
IN THE MATTER OF
NIBCO INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT AND SEC. 2(d) OF THE CLAYTON ACT

Docket 8074. Complaint, Aug. 10, 1960—Decision, Mar. 2, 1961

Consent order requiring an Elkhart, Ind., manufacturer of valves, fittings, and related products used by plumbers and pipefitters, to cease discriminating among its customers in violation of Sec. 2(d) of the Clayton Act by such practices as paying sums of money amounting to more than \$2500 to the American Radiator and Standard Sanitary Corp. for promoting its products through television programs in the trading areas of New Orleans, La., and Pittsburgh, Pa., without making comparable payments available to competitors of the latter.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party named in the caption hereof and hereby made respondent herein, and hereinafter designated and described more particularly, has been and is using unfair methods of competition and unfair acts and practices in commerce in violation of Section 5 of the Federal

Trade Commission Act (15 U.S.C. Sec. 45), and has been and is violating subsection (d) of Section 2 of the Clayton Act, as amended (15 U.S.C. Sec. 13), and it appearing to the Commission that a proceeding by it would be to the interest of the public, the Commission hereby issues its complaint, stating its charges with respect thereto as follows:

COUNT I

Charging violation of Section 5 of the Federal Trade Commission Act, the Commission alleges:

PARAGRAPH 1. Respondent Nibco, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its principal office and place of business located at 500 Simpson Street, Elkhart, Indiana.

PAR. 2. Respondent is now and has been engaged in the manufacture, sale and distribution of valves, fittings and related products, as used by plumbers and pipefitters.

Respondent sells its products of like grade and quality, for use or resale, to a large number of customers located throughout the United States, including wholesalers and manufacturer's representatives. Said manufacturer's representatives are independent businessmen, under contract with respondent, purchasing from respondent for resale to wholesalers. Approximately 85% of respondent's sales are made to said manufacturer's representatives. Respondent's sales of its products are substantial, exceeding \$20,000,000 annually.

PAR. 3. Respondent, in the course and conduct of its business, as aforesaid, has caused and now causes its said products to be shipped and transported from the state or states of location of its various manufacturing plants, warehouses and places of business, to purchasers thereof located in states other than the state or states wherein said shipment or transportation originated. There has been at all times mentioned herein a continuous course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, as aforesaid, respondent has established and maintains a policy whereby it fixes certain specified prices and discounts at which its products are to be resold by its above-mentioned manufacturer's representatives. Such prices and discounts are made known to said manufacturer's representatives by published price lists or otherwise, and said manufacturer's representatives are required to adhere to such prices and discounts.

The direct effect of said policy and practices has been to cause respondent's manufacturer's representatives to sell respondent's products at the prices and discounts fixed and established by respondent.

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ent; to prevent respondent's said manufacturer's representatives from selling respondent's products at prices either greater or less than those fixed and established by respondent, which greater or less prices they may deem adequate or warranted by their respective selling costs and by trade and competitive conditions generally; to suppress competition among said manufacturer's representatives in the distribution and sale of respondent's products; to suppress competition among respondent's said manufacturer's representatives and others in the distribution and sale of valves and fittings to the wholesaler trade; and to deprive the ultimate purchasers of such products of the advantages in price which they would otherwise obtain from a free and unobstructed flow of commerce in such products.

PAR. 5. The acts and practices of respondent, as herein alleged, are all to the injury and prejudice of competitors of respondent, of purchasers from respondent, and of the public; have a tendency and effect of obstructing, hindering, lessening and preventing competition in the sale of valves, pipe fittings and related products in commerce within the intent and meaning of the Federal Trade Commission Act; and constitute unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Charging violation of subsection (d) of Section 2 of the Clayton Act, as amended, the Commission alleges:

PARAGRAPHS 1, 2 and 3: The allegations of Paragraphs 1, 2 and 3 of COUNT I of this complaint are incorporated herein by reference and constitute the allegations of Paragraphs 1, 2 and 3 of COUNT II, except that the reference in Paragraph 3 of COUNT I to the Federal Trade Commission Act is eliminated herein, and reference to the Clayton Act, as amended, is substituted therefor.

