

Set Aside Order

111 F.T.C.

IN THE MATTER OF

GOODYEAR TIRE & RUBBER CO., ET AL.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 6486. Consent Order, March 9, 1961—Set Aside Order, June 2, 1989*

The Federal Trade Commission has set aside a 1961 consent order as to Atlantic Refining Co. ("Arco"), (58 FTC 309), thus removing all requirements and prohibitions because Arco has shown that significant changes of law make it unlikely that the practices prohibited by the order would be found unlawful were the original case brought today.

ORDER REOPENING AND SETTING ASIDE
FINAL ORDER ISSUED ON MARCH 9, 1961

On February 3, 1989, the Atlantic Richfield Company ("Arco") filed a request to reopen and set aside the Final Order that was entered in this proceeding on March 9, 1961, or in the alternative to modify the order. The request was filed 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.

Arco seeks to have set aside or modified the order issued in Docket No. 6486 which prohibits the Atlantic Refining Company ("Atlantic") from entering into certain kinds of contracts with the Goodyear Tire and Rubber Company ("Goodyear") and other of its suppliers. Arco was formed as a result of the merger of Atlantic with other oil companies. Arco is the successor to Atlantic and bound by the terms of the order in Docket No. 6486.

Arco asserts that, since the adjudication of this order, there have been changes of fact and of law that warrant reopening the order and setting it aside, in whole or in part, and that the public interest requires termination or modification of the order. Arco's central contention is that it ought to be allowed to negotiate with suppliers of tires, batteries and other automotive accessories ("TBA") concerning the terms of sale of those items to Arco franchisees that sell Arco petroleum products. Arco asserts that it could negotiate for its franchisees cooperative advertising and other promotional activities that are sponsored by TBA manufacturers. Obtaining such promotion-

al benefits would eliminate a restriction that Arco alleges unnecessarily places Arco and its petroleum franchisees at an unwarranted disadvantage.

The Commission has considered Arco's request and has concluded that Arco has made a showing that warrants setting aside the entire order in Docket No. 6486. Significant changes of law since the order was entered warrant setting aside the order.

Background

On March 9, 1961, the Commission held that the TBA sales commission agreement between Atlantic and Goodyear and another between Atlantic and the Firestone Tire and Rubber Company ("Firestone") constituted unfair methods of competition and violated section 5 of the Federal Trade Commission Act. 58 FTC 309. The Court of Appeals and the United States Supreme Court upheld the Commission's decision and order. 331 F.2d 394 (7th Cir. 1964), 381 U.S. 357 (1965).

Prior to 1951, Atlantic had acquired TBA products and resold them to its petroleum franchisees. In 1951, it switched to a system under which Atlantic selected manufacturers of TBA to supply its franchisees. Atlantic entered into "best efforts" contracts with Goodyear and Firestone. Under these contracts Atlantic agreed that it would exert its best efforts to promote Goodyear products to all of its franchisees within a designated geographic area and Firestone products within another area. In return those companies agreed to limit TBA sales to Atlantic franchisees within the designated areas and to pay Atlantic a commission on all their sales to the franchisees. Under the sales commission plan, designated Goodyear and Firestone wholesalers were allocated geographical regions. In each region, one wholesaler was to be the sole source of TBA supplies to each Atlantic franchisee.

The Commission's decision stated this arrangement was unlawful because it "presents a classic example of the use of economic power in one market (here, gasoline distribution) to destroy competition in another market (TBA distribution)." 58 FTC at 367. The Commission found that Atlantic had "sufficient economic power" to reduce competition that would have existed from suppliers of other TBA products. *Id.* at 364.

Atlantic was found to have successfully implemented its sales commission program through the use of threats and coercion. *Id.* at 347. The decision stated that Atlantic threatened, explicitly and

implicitly, to cancel franchises of gas stations that did not buy the TBA products that Atlantic recommended. *Id.* at 343–47. The gas station franchise agreements were subject to annual review and could be cancelled by Atlantic on a number of subjective grounds. *Id.* 356.

The Hearing Examiner found that sales of TBA were vital to service station owners. TBA provided both the products for the full services expected by customers and additional revenues that made the stations profitable. 58 FTC at 313.

The Commission entered an order that prohibits Atlantic from promoting or coordinating the sale of TBA products from any TBA vendor other than itself to Atlantic franchisees. In summary, the six paragraphs forbid Atlantic from:

1. Entering into agreements with Goodyear or other TBA suppliers in connection with sales by those suppliers to Atlantic franchisees.
2. Accepting anything of value for promoting the sale of any vendor's TBA products.
3. Using contracts, economic incentives and other means to encourage its franchisees to acquire any vendor's TBA products other than Atlantic's.
4. Monitoring the sale of any vendor's TBA products other than its own.
5. Intimidating or coercing its franchisees to acquire TBA products.
6. Preventing or attempting to prevent its franchisees from buying the TBA products of their choice.

