

Interlocutory Order

92 F.T.C.

IN THE MATTER OF  
FORD MOTOR COMPANY

*Docket 9105. Interlocutory Order, Dec. 4, 1978*

ORDER REQUESTING FILING OF ADDITIONAL BRIEFS

By motion of November 7, 1978, complaint counsel has requested that the Commission seek a preliminary injunction compelling Ford Motor Company to disclose certain facts concerning 1974-78 model year four-cylinder vehicles which complaint counsel alleges are afflicted with a latent defect resulting in premature camshaft/rocker arm wear. Ford subsequently filed an opposition to that motion and, in a supplement thereto filed on November 29, 1978, informed the Commission of certain steps it was taking to notify affected owners of the problem. Ford alleges that this action further supports Ford's position that the proposed injunction action would not be in the public interest. Ford further described its intended notification and adjustment program in a motion filed on November 30, 1978, in which it reiterated certain concerns regarding the possible occurrence of *ex parte* communications in violation of Section 4.7 of the Commission's Rules of Practice.

Before any action is taken with respect to complaint counsel's motion, and in order to assess Ford's contention that its intended notification and adjustment program indicates that the proposed injunction action is not in the public interest, the Commission would like to receive further information regarding the precise parameters of respondent's program including the existence of any conditions attached to that program.<sup>1</sup> The Commission particularly requests respondent to submit the text of the letter which Ford proposes to send to vehicle owners, indicating when such letter will be mailed. Ford should describe with specificity the categories of individuals to whom the letter will be sent, indicating whether prospective purchasers of new and used vehicles from Ford dealers will be notified. If respondent's intended rocker arm/camshaft notification and adjustment program differs from the program instituted in 1977 with respect to piston scuffing, the reason for such differences should be provided. The Commission also requests a copy of any instructions sent to Ford dealers advising them of the adjustment program, in addition to the mailgram attached to respondent's filing of November 3, 1978. Accordingly,

<sup>1</sup> While an oral hearing before the Commission would suffice to inform the Commission of the details of Ford's program without raising *ex parte* difficulties, it is the Commission's view that the requisite information can be obtained through additional briefs and that a hearing is unwarranted at this time.

*It is ordered,* That respondent is requested to file a supplemental brief on or before December 11, 1978, and that complaint counsel may file a response thereto on or before three days following service of respondent's supplemental brief.

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IN THE MATTER OF

KELLOGG COMPANY, ET AL.

*Docket 8883. Interlocutory Order, Dec. 8, 1978*

This order remands this matter for appointment of a substitute ALJ to preside over further proceedings; directs the filing of briefs by all parties; dismisses as moot motions for disqualification of the Chairman from participation and the motion for evidentiary hearing or oral argument; denies motion for issuance of subpoenas; and terminates a stay of proceedings entered October 20, 1978.

## ORDER

At the present time, the Commission has before it respondents' motions to disqualify the administrative law judge, Kellogg's motion for an evidentiary hearing, or, alternatively, for oral argument on its disqualification motion, Kellogg's motion (joined by General Mills) for the issuance of subpoenas *duces tecum*, complaint counsel's motion seeking the appointment of a substitute administrative law judge and an order directing that the proceedings be resumed "from the point at which Administrative Law Judge Harry R. Hinkes retired," and a motion for dismissal or other alternative relief filed by General Mills.

## I.

After a careful review of the submissions of the parties and the pertinent legal authorities, the Commission has concluded that Judge Hinkes became "unavailable" within the meaning of 5 U.S.C. 554(d) upon his retirement on September 8, 1978. Because his reappointment on a contractual basis was not approved by the Civil Service Commission, see 5 U.S.C. 1305 and 3105, and Civil Service Commission regulations adopted pursuant thereto, his service subsequent to September 8, 1978, once objected to by respondents, *cf. United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952), was of questionable validity. Accordingly, and in view of the Chairman's determination not to seek Civil Service Commission approval of the existing contractual arrangement or any other employment arrangement with Judge Hinkes, the matter must be remanded for the appointment of a substitute ALJ to preside over further proceedings. Therefore, respondents' motions requesting Judge Hinkes' disqualification are dismissed as moot. Kellogg's motion for an evidentiary hearing, or, in the alternative, for oral argument is also dismissed as moot.

Complaint counsel have requested the Commission to include a

directive to the substitute ALJ to proceed to the conclusion of the hearings, to base his assessment of the need for *de novo* hearings on the proposed findings and the record, and to recall witnesses if he concludes "that observation of the demeanor of the particular witnesses is likely to be of material assistance in making findings of controlling facts." The parties have addressed the legal precedents regarding the extent, if any, to which retrial may be necessary.

The Commission agrees with the parties that the ALJ should decide in the first instance the issues associated with the future conduct of these proceedings and whether portions of the record or particular witnesses, if any, will need to be reheard. To facilitate the law judge's consideration of the questions raised here, as well as ultimate Commission review, the parties are ordered to submit to the substitute ALJ, within forty-five (45) days from this order, briefs responding to the following questions, as well as any other legal or factual matters that the submitting party may deem relevant to the issue of whether retrial is required and, if so, to what extent. In addressing these matters, consideration should be given to the application of principles enunciated in recent precedents such as *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978), and *New England Coalition on Nuclear Pollution v. NRC*, 582 F.2d 87 (1st Cir. 1978).

1. Identify the issues in the proceeding whose resolution depends upon an evaluation of credibility and with respect to which it is important to preserve demeanor evidence.
2. With respect to the issues identified in No. 1 above, identify each witness pertinent to each issue and the location in the record where demeanor evidence would materially assist in determining credibility. Indicate why the demeanor of such witness is crucial to resolution of the issue so identified.
3. Assuming that certain witnesses should be recalled, would it be sufficient to recall them merely for the purpose of cross-examination?
4. Assuming that certain witnesses should be recalled for purposes of direct testimony and cross-examination, could such further appearances be limited to certain aspects of their testimony?

Appropriate replies, if any, shall be within the discretion of the substitute ALJ.

In ordering such briefing, we do not intend to imply that the substitute ALJ is obliged to make definitive determinations before proceeding with the hearings concerning the extent to which, if at all, the recall of any particular witness is required or desirable. As

we have noted, all such issues are matters for the ALJ to address in the first instance.

