

IN THE MATTER OF

AIRCO, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 3 OF
THE CLAYTON ACT

Docket 9098. Complaint, May 18, 1977 — Decision, July 31, 1979

This consent order, among other things, requires a Montvale, N.J. manufacturer and seller of industrial gases and welding products to cease, for a period of twenty years, from entering into, or enforcing agreements that require distributors of industrial gases to purchase from Airco any part of their industrial gas requirements, unless the initial term or renewal of such contracts and the minimum period for termination falls within specified time frame. The firm is also prohibited from requiring a distributor to purchase industrial gases at particular locations, or as a condition of purchasing welding or other industrial gas products at the same or any other location; and from refusing to sell its products to a distributor because that distributor refuses to purchase from Airco a designated part of its industrial gas requirements at a particular location. Additionally, the order prescribes arbitration for any dispute arising from company's refusal to sell; and sets forth the manner and form of such arbitration.

Appearances

For the Commission: *Gordon Youngwood, Peter L. Feldman, and Stephen C. Garavito.*

For the respondent: *W. Foster Wollen, Sherman & Sterling, New York City, R. Bruce MacWhorter, Danforth C. Newcomb and David Graus, New York City.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Airco, Inc. ("Airco"), respondent herein, has violated the provisions of Section 3 of the Clayton Act, as amended, (15 U.S.C. 14), and the provisions of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

DEFINITIONS

1. For the purpose of construing this complaint, the following definition shall apply:

(a) "Distributors" shall mean a business firm whose primary function in the industrial gas and welding products business is the

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purchase of industrial gases and welding products for the purpose of resale.

(b) "Welding products" are the equipment, supplies and consummable items used to fuse or cut metals.

(c) "Industrial gases" shall mean the following gases: oxygen, nitrogen, argon, acetylene, hydrogen, and helium.

RESPONDENT

2. Respondent Airco is a publicly-owned New York corporation with its principal place of business at 85 Chestnut Ridge Road, Montvale, New Jersey.

3. Airco is engaged in the manufacture and sale of industrial gases, ferroalloys and carbide, medical gases and equipment, cryogenic equipment, welding and cutting equipment, carbon, graphite, electronics and metals.

4. For 1975 Airco had net sales of \$765.7 million and a net income of \$42.7 million.

5. Airco, one of the nation's three leading producers of industrial gases, sells industrial gases to distributors through its Airco Welding Products Division. During 1972, Airco had the second largest volume of domestic sales of acetylene, argon, helium, nitrogen and oxygen to distributors and the largest volume of domestic sales of hydrogen to distributors.

6. At all times relevant herein, Airco sold and shipped its products in interstate commerce and was engaged in commerce within the meaning of the Clayton Act, as amended, and was a corporation whose business was in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

TRADE AND COMMERCE

7. The relevant lines of commerce affected by the actions of Airco are the sales to distributors of each of the following relevant industrial gases: acetylene, argon, helium, hydrogen, nitrogen, and oxygen.

8. During 1972, there were substantial sales by Airco of acetylene, argon, helium, hydrogen, nitrogen, and oxygen to distributors. Airco is one of the major sellers of these six gases to distributors.

9. The United States and certain sections thereof constitute geographic markets or sections of the country for each relevant line of commerce.

10. Barriers to entry are high for a new distributor of relevant industrial gases.

11. Barriers to entry are high for a new supplier of relevant industrial gases.

ACTS AND PRACTICES

12. In the course of interstate commerce, Airco, a leading company in each relevant line of commerce alleged herein, has used and is using its economic power and has engaged and is engaging in acts and practices to foreclose competition in the sale of relevant industrial gases to distributors. Among the acts and practices in which Airco has engaged and is continuing to engage in the course of interstate commerce, are the following:

- (a) Requiring distributors, pursuant to a contract, agreement, or understanding, to purchase from Airco their total requirements of each of the relevant industrial gases.
- (b) Requiring distributors to purchase their total requirements of the relevant industrial gases from Airco as a condition to their purchasing any relevant industrial gas from Airco.
- (c) Requiring distributors to purchase their total requirements of the relevant industrial gases from Airco as a condition to their purchasing of welding products from Airco.
- (d) Making available to customers of industrial gas distributors who have ceased purchasing one or more Airco industrial gases, products at rates set for the purpose of destroying a competitor or eliminating competition.
- (e) Preventing, hindering and frustrating distributors from engaging in the production and sale of acetylene.

