

Complaint

98 F.T.C.

IN THE MATTER OF

LEHIGH PORTLAND CEMENT COMPANY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF
THE CLAYTON ACT*Docket 9142. Complaint, July 30, 1980—Decision, Oct. 30, 1981*

This consent order requires, among other things, an Allentown, Pennsylvania corporation engaged in the production of cement to divest, in accordance with the terms of the Order, the Universal plant at Hannibal, Missouri and three Midwestern States distribution facilities. The order also bars the company for specified time periods, from making certain acquisitions in prescribed areas, without prior Commission approval.

Appearances

For the Commission: *Stephen Riddell* and *Seth B. Zimmerman*.

For the respondent: *Richard C. Lowery* and *Nolan E. Clark*,
Kirkland & Ellis, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Lehigh Portland Cement Company ("Lehigh"), a corporation subject to the jurisdiction of the Commission, intends to acquire the assets of the Universal Atlas Division ("Universal") of the United States Steel Corporation ("U.S. Steel"), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and 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, pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, as amended, 15 U.S.C. Section 45(b), stating its charges as follows:

I. Definitions

1. For the purpose of this complaint the following definitions shall apply:

a. *Portland cement* includes Types I through V of portland cement as specified by the American Society for Testing Materials. Neither masonry nor white cement is included.

b. *Relevant Market* refers to the manufacture and sale of portland cement in the "Midwestern Market," which consists of the northeastern region of the State of Missouri, the State of Iowa, the southern region of the State of Minnesota, the western region of the State of Wisconsin, the State of Illinois excluding the southern region, and the northwestern region of the State of Indiana.

II. Lehigh

2. Lehigh is a corporation organized and existing under the laws of the State of Pennsylvania with its principal office at 718 Hamilton Mall, Allentown, Pennsylvania.

3. Lehigh is a wholly-owned subsidiary of Heidelberg Cement, Inc. (a corporation organized and existing under the laws of the State of Delaware), which is a wholly-owned subsidiary of Heidelberger Zement Aktiengesellschaft ("Heidelberger") (a corporation organized and existing under the laws of the Federal Republic of Germany).

4. Lehigh is engaged primarily in the production and sale of portland cement.

5. In 1979, Lehigh had total sales of \$104,700,000 and total assets in 1980 of \$167,000,000.

6. Lehigh has portland cement plants located in Iowa, Indiana, Maryland, New York, and Washington. Lehigh's Mason City, Iowa and Mitchell, Indiana plants sell portland cement in the Midwestern Market.

III. U.S. Steel

7. U.S. Steel is a corporation organized and existing under the laws of the State of New Jersey, with its principal office at 600 Grant Street, Pittsburgh, Pennsylvania.

8. U.S. Steel's cement manufacturing division, Universal Atlas, produces and sells portland cement and specialty cement.

9. In 1979, Universal had total sales of approximately \$156,000,000 and total assets in 1980 of \$138,000,000.

10. Universal has portland cement plants located in Missouri, Kansas, Alabama, Indiana, Wisconsin, Illinois, Pennsylvania, and Texas. Universal's Buffington, Indiana and Hannibal, Missouri plants sell portland cement in the Midwestern Market.

IV. Jurisdiction

11. At all times relevant herein U.S. Steel and Lehigh have been engaged in the production and sale of portland cement in interstate

commerce and U.S. Steel and Lehigh are engaged in commerce as "commerce" is defined in the Clayton Act, as amended, 15 U.S.C. 12, *et seq.*, and each is a corporation whose business is in or affects commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, 15 U.S.C. 41, *et seq.*

V. The Acquisition

12. On or about February 15, 1980, Heidelberger and U.S. Steel entered into an agreement in principle which provides, *inter alia*, for the acquisition of the assets of Universal. Heidelberger and U.S. Steel have been working toward a final agreement and plan that on July 31, 1980, or soon thereafter, Lehigh will acquire Universal's assets, including the cement plants at Hannibal and Buffington.

VI. Trade and Commerce

13. The relevant line of commerce is the manufacture and sale of portland cement.

14. The relevant section of the country is the Midwestern Market.

VII. Actual Competition

15. U.S. Steel and Lehigh are now and have been for many years actual competitors in the manufacture and sale of portland cement within certain geographic markets, including the Midwestern Market.

