

Modifying Order

106 F.T.C.

IN THE MATTER OF

ATLAS SUPPLY CO., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION AND CLAYTON ACTS*Docket 5794. Order, July 19, 1951—Modifying Order, Oct. 8, 1985*

The Federal Trade Commission has denied a request from Atlas Supply Co. and its parent companies to set aside a 1951 cease and desist order (48 F.T.C. 53), but has modified the order by deleting one provision that restricted the joint purchasing activities of respondents.

ORDER MODIFYING CEASE AND DESIST ORDER ISSUED JULY 19, 1951

On June 7, 1985, Atlas Supply Company ("Atlas") and its shareholders, Amoco Oil Holding Company, The Standard Oil Company (Ohio), Chevron U.S.A. Inc., and Exxon Corporation filed a "Request To Reopen And Set Aside Cease And Desist Order" ("Request"), pursuant to Section 5(b) of The Federal Trade Commission Act, 15 U.S.C. 45(b) and Section 2.51 of the Commission's Rules of Practice. The Request asked the Commission to reopen the proceeding and terminate the cease and desist order issued on July 19, 1951 ("the order").

The order contains five substantive ordering paragraphs. The first two ordering paragraphs require Atlas and its shareholders to cease and desist from receiving or transmitting commissions, brokerage, or other compensation in connection with their purchases of automobile tires, tubes, batteries or other automobile parts or accessories ("TBA") in violation of Section 2(c) of the Robinson-Patman Act. The third and fourth ordering paragraphs require respondents to cease and desist from knowingly inducing or accepting discriminatory prices in connection with their TBA purchases in violation of Section 2(f) of the Robinson-Patman Act unless a cost saving or good faith meeting of competition justification exists. The fifth ordering paragraph, which was issued pursuant to Section 5 of the Federal Trade Commission Act, prohibits respondents from using their combined purchasing power in connection with their TBA purchases to obtain any "price, discount, rebate, allowance or other treatment from a seller which is preferential to that allowed, afforded or made available by such seller" to competitors of any of the respondents. After reviewing the Request, the Commission has concluded that respondents have not made a satisfactory showing that changed circumstances or public interest considerations require that the Robinson-Patman Act provisions of the order be terminated. The Commission has determined,

however, that it is in the public interest to modify the order to set aside the provision that prohibits Atlas and its shareholders from using their combined purchasing power to obtain preferential treatment from suppliers in connection with their joint TBA purchases.

Respondents have not shown how they are harmed by their obligation to comply with the Section 2(c) and 2(f) provisions of the order which they concede "do little more than repeat the Robinson-Patman Act . . ." Request, p.4. Respondents do not assert that the conduct in which they engaged prior to 1951 is no longer violative of the Robinson-Patman Act nor do they make any showing that the R-P provisions of the order inhibit lawful activity in which they wish to engage. Because the Section 2(c) and 2(f) provisions of the order merely require compliance with the law, they do not put respondents at a disadvantage with respect to their competitors who are also obliged to obey the law, nor do they impose any restrictions on respondents' lawful activities. Respondents' primary argument is that in view of the passage of thirty-four years since the order was issued there is no reason to suppose that the resumption of joint purchasing by Atlas and the other respondents would be accompanied by violations of the Robinson-Patman Act. However, the deterrent effect of law enforcement actions by the Commission could be adversely affected if the Commission were to sunset conduct orders that do no more than require compliance with the law. And in recent cases the Commission has declined to terminate conduct orders solely because of their age. See, e.g., *William H. Rorer, Inc.*, Docket No. 8599, Modifying Order issued September 14, 1984 [104 F.T.C. 544] (Commission declined to set aside a 17-year old order issued under Section 2(a) of the Robinson-Patman Act, although it did terminate fencing in provisions); *National Dairy Products Corp.*, 100 F.T.C. 431 (1982) (Commission declined either to rescind or terminate in five years a perpetual order issued under Section 2(a) of the Robinson-Patman Act); *ABC Vending Corp.*, Docket No. 7652 (Letter from Secretary of the Commission to Arthur H. Kahn, Esquire, dated January 28, 1982. Commission declined to set aside perpetual order provision based on Section 2(f) of the Robinson-Patman Act that "merely restates the law that must be adhered to by the respondent . . . and consequently does not hinder the respondent's ability to compete.").