EFFECTS

13. The acts and practices identified in Paragraph 10 have or may have the following effects among others:

- (a) Substantially lessening competition for the sale of relevant industrial gases to distributors.
- (b) Substantially lessening competition for the sale of relevant industrial gases to consumers.
- (c) Increasing entry barriers into each line of commerce alleged herein.
- (d) Depriving distributors of the opportunity of competing for sales of relevant industrial gases to certain classes of customers.
- (e) Depriving distributors of the freedom of choice to purchase industrial gases from competitors of Airco.

VIOLATIONS

14. The acts and practices alleged herein constitute tying arrangements, exclusive dealing arrangements or total requirements contracts in violation of Section 3 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended.

15. The acts and practices alleged herein constitute unfair methods of competition or unfair acts and practices by Airco in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and Section 3 of the Clayton Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Airco, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 85 Chestnut Ridge Road, in the City of Montvale, State of New Jersey.
2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

For the purpose of this order, the following definitions shall apply:

1. "Industrial gases" shall mean the following gases: oxygen, nitrogen, argon, acetylene, hydrogen and helium.

2. "Welding products" shall mean equipment, supplies and consumable items used to fuse or thermally to cut metals.

3. "Distributor" shall mean a business firm whose primary function in the industrial gas and welding products business is the purchase of industrial gases and welding products for the purpose of resale within the United States, but shall not include any business firm whose primary function in the resale of industrial gases and welding products is the distribution of industrial gases and welding products to entities engaged in the plumbing, heating or air conditioning trade.

4. "Location" shall mean a bona fide sales and distribution facility operated by a distributor as a receiving or distribution point for industrial gases, which facility ordinarily carries an inventory of industrial gases and welding products and is staffed with a bona fide sales force and operating and/or distribution personnel. Two or more facilities that are staffed by common sales and operating and/or distribution personnel shall be deemed to comprise a single location.

5. "Requirements" of any distributor for an industrial gas at any location shall mean such distributor's total requirements for such industrial gas either delivered to such location or delivered direct by the distributor to using customers which are generally served by sales or distribution personnel assigned to such location.

I

It is ordered and directed, That for a period of twenty (20) years from the date of service of this order, respondent Airco, Inc. (hereinafter Airco), its subsidiaries, divisions, affiliates, successors, and assigns, in connection with the distribution, offering for sale, or sale of industrial gases or welding products to distributors in which it owns less than a majority interest, shall:

A. Not offer, renew, extend or enter into any contracts or agreements, or enforce directly or indirectly those provisions of any contract or agreement, which require any distributor:

1. to purchase from Airco all or any part of its requirements of any industrial gas under a contract or agreement (a) having an initial term,

or a term on renewal, of more than 1 year or (b) if the agreement shall renew itself on an anniversary date unless terminated, or be terminable on notice, requiring prior notice of more than 90 days to effect such termination; or

2. to purchase from Airco all or any part of its requirements of any industrial gas at one or more locations as a condition to being permitted to purchase from Airco such industrial gas at another location; or

3. to purchase from Airco all or any part of its requirements of any industrial gas at any location as a condition to be permitted to purchase from Airco any other industrial gas at the same or any other location; or

4. to purchase from Airco all or any part of its requirements of any industrial gas at any location as a condition to being permitted to purchase from Airco any welding products.

B. Not refuse to sell, subject to Paragraph A 1 above, industrial gases or welding products to an Airco distributor because that distributor refuses (1) to purchase all or a designated part of its requirements of industrial gases from Airco; or (2) to purchase from Airco all or any part of its requirements of industrial gases at more than one of its locations.

