

IN THE MATTER OF

AE CLEVITE, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3429. Complaint, June 8, 1993--Decision, June 8, 1993*

This consent order prohibits, among other things, a Michigan manufacturer of locomotive engine bearings and its parent company, T&N PLC, from fixing prices or from inviting its competitors to fix or raise prices for locomotive engine bearings in the future. The consent order requires AE Clevite and T&N to provide copies of the FTC complaint and consent order to the directors and officers of the company, subsidiaries, and divisions engaged in the design, manufacture, marketing or sale of locomotive engine bearings in the United States.

Appearances

For the Commission: *Ronald B. Rowe, Morris A. Bloom and Ernest A. Nagata.*

For the respondent: *Richard Carlton, Sullivan & Cromwell, New York, N.Y.*

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 the Heavywall Bearing Division ("HBD") of J.P. Industries, Inc. ("JPI"), a corporation, the predecessor in interest of Glacier Clevite Heavywall Bearings ("Glacier Clevite"), a division of AE Clevite, Inc. ("AE Clevite"), a corporation (hereinafter sometimes referred to as "respondent"), 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 in that respect as follows:

PARAGRAPH 1. Respondent AE Clevite is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its principal offices located at 325 East Eisenhower Parkway, Ann Arbor, Michigan.

PAR. 2. Respondent is an indirect wholly-owned subsidiary of T&N plc ("T&N"), a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its principal offices at Bowdon House, Ashburton Road West, Trafford Park, Manchester M17 1RA, England. Respondent is now, and for some time it or its predecessors in interest have been, engaged in the design, manufacture and sale of locomotive engine bearings.

PAR. 3. For purposes of this complaint, the following definitions apply:

(A) "*Engine bearings*" means the components of internal combustion engines characterized by interfacing surfaces with relative motion of a sliding nature that provide support to a shaft rotating over a thin film of oil (including half bearings, bushings, and thrust washers); and

(B) "*Locomotive engine bearings*" means engine bearings having a wall thickness of greater than one-quarter of an inch for use within locomotive engines.

PAR. 4. On August 20, 1990, T&N completed its tender offer for the outstanding shares of JPI common stock, and on November 8, 1990, the Federal Trade Commission issued a Decision and Order in Docket No. C-3312 as a result of that acquisition. With the purchase of JPI, T&N acquired the JPI HBD's facility in McConnelsville, Ohio for the design, manufacture and sale of locomotive engine bearings. At that time, another T&N subsidiary, The Glacier Metal Co. Ltd. ("Glacier"), was also engaged, at its facility in Ilminster, England, in the design and manufacture of locomotive engine bearings, some of which were sold in the United States.

PAR. 5. The HBD of JPI is the predecessor in interest of Glacier Clevite, a division of respondent AE Clevite.

PAR. 6. Respondent or its predecessors in interest maintain and have maintained a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 7. At all time relevant herein, Glacier, JPI and Miba Gleitlager AG ("Miba"), an Austrian corporation, were competitors in the design, manufacture and sale of locomotive engine bearings. During 1988 and 1989, JPI and Miba together manufactured more than 95 percent of all locomotive engine bearings sold in the United States. JPI held the largest share and perceived Miba as a competitive threat due to Miba's efforts to increase its market share by undercutting JPI's prices.

PAR. 8. In a conversation that occurred in the spring of 1988 between the general manager of the JPI HBD and the managing director of Miba, the JPI HBD official advised the Miba official that the prices at which Miba sold locomotive engine bearings in the United States aftermarket were lower than those of the JPI HBD, and "as a result, they were ruining the marketplace." Following a response from the managing director of Miba that it was not Miba's intention to undercut the JPI HBD's prices in the marketplace, the general manager of the JPI HBD caused comparative price lists for locomotive engine bearings sold in the United States aftermarket to be faxed to Miba.

PAR. 9. The conduct described in paragraph eight constituted an implicit invitation by the JPI HBD for Miba to refrain from competition in the pricing of locomotive engine bearings sold in the United States aftermarket.

PAR. 10. The aforesaid acts and practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices herein alleged could recur in the absence of the relief herein requested.