In replying to complaint counsel, Kellogg has requested the Commission "to afford respondents a reasonable length of time following the ruling (*e.g.*, 30 days) to file additional disqualification motions before the Commission \* \* \* appoints a substitute judge \* \* \*." To the extent that this request may be deemed an application for a stay, it is denied, and the stay of proceedings ordered by the Commission on October 20, 1978, is hereby terminated. To the extent that the motion filed by General Mills on November 29, 1978, is not disposed of by this order, it will be acted upon by the Commission subsequent to the expiration of the time for the filing of responses.

## II.

By motion of September 22, 1978, Kellogg, joined by General Mills on September 27, 1978, requested the issuance of subpoenas *duces tecum* requiring the Federal Trade Commission and the Civil Service Commission to produce: "(1) documents referring or relating to the retirement of Administrative Law Judge Harry R. Hinkes and the retention of his services by the Federal Trade Commission thereafter, and (2) documents sufficient to show any rules, regulations, guidelines and policies concerning status of administrative law judges and the retention of the services of retired administrative law judges." On October 4, 1978, this motion was certified to the Commission.

In its accompanying memorandum, Kellogg asserts that a statement by Judge Hinkes announcing his retirement and retention "inevitably raise[s] serious questions as to whether the present status of the Administrative Law Judge presiding in this matter is in conformance with statutes and regulations intended to ensure the independence of administrative law judges and is consistent with the requirements of due process. \* \* \* Their resolution requires a clear understanding of the facts concerning Judge Hinkes' change in status." Kellogg further asserts that the requested subpoenas are "clearly relevant to the resolution of the question presented." However, in light of the Commission's disposition, *supra*, of the disqualification motions, the "question" concerning which Kellogg sought the subpoenas is no longer presented. Because the necessity and relevancy requirements of Rules of Practice 3.36 and 3.37 are not satisfied, the motion is denied.

Nevertheless, to clarify the record in this proceeding, appended hereto is a statement by Chairman Pertschuk, memorializing his role in the decisionmaking process that resulted in the contract. No

other Commissioner had any involvement with, or knowledge of, that process. Also appended, in their entirety, are three memoranda to or from Chairman Pertschuk or a member of his staff concerning the continued service of Judge Hinkes in the event he retired. There are no other such memoranda involving Chairman Pertschuk or any other Commissioner.

### III.

*It is ordered*, That (1) this matter is remanded for appointment of a substitute ALJ to preside over further proceedings;

(2) the parties are directed to file the briefs described above within forty-five days with replies to be within the discretion of the ALJ;

(3) respondents' motions seeking disqualification and Kellogg's motion for an evidentiary hearing or oral argument are dismissed as moot;

(4) Kellogg's motion for issuance of subpoenas is denied; and

(5) the stay entered on October 20, 1978, is terminated.

Commissioner Pitofsky did not participate.

#### SEPARATE STATEMENT OF CHAIRMAN PERTSCHUK

I think it important that I set forth for the record the role that I played in approving the contractual arrangement with Judge Hinkes that is challenged by the motions before the Commission and my reasons for initially approving the arrangement.

As is apparent from Chief ALJ Hanscom's memorandum to me dated August 16, 1978, the full text of which is released today Judge Hinkes had indicated his intention to retire effective August 31, 1978, for personal reasons including the fact that the difference between his take home salary and the amount he would receive in retirement was not, in his opinion, sufficient to justify his continuing in regular service. Chief Judge Hanscom recommended that I authorize the offering to Judge Hinkes of an arrangement whereby Judge Hinkes would be retained under contract to complete the *Kellogg* case after his retirement. After being advised that the arrangement was legally permissible and had been cleared with the Civil Service Commission, I authorized Chief Judge Hanscom to extend the offer to Judge Hinkes, as is evidenced by the memorandum dated August 21, 1978, from my attorney advisor, William J. Baer, to Chief Judge Hanscom. That authorization involved an administrative decision within my authority as Chairman pursuant to Reorganization Plan No. 8 of 1950, 64 Stat. 1264, and did not require the participation of the full Commission. *The Hearst*

*Corporation*, Dkt. 8832, 81 F.T.C. 1028(1972). I did not seek approval of the other Commissioners, nor to my knowledge did any other Commissioner participate in the matter.

I also wish to note for the record that after the offer had been made to Judge Hinkes, my staff informed me that Judge Hinkes had requested that I personally communicate to him my authorization of the arrangement. I telephoned Judge Hinkes and in a very brief conversation indicated only that I hoped he would accept the contractual arrangement and complete the case. Judge Hinkes responded that he would consider the request. I did not discuss with Judge Hinkes the merits of the case, the manner in which he might proceed with the case, or anything else concerning the proceeding.

I authorized extension of the offer to Judge Hinkes for the following reasons: (1) he had presided over the *Kellogg* case since the complaint had been issued in April 1972, and was therefore familiar with the extensive record of the case; (2) appointment of a substitute was likely to have resulted in a substantial loss of time required by his review of the already extensive record in the case; and (3) with a substitute ALJ issues would likely arise concerning the extent to which, if at all, the new ALJ was obliged or might wish to rehear witnesses who had testified. These are the sole factors on which my decision was based. In no way was my decision influenced by a belief that Judge Hinkes had been or would be in some manner more favorable to one side than the other. Understanding as I did that the arrangement with Judge Hinkes presented no legal problems, I concluded that the potential benefit to all concerned in having the case concluded in a manner that did not entail significant delays and burdens on the parties justified that arrangement to retain the services of Judge Hinkes.

After reviewing the briefs of the parties, however, I have come to the conclusions that Judge Hinkes became "unavailable" within the meaning of 5 U.S.C. 554(d) upon his retirement on September 8, 1978, and that because his reappointment on a contractual basis was not approved by the Civil Service Commission, his service subsequent to September 8, 1978, once objected to by respondents, was of questionable validity. In light of the substantial legal questions now raised and the fact that none of the parties desires to have Judge Hinkes continue to preside and evidently all are willing to forgo the benefits of having him continue, *i.e.*, potential savings in costs and time, I have determined not to seek Civil Service Commission approval of the existing contractual arrangement or some other employment arrangement with Judge Hinkes.

## MEMORANDUM

DATE: August 16, 1978

REPLY TO

ATTN OF: Daniel H. Hanscom,  
Chief Administrative Law Judge

SUBJECT: Retention of Administrative Law Judge  
Harry R. Hinkes on Contract Basis

TO: Chairman Pertschuk

Judge Harry R. Hinkes has advised that he intends to retire as of August 31, 1978. His stated reason for retiring is age, length of service and to take advantage of the 4.9 percent cost-of-living bonus which will be given to employees who retire by that date. He is 68 years of age and the difference between the retirement he will receive and his present take home pay will be approximately \$3,500 per year for the first one and one-half years of his retirement when his retirement income will be tax free. He does not feel justified at his age in working for the next year and one-half for this small difference in take home pay.