II

It is further ordered, That for a period of twenty (20) years from the date of service of this order:

A. If Airco has at its instance refused to sell to an Airco Distributor one or more industrial gases or welding products, following an election by that distributor to purchase one or more industrial gases from a supplier other than Airco, and a dispute exists between the distributor and Airco as to whether such refusal by Airco, subject to Paragraph I A 1 above, is because that distributor refuses (1) to purchase from Airco all or a designated part of its requirements of industrial gases; or (2) to purchase from Airco all or any part of its requirements of industrial gases at more than one of its locations, then the distributor or Airco may elect to have the dispute determined by arbitration under this Part II. If the arbitrators shall determine that such refusal by Airco was by reason of an aforementioned refusal to purchase by the distributor, Airco may nevertheless refuse to sell industrial gases or other welding products to such distributor if it is determined by the arbitrators that (a) such refusal was not in reprisal for the distributor's election to purchase industrial gases elsewhere than from Airco and (b) there was no commercially advantageous and less restrictive alterna-

tive available to Airco enabling Airco to market in the distributor's market area such industrial gas or gases purchased by the distributor from other sources.

In making such determinations, the arbitrators (i) shall consider, among other facts they deem relevant and to the extent they deem relevant, the current and prior relationship and course of business between Airco and the distributor and between Airco and other distributors; other practical business alternatives open to Airco; the present and future effect of the refusal to sell by Airco on other Airco distributors; and Airco's goals as to market participation and profitability; (ii) shall be guided by applicable law as to issues raised and (iii) shall not regard as itself dispositive but shall consider their conclusion (if they do so conclude) that Airco's said refusal to sell would not have occurred but for the earlier refusal to purchase by the distributor.

B. Unless otherwise agreed to by the parties, arbitration shall be held by three arbitrators and at a location in the United States designated by the distributor and in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The award of the arbitrators shall be final and binding on both parties. The arbitrators shall, upon a proper showing, issue protective orders and/or receive evidence *in camera* in the same manner as an administrative law judge of the Federal Trade Commission. In the event of a default by either party in appearing before the arbitrators, the arbitrators are authorized to render a decision, pursuant to advance written notice, upon the testimony of the party appearing.

C. Airco will not refuse to sell to any distributor eligible to invoke arbitration under this Part II without providing 60 days written notice to the distributor (a "discontinuance notice"). Any demand by a distributor for arbitration shall be delivered by notice in writing to Airco within 60 days of receipt of a discontinuance notice. Any demand by Airco for arbitration shall be effective upon notice to the distributor. Where arbitration has been demanded by either party, Airco may not refuse to sell the product referred to in the discontinuance notice to such distributor pending the decision of the arbitrators. The arbitrators shall render their decision within 120 days from the date of demand for arbitration and shall have the mandate to impose a time schedule for briefing, argument, presentation of evidence and the like to permit such time limit to be observed. The costs other than attorneys' fees shall be shared equally by the distributor and by Airco if Airco is the successful party in the arbitration and solely by Airco if the distributor prevails, unless in the course of arbitration it is determined by the arbitrators that either of the parties did not act in

good faith, in which event that person not acting in good faith shall bear all such costs.

D. The distributor's right to arbitration shall be clearly set forth in any distributor agreements that Airco shall enter into with its distributors.

E. As soon as feasible and in any event within 10 days after receipt by Airco of a distributor's demand for arbitration under this Part II, or simultaneously with transmittal by Airco of an arbitration demand to a distributor, Airco shall notify the Commission of such demand and the nature of the dispute. Airco shall also notify the Commission of the names of the arbitrators and the dates of the arbitration hearings within 10 days of the time known. The Commission may at its election intervene as friend of the arbitrators, and present evidence, engage in argument and submit briefs.

If Airco shall initiate arbitration hereunder, then the Commission may, in its sole discretion, at any time before any evidence has been taken suspend the provisions of this Part II respecting such arbitration. Airco will, if arbitration was initiated by it, on demand, provide the Commission with reasonable information for it to determine whether to suspend arbitration proceedings. If the Commission elects to suspend the provisions of Part II, Airco will not effect its refusal to sell to the distributor for at least 120 days from the date of receipt of the Commission of Airco's arbitration demand. In order for the Commission to have time to assess its possible courses of action pursuant to this order, the arbitrators shall not commence the taking of evidence prior to 60 days from the date of receipt at the office of the Commission of notification of such arbitration demand or such earlier time as to which the Commission may agree.