Commissioner Azcuenaga dissented, and having found evidence sufficient to support a reason to believe determination.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the Heavywall Bearing Division of J.P. Industries, Inc., the predecessor in interest of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

The respondent and T&N plc ("T&N"), their officer and attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent or by T&N 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 Commission having thereafter considered the matter and having determined that it had reason to believe that respondent's predecessor in interest had violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent AE Clevite, Inc. ("AE Clevite") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its principal offices located at 325 East Eisenhower Parkway, Ann Arbor, Michigan. Respondent is an indirect, wholly-owned subsidiary of T&N plc, a corporation organized, existing and doing business under and by virtue of the

laws of the United Kingdom, with its principal offices located at Bowdon House, Ashburton Road West, Trafford Park, Manchester M17 1RA, England.

2. AE Clevite or its predecessors in interest at all times relevant herein have been, and AE Clevite now is, a corporation whose business is in or affects commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent and of T&N, and the proceeding is in the public interest.

ORDER

I.

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

A. "*Respondent*" means AE Clevite, its predecessors, successors, assigns, subsidiaries and divisions, including Glacier Clevite Heavywall Bearing, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns;

B. "*T&N*" means T&N plc and all direct or indirect majority-owned subsidiaries and divisions of T&N plc that are engaged in the design, manufacturer, marketing, advertising, offering for sale, sale, or distribution of engine bearings;

C. "*Engine bearings*" means the components of internal combustion engines characterized by interfacing surfaces with relative motion of a sliding nature that provide support to a shaft rotating over a thin film of oil (including half bearings, bushings, and thrust washers); and

D. "*Locomotive engine bearings*" means engine bearing having a wall thickness of greater than one-quarter of an inch for use within locomotive engines.

II.

It is ordered, That respondent and T&N, in connection with the design, manufacture, marketing, advertising, offering for sale, sale, or distribution of locomotive engine bearings in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from engaging, directly or indirectly, through any corporation, subsidiary, division, or other device (including through T&N or T&N's other subsidiaries, divisions or affiliated companies), in the following acts or practices:

A. Requesting, proposing, urging or advocating that any competitor fix, raise, establish, maintain or stabilize prices, price levels or service levels;

B. Entering into, attempting to enter into, adhering to, or maintaining any combination, conspiracy, or agreement with any competitor to fix, raise, establish, maintain, or stabilize prices, price levels, or service levels; or

C. Inviting any competitor to raise prices by stating its willingness to follow or match any change in prices, price levels or service levels by any competitor.

Provided, however, that nothing contained herein shall prevent respondent from unilaterally raising, lowering, or otherwise altering its prices, price levels or service levels, publicly announcing any such change, or explaining the reasons for such a change to persons who are not competitors, such as customers, investors, securities analysts, news and financial reporters and the like.

III.

It is further ordered, That:

A. Within thirty (30) days of the date on which this order becomes final, respondent and T&N shall provide a copy of the complaint and order to all of their directors and officers, and

respondent shall provide a copy of the complaint and order to all of its management employees and all other employees engaged in the marketing, advertising, offering for sale, sale, or distribution of locomotive engine bearings to customers in the United States who have authority to affect the prices at which such locomotive engine bearings are sold;

B. For a period of three (3) years from the date on which this order becomes final, and within ten (10) days after the date on which any person becomes a director or an officer of T&N or a director, officer or management employee of respondent, or other employee of respondent engaged in the marketing, advertising, offering for sale, sale, or distribution of locomotive engine bearings to customers in the United States who has authority to affect the prices at which such locomotive engine bearings are sold, respondent or T&N shall provide a copy of the complaint and order to such person;

C. For a period of three (3) years from the date on which this order becomes final, and within thirty (30) days after the date on which any entity becomes a T&N majority-owned subsidiary, unincorporated division, or other operating entity engaged in the design, manufacture, marketing, advertising, offering for sale, sale, or distribution of locomotive engine bearings to customers in the United States, T&N shall provide a copy of the complaint and order to all directors, officers, management employees, and all other employees of such entity engaged in the marketing, advertising, offering for sale, sale, or distribution of locomotive engine bearings to customers in the United States who have authority to affect the prices at which such locomotive engine bearings are sold; and

D. Respondent and T&N shall require each person to whom a copy of the complaint and order is furnished pursuant to subparagraphs III.A., B., and C. of this order to sign and submit to respondent within thirty (30) days of the receipt thereof a statement that: (1) acknowledges receipt of the complaint and order; (2) represents that the undersigned has read and understands the order; (3) acknowledges that the undersigned has been advised and understands that non-compliance with the order may subject

respondent and T&N to penalties for violation of the order; and (4) identifies the undersigned by name, address, and telephone number.