Judge Hinkes joined the Federal government service on February 10, 1945. Thus, he is now in his thirty-third year of service. He first joined the FTC on August 23, 1959 as a Hearing Examiner. He was transferred to the NLRB on May 22, 1965, and returned to the FTC January 23, 1972.

Judge Hinkes is the presiding judge in the *Kellogg* case. He was assigned this matter on April 26, 1972, before I became Chief Administrative Law Judge. Because of extensive requirements for discovery in this case, complaint counsel were unable to begin trial until April 28, 1976. As the case now stands, the defense is approximately one-half completed, which will probably be followed by complaint counsel's rebuttal and defense surrebuttal. Judge Hinkes estimates that the trial will be completed early next year, and he anticipates filing an initial decision by the end of 1979 or early 1980.

The trial record now exceeds 36,000 pages, with approximately 10,000 additional pages remaining to be heard. Well over one hundred witnesses have already testified, including a number of economic experts. As you are aware, this is a highly complex proceeding. I believe we have no alternative but to retain Judge Hinkes to complete this case and file an initial decision. Assignment to a new law judge at this juncture could raise serious problems.

As I see it the only way to retain Judge Hinkes is to offer him a contract to complete the *Kellogg* case. While it has been suggested that Judge Hinkes might be retained as a rehired annuitant, the pay

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involved—the difference between his retirement pay and his normal salary would make no significant difference in his current “take-home” and is not sufficient to interest Judge Hinkes. Under a contract basis we would retain Judge Hinkes for \$150 per day. The total cost would be between \$25,000 and \$30,000. We believe Judge Hinkes would continue on the *Kellogg* case on this basis. The cost, in my opinion, is warranted under the circumstances.

Accordingly, we recommend and ask authorization to offer Judge Hinkes a contract according to the foregoing terms. Approval is needed by August 27, 1978 before Judge Hinkes retires.

Respectfully submitted,

/s/ Daniel H. Hanscom  
Chief Administrative Law Judge

FTC 4-3

FEDERAL TRADE COMMISSION  
OFFICE OF THE CHAIRMAN

## TRANSMITTAL SLIP

TO:

Judge Hanscom

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FROM:

Bill Baer *BB*


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DATE: August 21, 1978

- Please prepare reply for  
Chairman's Signature
- Please see me
- Approval
- Recommendation
- Information
- Necessary action
- Note and return
- File

REMARKS:

Mike says that, as usual, you recommend  
the most appropriate course. I thought  
you might want something more official  
for the record. Thus the attached.

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August 21, 1978

## MEMORANDUM

TO: Daniel Hanscom  
FROM: William J. Baer

The Chairman asked that I respond to your August 16, 1978 memo with respect to Judge Hinkes. We agree with your recommendation and hereby authorize you to extend Judge Hinkes a contract to complete the adjudicative matter over which he currently is presiding.

cc: ✓ Margery Waxman Smith  
Micheal Sohn

FEDERAL TRADE COMMISSION  
RECEIVED

AUG 22 1978

Assistant Executive Director  
PER MANAGEMENT

IN THE MATTER OF  
HARNISCHFEGER CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS

*Docket 9107. Complaint, March 10, 1978 — Decision, Dec. 8, 1978*

This consent order, among other things, requires a Brookfield, Wis. manufacturer of lattice-boom cranes and the Northwest Engineering Company, a Green Bay, Wis. competitor, to provide the F.T.C. with evidence that all merger agreements between them have been terminated; and return all confidential documents exchanged during negotiations. The order prohibits respondents from acquiring any part of each other's lattice-boom business until July 31, 1981 without furnishing the Commission with 60 days' notice of such intention. Should the Commission issue a complaint challenging the transaction during this period, respondents are required to postpone the proposed merger or acquisition until administrative proceedings have been concluded. Additionally, the order limits sales between the two companies until July 31, 1981.

*Appearances*

For the Commission: *Peter E. Greene.*

For the respondents: *Alan I. Becker, Kirkland & Ellis, Chicago, Ill.* for Harnischfeger Corporation and *William O. Fiffield, Sidley & Austin, Chicago, Ill.* for Northwest Engineering Company.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents, each subject to the jurisdiction of the Commission, have entered into a merger agreement which, if consummated, would violate 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, that said agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b), of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITION

PARAGRAPH 1. For the purpose of this complaint, the following definition shall apply: "lattice boom cranes" means cranes mounted either on crawlers or rubber tired vehicles, powered by one or more

engines, the boom and hoist functions of which are carried out by wire rope, and which are generally operated by a conventional gear train controlled by brakes and clutches.

## II. HARNISCHFEGER CORPORATION

PAR. 2. Harnischfeger Corporation (P&H) is a corporation organized under the laws of the State of Delaware, with its principal place of business at 13400 Bishops Lane, Brookfield, Wisconsin.

PAR. 3. P&H manufactures and sells lattice boom cranes throughout the United States. Annual sales thereof in 1977 exceeded \$25.8 million.

PAR. 4. In its fiscal year ended October 31, 1977, P&H had total net sales of approximately \$466,098,000 and net income of approximately \$21,850,000.

## III. NORTHWEST ENGINEERING COMPANY

PAR. 5. Northwest Engineering Company (NW) is a corporation organized under the laws of the State of Delaware, with its principal place of business at 201 West Walnut St., Green Bay, Wisconsin.

PAR. 6. NW manufactures and sells lattice boom cranes throughout the United States. Annual sales thereof in 1977 exceeded \$21.6 million.

PAR. 7. In the twelve-month period ended October 31, 1977, NW had total net sales of approximately \$43,314,000 and net income of approximately \$1,091,000.

## IV. JURISDICTION

PAR. 8. At all times relevant herein P&H and NW have been engaged in the manufacture and sale of lattice boom cranes in interstate commerce and are engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and each is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

## V. THE MERGER AGREEMENT

PAR. 9. On or about December 22, 1977, P&H and NW entered into a merger agreement which provides, *inter alia*, for the merger of a subsidiary of P&H into NW. Upon consummation of the merger NW will become a wholly-owned subsidiary of P&H.

