

IN THE MATTER OF

GENERAL RAILWAY SIGNAL CO., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT AND SEC. (2) OF THE CLAYTON ACT*Docket C-837. Consent Order, Sept. 24, 1964—Modifying Order, Nov. 13, 1986*

The Federal Trade Commission has modified a 1964 consent order (66 F.T.C. 882) by permitting American Standard Corp., a successor to original respondent Westinghouse Air Brake, to engage in activities necessary to participate in lawful joint ventures. The FTC found that respondent "has adequately demonstrated that evolving technological and economic factors in the railroad signaling equipment and systems industry have created a competitive need for American Standard to participate in joint ventures . . .".

ORDER MODIFYING CONSENT ORDER

ISSUED SEPTEMBER 24, 1964

On April 8, 1986, American Standard Inc. ("American Standard"), successor to respondent Westinghouse Air Brake Co. ("WABCO"), filed a "Request To Reopen Proceeding and Terminate 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 asks the Commission to reopen the proceeding and vacate the consent order issued September 24, 1964, ("order") in its entirety. In the alternative, the Request asks the Commission to modify the order "to permit conduct that is otherwise permissible under the antitrust laws, including conduct that is reasonably ancillary to the formation or operation of lawful joint ventures, exempt from application of the antitrust laws, or beyond the subject matter jurisdiction of the FTC."

After reviewing the Request and other relevant information, the Commission has concluded that it is in the public interest to modify the order to permit American Standard to engage in conduct that is ancillary to and reasonably necessary for the formation or operation of any joint venture that is lawful under the antitrust laws. American Standard has adequately demonstrated that evolving technological and economic factors in the railroad signaling equipment and systems industry have created a competitive need for American Standard to participate in joint ventures to research, develop and produce integrated railroad systems and to bid for "turnkey" railroad projects. The order's present language, designed to restrain conduct that might facilitate collusive agreements, could be interpreted to prohibit other-

wise lawful joint venture activity. It is in the public interest to modify the order to enable American Standard to participate in otherwise lawful joint venture activity because the competitive injury American Standard will likely suffer if it cannot engage in such lawful activity is not outweighed by any need to retain the order in its current form.¹

American Standard also seeks modification of the order to clarify that its terms do not prohibit conduct statutorily exempt from application of the antitrust laws or beyond the subject matter jurisdiction of the Commission under Section 5(a) of the Federal Trade Commission Act, as amended. Such limitations, however, already apply to this order and all other orders of the Commission. Therefore, a modification merely to restate existing law is unnecessary.

American Standard has not made an adequate showing that changed conditions of fact or law, or the public interest, require vacation of the order in its entirety. The order contains provisions that enjoin horizontal agreements concerning prices, territories, markets, customers and certain other matters, which are generally *per se* unlawful. American Standard has not demonstrated that these provisions harm its competitive posture and, accordingly, has not demonstrated a need to modify these provisions.

The order contains several other provisions, including restrictions on the use of requirements contracts and cumulative volume discounts and on exchanges of information about price or other terms of sale. The Commission finds that the asserted changes in fact and law relied upon by American Standard do not provide a basis for vacating these provisions.

Although the domestic signaling industry has become less concentrated since the order was entered, the signaling market remains highly concentrated and is dominated, as it was at the time the order was entered, by two firms, one of which is American Standard. Little new entry has occurred since the order was entered, and foreign signaling firms continue to face substantial barriers to entry. Given this continued market structure, the changes in the domestic signaling industry cited by American Standard do not constitute unforeseeable changes in fact sufficient to require termination of the order's provisions prohibiting requirements contracts, cumulative volume discounts and information exchanges.

