IN THE MATTER OF

INSTO-GAS CORPORATION

Docket 5851. Order and opinion, Sept. 24, 1954

Order reopening and remanding case to hearing examiner for the taking of additional evidence as to monopolistic position, relevant market and other applicable economic factors.

Before *Mr. Webster Ballinger*, hearing examiner.

Mr. George W. Williams and *Mr. Rufus E. Wilson* for the Commission.

Fischer, Brown, Sprague, Franklin & Ford, of Detroit, Mich., for respondent.

ORDER REMANDING CASE TO HEARING EXAMINER

This case having come on to be heard upon an appeal filed by the respondent from the initial decision of the hearing examiner, the briefs in support of and in opposition thereto, and the oral arguments of counsel; and

The Commission having duly considered the matter and being of the opinion that the record herein does not afford adequate basis for an informed determination as to whether or not the effect of respondent's practices may be to substantially lessen competition or tend to create a monopoly; and

The Commission having determined that the case should be remanded to the hearing examiner in order that these deficiencies may be supplied:

It is ordered that this case be, and it hereby is, reopened and remanded to the hearing examiner for further proceedings in conformity with the accompanying written opinion.

Commissioners Howrey and Gwynne not participating for the reason oral argument was heard prior to their appointment to the Commission.

OPINION OF THE COMMISSION

By Mason, Commissioner

This matter is before the Commission on respondent's appeal from the initial decision of the hearing examiner that respondent's contracts with its distributors and its customers under which its products are leased or sold violate Section 3 of the Clayton Act.

Respondent distributes articles of portable equipment including blow torches, hoses, plumber's furnaces and metal cylinders containing propane gas used by plumbers, electricians and others for welding and

various commercial purposes—said products being marketed in commerce under the product name Insto-Gas through wholesalers of plumbing, heating and mill supplies. In such connection, it enters into contracts with these dealers providing that the gas cylinders which are to be delivered thereunder are being leased to the dealers and shall remain the property of respondent; and the dealers agree to have them refilled only at such filling stations (bulk plants) as have contracted to sell respondent propane gas according to specifications. The dealers additionally covenant to limit deliveries of the cylinders to users who have entered into lease agreements with the respondent and to have customers execute such agreements upon delivery by the distributor. As to the users, they agree under their contracts to purchase from the respondent, or sources authorized by it, all gas needed in refilling the leased cylinders, and further agree to use only Insto-Gas appliances and equipment with said cylinders.

In addition to the existence of the tying contracts, the facts disclosed are these: respondent's aggregate volume of sales in 1950 was $800,000; the torches sold by it in that year numbered approximately 10,000; during the past 18 years it has leased approximately 80,000 of its 18-pound cylinders under 11,000 leases; it has 200 distributors and bulk plants scattered throughout 45 states; and its business is nationwide and not confined to any saturated geographical area. The record merely discloses further that there are competitors who engage in the leasing or outright sale of cylinders and in the sale of gas and appliances, and there is the suggestion that perhaps the majority of the cylinders being used are held under lease rather than through purchase.

The hearing examiner found that respondent's contracts, insofar as they relate to the use of compressed propane gas in cylinders and the sale of equipment and appliances sold by respondent, violate Section 3 of the Clayton Act.

We are aware that the courts have generally recognized a distinction (valid in our view) between tying contracts and the general run of exclusive dealing contracts, and have been more quick to declare the illegality of the former. At the same time, while we are cognizant of Justice Frankfurter's statement in the *Standard Stations* case [1] that "tying agreements serve hardly any purpose beyond the suppression of competition," we know of no case wherein "tying contracts," without more, have been declared per se illegal.

In *International Salt Co.* v. *United States*,[2] the Court, in affirming

[1] *Standard Oil Co. of California* v. *United States*, 337 U. S. 293, 69 S. Ct. 1051 (1949).
[2] *International Salt Co., Inc.* v. *United States*, 332 U. S. 392, 68 S. Ct. 12 (1947).

a summary judgment, stated that "it is unreasonable, per se, to foreclose competitors from any substantial market." The case involved contracts tying the sale of a nonpatented to a patented product, defendant was the country's largest producer of salt for industrial purposes, it owned patents on the leased machines, and it sold about $500,000 worth of salt for use in such machines. In the later *Standard Stations* case the court related those factors and, in speaking of *International Salt*, merely said that the decision therein "at least as to contracts tying the sale of a nonpatented to a patented product, rejected the necessity of demonstrating economic consequences once it has been established that the volume of business affected is not insignificant or insubstantial and that the effect of the contracts is to foreclose competitors from a substantial market."