## VI. TRADE AND COMMERCE

PAR. 10. The relevant line of commerce is the manufacture and sale of lattice boom cranes and submarkets thereof.

PAR. 11. A relevant section of the country or geographic market is the entire United States.

PAR. 12. The manufacture and sale of lattice boom cranes is highly concentrated, with the combined market share of the four largest manufacturers estimated to be approximately 70 percent.

PAR. 13. Barriers to entry into the manufacture and sale of lattice boom cranes are substantial.

## VII. ACTUAL COMPETITION

PAR. 14. P&H and NW are and have been for many years actual competitors of each other in the manufacture and sale of lattice boom cranes and submarkets thereof and actual competitors of others engaged in the manufacture and sale of lattice boom cranes and submarkets thereof throughout the United States.

PAR. 15. In 1977, P&H accounted for approximately 12.5 percent of United States production of lattice boom cranes and Northwest accounted for approximately 6.4 percent thereof. P&H accounted for approximately 8.4 percent of 1977 United States sales of lattice boom cranes, and Northwest accounted for approximately 7.0 percent thereof.

## VIII. EFFECTS; VIOLATIONS CHARGED

PAR. 16. The effects of the proposed acquisition may be to substantially lessen competition or 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 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 P&H and NW in the manufacture and sale of lattice boom cranes and submarkets thereof will be eliminated;

(b) actual competition between competitors generally in the manufacture and sale of lattice boom cranes and submarkets thereof may be lessened;

(c) NW will be eliminated as an actual substantial independent competitor in the manufacture and sale of lattice boom cranes and submarkets thereof;

(d) concentration in the manufacture and sale of lattice boom

cranes will be increased and the possibilities for eventual deconcentration may be diminished; and

(e) mergers or acquisitions between other lattice boom crane manufacturers may be fostered, thus causing a further substantial lessening of competition and tendency toward monopoly in the manufacture and sale of lattice boom cranes.

#### DECISION AND ORDER

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

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 respondents 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, 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. Respondent Harnischfeger Corporation is a corporation, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at 13400 Bishops Lane, Brookfield, Wisconsin.

2. Respondent Northwest Engineering Company is a corporation, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at 201 West Walnut St., Green Bay, Wisconsin.

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

## ORDER

## DEFINITION

For purposes of this order the following definition shall apply:

"Lattice-boom cranes" means cranes mounted either on crawlers or rubber-tired vehicles powered by one or more engines, the boom hoist of which are carried out by wire rope, and which are generally operated by a conventional gear train controlled by brakes and clutches.

## I.

*It is ordered,* That Harnischfeger Corporation (Harnischfeger) and Northwest Engineering Company (Northwest) do forthwith provide evidence that all agreements which provided for the merger of a newly formed subsidiary of Harnischfeger into Northwest and which would result in Northwest becoming a wholly-owned subsidiary of Harnischfeger have been terminated. Harnischfeger and Northwest each shall forthwith return any confidential documents provided by the other in connection with the merger agreement, and nothing herein contained shall relieve any party from any obligations of confidentiality imposed by agreement between them or by operation of law.

## II.

*It is further ordered,* That until July 31, 1981 neither Harnischfeger nor Northwest shall acquire either directly or indirectly any part of the lattice boom crane business of each other, whether represented by securities or assets, until sixty (60) days following receipt by the Director of the Bureau of Competition of the Federal Trade Commission of written notice of the proposed acquisition or merger, which notice shall specifically refer to this order. If within sixty (60) days of receipt by the Director of said notice the Commission issues an administrative complaint challenging the proposed acquisition or merger, such proposed acquisition or merger shall not be consummated, nor shall any steps be taken to effectuate such proposed acquisition or merger until the administrative complaint issued by the Commission is dismissed by the Commission, until a final order as defined in 15 U.S.C. 21 and 45 is entered, or until a consent order is entered and served upon the respondents in that administrative proceeding. If within the aforesaid sixty (60) days the Bureau of Competition receives any written position papers from either

Harnischfeger or Northwest and the Bureau recommends issuance of a complaint, the Bureau shall promptly forward to the Commission such papers together with the written notice submitted to the Bureau Director. In the event that within sixty (60) days of the Director's receipt of said notice the Commission issues an administrative complaint challenging the proposed acquisition or merger, the Bureau of Competition shall exert its best efforts to complete the administrative proceeding in an expedited manner.

The execution of a contract between Harnischfeger and an independent distributor or dealer who also is, or formerly was, a distributor or dealer for Northwest shall not be deemed the acquisition of any part of the lattice boom crane business of Northwest under this paragraph, and the execution of a contract between Northwest and an independent distributor or dealer who also is, or formerly was, a distributor or dealer for Harnischfeger shall not be deemed the acquisition of any part of the lattice boom crane business of Harnischfeger under this paragraph, except that Harnischfeger and Northwest shall not jointly execute a contract between them and an independent distributor or dealer.

### III.

*It is further ordered,* That until July 31, 1981 the total sales for each quarterly period or portion thereof based on a calendar year, between Harnischfeger and Northwest shall not account, either directly or indirectly, for an amount equivalent to 4 percent or more of Northwest's total sales for the previous fiscal year. Sales as used herein means the dollar value of total product and parts shipments and shall be accounted for as of the date of shipment.

### IV.

*It is further ordered,* That Harnischfeger and Northwest each shall notify the Commission at least thirty (30) days prior to any proposed corporate change such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation of dissolution of subsidiaries or any other change which may affect compliance obligations arising out of this order.

### V.

*It is further ordered,* That Harnischfeger and Northwest each shall within sixty (60) days after service upon it of this order file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order. Thereafter, on or

before August 15, 1979 and annually thereafter until August 15, 1981, each shall file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order for the immediately preceeding consecutive twelve month period ending on July 31st. The fact that any activity is not prohibited by this order shall not bar a challenge to it by the United States Government, any agency thereof or any person.

Complaint

92 F.T.C.

IN THE MATTER OF

## NELSON BROTHERS FURNITURE CORP.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
THE FEDERAL TRADE COMMISSION ACT*Docket C-2941. Complaint, Dec. 8, 1978 — Decision, Dec. 8, 1978*

This consent order, among other things, requires a Chicago, Ill. retailer of household goods to cease misrepresenting or failing to make relevant timely disclosures regarding the cost, savings, condition and availability of advertised merchandise; employing bait and switch tactics, or any other unfair or deceptive sales technique in the advertising and sale of its products. Additionally, the order provides customers with the right to arbitration for unresolved disputes and requires the firm to maintain prescribed business records for a period of three years.