IV.

It is further ordered, That respondent shall:

A. Within sixty (60) days of the date on which this order becomes final, and annually thereafter for three (3) years on the anniversary date of this order, and at such other times as the Commission may by written notice to the respondent require, file with the Commission a verified written report setting forth in detail the manner and form in which respondent and T&N have complied and are complying with this order;

B. For a period of three (3) years after the date on which this order becomes final, maintain and make available to the staff of the Federal Trade Commission for inspection and copying, upon reasonable notice, all records of communications with competitors of respondent relating to any aspect of pricing or service for locomotive engine bearings to customers in the United States, and records pertaining to any action taken in connection with any activity covered by paragraphs II, III, and IV of this order; and

C. Notify the Commission at least thirty (30) days prior to any change in respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries engaged in the design, manufacturer, marketing, advertising, offering for sale, sale, or distribution of locomotive engine bearings, or any other change in respondent that may affect compliance obligations arising out of this order.

Commissioner Azcuenaga dissented, not having found evidence sufficient to support a reason to believe determination.

CONCURRING STATEMENT OF COMMISSIONER DEBORAH K. OWEN

Based on the reasoning articulated in my earlier statement on invitations to collude,¹ I have voted in favor of the final issuance of the consent agreement in this matter. Several aspects of this case are worthy of note, however.

As previously indicated, I believe that in this novel area of Commission enforcement, the Commission should be cautious to ensure that the activity challenged is, in fact, an attempt to engage in a naked restraint of trade, rather than in a joint venture or other potentially efficient agreement. *See*, Quality Trailer Statement at 6-7. Here, the conduct alleged in the Commission's complaint to be a violation of Section 5 of the Federal Trade Commission Act is described as "an implicit invitation by [respondent for its competitor] to refrain from competition in the pricing of locomotive engine bearings sold in the United States aftermarket." Complaint, paragraph 9. At first blush, an "implicit" invitation might suggest something other than a solicitation to fix prices.

Two factors alleviate any such concern here. First, as the Analysis of Proposed Consent Order to Aid Public Comment notes, "[t]he challenged conduct did not relate to any proposed *bona fide* integration between the parties." Under such circumstances, it is difficult to envision what efficiency-enhancing motive there might have been for complaining to a competitor that its lower prices were "ruining the market place," and subsequently sharing comparative price lists with that competitor. Complaint, paragraph 8. Based on available information, as in Quality Trailer Products, this appears to be attempted price-fixing. Second, the theory of potential harm is strong in this case, in light of the 95 percent combined market share of the two competing parties to the discussion. Complaint, paragraph 7. While, as I have previously indicated, an "iron-clad" demonstration of potential harm is not an element of this sort of Section 5 offense, Quality Trailer Statement at 6-7, the presence of

¹ See Concurring Statement of Commissioner Deborah K. Owen in the Matter of Quality Trailer Products Corporation (File No. 911-0068) ("Quality Trailer Statement").

potential injury (and, therefore, motive) makes the inference of an attempted price-fix more credible.

Finally, I would note that the order in this matter, like the order in *Quality Trailer Products*, could be construed to prohibit, in addition to price-fixing solicitations, an invitation to enter into a procompetitive joint venture that, incidentally, involves setting prices. Again, I interpret these constraints to be fencing-in provisions designed to facilitate enforcement of the order, rather than an intent by the Commission to discourage solicitations to joint venture, or to engage in other legitimate action that may involve price discussions. In another case, the Commission may wish to consider less restrictive relief, depending upon the needs of the company involved and the egregiousness of the offense.²

² Here, as in *Quality Trailer Products*, the order includes a proviso exempting certain conduct from the general proscriptions. The fact that the exempted conduct varies in the two cases (discussing prices with respect to certain sales between competitors vs. unilateral price changes and announcements thereof to non-competitors) illustrates the Commission's ability to fine-tune its mandates.