On the other hand, the Commission has concluded that the public interest warrants modifying the order to set aside its fifth ordering paragraph which prohibits Atlas and its shareholders from using their combined purchasing power to obtain preferential treatment from suppliers in connection with their joint TBA purchases. As the Request observes, this provision does not define "preferential" nor, in contrast to the Robinson-Patman Act provisions of the order, does it

include any specific recognition of the availability of a cost justification or meeting competition defense. Request, p.4. It thus forbids conduct that would be lawful under the Robinson-Patman Act. To the extent that this provision was included in the order out of concern that the market growth which had been experienced by the Atlas brands from 1930 to 1949 threatened a recurrence, in TBA at least, of the monopoly power of the original Standard Oil Company, Request, p.5, respondents have demonstrated that in the thirty-four years since the order was issued there has been no such recurrence of monopoly power with respect to TBA and no tendency in that direction. In contrast to the situation at the time the order issued when it was stipulated that Atlas products approximated ten percent of the total replacement sales of TBA products in the United States, Atlas brands today represent TBA market shares ranging from a high of 3.26 percent (oil filters) to a low of 0.176 percent (remanufactured starters and alternators). Nevertheless, according to the Request, the breadth of the possible reach of the fifth ordering paragraph has caused Atlas and its shareholders to forego any consideration of joint purchasing regardless of efficiencies or competitive considerations. Request, p.5. The fifth ordering paragraph initially served a legitimate purpose in that it assured the termination of the violations of the Robinson-Patman Act that had been associated with respondents' joint purchasing activities. It appears, however, that this provision of the order has long since accomplished its remedial purpose and is now serving to inhibit respondents from engaging in lawful competitive behavior. Despite the passage of thirty-four years since the order issued, respondents' competitors in the TBA industry have not been placed under any comparable restraint. Moreover, in many instances joint buying groups may facilitate pro-competitive economies and efficiencies without significant countervailing anticompetitive effects. Request, pp. 10-12.

Accordingly, *it is ordered*, that this matter be, and it hereby is, reopened, and that the fifth ordering paragraph of the Commission's order issued on July 19, 1951, shall be of no further force and effect as of the effective date of this modifying order.

IN THE MATTER OF

BOC INTERNATIONAL, LIMITED, ET AL.
(formerly known as British Oxygen Company, Limited)

Docket 8955. Interlocutory Order, October 9, 1985.

ORDER LIFTING *IN CAMERA* TREATMENT AND
PLACING EXHIBITS ON THE PUBLIC RECORD

By order of January 14, 1978, the Commission temporarily reinstated *in camera* treatment for certain evidentiary exhibits in this matter, pending receipt of answers to, and resolution of, motions for extension of the *in camera* treatment of these documents by BOC for one year and Airco for three months or until document production was complete in another proceeding. On May 14, 1980, the Commission dismissed the complaint in this matter without resolving the motions, thus leaving the documents in an *in camera* status.

On January 5, 1985, access was requested under the Freedom of Information Act, 5 U.S.C. 552 ("FOIA"), for documents submitted during investigation of companies in the industrial gas industry. All responsive documents were examined pursuant to the request to ascertain whether they were protected from mandatory public disclosure by the exemptions contained in the FOIA. That examination included analysis of whether the exhibits described below warranted continuing *in camera* protection. Because, as explained below, the Commission has determined that *in camera* treatment is no longer justified, the documents will become part of the public record in this matter. Accordingly, no FOIA exemptions will apply to them.

The exhibits in question were entered into evidence in the matter of *British Oxygen Company, Limited*, D. 8955, [86 F.T.C. 1241 (1975), *dismissed*, 95 F.T.C. 805 (1980)] as CX 78, 95, 161, 162, 163, 232, 254, 255, and 301. They consist of business records containing financial information that was sensitive to the parties at the time it was introduced into evidence in 1974 and other information reflecting BOC's interest during the period from 1970 through 1973 in entering the United States industrial gas market. The exhibits also comprise reports of interviews held in 1973 with Airco's two top executives. The latter group of documents includes evaluations made twelve years ago of Airco's top executives and its Board of Directors.

There is a strong public interest in holding all aspects of Commission adjudicative proceedings open to interested persons for public inspection and understanding. Accordingly, the Commission's Rules of Practice provide for issuance of *in camera* orders only in unusual