*Appearances*For the Commission: *Nathan P. Owen.*For the respondent: *Sidley & Austin, Chicago, Ill.*

## 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 Nelson Brothers Furniture Corp., hereinafter referred to as respondent, has 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 Nelson Brothers Furniture Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 2750 West Grand Ave., Chicago, Illinois.

PAR. 2. Respondent is engaged in the operation of retail stores in the States of Illinois and Wisconsin. Its volume of business is substantial. In the operation of its retail stores respondent maintains showrooms in which it offers and sells to its customers an extensive line of home furnishings, bedding, carpeting, televisions, appliances and other merchandise. Much of the said merchandise is purchased from numerous suppliers located throughout the United States.

PAR. 3. In the course and conduct of its business, respondent causes, directly or indirectly, the aforesaid merchandise to be

shipped and distributed from manufacturing plants, warehouses, or from other sources of supply to its warehouses, distribution centers, or retail stores located in various states other than the state of origination, distribution or storage of said merchandise. Respondent maintains a substantial course of trade in the distribution, advertising, offering for sale and sale of the aforesaid merchandise in or affecting Commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of its business, as aforesaid, respondent disseminated and caused to be disseminated certain advertisements concerning the aforesaid merchandise by various means, including but not limited to advertisements in newspapers of general and interstate circulation, in radio and television broadcasts of interstate circulation and in other advertising media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said merchandise from respondent in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended. Many of the said advertisements list, describe or depicted various items of said merchandise and also contained statements and representations concerning the price or terms at which said merchandise was offered for sale and sold to the public. Many of said advertisements contain further direct and express statements and representations concerning the time periods during which the offers were in effect.

PAR. 5. In the course and conduct of its business, and for the purpose of inducing the sale of its merchandise, respondent has made numerous statements and representations in newspaper advertisements, radio and television commercials and in other advertising media and in oral statements by salesmen to prospective customers.

Typical and illustrative of said statements and representations, but not all-inclusive thereof, are the following:

1. Warehouse Clearance Sale. . . Every price has been slashed to ribbons to bring you the savings of a life time. . . Starting today. . . 3 Big Days of Super Savings "Nelson Warehouse Priced"
2. Out of Our Warehouse Must sell 3 rooms of furniture! 16 pc. living rm., 11 pc bdrm., complete dinette. \$333. Terms Nelsons' 2750 W. Grand (Classified Ad)
3. Hurry. . . Time is Running Out. Get This Beautiful 10-cup 'Toastmaster' Stainless Steel Automatic Coffee Maker Absolutely Free! Its yours Free with purchase of a Speed Queen Automatic Washer or Dryer with stainless steel drum. . .
4. Warehouse Sale

## Complaint

92 F.T.C.

\* \* \* \* \*

Look! Here are . . . Down-To-Earth Price Reductions! Here's Your Big Chance To Save!

\* \* \* \* \*

It's the Buying Opportunity of a Lifetime

5. Grouped to Save you Money and Beautify Your Home. Get Your Share of Savings on this Special 3-room Offer! Everything is complete. . . "From the Rugs on the Floor. . . To the Pictures on the Wall" \$688

6. Count the dollars you save on furniture by the roomful at Nelson Brothers' low warehouse prices Glamorous living roomfuls of furniture. . . complete from rugs on the floor to pictures on the wall. . . You'd expect the price tag to be \$500.00 . . . low warehouse priced from \$288.00.

Plenty of Credit for You. . . Free Delivery Too. (During the above television audio, slides were shown of 4 living room suites with the words "\$288.00" superimposed on the slides when mentioned in the audio.)

Nelson Brothers loves me, and they'll love you too! (Jingle; sung.)

PAR. 6. By and through the use of the above quoted statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in conjunction with the oral statements and representations of respondent's salesmen to customers and prospective customers, respondent has represented that:

1. Respondent's merchandise was offered for sale at special or reduced prices, and that savings were afforded to purchasers from respondent's regular selling prices.

2. Purchasers of respondent's advertised merchandise would realize significant savings from the price at which said merchandise was offered for sale or sold at retail by respondent in its recent regular course of business.

3. Merchandise advertised for sale by respondent in room groupings for one stated price afforded special or significant savings which were not available if all of the products depicted in said room groupings were purchased as a group at times other than those during which the group was advertised as being "on sale."

4. Respondent's advertised offer was made for a limited time only.

5. The prices at which respondent offered merchandise for sale in their advertisements were the prices at which said merchandise was sold to all customers who purchased such merchandise during the effective duration of said advertised offer.

6. At least one, or more, of the room "groupings" pictured in

respondent's television advertisements were available as shown for the price or prices set forth in said advertisements.

7. Respondent was making a bona fide offer to sell the advertised merchandise at the prices and on the terms and conditions stated in the advertisements.

8. The prices shown on the hang tags attached to merchandise in respondent's showrooms and labeled as "Nelsons' Warehouse Price" were the amounts at which said merchandise was sold or offered for sale by respondent for a reasonable substantial period of time in the recent, regular course of its business.

9. All purchasers of merchandise would receive free gifts or bonuses with the purchase of said merchandise when such gifts or bonuses were mentioned in the advertised offer.

10. The prices quoted in respondent's advertisements were the full amount which a customer would have to pay to have the merchandise in working order, as pictured in the advertisement, in his home.

PAR. 7. In truth and in fact:

1. Respondent's products were not offered for sale at special or reduced prices and savings were not afforded purchasers by way of reductions from respondent's regular selling prices. The prices stated in respondent's advertisements were available to purchasers at other times, both before and after the effective period of said advertisements.

2. Purchasers of respondent's advertised merchandise did not realize significant savings from the prices at which said merchandise had been offered for sale or sold at retail in its recent, regular course of business. The prices represented in said advertisements did not constitute reductions from those at which the same merchandise was regularly offered for sale or was available for purchase from respondent in its regular course of business.

3. Merchandise advertised for sale by respondent in room "groupings" for one stated price did not afford purchasers special or significant savings from the cost of such merchandise if purchased as a group as depicted in said advertisements at times other than those during which the group was advertised as "on sale."

4. Respondent's advertised prices were often not available for a limited time only but were available to purchasers before during or after the limited time described in the advertised offer.

5. The prices at which respondent offered merchandise for sale in their advertisements were often not the prices at which said merchandise was sold to all purchasers thereof during the effective

duration of said advertised offer. The advertised prices were only available to purchasers of the advertised merchandise who specifically requested said merchandise at the advertised prices.

