It is further ordered, That upon completion of the hearings the hearing examiner shall certify the record to the Commission with his report and recommendation thereon.

BRILLO MANUFACTURING CO., INC.

Docket 6557. Order and Opinion May 23, 1958

Order remanding merger case to hearing examiner for further consideration of repondent's motion to dismiss complaint.

OPINION OF THE COMMISSION

By SECREST, Commissioner:

The repondent produces steel wool and steel wool products.[1] In July 1955, it acquired all the capital stock and assets of the Williams Co. which processed similar products. In challenging such acquisition as unlawful, the complaint issuing in this proceeding alleged that its competitive effects may be those proscribed in section 7 of the Clayton Act, as amended.[2] Contending that counsel in support of the complaint had failed to make out a prima facie case by not showing, first, that the relevant markets or lines of commerce affected by the acquisition are industrial steel wool and household steel wool, and, second, that the effect of the acquisition may be substantially to lessen competition, respondent, at the close of the case-in-chief filed with the hearing examiner a motion to dismiss the complaint. This motion the examiner granted in part and denied in part, and in so doing he ruled (1) that the relevant markets involved in the proceeding are industrial and household steel wool products, because these are the products produced by respondent and Williams and thus constitute the area of effective competition between the two corporations; (2) that when, as here, the record shows that the acquiring and the acquired corporations each enjoy a substantial share of the industrial steel wool market, the acquisition as a matter of law substantially lessens competition in that market and thus constitutes a violation of section 7 of the Clayton Act, as amended; and (3) that, on the other hand, the record showing that the acquired corporation had only $\frac{3}{10}$ of 1 percent of the household steel wool market necessarily precludes a finding of competitive injury in that market and hence cannot constitute a violation of section 7. Interlocutory appeals have been filed by the re-

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[1] These articles are marketed for household use in the cleaning of pots and pans and also used as abrasives in the paint and other trades.

[2] 64 Stat. 1125, 15 U.S.C. 18:

"* * * [N]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

spondent and counsel supporting the complaint from the rulings adverse to them.

The respondent's appeal excepts to the standards applied by the hearing examiner when determining industrial steel wool to be a line of commerc. We think the hearing examiner in concluding as a matter of law that industrial steel wool was the relevant market erred in basing his determinations solely on the fact that those were the wares being produced by the acquired and acquiring companies. The test instead is whether these products are shown by the facts to have such peculiar characteristics and uses as to constitute them sufficiently distinct from others to make them a "line of commerce" within the meaning of the act. *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957). That the acquired and acquiring corporations both made industrial steel wool was only one circumstance to be considered. Additional factors which could have been taken into account include data relating to the manner in which the products are marketed, their physical characteristics, prices and possibly other things bearing on the question of whether or not they may be distinguished competitively from other wares. On the other hand, as the examiner in essence held, the mere fact that articles other than steel wool are marketed for industrial use as abrasives is not adequate legal warrant for including all abrasive products in the relevant line of commerce. The determinations as to the area of effective competition should have been made on the basis of all record facts delineating the relevant market or markets. Inasmuch as the hearing examiner's ruling was based on a standard other than the foregoing, this aspect of the appeal is granted.

The respondent further states that the hearing examiner's ruling bars it from proving on defense that the relevant market in fact includes other industrial abrasives. No showing has been made in the appeal that the hearing examiner heretofore has excluded evidence pointing to a substantial competitive interrelationship between industrial steel wool and other abrasives. As noted above, the issue as to the bounds of the relevant market in section 7 proceedings is one of fact. Thus, the respondent's right to present evidence showing that products other than steel wool are included within the area of effective competition and, therefore, are a part of the relevant line of commerce is fully protected. This, however, should not be construed as a holding that all economic data having an indirect or casual bearing on the marketing of the products concerned should be received in section 7 proceedings. Manifestly, the scope of the investigation should not be expanded beyond manageable proportions, and only evidentiary material from which significant market or competitive impact may be evident need be received.

In his ruling, the examiner further stated that in the light of respondent's substantial share of the market for industrial steel wool, its acquisition of another manufacturer which similarly had been a substantial factor in that market must of necessity be attended by reasonable probabilities of substantial lessening of competition in such line of commerce. We do not concur in the holding that a significant increase in a producer's already substantial share of the market necessarily demonstrates likelihood of statutorily forbidden effects in every distributional situation. This is not to say that the dimensions of the market segment being eliminated from competition between merging corporations may not in some evidentiary situations support inferences of substantial anticompetitive effects. Nevertheless, informed determinations as to actual or probable competitive effects can only be based on an analysis of all facts of record pertaining to the relevant market. In addition to the facts concerning market shares, likewise important is such evidence as was received herein pertaining to the general competitive situation, number of competitors and degree of concentration prevailing in the industry. Hence, it was error for the hearing examiner to find as a matter of law that the record showing of substantiality of the market shares involved in the acquisition established a violation of section 7.