The Hearing Examiner's proposed order, in effect, would have imposed only the restrictions of paragraphs 5 and 6. The Commission appears to have added paragraphs 1–4 because it believed the sales commission plans could persist "even without the use of overt coercive tactics or of written or oral tying agreements, and this power is a fact existing independently of the particular method of distributing or sponsoring TBA used by Atlantic." 58 FTC at 364–5.

Standard for Reopening a Final Order of the Commission

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require.¹ A

¹ Section 5(B) provides, in part:

[T]he Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the

satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. *Louisiana Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986) at 4. See, S. Rep. No. 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); see *Phillips Petroleum Co.*, Docket No. C-1088, 78 FTC 1573, 1575 (1971) (modification not required for changes reasonably foreseeable at time of consent negotiations); *Pay Less Drugstores Northwest, Inc.*, Docket No C-3039, Letter to H.B. Hummelt (Jan. 22, 1982) (changed conditions must be unforeseeable, create severe competitive hardship and eliminate dangers order sought to remedy) (unpublished); see also *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) ("clear showing" of changes that have eliminated reasons for order or such that the order causes unanticipated hardship).

The language of Section 5(b) plainly anticipates that the burden is on the requester to make "a satisfactory showing" of changed conditions to obtain reopening of the order. See also *Gautreaux v. Pierce*, 535 F. Supp. 423, 426 (N.D. Ill. 1982) (requester must show "exceptional circumstances, new, changed, or unforeseen at the time the decree was entered"). The legislative history also makes clear that the requester has the burden of showing, by means other than conclusory statements, why an order should be modified.² If the Commission determines that the requestor has made the necessary showing, the Commission must reopen the order to determine whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the requester fails to meet its burden of making the satisfactory showing of changed conditions required by the statute.

person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part.

The 1980 amendment to Section 5(b) did not change the standard for order reopening and modification, but "codified existing Commission procedures by requiring the Commission to reopen an order if the specified showing is made," S. Rep. No. 96-500, 96th Cong., 2d Sess. 9-10 (1979), and added the requirement that the Commission act on petitions to reopen within 120 days of filing.

² The legislative history of amended Section 5(b), S. Rep. No. 96-500, 96th Cong., 2d Sess. 9-10 (1979), states:

Unmeritorious, time-consuming and dilatory requests are not to be condoned. A mere facial demonstration of changed facts or circumstances is not sufficient The Commission, to reemphasize, may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order.

The requester's burden is not a light one in view of the public interest in repose and the finality of Commission orders. See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 296 (1974) ("sound basis for . . . [not reopening] except in the most extraordinary circumstances"); *RSR Corp. v. FTC*, 656 F.2d 718; 721-22 (D.C. Cir. 1981) (applying *Bowman Transportation* standard to FTC order).

Changed Conditions of Law Warrant Reopening the Order

Arco has requested that the Commission set aside the order because of changed conditions of fact and law or, absent changed conditions, because of the public interest. For the reasons described below, changes of law warrant reopening the order against Atlantic. Having reopened and set aside the order on the basis of changes of law, the Commission does not reach the issue of whether the changes of fact or public interest considerations warrant reopening.

In finding a violation, the Commission considered Atlantic's sales commission plan to be in the nature of a tying restriction and that it had unlawful vertical restraint aspects. Arco asserts that in 1961 the Commission did not consider fundamental issues necessary under current legal standards to find that the sales commission plan would be unlawful. Arco also asserts that the practices prohibited by the order are now unlikely to be unlawful. These assertions are of the types that warrant reopening an order and considering appropriate modifications.

1. The Tying Rationale

The Commission's decision was, to a large extent, based on the similarity of this case to a tying restriction where the sale of one product is conditioned on the agreement to buy another. While the opinion did not classify the matter as a tying case, that appears to be because the Atlantic franchise was not explicitly conditioned on the purchase of Goodyear or Firestone products. Nevertheless, the mode of analysis and source of precedent was that of tying cases. 58 FTC at 363-4. The opinion stated, for example, this is "a classic example of the use of economic power in one market (here, gasoline distribution) to destroy competition in another market (TBA distribution)." *Id.* at 367.

Arco points out that the tying concept used by the Commission in this case relies on the Supreme Court's approach to tying in *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958) and related decisions. That line of cases bases illegality on the finding of a tie and the foreclosure of a substantial volume of commerce. Those cases do not require and the Commission did not find that Atlantic had market power in the tying product (franchises for gas stations).

The approach of *Northern Pacific* to unlawful tying was ended in 1977 by the Supreme Court's decision in *United States Steel Corp. v. Fortner Enterprises*, 429 U.S. 610 (1977). In that case, the Court determined that a precondition to finding unlawful tying was establishing that the seller had market power in the tying product (*i.e.*, franchises). It required a finding that the seller have the power to raise price above a competitive level or impose other burdensome terms that could not be imposed in a competitive market. *See also*, *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984).

Despite language in the Commission's opinion about Atlantic's power in the gasoline market, the Commission made no inquiry into the question of whether it had the power to raise price above a competitive level. And, in view of the fact that Atlantic had a market share of less than seven percent of its gasoline market, it seems unlikely that there would have been a basis for such a finding if the inquiry had been made. The Commission's discussion of economic power concerned Atlantic's total assets and the disparity of wealth between Atlantic and its franchisees. 58 FTC at 356, 364.

