

Statement

IN THE MATTER OF
BEATRICE FOODS CO.

MODIFIED ORDER, OPINIONS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 6653. Complaint, October 16, 1965—Decision, June 7, 1967

Order modifying a divestiture order dated Dec. 10, 1965, 68 F.T.C. 1003, which required a major food processing corporation to divest certain acquired companies by further requiring the corporation, pursuant to a final decree of May 23, 1967, 8 S.&D. 495, by the Court of Appeals for the Ninth Circuit, to sell certain plants to a single purchaser to be approved in advance by the Commission.

STATEMENT OF THE COMMISSION

A majority of the Commission has agreed to present to the Ninth Circuit for its consideration a proposed consent settlement of the Commission's Section 7 proceeding against *Beatrice Foods Co.*, Dkt. No. 6653.

Complaint in this matter was filed October 16, 1956. Five of the 175 acquisitions¹ charged in the complaint as illegal were found by the hearing examiner to be in violation of Section 7. His decision, rendered on March 2, 1964, was sustained by the Commission in an opinion issued on April 26, 1965 [67 F.T.C. 473, 697]. The final order entered by the Commission on December 10, 1965 [68 F.T.C. 1003], required divestiture within 18 months of four of the five acquisitions found to have been illegal and prohibited Beatrice from making any further acquisitions of dairy companies without Commission approval for a period of 10 years.

This order and the Commission's decision, finding liability, is now on appeal to the Ninth Circuit. The printing of the record is not yet complete, final briefs have not been exchanged, and oral argument has not yet been scheduled.

The consent order now agreed to by the parties resulted from renewed negotiations instituted in February 1967 at the request of respondent's counsel and participated in by the Commission and its staff and Beatrice.

Under the consent offer now proposed Beatrice agrees to divest itself of plants and related facilities located in Pasadena, California; Cedar City, Utah; Las Vegas, Nevada; El Paso, Texas;

¹ Of these acquisitions 77 were challenged under Section 7 and the remaining 98 under Section 5, either because the companies were not corporations or were not in commerce.

Roswell and Albuquerque, New Mexico; and all operations in Arizona. These operations span a distribution area stretching across the Southwest United States and encompass West Texas, New Mexico, Arizona, southern California, southern Nevada and southern Utah. The settlement also calls for the divestiture of the acquired company in Morgantown, West Virginia, and prohibits Beatrice from acquiring any other dairy company without Commission approval for a 10-year period.² The properties subject to divestiture under this settlement, with the exception of the Morgantown operation, are contiguous and capable of being sold as a single property to a single company. The divestiture contemplated by the settlement accounts for approximately 24 percent of the total premerger sales challenged in the complaint and is thus roughly comparable to the consent settlements agreed to with Foremost, Borden and National Dairy which divestitures involved 36%, 25% and 32% respectively of premerger sales of acquired firms.³ If the illegal acquisitions which Beatrice has already disposed of are taken into account, Beatrice will have eventually divested itself of 32% of the premerger sales acquired.

In considering any settlement proposal the Commission must seek to weigh the relative gains for the public interest between the certainty of immediate divestiture of named plants which the settlement achieves and the always uncertain contingency of court victory, the time which will elapse before final court decision and the possible effect which such delay will have on the continued viability—and indeed on the continued existence—of the properties which can reasonably be expected to be subject to an eventual court-ordered divestiture.⁴

In the view of a majority of the Commission the proposed consent settlement achieves in large measure the original objective of the complaint which was to prevent the disappearance from

² Under this consent order Beatrice agreed to sell off its plant in Morgantown, West Virginia instead of the acquired plant in Durham, North Carolina. Beatrice is also divesting the Valley Gold operations in New Mexico and the Las Vegas, Nevada and Glendale, Arizona facilities which were not under the December order, in place of its Idaho division and the remainder of the Utah division which were under the December order.

³ Each of the cases was settled on consent. *Borden* (Dkt. 6652) [65 F.T.C. 296] and *National Dairy* [Dkt. 6651] on April 15, 1964 and January 30, 1963 [62 F.T.C. 120], respectively, prior to any hearings, and *Foremost* [Dkt. 6495] on March 5, 1965 [67 F.T.C. 282], after full hearings and an opinion by the Commission finding violation.

