Order denying petition to reopen proceeding to adduce new evidence and modify desist order of Jan. 21, 1960 (p. 743 herein).

ON PETITION TO REOPEN PROCEEDING

By TAIT, *Commissioner:*

Respondent has petitioned the Commission to reopen this proceeding for alternative purposes of adducing new and additional evidence, rehearing the matter on certain stated grounds, and modifying the order of January 21, 1960.

Request to Introduce New and Additional Evidence

The new and additional evidence which respondent seeks to offer appears to relate principally to the alleged entry of a new company in the florist foil field and the expansion of the florist foil sales of another firm. The concerns mentioned are Kaiser Aluminum & Chemical Sales, Inc., a division of Kaiser Aluminum & Chemical Corporation, and Archer Aluminum, a division of R. J. Reynolds Tobacco Company. Respondent states that the Kaiser firm began to sell florist foil in 1960 and that Archer Aluminum has intensified and extended its activities in the florist foil field since the close of hearings on October 30, 1958.

Respondent contends that the entry of the one new firm and the expansion of the other, both with averred competitive strength comparable to respondent, shows (a) that the respondent's acquisition of Arrow Brands has not had the effect of a probable lessening of competition or a tendency to monopoly and (b) that any lessening as a result of the acquisition can not be laid at the door of the respondent.

The new facts which respondent seeks to have added to the record relate to alleged changes in the competitive structure of the market occurring since the record was closed. The fact is that respondent was shown at the time of the hearings to be in violation of Section 7. This requires an order of divestiture under the statute. Even though subsequent events may show that future competitive conditions are not as anticipated, this would not make legal that which was illegal, nor relieve the respondent of the consequences of its action, unlawful as of the time of trial. It follows that the new evidence could have no bearing on the outcome of this proceeding.

The mere entry of a new company or the broadening of the activities of an existing company in the industry would not show the Commission's determination to be incorrect. The decision was not made on the basis that respondent had so monopolized the field as to preclude competition. It was made with an awareness that new companies could come into the business, particularly companies with large resources. The acquisition was nevertheless found to be illegal. Competition in the industry before the merger was represented by a number of firms, not very large in size, which were vigorous, aggressive competitors in price, service, design and other ways. We found that the acquisition seriously and substantially lessened the competition in the relevant line of commerce. A new entry comparable in strength to Reynolds Metals Company could no doubt offer competition to the respondent; it would not restore the kind of competition which has been reduced or eliminated. Moreover,

in the case of the Kaiser firm, it is too early to tell what may be the impact on the market of the entry of this company.

Respondent claims that since this case was closed, the importations of florist foil have substantially increased and have resulted in the loss of customers by Arrow Brands and other domestic companies. The effect of import foil on competition in the American market was a factor considered by the Commission in its decision.

Respondent seeks to show that certain named competitors continue in business and that they have not been injured and will not likely be injured by the acquisition. The issue before the Commission in deciding the case was not one of probable injury to competitors, but of probable injury to competition. Therefore, the fact that these firms continue in business, as claimed, would not change the decision.

A further point raised by the respondent is the assertion that during 1959, Arrow Brands suffered a decrease in its sales volume. This is sufficiently disposed of by our prior discussion. If true, it would not change our decision. Respondent's other points either do not relate to new developments or they concern factors which, if shown, would make no difference in the determination.

Request for Rehearing and Reargument

In the second part of its petition, respondent requests a rehearing and reargument on certain grounds, all of which relate to points previously raised before the Commission on respondent's appeal from the initial decision and disposed of by the Commission's decision. No showing has been made which would justify a rehearing of the same issues.

Request for Modification of the Order

Finally, respondent has petitioned the Commission to modify the order of divestiture issued January 21, 1960. Specifically, it requests the deletion of the provisions which relate to the new plant at Torrance, California, and to other assets and properties put into Arrow Brands since the acquisition.

The order in pertinent part requires divestiture of respondent's interest in Arrow Brands

> together with the new plant built after the acquisition for Arrow Brands, Inc., and so much of any other assets and properties put into the business of Arrow Brands, Inc., since the acquisition as may be necessary to restore it to at least the same relative, competitive standing it formerly had in the florist foil industry at or around the time of the acquisition.

We do not interpret the order as necessarily requiring respondent to divest itself of the new plant and the added equipment if there

is any other way in which it can reestablish the competitor as ordered. A further provision requiring the submission of a plan for compliance gives respondent the opportunity to submit for approval some method of complying with the order which does not involve the Torrance, California, plant and other property put into the company, if it can. In view of this, we do not think respondent's objections to the form of the order are well taken.

Accordingly, respondent's petition to reopen will be denied.

Commissioner Kern did not participate in the decision herein.

ORDER

Respondent, having filed a petition on March 11, 1960, requesting alternatively that this proceeding be reopened for the purpose of (a) adducing new and additional evidence, (b) rehearing the matter on certain stated grounds, and (c) modifying the Commission's order issued January 21, 1960; and

The Commission, for the reasons stated in the accompanying opinion, having determined that the aforementioned petition should be denied:

It is ordered, That respondent's petition to reopen the proceeding, filed March 11, 1960, be, and it hereby is, denied.

Commissioner Kern not participating.

SNAP-ON TOOLS CORPORATION

Docket 7116. Order and Opinion, Apr. 4, 1960