For purposes of reopening the order, the important point is that the Commission made no inquiry concerning the market power of Atlantic and that today such an inquiry would be mandatory. In addition, Arco has shown that under current law a finding of unlawful restraints is unlikely. *Fortner* and subsequent cases established criteria that changed the law of tying in ways that are central to the determination of this case. Accordingly, there has been a change of law that warrants reopening this order.

2. The Vertical Restraints Rationale

Although the Commission relied on *Northern Pacific*, 356 U.S. 1, and used a tying rationale for its decision, it did not explicitly characterize the case as an unlawful tie-in. Indeed, the Supreme Court, in affirming, suggests the Commission found something other, perhaps more, than an unlawful tie. 381 U.S. 357, 369-70 (1965). If

the Commission's finding was not that the sales commission plan was an unlawful tie, the plan was, nevertheless, held to be a *per se* unlawful vertical restraint of some other type. Since the Supreme Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), it has been clear that non-price vertical restraints generally are to be evaluated under a rule of reason standard. That standard requires consideration of whether interbrand competition may be enhanced by efficiencies resulting from vertical restraints. But as the Supreme Court noted in reviewing this case, the Commission refused to consider "evidence of economic justification" or to analyze "the competitive effect of the sales commission plan, examining the entire market in tires, batteries and accessories." 381 U.S. 357 at 371 (1965). Thus, to the extent the Commission's decision rests on an analysis of non-price vertical restraints, it appears that this change of law also warrants reopening the order.

The Order Will Be Set Aside

An order is not automatically set aside on the grounds that the law has changed, even if, as here, the Commission refused to consider issues that later become mandatory. Having satisfied itself on a record of adequate proof under then prevailing standards, the Commission does not have to reprove its case to maintain a final order. The order will remain in force unless the requester can show that there is no basis in current law on which such a case could be brought and either that there is no need for the order or that the current effect of the order is detrimental to competition.

In this request, Arco has satisfied this standard for modification. Arco has presented persuasive evidence that Atlantic probably lacked the "economic power" (as that term has been understood since *Fortner*, 429 U.S. 610) to effect an unlawful tie. Arco has also shown that there is no need for the order by presenting evidence that gas stations as a group, and Arco in particular, probably have too small a market share to produce substantial competitive effects on TBA distribution.³

Furthermore, there is some danger that paragraphs 5 and 6, the core provisions of this order, might have anticompetitive effects by deterring efficient conduct if they remained in force. They prohibit the use of coercion or intimidation as means of marketing TBA products,

³ Gas stations nationwide sold 3 percent of replacement batteries and 8 percent of replacement tires in 1987.
Document at 10

and preventing franchises from buying or displaying TBA products of their choice. The coercive use of economic power certainly can be illegal, but the disparity of bargaining power that the Commission identified in this case does not imply coercion. Under today's legal standards, even if Arco wished to require its franchisees to carry certain other branded products as a condition of obtaining or maintaining its franchise, the requirement would not constitute coercion and would be legal under a rule of reason in the absence of proof that it injured consumers. In view of these considerations, it appears that continuing the order in this case is unwarranted.

Accordingly, *it is ordered*, that this matter be reopened and that the Commission's order in Docket No. 6486 issued on March 9, 1961, be set aside as to Atlantic Refining Co. as of the date of this order.

IN THE MATTER OF

KKR ASSOCIATES, 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 C-3253. Complaint, June 13, 1989—Decision, June 13, 1989

This consent order requires, among other things, that the respondents divest either Beatrice or RJR assets used in the production and sale of packaged nuts, ketchup and oriental food, following KKR's acquisition of RJR Nabisco, Inc. Respondents are also required to hold RJR's assets and operations separate and apart from other entities owned by KKR, pending completion of the required divestitures.

Appearances

For the Commission: *Renee S. Henning.*

For the respondents: *Joseph A. DeFrancis, Latham & Watkins,*
Washington, D.C. and *Richard C. Weisberg, Latham & Watkins,*
New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondents, KKR Associates, a limited partnership; Kohlberg Kravis Roberts & Co. L. P. ("KKR & Co."), a limited partnership; RJR Acquisition Corporation ("RJR Acquisition"), a corporation; RJR Associates, L.P. ("RJR Associates"), a limited partnership; RJR Holdings Group, Inc. ("RJR Group"), a corporation; RJR Holdings Corp. ("RJR Holdings"), a corporation; Henry R. Kravis, a natural person; Robert I. MacDonnell, a natural person; Michael W. Michelson, a natural person; Paul E. Raether, a natural person; and George R. Roberts, a natural person (collectively, "Respondents"), all subject to the jurisdiction of the Federal Trade Commission, have acquired the majority of the stock of RJR Nabisco, Inc. ("RJR") 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 ("FTC Act"), 15 U.S.C. 45; and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows: