

Interlocutory Order

IN THE MATTER OF

JAMES B. LANSING SOUND, INC.

Docket C-1785. Interlocutory Order, Aug. 29, 1978

ORDER DENYING PETITION TO REOPEN

By petition of April 14, 1978, supplemented by reply memorandum of June 23, 1978,¹ respondent James B. Lansing Sound, Inc. (JBL) requests that a consent order issued against JBL on August 24, 1970 be modified to prohibit certain non-price vertical restrictions only when these restrictions are engaged in for the purpose of or with the effect of controlling retail prices.² JBL contends that changed conditions of law as well as the public interest warrant such a change. In particular, respondent relies upon the decision in *Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36 (1977), and the presence of "vibrant intra-brand [sic] competition in the relevant product market" to support the requested modification. After due consideration of JBL's contentions, the Commission has determined to deny the petition.

As the Commission recently stated, *Sylvania* did not legalize territorial, customer, or other non-price vertical restrictions.³ Rather, the court simply directed that non-price vertical restrictions which are not part of a larger price-fixing scheme be scrutinized under the rule of reason when challenged under the Sherman Act.⁴ A respondent seeking relief from order prohibitions against vertical

¹ Respondent's motion for leave to file a reply memorandum is granted.

² The Commission's order [77 F.T.C. at 1168] currently requires JBL to cease and desist from:

1. Entering into, maintaining or enforcing any contract, agreement, combination, understanding or course of conduct which has as its purpose or effect the fixing, establishing or setting of the prices at which its independent dealers or distributors may resell their products; *provided, however*, that nothing contained herein shall be construed to prevent respondent from engaging in a legitimate fair trade program in those states having fair trade laws.

2. Preventing or prohibiting any independent dealer or distributor from reselling his products to any person or group of persons, business or class of businesses, except as may be expressly provided herein.

3. Preventing or prohibiting any independent dealer or distributor from soliciting sales outside of his market area.

4. Requiring its independent dealers or distributors to make their sales records available to respondent for inspection.

Respondent requests that the following language be inserted in lieu of Paragraphs 2, 3, and 4:

2. Engaging in any of the following activities for the purpose of or which have the effect of controlling the retail prices at which its products are sold or advertised:

(a) Preventing or prohibiting any independent dealer or distributor from reselling his products to any person or group of persons, business or class of businesses.

(b) Preventing or prohibiting any independent dealer or distributor from soliciting sales outside of his market area.

(c) Requiring its independent dealers or distributors to make their sales records available to respondent for inspection.

³ See Commission letter of May 19, 1978 to David J. Cynamon, Esq., regarding Performance Sailcraft, Inc., File No. 771 0027 at 2 ("Cynamon letter").

⁴ The *Sylvania* Court noted that the jury had rejected the allegation that Sylvania's location restriction was part of a larger scheme to fix prices and characterized this finding as "[m]ost important." 433 U.S. at 41 n.9.

restrictions premised upon allegations that Section 5 has been violated⁵ must therefore do more than assert that some of the practices covered by those prohibitions are no longer *per se* violations of the antitrust laws:

[O]ne asking to be relieved of order provisions concerning such territorial restrictions should be prepared to show that its restraints would not be part of a price-setting mechanism; that the restraints would be reasonable; and that the prohibitions against territorial restraints required by the order have harmed or would harm substantially the respondent's competitive position. Insofar as such a claim of competitive harm rests upon the premise that the respondent's competitors are using such restraints, a respondent should also be prepared to show that such competitors' restraints are reasonable.⁶

From this perspective, it is clear that respondent has not demonstrated that it deserves relief from the strictures of the order. JBL maintains that competition is "extremely intense," that JBL "can under no circumstances be considered as dominating the U.S. loudspeaker market," that it would be unfair and contrary to the public interest "to burden respondent with prohibitions which are more restrictive than those which are applicable to its competitors * * *," and that JBL would suffer "severe competitive disadvantage" if the order is not modified. Yet, in support of these contentions JBL offers only two pieces of information: (1) JBL's estimated market share of 7 percent in the U.S. market; and (2) the presence of 165 different brands of loudspeakers for sale in the U.S. market.

Such a showing is on its face inadequate since it does not address the Commission's outstanding orders involving JBL's competitors.⁷ With respect to other competitors who are not subject to similar cease and desist order, it is not clear to what extent these competitors are utilizing vertical restraints which are unavailable to JBL and which are "reasonable" under the antitrust laws, much less that JBL is under a "severe competitive disadvantage" as a result. Finally, it is impossible to endorse respondent's proffered modification absent a more comprehensive analysis of the intensity of interbrand competition in the market for loudspeakers. Respondent's share of the market viewed in conjunction with a listing of other available brands simply does not provide enough of an insight

⁵ Of course, it is well-settled that conduct which falls short of violating the Sherman Act may nevertheless run afoul of Section 5. *E.g.*, *F.T.C. v. Brown Shoe Co.*, 384 U.S. 316 (1966); *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 242-46 (1972).

⁶ Cynamon letter at 5 n.4.

⁷ *TEAC Corp. of America*, Dkt. C-2752 (October 24, 1975) [86 F.T.C. 981]; *Sherwood Electronic Laboratories, Inc.*, Dkt. C-2753 (October 24, 1975) [86 F.T.C. 988]; *Sansui Electronics Corporation*, Dkt. C-2754 (October 24, 1975) [86 F.T.C. 955]; *U.S. Pioneer Electronics Corporation*, Dkt. C-2755 (October 24, 1975) [86 F.T.C. 1002]; *Nikko Electronic Corporation of America*, Dkt. C-2829 (July 12, 1976) [88 F.T.C. 31]; *United Audio Products, Inc.*, Dkt. C-2828 (July 12, 1976) [88 F.T.C. 24].

into the prevailing market structure and performance to facilitate an informed decision on the reasonableness of JBL's proposal.

Respondent attaches great significance to the Commission's acceptance of a consent order in *Levi Strauss & Co.*, Dkt. 9018, [92 F.T.C. —] since that case also involved allegations of resale price maintenance. The Commission's decision to accept a more limited order in *Levi Strauss* than the order against JBL cannot be construed as representing any definitive policy statement regarding cases which encompass both price and non-price vertical restraints. Each case must and will be judged on its own merits. Accordingly,

It is ordered, That the respondent's petition is denied.

Complaint

92 F.T.C.

IN THE MATTER OF
AMERICAN SERVICE BUREAU, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FAIR CREDIT REPORTING ACT

Docket C-2926. Complaint, Sept. 7, 1978 — Decision, Sept. 7, 1978

This consent order, among other things, requires a Chicago, Ill. insurance investigations firm to cease soliciting or collecting impermissible information as a means of identifying consumers seeking required disclosure of file contents; and unfairly or deceptively attempting to obtain from consumers authorization to elicit excessive information. Additionally, the firm is required to provide those persons requesting or disputing file information a prescribed statement regarding their rights under the Fair Credit Reporting Act.

Appearances

For the Commission: *Dennis D. McFeely.*

For the respondent: *Richard V. Henry, Chicago, Ill.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fair Credit Reporting Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that American Service Bureau, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows (all allegations hereinafter made in the present tense shall include the past tense):

PARAGRAPH 1. American Service Bureau, Inc. (hereinafter referred to as "ASB") is a corporation organized and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 211 East Chicago Ave., Chicago, Illinois.

PAR. 2. Respondent disseminates written, oral or other communications of information bearing on consumers' credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, and/or mode of living, which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing consumers' eligibility for credit or insurance to be used primarily for personal, family, or household