⁴ In this connection we cannot ignore the fact that since complaint issued in this case, Beatrice has already sold off or closed the following facilities which were found to be acquired unlawfully: Hawaii Brewing; Rawley Frozen Foods; Bakersfield, California; Pasadena, California (retail); Valleymaid Ice Cream; Eckles Ice Cream Co.; and Dahl-Cro-Ma. These seven plants accounted for \$11.4 million or 20% of the premerger sales of the companies affected by the December order. We know from experience with the dairy industry that the dynamics of this industry and the constant changes in dairy ownership underscore the importance of achieving divestiture as quickly as possible.

the dairy industry of viable regional dairy companies. The effect of the proposed settlement, if divestiture of the southwest plants can be effected to a single purchaser, will be the establishment of a substantial, viable regional dairy company with sales of \$36 million and profits of \$1,137,000 in what is reported by our staff to be one of the fastest growing areas in the continental United States. It can be anticipated that the establishment of such a medium-size regional competitor and the elimination of Beatrice from the southwestern area will re-establish the forces of potential competition in this region, since Beatrice remains in northern Utah and in northern California.

In the view of a majority of the Commission the relief secured through this consent settlement is effective and indeed is in some respects more effective than the divestiture which might be ordered by a court because of the immediacy with which it can be implemented.

DISSENTING STATEMENT

BY ELMAN, *Commissioner*:

There have been three recent Commission decisions designed to provide basic guidelines of law and policy in the field of conglomerate mergers: *Consolidated Foods Corp.*, Docket No. 7000 [62 F.T.C. 929], dealing with reciprocity; *Procter & Gamble-Clorox*, Docket No. 6901 [63 F.T.C. 1465], dealing with product-extension mergers; and *Beatrice Foods Co.*, Docket No. 6653, dealing with market-extension mergers. The first two went to the Supreme Court and resulted in affirmance of the Commission's decisions. The third is now terminated, while still pending for review in the Ninth Circuit, by acceptance of a consent order.

Today's action is taken by a vote of 2-1, with two members not participating. One of the two members of the Commission constituting the present majority did not participate in any way in the adjudicative proceedings before the Commission. In the recent *Procter & Gamble-Folger* case (Docket C-1169, February 9, 1967) [p. 135 herein], where the Commission accepted a consent order simultaneously with the issuance of the complaint, that commissioner stated as follows [pp. 146-147 herein]:

I do not believe that the Commission, having filed a complaint in which it had reason to believe that a challenged acquisition violated the law, should settle that complaint by consent unless the consent order adequately and fully removes the anticompetitive impact which the acquisition is believed to have engendered and provides the relief which the Commission could reasonably anticipate a court would direct. * * *

The law respecting the anticompetitive impact of conglomerate mergers has not yet been established. There is a great need to test and develop the case law in these areas. By its willingness to enter into consent orders and agreements, a majority of the Commission has prevented the development of case law dealing with such mergers that is so essential both to the law enforcement agency and to the businessman seeking to conform his conduct to the confines of the law.

Today's settlement does not come in advance of trial, before the allegations of the complaint have been tested, but after the case has already been fully tried and adjudicated by the Commission. This case—one of the most important ever brought in the merger field—involved a series of acquisitions made by respondent, the third largest dairy company in the United States, over an extended period of time. After proceedings lasting almost a decade, the Commission on April 26, 1965, determined, in a unanimous opinion, that a number of these acquisitions were illegal. When it announced its opinion, the Commission did not follow its usual procedure and issue a final order at the same time. Instead, because of the magnitude and complexity of the problems of relief, the Commission deferred entry of a final order pending receipt of the parties' views on the form and content of an appropriate order. On December 10, 1965, after full consideration of the proposals submitted by complaint counsel and respondent, the Commission issued a final order, accompanied by an opinion examining in detail all of the factors bearing on the scope of the order. That order is now set aside and replaced by a consent order having the approval of only two members of the Commission.

I shall not discuss the merits of the consent order, except to note that it falls substantially short of the relief which the Commission, after the most extensive and careful consideration, on the basis of the findings of fact in the record, determined to be necessary in order to redress the violations found. There is no reason to anticipate that the Commission's decision and order would not be sustained on review. It is most regrettable that the opportunity for such review has now been foreclosed by the action of a bobtailed Commission. Businessmen and the bar, as well as the antitrust enforcement agencies, would have benefited from a Supreme Court decision in this test case, settling the rules of law applicable to market-extension mergers.