6. In many instances, some of the room "groupings" pictured in respondent's television advertisements were not available for purchase as shown for the price or prices set forth in said advertisements.

7. Respondent was not making a bona fide offer to sell the advertised merchandise at the prices and on the terms and conditions stated in its advertisements. Said offers were frequently made for the purpose of obtaining leads or prospects for the sale of other merchandise at higher prices.

8. The prices shown on the hang tags attached to merchandise in respondent's showrooms and labeled as "Nelsons' Warehouse Price" were not the prices at which said merchandise was sold to the public for a reasonably substantial period of time in the recent, regular course of respondents' business.

9. Purchasers of merchandise did not always receive advertised free gifts or bonuses. The gifts or bonuses mentioned in respondent's advertisements were only given to those purchasers who specifically requested them when purchasing said advertised merchandise.

10. The prices quoted in respondent's advertisements were not all costs a customer was required to pay to have that item in working condition, as pictured in the advertisement, in his home. In addition to the prices quoted, certain other charges were frequently made: such as; installation, set up or assembly, service and warranty charges.

PAR. 8. In the further course and conduct of its business respondent has caused to be advertised merchandise without disclosing in said advertising that such merchandise was used or not new or damaged or defective or was otherwise classified as "distressed." Furthermore, respondent has sold, or offered for sale or has delivered merchandise without disclosing, orally or in writing, at the time of sale that such merchandise was used or not new or damaged or defective or was otherwise classified as "distressed."

Therefore, respondent's failure to disclose in advertising to prospective customers and failure to inform prospective customers or purchasers, orally or in writing, at the time of sale, that merchandise to be sold or offered for sale was used or not new or damaged or defective or was otherwise classified as "distressed" in furtherance of their deceptive advertising and sales practices, was an unfair or

deceptive practice, in violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 9. In the further course and conduct of its business, respondent has made in its advertisements, offers of specific items of merchandise for sale at certain prices during certain times at certain of their stores. During the effective period of said advertisements, respondent has failed to have:

1. Each advertised item clearly and conspicuously available for sale to the public in each and every retail showroom at which the item was advertised as available;
2. At each location where an advertised item was displayed for sale, a sign or other marking clearly disclosing the item which was "as advertised" or "on sale";
3. Each advertised item individually and clearly marked with a price which was equal to or less than the advertised price;
4. Each advertised "room grouping" clearly and conspicuously marked with a "group" price which was at or below the advertised price; and
5. Each item included in the advertised group clearly and conspicuously listed and disclosed separately from items not included within the group.

Respondent's failure to adequately identify items in its showrooms or to have advertised items available in its showrooms, encouraged its salespersons to engage in bait and switch selling practices and other deceptive, false or misleading sales tactics.

PAR. 10. The use by respondent of the aforesaid unfair, false, misleading or deceptive statements, representations, advertisements, acts or practices, has had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements, representations and advertisements were true and into the purchase of substantial quantities of respondents' merchandise by reason of said erroneous and mistaken belief.

PAR. 11. In the course and conduct of the aforesaid business, and at all times mentioned herein, respondent has been, and now is, in substantial competition, in or affecting commerce, with corporations, firms and individuals engaged in the sale of merchandise of the same general kind and nature as the aforesaid merchandise sold by the respondent.

PAR. 12. The aforesaid acts and practices of the respondent as herein alleged, were all to the prejudice and injury of the public and the respondent's competitors and constituted unfair methods of

competition in commerce and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices 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 Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the 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 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 the respondent has violated the said Act, and that 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, and having duly considered comments filed pursuant to Section 2.34 of its Rules, 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:

A. Proposed Respondent Nelson Brothers Furniture Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 2750 West Grand Ave., Chicago, Illinois.

B. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

#### ORDER

A. It is ordered that respondent, Nelson Brothers Furniture Corp., a corporation, its successors and assigns, directly or through

its officers, agents, representatives, sales persons and employees, or through any corporation, subsidiary, division or any other device, in connection with the advertising, offering for sale, sale and distribution of home furnishings, bedding, carpeting, televisions, appliances, or any other merchandise, to the public, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Advertising or offering for sale any merchandise at a special or reduced price, unless such price constitutes a significant reduction from the price at which such merchandise has been sold or openly offered for sale by respondent for a reasonably substantial period of time in the recent, regular course of respondent's business.

2. Advertising or offering for sale any group, set, suite, or similar combination of merchandise at a group "sale" price, or price described by words of similar meaning or import, unless the "sale" price at which the merchandise is offered constitutes a bona fide and reasonably significant reduction from the most recent price at which the group was sold or openly offered for sale for a reasonably substantial period of time in the recent, regular course of respondent's business.

3. Advertising or offering for sale any merchandise which is limited as to quantity or availability unless such limitations are clearly and conspicuously disclosed in such advertising or offering in immediate conjunction with or in close proximity to the advertised merchandise so limited and the limitations are actually enforced and adhered to.

4. Failing to sell or to offer for sale advertised merchandise at the terms and conditions and at or below the price disclosed in the advertisement for the said merchandise.

*Provided, however,* that it shall constitute a defense to a charge under Paragraph 3 or 4 of this order if respondent maintains records sufficient to show that: a) the advertised merchandise was ordered in normally adequate time for delivery, b) the advertised merchandise was ordered in quantities sufficient to meet reasonably anticipated demands and c) the advertised merchandise was not delivered to the customer due to circumstances beyond the respondent's control.

5. Using pictorial representations of two or more items of merchandise in conjunction with a stated price or range of prices when all of the merchandise in the pictorial representations is not being offered at the stated price or range of prices, unless a clear and conspicuous disclosure is made in immediate conjunction with or in close proximity to the stated price or range of prices identifying

merchandise which is included or is not included in the stated price or range of prices.

6. Using, in any manner, a sales plan, scheme, or device wherein false, misleading, or deceptive statements or representations are made in order to obtain leads or prospects for the sale of merchandise.

7. Advertising or offering for sale, orally or in writing, any merchandise or services when the purpose of the advertising or offer is not to sell the offered merchandise or services but to obtain leads or prospects for the sale of other merchandise or services at higher prices.