PAR. 4. In the course and conduct of its business in commerce, respondent has paid or contracted for the payment of something of value to or for the benefit of certain of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments have not been offered or otherwise made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.

PAR. 5. For example, between September 1958 and June 1959 respondent contracted to pay, and periodically did pay, sums amounting to more than \$2500.00 to the American Radiator and Standard Sanitary Corporation for services and facilities furnished

it by American Radiator and Standard Sanitary Corporation in promoting the sale of respondent's products through television programs sponsored by American Radiator and Standard Sanitary Corporation in the trading areas of New Orleans, Louisiana, and Pittsburgh, Pennsylvania. Such payments were not offered or otherwise made available on proportionally equal terms to all other customers competing with American Radiator and Standard Sanitary Corporation in the sale and distribution of products of like grade and quality purchased from respondent.

PAR. 6. The acts and practices of respondent, as alleged herein, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson Patman Act.

Mr. Lynn C. Paulson and Mr. Timothy J. Cronin, Jr., for the Commission.

Welch, Mott & Morgan, of Washington, D. C., by Mr. Harold E. Mott and Mr. Edward J. Stegemann; and Bontrager & Spahn, of Elkhart, Ind., for the respondent.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

The complaint in this proceeding, issued August 10, 1960, contains two counts. Count I charges respondent Nibco Inc., a corporation, located at 500 Simpson Street, Elkhart, Indiana, with violation of Section 5 of the Federal Trade Commission Act and Count II charges said respondent with violation of subsection (d) of Section 2 of the Clayton Act, as amended, in connection with the manufacture, sale and distribution of valves, fittings and related products, as used by plumbers and pipefitters.

After the issuance of the complaint, respondent entered into an agreement containing consent order to cease and desist with counsel in support of the complaint, disposing of all the issues in this proceeding, which agreement was duly approved by the Director and Associate Director of the Bureau of Litigation.

In Count I of the complaint, respondent Nibco Inc. is charged with establishing and maintaining a policy whereby it fixes certain specified prices and discounts at which its products are to be resold. It was alleged in the agreement that this charge was based upon the belief that respondent's system of distribution utilized distributors who were independent businessmen, when in fact said distributors were manufacturers' sales representatives, and as such were agents of the respondent. Consequently, it was agreed that Count I of the complaint should be dismissed.

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It was expressly provided in the agreement that the signing thereof is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

By the terms of said agreement, the respondent admitted all the jurisdictional facts alleged in the complaint and agreed that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with the allegations.

By said agreement the respondent expressly waived any further procedural steps before the hearing examiner and the Commission; the making of findings of fact or conclusions of law; and all the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement.

Respondent further agreed that the order to cease and desist, issued in accordance with said agreement, shall have the same force and effect as if made after a full hearing.

It was further provided that said agreement, together with the complaint, shall constitute the entire record herein; that the complaint herein may be used in construing the terms of the order issued pursuant to said agreement; and that said order may be altered, modified or set aside in the manner prescribed by the statute for orders of the Commission.

The hearing examiner has considered such agreement and the order therein contained, and, it appearing that said agreement and order provides for an appropriate disposition of this proceeding, the same is hereby accepted and is ordered filed upon becoming part of the Commission's decision in accordance with Sections 3.21 and 3.25 of the Rules of Practice, and, in consonance with the terms of said agreement, the hearing examiner finds that the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent named herein, and issues the following order.

ORDER

It is ordered, That respondent Nibco Inc., a corporation, and its officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of pipe, pipe fittings, and related products, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to, or for the benefit of, any customers of respondent as compensation

or in consideration for any services or facilities furnished by or through such customers in connection with the handling, offering for sale, sale or distribution of said products, unless such payment or consideration is affirmatively made available on proportionally equal terms to all other customers competing in the distribution of such products.

It is further ordered, That COUNT 1 of the complaint herein is dismissed.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 2nd day of March, 1961, become the decision of the Commission; and, accordingly:

It is ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in