A corollary concept of quantitative unsubstantiality was the basis for the hearing examiner's ruling dismissing the charges pertaining to the household steel wool market, from which ruling counsel supporting the complaint has appealed. In 1954, the year preceding the acquisition, the share of the household market for steel wool held by the acquired corporation comprised $\frac{3}{10}$ of 1 percent. In such year, the hearing examiner noted, the respondent's share of that market was 45.3 percent, which was exceeded only by one other manufacturer. Because no area of substantial competition had previously existed between the acquired and acquiring companies in the household line of commerce, he concluded that no substantial lessening of competition could result from the acquisition. The facts emphasized by the courts in the decisions cited by the hearing examiner in support of his holding differ materially from those apparently presented in this proceeding. Hence, those decisions [3] construing section 7 prior to its amendment are not deemed controlling to decision here.

In the *Thatcher* case, the acquired corporation, Woodbury, had decided prior to the stock transfer to stop the manufacture of milk bottles. Its share of that relevant market was less than 1 percent, and the acquiring corporation took over and filled its "one or two" outstanding contracts for milk bottles. The acquired company was not

[3] *Federal Trade Commission* v. *Thatcher Manufacturing Co.*, 5 F. 2d 615 (C.A. 3, 1925); affirmed in part reversed in part 272 U.S. 554 (1926); *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291 (1930).

licensed to use any of the automatic feeding machines then in successful use for manufacturing such bottles; and, furthermore, the court of appeals found that the prime purpose of the acquiring corporation was to secure Woodbury's license to use certain automatic machinery for manufacturing containers other than milk bottles. Those matters, it was held, precluded inferences as to competition being substantially lessened or tendency to monopoly.

In the *International Shoe* case, less than 5 percent of the products of the acquired and acquiring companies were in competition; and the decision emphasized that the resources of the acquired corporation were depleted and its insolvency probable.

The prime test of legality at the time when the foregoing decisions were rendered was thought to be the prior existing competition between the corporations involved in joinders of interest. Preacquisition competition is not necessarily a prerequisite under the Act, as amended. All acquisitions are within its reach whenever reasonable likelihood appears of forbidden competitive effects. *United States* v. *du Pont, supra* (592). For the reasons set forth above, we think the ruling granting the motion to dismiss as to the household line of commerce for steel wool is based on an improper standard. That the household market share of the acquired corporation had been less thar 1 percent was a circumstance as to which due cognizance was to be taken. It was error, however, for the hearing examiner to deem such fact exclusively controlling as a matter of law and to fail to accord due consideration to other relevant market information of record, including post-acquisition production and marketing data.

No factual analysis or evaluation of the evidence presented for delineating the relevant markets, and any competitive effects which reasonably may result from the acquisition, appears in the hearing examiner's order for us to review. The motion to dismiss should be ruled on on the basis of the facts. Accordingly, the proceeding is being remanded to the hearing examiner for further consideration of the merits of respondent's motion in the light hereof.

ORDER REMANDING CASE TO HEARING EXAMINER

This matter having come on for hearing upon the cross interlocutory appeals from the hearing examiner's rulings which granted in part and denied in part the respondent's motion to dismiss the complaint; and the Commission having granted the appeals for the reasons and in the manner indicated in the opinion accompanying this order:

It is ordered, That the case be remanded to the hearing examiner for further consideration of the respondent's motion to dismiss and ruling thereon in the light of the Commission's opinion.

TIMKEN ROLLER BEARING CO.

Docket 6504. Order and Opinion, May 27, 1958

Order vacating and setting aside initial decision dismissing complaint in section 3 Clayton Act proceeding and remanding case to hearing examiner for further action.

OPINION OF THE COMMISSION

By KERN, Commissioner:

This matter comes before us on the appeal of counsel supporting the complaint from the hearing examiner's initial decision wherein he dismissed the complaint. Briefs in support of and in opposition to the appeal have been filed, and oral argument of counsel has been heard.

The complaint, issued February 13, 1956, charged respondent with violation of section 3 of the Clayton Act in the sale of its tapered roller bearings in interstate commerce.[1] At the close of the introduction of evidence in support of the complaint, respondent moved for dismissal on the ground that a prima facie case had not been established. The hearing examiner granted the motion and dismissed the complaint.

The appeal raised two questions:

1. Does the record show prima facie that respondent has sold its tapered roller bearings to distributors or jobbers on the condition, agreement, or understanding that the distributors or the jobbers will not handle tapered roller bearings sold by any competitor with the probable effect of substantially lessening competition or tending to create a monopoly in any line of commerce?

2. Did the hearing examiner err in refusing to admit into evidence some 94 exhibits offered as relevant to the issues raised by the complaint?

Respondent, an Ohio corporation with headquarters in Canton, Ohio, is the largest manufacturer and seller of tapered roller bearings in the United States. It sells its products both for use as original equipment and for replacement and repairs in automobiles, tractors, and other machines. Only sales for ultimate purposes of replacement and repairs are involved in this proceeding.

Respondent's total sales in the replacement market run between $10 million and $20 million a year. Its closest competitor does a yearly business of between $1 million and $2 million a year in the sale

[1] The pertinent text of this section is as follows:

"SEC. 3. That it shall be unlawful for any person engaged in commerce * * * to * * * make a sale or contract for sale of goods * * * for * * * resale within the United States * * * on the condition, agreement, or understanding that the * * * purchaser thereof shall not use or deal in the goods * * * of a competitor or competitors of the * * * seller, where the effect of such * * * sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." [38 Stat. 731; 15 U.S.C. 14.]