8. Discouraging or disparaging the purchase of any merchandise or services which are advertised or offered for sale.

9. Representing that any price is respondent's regular, usual, former, customary or original price, unless such price is the price at which such merchandise or service has been sold or openly offered for sale by respondent for a reasonably substantial period of time in the recent and regular course of respondent's business, and does not exist for the purpose of establishing a fictitious price upon which a deceptive comparison, or "free" or similar offer might be based.

10. Using the words "free" or "gift" or any other word or words of similar import or meaning in connection with the sale, offering for sale or distribution of respondent's merchandise or services in advertisements or other offers to the public, as descriptive of an article of merchandise or service:

(a) When all the conditions, obligations, or other prerequisites to the receipt and retention of the "free" or "gift" article of merchandise or service offered are not clearly and conspicuously disclosed in immediate conjunction with or in close proximity to the "free" or "gift" offer.

(b) When, with respect to any article of merchandise or service required to be purchased in order to obtain the "free" or "gift" article or service, the offeror either (i) increases the ordinary and usual price of such merchandise or service or (ii) reduces the quality or (iii) reduces the quantity or size thereof.

11. Failing to give "free" or "gift" merchandise to all persons who complied with the terms and conditions of the "free" or "gift" offer.

12. Using pictorial representations in advertising, unless such pictorial representations describe or show the advertised merchandise with sufficient clarity so that the advertised merchandise can be

readily identifiable by potential customers when visiting respondent's showrooms.

13. Failing to disclose in advertising, in a clear and conspicuous manner, in immediate conjunction with or in close proximity to the advertised merchandise, that such merchandise is used or not new or damaged or defective or is otherwise classified as "distressed" if such is the case.

14. Failing to inform all customers at the time of sale and to provide in writing on the face of all order forms, in close proximity to the description and price of the merchandise being sold that such merchandise is used or not new or damaged or defective or is otherwise classified as "distressed" if such is the case.

15. Failing to inform all customers at the time of sale and to provide in writing on the face of all order forms, in close proximity to the description and price of the merchandise being sold, that such merchandise will be sold "as is," or "as shown" with defects, irregularities or damage if such is the case.

16. Failing to have each customer who has agreed to purchase merchandise on an "as is" or "as shown" basis, sign at the time of sale, the following statement stamped on the face of the order form in close proximity to a description of the merchandise and written in the same language as that used in the sales presentation, with text of not less than ten-point boldface type:

THE ABOVE DESCRIBED MERCHANDISE IS SOLD "AS IS" OR "AS SHOWN" WITH DEFECTS, IRREGULARITIES OR DAMAGE.

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CUSTOMER SIGNATURE

17. Failing to disclose in its advertising and at the time of sale that in addition to the price quoted in respondent's advertising, certain other charges, as applicable, are made for installation, assembly, delivery or for other services performed in connection with the sale or delivery of merchandise.

18. Failing to maintain and produce for inspection and copying for a period of three years from the date of service of this order, or the date of the event, whichever is later, adequate records to document:

- a. Respondent's total costs for each advertisement run by them during the three years; and
- b. The volume of sales made of the advertised product or service at the advertised price; and
- c. The factual basis for any representations or statements as to

special or reduced prices, as to usual or customary retail prices, as to savings afforded purchasers, and as to similar representations of the type described in Paragraphs A.1. and A.2. of this order; and

d. The number of advertised items in stock as of the first day the advertisement is run, the last day the advertisement is run, and six weeks to the day after the termination of the publication of the advertisement; and

e. Copies of all advertisements, including newspapers, radio and television advertisements, direct mail and in-store solicitation literature and any other promotional material distributed to the public; and

f. The names and addresses of all customers who purchased "as is" or "as shown" merchandise.

B. *It is further ordered*, That respondent cease and desist from advertising or offering for sale any merchandise at any stated price, unless during the effective period of an advertised offer:

1. Each advertised item is clearly and conspicuously available for sale to the public at or below the advertised price in each store covered by the advertisement;

2. At each location within each store where an advertised item is displayed there is a sign or other conspicuous marking attached to or in close proximity to the item clearly disclosing that the item is "as advertised" or "on sale" or words of similar import and meaning;

3. Each advertised item is individually and clearly marked with the price which is at or below the advertised price; and

4. Each advertised "room grouping" is clearly and conspicuously marked by a "group" price which is at or below the advertised price; and

5. Each item included in the advertised group is clearly and conspicuously listed and disclosed separately from items not included within the group.

C. *It is further ordered*, That respondent shall deliver a copy of this order to cease and desist to each of its operating divisions and to each of its present and future officers, directors, and personnel engaged in any way in the offering for sale, sale or distribution of any product, in any aspect of preparation, creation or placing of any and all advertisements, and in any processing, counselling, consummation or enforcement of any extension of consumer credit, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

D. *It is further ordered*, That respondent shall provide each

present and future advertising agency utilized by respondents with a copy of this order to cease and desist.

E. *It is further ordered.* That in addition to other rights given to a customer pursuant to this order, if the respondent and a customer are unable to agree upon a settlement of any controversy which is concerned with or relates to the quality, quantity, condition, repair or replacement of furniture, appliances, or other merchandise, or the failure to replace or repair damaged or defective merchandise, or to make cancellations with refunds with respect thereto, then, at the option of the customer, such customer shall have the right to submit the issues to an impartial arbitration procedure entailing no mandatory administrative cost or filing fee to the customer, which shall be conducted in accordance with the arbitration rules and procedures of the Arbitration Program of the Better Business Bureau of Metropolitan Chicago, Inc., 35 E. Wacker Drive, Chicago, IL 60601. Customers of respondent's Wisconsin stores who elect to seek arbitration pursuant to this paragraph shall be entitled to a proceeding conducted in accordance with the arbitration rules and procedures of the Council of Better Business Bureaus, Inc., 1150 17th St., N.W., Washington, D.C. 20036 conducted by the Better Business Bureau of Greater Milwaukee, 174 W. Wisconsin Ave., Milwaukee, Wisconsin 53203.

F. *It is further ordered.* That respondent comply with and abide by any award or decision rendered pursuant to the arbitration provision hereof.

Furthermore, respondent shall not be entitled to prevent arbitration pursuant to any provision of this order by reason of having obtained a default judgment against any customer in an action for money allegedly due the respondents or their assignees.

G. *It is further ordered.* That respondent shall provide notification to customers of their right to submit such controversy to arbitration by prominently displaying the following notice in all its stores at the location where customers usually execute consumer credit instruments or other legally binding documents, such notice being written in the same language as that used in the sales presentation with text of not less than ten-point boldface type:

#### NOTICE TO ALL CUSTOMERS

Any controversy which is concerned with or relates to the quality, quantity, condition, repair or replacement of furniture, appliances or other merchandise, or the failure to replace or repair damaged or defective merchandise, or to make cancellations with refunds with respect thereto shall be settled, at the option of the customer, and at no cost to the customer, by arbitration.

