

substantial evidence. 2) The FTC order in finding anticompetitive effect of the acquisition is not supported by substantial evidence. 3) The injunction entered by the FTC is over broad.

Abex Corporation is the successor name to American Brake Shoe Company. On April 16, 1963, American Brake Shoe, a large conglomerate which manufactures railroad products, hydraulics, castings and friction materials merged with the S. K. Wellman Company. Wellman at the time manufactured only one line of products; these were sintered metal friction materials for clutches, brakes and transmissions for heavy duty equipment and machinery. Wellman's principal customers had been aircraft companies, mining companies and the like.

Prior to the merger, American Brake Shoe sought Commission approval for its purchase of Wellman. After 13 months, American Brake Shoe proceeded with the merger without receiving such approval.

*930 At the hearing before the FTC Examiner, Abex insisted and offered evidence tending to prove that sintered friction materials were only a small part of a large competitive field which included both 'organic' friction materials (asbestos brakes, etc.) and metal friction materials. The Trial Examiner made findings of violation of Section 7 of the Clayton Act by Abex's acquisition of Wellman on two different bases-- first, assuming that all friction materials constituted the overall market (or 'universe') and second, assuming that sintered metal friction materials constituted a valid submarket. The FTC specifically held that sintered friction materials constituted a valid submarket and declined to consider the wider 'universe' for which Abex argued. The FTC affirmed the findings of the Examiner as to the anticompetitive effect of the acquisition and ordered divestiture and a 10-year injunction against similar acquisitions.

Both the Examiner and the Commission cited and relied on an analysis of the sintered metal friction material market which tended

to show that Abex, by its acquisition of Wellman, moved from third to a dominant first place in the market.

The Commission's opinion on this score said:

'It is obvious that the elimination of Wellman as a substantial competitor from the already limited number of producers necessarily leads to the results proscribed by the statute. The margin of error, if any, residing in the market share percentages computed from the survey is therefore of little significance. Our examination of the record accordingly constrains us to affirm the finding of the examiner that the effect of the merger may be to substantially lessen competition in the production and sale of sintered metal friction materials.'

[1] As to the first appellate issue concerning whether sintered metal friction materials were a valid submarket, Abex appears to us to rely more upon theory than upon economic realities. In essence, it asserts that any clutch or braking device which currently uses sintered metal friction could be so designed as to supplant sintered metal friction by organic or other metal friction. But the record is singularly devoid of any testimony that indicates that any such competition exists as a practical matter.

There is evidence from which the FTC could have concluded that sintered metal friction devices are up to 40% More expensive than organic and hence are used in specialty applications which through too quickly.

In its 1960 annual report petitioner said:

'For severe applications, American Brakeblok manufactures friction parts of sintered metals: powdered metals which are molded under pressure and then fused under heat. These materials handle power transmission on heavy construction equipment and braking on jet aircraft such as the Boeing 707 and Douglas DC-8. They are also used in some automotive transmissions where special heat-resistant characteristics are required.'