Asserted changes in law since 1964 also do not require termination of these provisions. The legality of requirements contracts has always

¹ The order's provisions are aimed at horizontal conduct and agreements. The order language prohibiting agreements with "any other person, persons or business entity not a party hereto" is limited by the existing exemption for any "bona fide offer, agreement or transaction with any other person, persons or business entity to purchase or sell railroad signaling and control systems or railroad signaling equipment at prices, terms or conditions of sale independently determined and offered and independently accepted." The new modification for lawful joint venture activities will be a further limitation. The "any other person . . . not a party hereto" language will, in practical effect, mean only vendors of signaling equipment or systems.

been determined by a rule of reason analysis. Although certain factors, such as the extent of market foreclosure, have received different degrees of emphasis under the rule of reason since the order was entered, this does not rise to the level of a change in law sufficient to reopen and vacate the order. The order reflects a determination that the respondents could use requirements contracts to achieve anticompetitive effects, rather than a determination that all requirements contracts are *per se* anticompetitive. Similarly, the cases cited by American Standard with respect to volume discounts do not establish a fundamental change in law requiring modification of the order. These cases merely articulate the statutory defenses provided by Section 2(a) of the Clayton Act, 15 U.S.C. 13(a), as amended, and such defenses are already available under the order even though not explicitly set forth therein. See *FTC v. Ruberoid*, 343 U.S. 470 (1952); *William H. Rorer, Inc.*, Docket No. 8599, 104 F.T.C. 544 (1984). To the extent that such defenses might have been deemed inapplicable because the prohibition of cumulative volume discounts is premised upon the allegations of the complaint that such discounts violated Section 5 of the Federal Commission Act as well as Section 2(a) of the Clayton Act, the Commission, in the public interest, has determined that the statutory defenses should apply.

American Standard also has not identified public interest considerations sufficient to warrant termination of these provisions of the order. The Commission may determine that the public interest requires reopening of an order if the respondent demonstrates that it is competitively disadvantaged by the order. When such a showing is made, the Commission will weigh the reasons favoring the modification against any reasons not to make the modification. American Standard, however, has not made a threshold showing that it is competitively disadvantaged by these provisions, except to the extent that the order may be construed to prohibit lawful joint ventures. Accordingly, the public interest does not require reopening and termination or modification of these provisions.

Accordingly, *it is ordered*, that this order be and it hereby is reopened and that the Commission's order issued on September 24, 1964, be and it hereby is modified to include a new subparagraph (4), at 66 F.T.C. 882, 893 (1964), to read as follows:

(4) Nothing contained in the foregoing paragraphs of the order shall be construed to prohibit respondent WABCO from engaging in any conduct or entering into any agreement that is ancillary to and reasonably necessary for the formation or operation of a joint venture that is lawful under the antitrust laws.

IN THE MATTER OF
UNION CARBIDE CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND CLAYTON ACTS

Docket C-2902. Consent Order, Sept. 28, 1977—Modifying Order, Nov. 14, 1986

The Federal Trade Commission has modified a 1977 consent order (90 F.T.C. 257) by removing references to welding products and gas welding apparatus. Respondent is no longer in the welding business.

ORDER MODIFYING CONSENT ORDER
ISSUED SEPTEMBER 28, 1977

On May 22, 1986, Union Carbide Corporation ("Carbide") filed a "Request to Reopen Proceeding and Modify 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 Federal Trade Commission Procedures and Rules of Practice, 16 CFR 2.51. The Request asks the Commission to reopen and modify the consent order in Docket No. C-2902. The Request seeks three modifications.

First, Carbide requests that Paragraph I.A.1 of the order be modified to enable it to enter requirements contracts for terms up to five years. The order presently requires that any requirements contracts have initial terms not longer than one year and be terminable annually on not more than 90-day notice. Second, Carbide requests that Paragraph III of the order be modified to enable it to acquire independent distributors of industrial gases upon 30-days prior notice, as opposed to the current requirement that Carbide obtain the prior approval of the Commission for most such acquisitions. Third, Carbide requests that the Commission delete from the order all prohibitions relating to "Welding Products" and "Gas Welding Apparatus."

The Commission has carefully considered Carbide's Request and has concluded that Carbide has not made a satisfactory threshold showing that changed conditions of fact or law or the public interest require Paragraphs I.A.1 or III to be reopened to consider whether these provisions should be modified to allow five-year requirements contracts or distributor acquisitions upon prior notice. However, the Commission has found that reopening the order and deleting references to "Welding Products" and "Gas Welding Apparatus" is warranted by changed conditions of fact and the public interest.

In making these findings the Commission has considered Carbide's