

Opinion

IN THE MATTER OF

BROADWAY-HALE STORES, INC.

Docket C-1057. Decision, April 14, 1966—Opinion, April 13, 1972

Opinion in response to application to make acquisition.

OPINION IN RESPONSE TO APPLICATION OF
BROADWAY-HALE STORES, INC.

On April 14, 1966, the Commission issued an order which, *inter alia*, prohibited Broadway-Hale Stores, Inc. (Broadway-Hale), for five years from acquiring any department store or other GMAF store without the prior approval of the Commission. Subsequently, Broadway-Hale sought and received Commission approval for a proposed acquisition of Neiman-Marcus, and in connection with that approval, the Commission, on March 11, 1969, issued a modified order extending the moratorium provisions of the original order for a period of five years from the date of issuance. In an opinion accompanying the approval of the Neiman-Marcus acquisition, the Commission stated:

When a company under a merger has requests permission to make an acquisition which * * * appears on its face to have possible anticompetitive consequences, such request will probably not be granted unless the parties can demonstrate that the possibility of such anticompetitive consequences is remote.

On May 7, 1971, Broadway-Hale requested Commission approval to acquire Bergdorf and Goodman (Bergdorf) and Bergdorf-Goodman Fur Corporation, which request was opposed by the compliance staff of the Commission. The Commission determined to afford Broadway-Hale and Bergdorf a public hearing for the purpose of establishing a more complete factual record with respect to the absence of the possibility of anticompetitive consequences stemming from the acquisition. The General Counsel of the Commission was appointed as its representative to preside over such hearing, and the Commission staff was authorized to participate fully in the hearing.

The basic issues in dispute between the parties turned on the questions of whether Broadway-Hale could or would expand internally into the New York market, whether it is possible to enter the New York Metropolitan market without a flagship store on Fifth Avenue, and whether, if the purchase of Bergdorf Goodman were disapproved, Bergdorf would in fact exit permanently from the New York market.

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Broadway-Hale's arguments were supported by the unanimous testimony of the witnesses appearing at the hearing. All supported the Broadway-Hale contentions respecting the general difficulties of entry into the New York market—the necessity to have a Fifth Avenue flagship store in order to enter the suburbs in the broader New York Metropolitan market, the unstable financial condition of Bergdorf Goodman and its need either to exit or to expand, and the massive financing which would have been required and would probably have been unavailable for the latter.

Complaint counsel relied in support of its position in part on its analysis of Bergdorf Goodman's financial statement which it claimed indicated a solid profitability position for Bergdorf in the years just preceding the calendar year 1970 and which it argued demonstrated that Bergdorf if it chose could secure the financing which it would need in order to expand. Complaint counsel argued, therefore, that it was not clear that Bergdorf Goodman would necessarily exit the New York market if this acquisition were disapproved. The other evidence relied upon by complaint counsel was Neiman-Marcus' entry into several markets on its own. This evidence, complaint counsel argued, tended to refute the Broadway-Hale testimony as to its inability to enter the New York market internally.

We recognize, of course, that competitive conditions involved here are dynamic to a certain degree and that events and conditions which seem certain and inevitable one day may be altered by the business realities of the next. We recognize that by approving this acquisition we assume the risk that had we denied the request, Bergdorf might have remained a viable competitor, Broadway-Hale might have entered the market independently and competition would thereby have been advanced. On the record before us, this possibility must be considered exceedingly remote whereas there is a substantial probability that a denial of the request would result in a net loss of competition.

We remain today as concerned with competitive conditions in the GMAF industry as we were at the time the order against petitioner and similar orders were issued, and it is our intention to continue to scrutinize mergers in this industry with great care. It is precisely because of this concern that we feel it is essential that we adopt in this matter the action which will yield the greatest probability of pro-competitive results. Judged by this standard and by the standard announced in our earlier opinion, we conclude that the request should be approved. The circumstances which we have described with respect to the competitive condition of the mid-Manhattan high-

fashion market and the future plans of the petitioning parties combine to create a situation which is perhaps unique in this country. Thus, the result in this matter must be limited strictly to the singular facts here present and should not be viewed as having a broader reach.

Accordingly, on the basis of the evidence before us, we approve the proposed acquisition.