In the *Standard Stations* case, the court had before it a situation involving requirements contracts and it was held that the qualifying cause of Section 3 was satisfied "by proof that competition has been foreclosed in a substantial share of the line of commerce affected." Defendant was the largest seller of gasoline in a saturated seven-state area; its combined sales amounted to 23% of the total taxable gallonage sold in the area; sales by company-owned service stations constituted 6.8% of the total, sales under exclusive dealing contracts with independent service stations 6.7% of the total; retail service-station sales by Standard's six leading competitors absorbed 42.5% of the total taxable gallonage—the remaining retail sales were divided between more than 70 small companies—and it was undisputed that Standard's major competitors employed similar exclusive dealing arrangements. Exclusive supply contracts with Standard had been entered into by operators of 5,937 independent stations (16% of the retail gasoline outlets in the seven-state area), which purchased from Standard in 1947, $57,646,233 worth of gasoline and $8,200,089.21 worth of other products. These are but a few of the relevant facts which the court had before it in reaching its conclusion of illegality.[3]

In the more recent Times-Picayune opinion [4] (a proceeding under the Sherman Act), the Supreme Court had occasion to summarize the law as follows:

"From the 'tying cases' a perceptible pattern of illegality emerges:

[3] In connection with the pronouncement of the "quantity" or "Share-of-commerce" test and the purpose of the competitive impact clause, the majority in the *Standard Stations* case alluded to the legislative history surrounding the addition of the qualifying language of Section 3. For an interesting discussion of the legislative history, see Lockhart and Sacks, *The Relevance of Economic Factors in Determing Whether Exclusive Arrangements Violate Section 3 of the Clayton Act.* 65 Harvard L. Rev., 913, 933–940 (1952).

[4] *Times-Picayune Publishing Co., et al.* v. *United States,* 345 U. S. 594 (1953).

When the seller enjoys a monopolistic position in the market for the 'tying' product, or if a substantial volume of commerce in the 'tied' product is restrained, a tying arrangement violates the narrower standards expressed in Section 3 of the Clayton Act because from either factor the requisite potential lessening of competition is inferred."

The *Times-Picayune* decision further points out that "the essence of illegality in tying agreements is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next." But the Court significantly failed to find that the defendant, Times-Picayune, held a "dominant" position, and notice was taken of the fact that, unlike other "tying" cases where patents or copyrights supplied at least prima facie evidence of the requisite market control, any equivalent market "dominance" by the defendant would have to be based on "comparative marketing data." Such data is wholly lacking here.

To apply the foregoing tests of illegality to the record in the instant case would be an application of legal doctrine to a factual vacuum.

We are in the dark as to whether the respondent, Insto-Gas, has a monopolistic position in the market for the "tying" product (the cylinders). There is no indication of any patent monopoly; nor do we have the benefit of comparative marketing data upon which any equivalent market dominance could be based. There is nothing to indicate respondent's relative size in the industry and no information concerning the number, or competitive standing, of competitors. Our search of the record for that "essence of illegality"—the wielding of monopolistic leverage—upon which to base some determination of a foreclosure has been in vain. Foreclosure cannot be assumed; it must be demonstrated.

Nor have we been able to ascertain whether a "substantial volume" of commerce in the "tied" product (the gas and appliance) is restrained. We know, of course, that respondent's aggregate volume of sales in 1950 was $800,000, which amount was apparently derived from at least three sources, namely, the lease charges, the sales of gas and the sales of appliances. However, contrary to the hearing examiner's findings, the respondent's contracts do not confine the use of its appliances to its own cylinders; rather, the appliances are sold to the using public without restriction and irrespective of whether or not the purchaser is going to use the same with respondent's cylinders or with those of a competitor. As a consequence we cannot determine just how much of the respondent's aggregate sales of $800,000 (an absolute, noncomparative figure) results from or is connected with the tying

contract arrangements. Thus, whether a substantial volume of commerce in the "tied" product is restrained would be anybody's guess.