VIII. Effects

16. The effects of the proposed acquisition may be substantially to lessen competition or to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and the acquisition constitutes an unfair method of competition and unfair act or practice within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

- (a) actual competition between Lehigh and U.S. Steel in the relevant market may be eliminated;
- (b) actual competition among competitors generally in the relevant market may be lessened;
- (c) concentration in the relevant market may be increased and the possibilities for eventual deconcentration may be diminished;

(d) mergers or acquisitions between other portland cement producers in the relevant market may be fostered, thus causing a further substantial lessening of competition or tendency toward monopoly in that market; and

(e) barriers to entry into the relevant market may be increased.

Violations Charged

17. By reason of the foregoing, the proposed acquisition by Lehigh of the assets of Universal constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violations of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

Respondent Lehigh Portland Cement Company (hereinafter "Lehigh"), its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by Lehigh 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 Lehigh 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(f) of its Rules, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Lehigh Portland Cement Company is a corporation organized, existing and doing business under the laws of the State of Pennsylva-

nia with its principal office located at 718 Hamilton Mall, Allentown, Pennsylvania.

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 purposes of this Order, the following definitions shall apply:

1. "Lehigh" means Lehigh Portland Cement Company, a corporation, organized, existing and doing business under the laws of the State of Pennsylvania with its principal office located at 718 Hamilton Mall, Allentown, Pennsylvania, and its subsidiaries and the successors and assigns of its business. For the purpose of Paragraphs III, IV, VI and VII of this Order only, "Lehigh" also includes Heidelberg Cement, Inc. (hereinafter "HCI"), a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office located at 100 West Tenth Street, Wilmington, Delaware, and its subsidiaries and the successors and assigns of its business, and Heidelberger Zement Aktiengesellschaft (hereinafter "Heidelberger"), a corporation organized, existing and doing business under the laws of the Federal Republic of Germany, with its principal office located at Berliner Strasse 6, 6900 Heidelberg, West Germany, and its subsidiaries and the successors and assigns of its business.

2. With respect to any business entity named herein, "Subsidiary" means any corporation in which such named business entity owns more than fifty percent (50%) of the outstanding shares of a class of securities having voting power to elect a majority of the Board of Directors of the corporation (whether or not any other class of security has or might have voting powers by reason of the happening of a contingency).

3. "Cement" means portland cement clinker or finished portland cement Types I through V, as specified by the American Society for Testing and Materials. Neither masonry cement, white cement, masonry clinker, nor white cement clinker is included.

4. "Lehigh Cement Manufacturing Plant" means a facility which is then owned by Lehigh, HCI or Heidelberger and which is then engaged in the manufacture of Cement or has been engaged in the manufacture of Cement within the immediately preceding twelve (12) months. For any acquisition(s) of Assets subject to Paragraph IV

of this Order, "Lehigh Cement Manufacturing Plant" shall be determined as of the date of each such acquisition of Assets.

5. "Plant Area" means (i) the area included within the States of Missouri, Iowa, Minnesota, Wisconsin, and Illinois so long as a Lehigh Cement Manufacturing Plant is located within any of these states and (ii) each area in the United States within a 300 mile radius of any Lehigh Cement Manufacturing Plant (except for the facility located at Buffington, Indiana) not located within such states. For any acquisition(s) of Assets subject to Paragraph IV of this Order, "Plant Area" shall be determined as of the date of each such acquisition of Assets.

6. With respect to any acquisition subject to Paragraph IV of this Order, "Assets" means:

(a) any Cement manufacturing plant located in any Plant Area other than a Cement manufacturing plant that has not been engaged in the manufacture of Cement for at least twelve (12) months immediately preceding its acquisition;

(b) any Cement distribution terminal located in any Plant Area other than a Cement distribution terminal that has not been used as a Cement distribution terminal for at least three (3) months immediately preceding its acquisition; or

(c) any equity interest in a business entity, corporate or non-corporate (other than the equity securities of a business entity in which Lehigh owned an equity interest as of February 29, 1980), which owns a facility or facilities described in (a) or (b) above.

7. "U.S. Steel" means United States Steel Corporation, a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office located at 600 Grant St., Pittsburgh, Pennsylvania.

8. "Hannibal Plant" means the Cement manufacturing plant located at Hannibal, Missouri and the Cement distribution terminals located at Summit, Illinois, Bettendorf, Iowa and St. Louis, Missouri, all of which Lehigh has acquired from U.S. Steel, together with such other assets associated with the plant and terminals as may be necessary for the plant and terminals to operate as a going concern and a viable competitor in the production and sale of Cement.

I

It is ordered, That within two (2) years from the date on which this Order becomes final, Lehigh, its directors, officers, employees, and agents shall divest absolutely all right, title and interest in the

Hannibal Plant together with any and all additions and improvements thereto. Divestiture shall be made to an acquirer or acquirers subject to the prior approval of the Federal Trade Commission.

