unless there are maintained by respondent full and adequate records disclosing the facts upon which such claims and representations are based.

It is further ordered, That the 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.

In the Matter of

THE PURE OIL COMPANY ET AL.*

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATIONS OF SEC. 2(a) OF THE CLAYTON AND THE FEDERAL TRADE COMMISSION ACTS

Dockets 6640, 6898, 7567, 8537. Complaints, Sept. 26, 1956—Decision, Dec. 28, 1964

Order vacating the initial decisions and dismissing the complaints charging four major marketers of gasoline with anti-competitive practices, and announcing a comprehensive industrywide inquiry into the marketing and other competitive problems of the gasoline industry.

Complaint

SEPTEMBER 26, 1956

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated, and is now violating, the provisions of subsection (a) of Section 2 of the Clayton Act (15 U.S.C., Section 13) as amended by the Robinson-Patman Act, approved June 19, 1936, and the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C., Section 45), 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 with respect thereto as follows:

COUNT I

Paragraph 1. Respondent Pure Oil Company is a corporation organized, existing and doing business under and by virtue of the laws

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*And the following related cases: The Texas Company, Docket No. 6898; Standard Oil Company (Indiana), Docket No. 7567; and Shell Oil Company, Docket No. 8537.

of the State of Ohio, with its principal office and place of business located at 35 East Wacker Drive, Chicago, Illinois.

PAR. 2. Respondent Pure Oil Company is now, and for several years last past has been, among other things, primarily engaged in the sale and distribution of gasoline and other petroleum products throughout the United States under the brand name of "Pure." "Pure" gasoline is nationally advertised and enjoys wide public acceptance.

Respondent occupies a major position in the petroleum industry, being among the Nation's leading producers and marketers of gasoline and other petroleum products. In 1955 respondent produced crude oil and gas from 5,540 net wells in 15 States and the Gulf of Mexico. It has four major refineries strategically located to serve its marketing area. Crude oil processed in these refineries during the year 1955 totalled 60,592,000 barrels compared with 47,178,000 barrels processed in 1954. It has marketing facilities located in twenty-four States and as of December 31, 1955, distributed its products from and through approximately 15,000 retail outlets. Of these, some 15,000 retail outlets respondent operates 93 as company stations, leases some 3,379 stations to independent dealers and has contracts in force of which 8,474 other independent stations under the terms of which "Pure" gasoline and other "Pure" petroleum products are sold. In addition thereto, respondent sells its "Pure" gasoline and other petroleum products to a number of independent jobbers who in turn sell "Pure" gasoline at retail through their own stations and to other independent gasoline service station operators. Some 3,288 stations are to be found in this latter category.

PAR. 3. Respondent Pure Oil Company markets its gasoline and other petroleum products on a nationwide basis through its own company-owned and operated stations as well as under dealer contracts. In the latter category, respondent has entered into dealer contracts with approximately 120 dealers located in the Birmingham, Alabama, area, now in force, obligating said respondent to sell and deliver to such dealers all of their respective requirements of respondent's brand of gasoline during the term of such contracts.

PAR. 4. For the purpose of supplying said customers, and in making delivery pursuant to said contracts, respondent ships or otherwise transports its gasoline from its refinery in Baton Rouge, Louisiana, to Birmingham, Alabama, through the facilities of the Plantation Pipe Line from which it is distributed to said dealers. There is now and has been at all times mentioned herein a continuous stream of trade in commerce, as "commerce" is defined in the Clayton Act, of said gasoline between respondent's Baton Rouge, Louisiana, refinery, terminals and

distribution points, and said retail dealers purchasing said gasoline in Birmingham, Alabama. All of such purchases by said retail dealers are and have been in the course of such commerce. Said gasoline is transported into Alabama by respondent and there sold by respondent for resale in the Birmingham, Alabama, area.

PAR. 5. Respondent Pure Oil Company, in the course and conduct of its business, is now, and during the times mentioned herein has been, in substantial competition with others engaged in the production, sale and distribution of gasoline and other petroleum products in commerce between and among the various States of the United States and of the District of Columbia.

PAR. 6. Respondent Pure Oil Company, in the course and conduct of its business, has discriminated in price between different purchasers of its gasoline of like grade and quality by selling it to certain of its customers at higher prices than it did to other of its customers.

Since on or about December 29, 1955, respondent Pure Oil Company, in the course and conduct of its business, as above described, has sold its gasoline to certain dealers located in and around Birmingham, Alabama, at prices substantially lower than the prices charged by said respondent to other of its retail purchasers of gasoline located in the State of Alabama as well as in other States of the United States.

PAR. 7. The effect of the aforesaid discriminations or of any appreciable part thereof has been or may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and its favored customers are respectively engaged, or to injure, destroy or prevent competition with respondent or with said favored customers who receive the benefits of said discriminations or with the customers of either of them.

PAR. 8. The foregoing alleged discrimination in price made by respondent Pure Oil Company are in violation of subsection (a) of Section 2 of the Clayton Act, as amended.

COUNT II

PAR. 9. The allegations of Paragraphs One through Three of Count I of this complaint are hereby adopted and incorporated herein by reference and made a part of this Count II the same as if they were repeated herein verbatim.

PAR. 10. In the course and conduct of its business, respondent Pure Oil Company is now and has been at all times referred to herein engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, in that it ships or otherwise transports its gasoline

in tank cars, tankers, pipe lines, and trucks from its different refineries, terminals and distribution points located in various States of the United States to its retail dealers located in the Birmingham, Alabama, area and to various other States of the United States.

PAR. 11. Except to the extent that competition has been hindered, frustrated, lessened and eliminated as set forth in this complaint, respondent has been and is now in substantial competition with other corporations, individuals and partnerships engaged in the sale and distribution of gasoline in "commerce" as that term is defined in the Federal Trade Commission Act.

PAR. 12. Beginning in or about December 1955, respondent, acting through its Division Manager, one Fayette G. Shepard, and some 60 odd of its retail dealers, engaged in selling Pure Oil Company gasoline and other petroleum products in the Birmingham, Alabama, area, for the purpose of suppressing, preventing, hindering, and lessening competition in the sale and distribution in such commerce of gasoline, have entered into, maintained and carried out a combination, planned common course of action, understanding and agreement, through which they would fix and maintain, and did fix and maintain, the price at which gasoline was sold or would be sold at retail in the gasoline service stations leased and operated by the some 60 odd retail service stations selling Pure Oil Company gasoline and other petroleum products.

PAR. 13. Pursuant to and in furtherance of the aforesaid unlawful combination, planned common course of action, understanding and agreement, respondent, acting through and with the aforesaid Fayette G. Shepard, together and in conspiracy and combination with the aforesaid some 60 odd retail service station dealers, did and performed the following acts and things:

1. Agreed to attempt to adopt and did to a substantial degree and extent adopt, adhere to and maintain a plan or policy, sometimes designated and referred to as the "Chicago Plan" or "1 cent policy," whereby the posted retail price of gasoline for grades at Pure stations in the Birmingham area would not exceed the price of gasoline for similar grades posted by independent stations selling unbranded grades of gasoline by more than 1 cent in said area.

2. Agreed to fix and maintain, and did fix and maintain, the retail price at which gasoline was sold or to be sold at the various service stations operated by the some 60 odd retail dealers operating under contract with respondent.

3. Agreed to and adhered to certain discounts, terms and conditions upon which the said gasoline would be sold to the some 60 odd retail service stations and to the purchasing public.

