carrier. No other private actions based on the alleged violation have been filed.

OTHER MATERIALS

No materials or documents of the type described in Section 2(b) of the Antitrust Procedures and Penalties Act were considered in formulating the proposed judgment. Consequently, none are submitted.

Dated: , 1980
New York, New York

/s/ Philip F. Cody
PHILIP F. CODY

/s/ Edward Friedman
EDWARD FRIEDMAN

/s/ Jacqueline W. Distelman
JACQUELINE W. DISTELMAN

/s/ Charles v. Reilly
CHARLES V. REILLY

/s/ Jorge Guttlein
JORGE GUTTLEIN

Attorneys, Department of Justice
Antitrust Division
26 Federal Plaza, Room 3630
New York, New York 10278
Telephone: (212) 264-0394