F. If the distributor shall prevail in the arbitration, then Airco shall enter into an appropriate contractual relationship in conformity with this order.

G. The Commission will not assert any claim that Airco has violated this order based merely upon the subject matter of any dispute arbitrated hereunder unless Airco has failed to comply with the award of the arbitrators in such dispute.

H. If in any arbitration under Part II the distributor prevails but elects not to be reinstated or continued as an Airco distributor as to products covered by the arbitration, then the following shall apply if the distributor so elects in writing delivered within 30 days of the date of the arbitration award.

If the distributor shall have had furnished to him by Airco more than 50% in dollar value (determined at the time of the distributor's said election based upon the then replacement cost) of cylinders of all kinds

used in its industrial gases business, whether the furnishing thereof by Airco has been by lease, rental, demurrage, loan or any other arrangement in which ultimate ownership has been retained by Airco, then Airco agrees it will, at the distributor's election, sell all or any part of such cylinders belonging to it and used by the distributor to the distributor at a price which is the greater of the average of the book value on the books of Airco of such cylinders of like kind or 85% of the replacement value thereof. Airco further agrees that it will finance the sale to the distributor of such cylinders in a transaction calling for payment of principal and interest over a 10-year period, at an interest rate equivalent to that currently prevailing in financial circles for similar risks.

III

It is further ordered:

That for a period of twenty (20) years from the date of service of this order, Airco shall not, either directly or indirectly through subsidiaries in which Airco owns a majority interest, (i) lease or otherwise make available to customers of any distributor who has ceased purchasing one or more Airco industrial gases within the preceding two years, industrial gas cylinders at rental or demurrage rates set for the purpose of destroying a competitor or eliminating competition, or (ii) lease or otherwise make available to competitors of any distributor who has ceased purchasing one or more Airco industrial gases within the preceding two years, industrial gas cylinders at rental or demurrage rates lower than the standard rental or demurrage rate for such cylinders then in effect for Airco industrial gas distributors for the purpose of destroying a competitor or eliminating competition; *provided, however*, that if either a standard cylinder rental rate schedule to Airco industrial gas distributors or a standard cylinder demurrage rate schedule to such distributors, but not both, is in effect, then, for the purpose of this Part III, one shall be deemed to be equivalent to the other on the basis of the revenue that would be generated by a single cylinder during a two-month period of continuous usage, rounded to the nearest cent; and *provided, further*, that for the purpose of this Part III, a standard cylinder rental or demurrage rate shall be a rate which is available to all Airco industrial gas distributors; and *provided, further*, that the purpose of destroying a competitor or eliminating competition must be established by proof of intent on the part of Airco to destroy the industrial gas business of, or eliminate as a competitor, a distributor who has ceased to distribute one or more Airco industrial gases; and evidence that Airco has engaged in price competition with

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such distributor or that Airco intends to seek or obtain the trade of particular customers then being served by such distributor shall not, by itself, be sufficient to establish such intent; and *provided, further*, that Airco may set rental or demurrage rates for customers or competitors of such distributor lower than those in effect for Airco industrial gas distributors in good faith response to competitive conditions in the area served by such distributor; and *provided, still further*, that Airco shall have all defenses which would be available in law, including, but not limited to, the defenses of meeting competition and cost justification.

IV

It is further ordered:

That if provisions of the consent order entered against Union Carbide Corporation on September 28, 1977 in settlement of a proceeding in FTC Docket No. C-2902 similar to provisions of this order, are hereafter modified or revoked, then Airco may apply to the Commission for modification of, or relief from, any such provisions in this order, and upon such application the Commission shall grant such modification or relief in the provisions of this order covered by such application as is necessary to conform such provisions in this order with the modified provisions of such Union Carbide consent order.