Additionally, respondent asserts that its volume of sales of one of the products, the gas, represents but $\frac{1}{35}$th of 1% of the volume sold nationally. Whether this contention is relevant cannot now be determined, for the record does not clearly reveal in just what line of commerce competition is allegedly restrained. Certainly it is the burden of counsel supporting the complaint to provide a reliable definition of the relevant market.[5]

The record is thus so devoid of pertinent facts that we have no choice but to disagree with the examiner. As we have recently emphasized, the Commission should carefully consider and weigh—as an expert tribunal—the applicable economic factors.[6] Conclusive presumptions of guilt should not substitute for fair evidentiary standards.[7]

Since the record at this stage is so barren, we reserve ruling on respondent's exceptions in detail. Nevertheless, it might be advisable to note at this time respondent's objections to the hearing examiner's rulings of April 2, 1952, striking certain testimony and various exhibits offered by respondent. Typical of the matters there stricken are those relating to respondent's Exhibit 6 and testimony in regard thereto indicating that the Interstate Commerce Commission has issued a regulation to the effect that gas cylinders are not to be shipped unless filled by or with the consent of the owner. Other exhibits stricken by the ruling have reference to state laws or regulations similarly relating to the refilling of cylinders and to the use of appliances requiring propane gas.

In striking such matters the hearing examiner ruled, among other things, that they had no evidentiary bearing upon matters in issue.

The stricken evidence appears to relate to conditions under which the industry's products are distributed and, in instances, used by its customers. If state laws, for example, make unrestricted refilling of tanks by unauthorized persons illegal under local police powers, it would be highly inappropriate for the Commission to refuse to consider such mandates. This does not mean that local regulations or state laws are necessarily paramount, but we cannot conceive the public interest to be served by rejecting any consideration of respondent's alleged obligations under them.

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[5] See *U. S.* v. *E. I. DuPONT De Nemours & Co.*, 118 F. Supp. 41 (1953).

[6] In the Matter of *The Maico Co., Inc.*, F. T. C. Dkt. 5822 (1953). In the Matter of *Pillsbury Mills, Inc.*, F. T. C. Dkt. 6000 (1953).

[7] Address of Hon. Edward F. Howrey before the Section of Antitrust Law, Amer. Bar Ass'n., Chicago, Illinois, August 19, 1954.

The case is remanded for further proceedings in conformity with this opinion.

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Mead, Commissioner

I concurr in the order of the Commission remanding this case to the hearing examiner for the taking of additional evidence. In my opinion, the record should show more clearly whether or not a substantial volume of commerce in the "tied" product is restrained. I am also interested in any appropriate application to the case of safety laws or regulations relating to the refilling and use of gas cylinders containing propane gas.

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Commissioners Howrey and Gwynne did not participate for the reason that oral argument was heard prior to their appointment to the Commission.

IN THE MATTER OF

FOSTER-MILBURN COMPANY AND STREET & FINNEY, INC.

Docket 5937. Order and opinion, Sept. 24, 1954

Order ruling on interlocutory appeals from hearing examiner's rulings—

Granting the appeal of counsel supporting the complaint from rulings (1) striking doctor's testimony as biased and (2) refusing to permit counsel supporting the complaint, on rebuttal, to present scientific witnesses to testify concerning clinical tests performed on human subjects; and

Denying remaining appeals of both counsel.

Before *Mr. J. Earl Cox*, hearing examiner.

Mr. Joseph Callaway for the Commission.

Denning & Wohlstetter, of Washington, D. C., and *Ballantine, Bushby, Palmer & Wood*, of New York City, for respondents.

ORDER RULING ON INTERLOCUTORY APPEALS

This matter came before the Commission upon the interlocutory appeal filed on April 19, 1954, by counsel supporting the complaint from various rulings made by the hearing examiner on March 25, 1954, and upon the interlocutory appeal of counsel for the respondents filed on May 19, 1954, from the hearing examiner's order of April 27, 1954, and the answers submitted in opposition to such appeals, and oral arguments of counsel.

For the reasons stated in its accompanying opinion, the Commission is of the view that the appeal of counsel supporting the complaint should be granted in part and denied in part as there noted, and that the appeal of counsel for the respondents should be denied.

It is ordered that the appeal of counsel supporting the complaint be, and it hereby is, granted in part and denied in part as noted in the accompanying opinion.

It is further ordered that the appeal of counsel for the respondents be, and it hereby is, denied.

Commissioners Howrey and Gwynne concurring in the result.

OPINION OF THE COMMISSION

By Carretta, Commissioner:

This case is before us upon interlocutory appeals separately filed by counsel supporting the complaint and counsel for respondents from various rulings of the hearing examiner and upon the answers submitted in opposition to such appeals, and the oral arguments of counsel.