II

It is further ordered, That pending divestiture of the assets required by Paragraph I of this Order, Lehigh shall not cause or permit the wasting or deterioration of such assets, in any manner which may impair the marketability or viability of any such assets, except for normal wear and tear or in the ordinary course of operation.

III

It is further ordered, That the divestiture required by this Order shall not be made, directly or indirectly, to any person who, at the time of divestiture, is a director, officer, employee or agent of, or is otherwise under the control or direction of, Lehigh.

IV

It is further ordered, That, for a period of ten (10) years from the date on which this Order becomes final, Lehigh shall not acquire, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Federal Trade Commission, the whole or any part of any Assets, located in any Plant Area(s) in which Lehigh, at the time of the acquisition, is then engaged in the manufacture of Cement at a Lehigh Cement Manufacturing Plant.

Provided, however, that if Lehigh acquires any Assets which are located only in Plant Area(s) in which no Lehigh facility is then engaged in the manufacture of Cement, but in which any Lehigh facility has been engaged in the manufacture of Cement within twelve (12) months immediately preceding such acquisition of Assets, then Lehigh shall not, without prior Commission approval, engage in the manufacture of Cement at such non-operating facility or facilities for a period of twelve (12) months from the date of such acquisition of Assets or for a period of ten (10) years from the date on which this Order becomes final, whichever period is greater.

Further provided, however, that nothing in this Paragraph affects the lawfulness, under the antitrust laws of the United States, of any acquisition of Assets by Lehigh.

V

It is further ordered, That within one hundred twenty (120) days from the date on which this Order becomes final, and every one hundred twenty (120) days thereafter until it has fully complied with Paragraph I of this Order, Lehigh shall submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which it intends to comply, is complying or has complied therewith. All such reports shall include, in addition to such other information and documentation as may hereafter be requested, (a) a specification of the steps taken by Lehigh to make public its desire to divest the assets described herein, (b) a list of all persons or organizations to whom notice of divestiture has been given, (c) a summary of all discussions and negotiations together with the identity and address of all interested persons or organizations, and (d) copies of all reports, internal memoranda, offers, counteroffers, communications and correspondence concerning said divestiture.

VI

It is further ordered, That within ninety (90) days of January 1, 1982, and annually thereafter until the expiration of the prohibitions in Paragraph IV of this Order, Lehigh shall submit in writing to the Federal Trade Commission verified reports listing all acquisitions of any equity interest in, and mergers with, any business entity, corporate or non-corporate, engaged in the production of Cement in the United States, the date of each such acquisition or merger, and such additional information relating thereto as may from time to time be requested.

VII

It is further ordered, That Lehigh shall notify the Commission at least thirty (30) days prior to any proposed corporate changes which may affect compliance obligations arising out of this Order, such as dissolution, assignment or sale resulting in the emergence of successor corporations.

Modifying Order

98 F.T.C.

IN THE MATTER OF

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF
AMERICA, LOCAL UNION 959MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-2963. Order, May 9, 1979—Modifying Order, Nov. 2, 1981*

In response to recent appeals court decisions under the National Labor Relations Act (NLRA), this order reopens the proceeding and modifies the Commission's order issued on May 9, 1979 (44 FR 34923, 93 F.T.C. 739) by modifying the last proviso of the first ordering paragraph, so as to permit Local 959 to negotiate NLRA-authorized subcontracting agreements with construction industry employers.

ORDER

The Commission on September 18, 1981 having issued an order against respondent to show cause why the proceeding herein should not be reopened for the purpose of modifying the first ordering paragraph of the consent order to cease and desist entered on May 9, 1979; and respondent having answered that it has no objection to the reopening of the proceeding and the modification of the consent order, as set forth in the order to show cause;

Accordingly, *It is ordered*, That the matter is reopened and that the first ordering paragraph of the order herein is modified so that it will read:

It is ordered, That respondent International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 959, its successors and assigns, affiliated sub-divisions, officers, trustees, employees, agents and members, directly or indirectly through any other form of business organization, shall forthwith cease and desist from:

1. Entering into any agreement or understanding that requires an employer engaged in the construction business to use or deal only with third party businesses who agree to perform work on the same terms and conditions as are agreed to between such employer engaged in the construction business and respondent;
2. Entering into any agreement or understanding with an employer engaged in the construction business that requires a third party business to be signatory to a collective bargaining agreement