MODIFIED ORDER

Beatrice Foods Co., having filed in the United States Court of Appeals for the Ninth Circuit on February 9, 1966, a petition to

review and set aside the order of divestiture issued herein on December 10, 1965 [68 F.T.C. 1003]; and the Commission and Beatrice Foods Co., having subsequently agreed upon a plan of divestiture and upon the provisions of a final order modifying the order entered by the Commission on December 10, 1965; and the Court, on May 23, 1967 [8 S.&D. 495], having issued its final decree affirming and enforcing said order as submitted by the Commission and Beatrice Foods Co.;

Now, therefore, it is hereby ordered, That the order of December 10, 1965, be, and it hereby is, modified in accordance with the final decree of the Court to read as follows:

It is ordered, That:

I

Beatrice Foods Co. ("Beatrice"), within a period not exceeding eighteen (18) months from the effective date of this order, unless extended, shall divest itself absolutely and in good faith to a purchaser approved in advance by the Commission, of all plants which are owned in whole or in part by Beatrice or operated by Beatrice at Pasadena, California (two plants); Cedar City, Utah; El Paso, Texas; Roswell, New Mexico; Albuquerque, New Mexico; all locations in the State of Arizona; and Morgantown, West Virginia, and which are engaged in the manufacturing, processing or distribution of pasteurized and homogenized milks, buttermilks, skim milks, cream, half & half, sour cream, cottage cheese, ice cream, ice milk, mellorine-type products, sherbet, or water ices, together with all assets, properties and businesses which are or may be used or conducted by Beatrice at or in conjunction with said plants, or added to said plants or utilized in replacement of said plants by Beatrice, as may be necessary to restore the properties as competitive entities, all as hereinafter provided.

Provided, however, That this order does not require that the plant, assets, properties and businesses located at Morgantown, West Virginia, be sold to the purchaser of the other plants, assets, properties and businesses described above.

Provided further, however, That if, at the expiration of one year from the effective date of this order, Beatrice establishes that despite its good faith efforts it has been unable to dispose of the plants, assets, properties and businesses described above—other than those located at Morgantown, West Virginia—to a single purchaser, Beatrice may dispose of said plants, assets, properties and

businesses to two or more purchasers, approved in advance by the Commission.

As used in this order the term "assets, properties and businesses conducted by Beatrice at or in conjunction with said plants" shall include all dairy distribution stations and branches regardless of where located, which are owned in whole or in part by Beatrice or operated by Beatrice and supplied by any of said plants.

II

Such divestitures shall be effected subject to the following:

1. Upon the completion of such divestitures to the purchaser or purchasers (herein called the "transferee"), Beatrice, its officers, directors, agents, representatives, or employees shall not exercise any control or supervision over the policies, control, management, operation or acts of transferee, or any successor in interest to transferee: *Provided*, That where necessary for the successful operation of the business of the transferee, Beatrice may license for a limited period of time the use of any of its trademarks or trade names in the territory of the transferee subject to the prior approval by the Commission of each license and the terms thereof.

2. By these divestitures no interest shall be sold or transferred, directly or indirectly, to anyone who is at the time of the divestiture an officer, director, employee or agent of, or directly or indirectly under the control or direction of Beatrice or any of Beatrice's divisions, subsidiaries or affiliated corporations, or who owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of common stock of Beatrice without the prior approval of the Commission.

III

Beatrice shall cease and desist, for a period of ten (10) years from the effective date of this order from acquiring, directly or indirectly, any interest in any firm, corporate or non-corporate, engaged principally or as one of its major commodity lines at the time of such acquisition in any State of the United States or in the District of Columbia in the business of manufacturing, processing or distributing at wholesale or on retail milk routes any of the products described in Paragraph I of this order, without the prior approval of the Commission.

IV

Beatrice shall submit to the Commission every ninety (90) days a report in writing setting forth its efforts and progress in carrying out the divestiture requirements of this order until all assets have been divested with the approval of the Commission; and Beatrice shall submit to the Commission on the first day of each calendar year a report in writing setting forth its compliance with the cease and desist provisions of this order.

V

Beatrice shall notify the Commission of the names and addresses of all persons, firms or corporations who shall express to Beatrice any interest in purchasing the plants, assets, properties or businesses to be divested under the terms of this order, within thirty (30) days after having been informed of such interest.

Commissioner Elman not concurring, and Commissioners MacIntyre and Reilly not participating.