V

It is further ordered:

That Airco shall within twenty-one (21) days after service upon it of this order forward a copy of this order and the complaint issued herein, along with a copy of the attached letter (Attachment A) on respondent's official company stationery and signed by a responsible official of Airco to distributors of Airco industrial gases and/or welding products.

VI

It is further ordered:

That Airco notify the Commission at least thirty (30) days prior to any proposed changes in corporate structure of Airco such as dissolution, assignment or sale resulting in the emergence of a successor corporation, which may affect compliance obligations arising out of the order.

VII

It is further ordered:

That Airco 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 in which it has complied with this order, and shall file such other reports as may from time to time be required to assure compliance with the terms and conditions of this order.

ATTACHMENT A

(LETTERHEAD OF AIRCO, INC.)

Date:

Dear ————:

Airco has entered into a consent order with the Federal Trade Commission which obligates the company not to impose certain restrictions upon its distributors* of industrial gases* and welding products* or to engage in certain other practices. A copy of the consent order is attached. In brief, Airco has agreed not to require the purchase by any Airco distributor of any industrial gas at any location* as a condition of his being permitted to buy any other gas, or to buy the same gas at another location, or to buy any welding product, and will not refuse to sell a particular gas or welding product to an Airco distributor because he discontinues buying another product from Airco.

Airco has also agreed not to enforce any provisions of any existing contracts for the purchase of industrial gases or welding products which are inconsistent with the consent order. As a consequence, your present single contract with us covering your requirements* for all the industrial gases you now buy from us may now be treated by you as a group of identical but separate contracts, each covering your requirements for one industrial gas. These contracts may be terminated by you for all the products you buy, or separately for particular products or for any specific location, upon prior written notice to us of not less than 90 days (even though your contract may provide for a longer notice) effective at the next anniversary date under your existing contract, or if the anniversary date falls within 90 days of the date hereof, then 90 days after such notice.

Within six months of the date* of this letter, Airco will submit to you a new form of supply contract consistent with the consent order discussed above. If you terminate any existing contract, you will be offered this new contract in its place. In any event, the new contract will replace all current contracts as soon as our commitments with our respective distributors permit us to effect the substitution, and we will issue appropriate notices of termination to our distributors at the time we circulate the new form of contract.

Finally, your attention is called to the provisions of Part II of the order giving you the right to arbitrate certain disputes which you might have with Airco as to Airco's right to discontinue dealing with you because you have elected to purchase industrial gases from another supplier.

* The terms "industrial gases," "welding products," "distributor," "requirements" and "location" are defined in the enclosed order.

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If in the future, you believe that any of the terms of the enclosed consent order have been violated, you may report the details in writing to:

Federal Trade Commission
Bureau of Competition
Washington, D.C. 20580

Very truly yours,

(Name and Title of
Responsible Official)
Airco, Inc.

IN THE MATTER OF
PENDLETON WOOLEN MILLS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-2985. Complaint, July 31, 1979 — Decision, July 31, 1979

This consent order, among other things, requires a Portland, Ore. manufacturer of wool products to cease fixing, maintaining, or enforcing resale prices for its products; soliciting the identity of dealers who fail to conform to such prices; and taking adverse action against recalcitrants. Respondent is also prohibited from restricting the use of product trademarks or other identification in the sale or advertising of such products; and barred from suggesting retail prices for any product until April 20, 1982.

Appearances

For the Commission: *Jeffrey Klurfeld.*

For the respondent: *James H. Clarke and William Lubersky, Spears, Lubersky, Campbell & Bledsoe, Portland, Oregon.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Pendleton Woolen Mills, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, 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:

For purposes of this complaint, the following definitions shall apply:

"Product" is defined as any item which is manufactured, offered for sale or sold by respondent. Product shall not include any item which Jacques deLoux, Inc. manufactures or purchases from any third party, and which it sells to any person, partnership, corporation or firm other than to respondent.

"Dealer" is defined as any person, partnership, corporation or firm which sells any product in the course of its business.

PARAGRAPH 1. Respondent Pendleton Woolen Mills, Inc. is a corpora-