**(Illinois stores conclude:)**

Such arbitration shall be conducted in accordance with the rules and procedures of the Arbitration Program of the Better Business Bureau of Metropolitan Chicago, Inc. Consumers seeking arbitration should contact the Better Business Bureau of Metropolitan Chicago, Inc., whose offices are located at 35 E. Wacker Drive, Chicago, Illinois 60601, telephone (312) 346-3313.

Under Illinois state law, arbitration, if undertaken is legally binding and final!

**(Wisconsin stores conclude:)**

Such arbitration shall be conducted in accordance with the rules and procedures of the Council of Better Business Bureaus, Inc., 1150 17th Street N.W., Washington, D.C. 20036 conducted by the Better Business Bureau of Greater Milwaukee. Consumers seeking arbitration should contact the Better Business Bureau of Greater Milwaukee, Wisconsin 53203, telephone (414) 273-4300.

Under Wisconsin state law, arbitration, if undertaken is legally binding and final!

Respondent is authorized and directed to change the instructions, contained in the Notice set forth above as to how to secure arbitration, if circumstances require.

H. *It is further ordered*, That respondent shall maintain full and complete records and copies of all complaint correspondence received from customers, and any internal memoranda written in connection therewith, and full and complete records of all oral complaints and requests for service or repair, for a period of three (3) years from the date of receipt thereof.

I. *It is further ordered*, That nothing contained in this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondent from complying with agreements, orders or directives of any kind obtained by any other municipal, state or federal agency, except to the extent that they are inconsistent with the terms and conditions of this order, or act as a defense to actions instituted by municipal, state or federal agencies.

Nothing in this order shall be construed to imply that any past or future conduct of respondent complies with the rules and regulations of, or the statutes administered by, the Federal Trade Commission.

J. *It is further ordered*, That the respondent notify the Commission at least 30 days prior to any proposed change in the respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation or corporate structure which may affect compliance obligations arising out of this order.

K. *It is further ordered*, That respondent herein shall, within sixty (60) days after service upon it of this order, file with the

Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Complaint

92 F.T.C.

IN THE MATTER OF  
LOCKHEED CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS

*Docket C-2942. Complaint, Dec. 21, 1978 — Decision, Dec. 21, 1978*

This consent order, among other things, requires a Burbank, Calif. aircraft manufacturer and its subsidiaries to cease offering or making payments to influential foreign entities for the purpose of preventing competition in the sale of their aircraft abroad; and to keep adequate documentation for all payments, brokerage fees, commissions, or political campaign contributions paid to any one foreign party which total annually in excess of \$100,000. Respondents are additionally required to report to the Commission, within ten days, any corporate policy change which relates to foreign sales activities.

*Appearances*

For the Commission: *Daniel A. Laufer* and *Jaime Taronji, Jr.*

For the respondent: *Roger Clark, Rogers & Wells*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Lockheed Corporation, a corporation under the jurisdiction of the Commission, has violated Section 2(c) of the Robinson-Patman Act (15 U.S.C. 13(c)) and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

PARAGRAPH 1. Lockheed Corporation (hereinafter "Lockheed") is a California corporation with its principal office and place of business located at 2555 Hollywood Way, Burbank, California.

PAR. 2. At all times relevant herein, Lockheed was engaged in the purchase or sale of products and services in interstate and foreign commerce and was a corporation whose business was in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

PAR. 3. Between 1970 and 1975, in connection with certain export sales of jet aircraft by Lockheed in competition with other domestic aircraft manufacturers, Lockheed made payments to or intended for foreign government officials or officers or employees of foreign commercial customers who were in a position to make or influence the decision whether or not to purchase the aircraft offered for sale

by Lockheed. Such payments, in some instances, effectively excluded other domestic aircraft manufacturers from selling their aircraft to the governments and airlines whose officials, officers, and employees had received the payments.

PAR. 4. The above-described acts, practices and methods of competition by Lockheed committed in a successful attempt to procure aircraft sales for itself and deny such sales to domestic competitors, constitute unfair acts or practices and unfair methods of competition in violation of Section 2(c) of the Robinson-Patman Act (15 U.S.C. 13(c)) and Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45).

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices 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 a violation of the Federal Trade Commission Act and the Robinson-Patman Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all 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 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 the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed 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 findings and enters the following order:

1. Respondent Lockheed Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal place of business at 2555 Hollywood Way, Burbank, California.

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

*It is hereby ordered,* That respondent Lockheed Corporation, and its officers, agents, employees, representatives, successors and assigns, and its subsidiaries, through any corporate or other device, in its transactions in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall cease and desist, in connection with its foreign sales activity, from offering to make or making payments to officers, employees, agents or representatives of commercial customers or foreign governments in any form whatsoever, directly or indirectly, where the purpose of such payments is to influence the recipient of the payment or the customer to favor respondent at the expense of one or more domestic competitors of respondent or to prevent domestic competitors from bidding, selling, or otherwise doing business in competition with respondent in the sale of aircraft, aircraft parts or related services to foreign governments or business entities. For purposes of this order, "payments" shall not include normal business expenditures for entertainment, travel or small gifts (the cost of which does not exceed \$1,000 per gift) for promotion of respondent's products or services, or payments permitted under Sections 103(b) or 104(d)(2) of the Foreign Corrupt Practices Act of 1977.

*It is further ordered,* That respondent and its subsidiaries shall maintain adequate documentation, with respect to all payments referred to in the previous paragraph; and with respect to all brokerage fees, commissions or political campaign contributions which total in excess of \$100,000 in any calendar year, paid to any one foreign public official, person, firm, corporation, or other foreign entity, and the Federal Trade Commission shall have continuing access to such documentation. Such documentation shall include, but not be limited to, all internal memoranda, all financial documents, and all correspondence with third persons, firms, corporations, or other entities regarding such payments, brokerage fees, commissions, or political campaign contributions and all correspondence with international marketing consultants regarding breaches of their consulting contracts, maintained in the ordinary course of business.

*It is further ordered,* That in the event there is to be any change of respondent's policy respecting payments by respondent in connection with its foreign sales activities, respondent will file with the Federal Trade Commission, within ten (10) days of the date when