PAR. 14. This alleged unlawful planned common course of action is singularly unfair, oppressive and to the prejudice of the public and respondent's competitors and retailers of gasoline in the Birmingham, Alabama, marketing area and has a dangerous tendency to unduly restrain, hinder, suppress and eliminate competition between and among respondent's retail dealers and the independent retail dealers located in the Birmingham, Alabama, areas, or others, and has unduly restrained, hindered, suppressed and eliminated competition therein in the sale and distribution of gasoline in commerce within the meaning of the Federal Trade Commission Act and constitutes an unfair method of competition and an unfair act and practice in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Rufus E. Wilson, *Mr. Alan Weber*, and *Mr. Paul D. Scanlon*, for the Commission.

Howrey, Simon, Baker & Murchison, by *Mr. William Simon* and *Mr. A. Duncan Whitaker* of Washington, D.C., and *Vinson, Elkins, Weems & Searls*, by *Mr. Ben A. Harper* and *Mr. John C. Snodgrass* of Palatine, Illinois, for respondent.

COMPLAINT*

SEPTEMBER 27, 1957

The Federal Trade Commission, having reason to believe that The Texas Company, a corporation, hereinafter sometimes referred to as respondent, has violated and is now violating the provisions of Section 2(a) of the Clayton Act (15 U.S.C., Section 13), as amended by the Robinson-Patman Act, approved June 19, 1936, and the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C., Section 45), 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 with respect thereto as follows:

COUNT I

PARAGRAPH 1. Respondent, The Texas Company, 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 135 East 42d Street, New York 17, New York. Respondent is now, and for several years last past has been, among other things, engaged in the offering for sale, sale and distribution of gasoline and other petroleum products throughout the United States under the

*Hearing Examiner's order of Mar. 30, 1959, supplemented complaint to encompass activities allegedly in violation of Count II occurring since the date of the complaint, specifically in the Detroit area from June 1957 to June 1958.

brand names of "Texaco", "Fire Chief", and "Sky Chief". Gasoline sold under these brand names is nationally advertised and enjoys wide public acceptance. Respondent occupies a major positions in the petroleum industry, being among the Nation's leading producers and marketers of gasoline and other petroleum products. The Texas Company, is an integrated organization engaged in all aspects of the oil industry and operates throughout the United States in one or more phases of the oil industry, or in related business. In 1956, the respondent produced 148,357,911 barrels of crude oil from its domestic wells. The company owns or leases 11,260,558 acres of productive and prospective land in the United States. At the close of 1956, the respondent's domestic crude and production pipe line system aggregated 6,707 miles. Marine equipment operated by the respondent in 1956 consisted of 76 ocean going vessels with a total capacity of approximately 1,265,000 deadweight tons. The respondent has a total of 13 refineries located in the States of Texas, Illinois, New Jersey, California, Oklahoma, Wyoming, Montana, Delaware and Rhode Island, and these refineries have a daily aggregate crude capacity of 616,000 barrels. The respondent has approximately 140 terminals located throughout the United States of which 43 are served by pipe line and the balance by ocean or inland waterway. The company's products are marketed in every State of the United States, being sold direct from terminals and refineries and principally marketed through approximately 2,200 bulk stations.

The respondent also owns or leases producing properties, refineries and pipe lines, and markets its products in foreign lands.

PAR. 3. Respondent markets its gasoline and other petroleum products on a nationwide basis through its own company-owned and operated stations as well as under contracts with independent dealer stations. In the latter category, respondent has entered into dealer contracts with dealers, hereinafter referred to as "Texas" or "Texaco" dealers, located in the Portsmouth-Norfolk-Virginia Beach, Virginia, area, and other areas, now in force, and under the provisions thereof respondent sells and delivers to such dealers all of their respective requirements of respondent's brands of gasoline during the terms of such contracts.

PAR. 4. For the purpose of supplying said customers, and in making delivery pursuant to said contracts, respondent ships or otherwise transports its gasolines from its refineries located in various States across State lines, to bulk stations and other distributing points in the aforementioned area, from which it is distributed to said Texaco retail dealers. There is now and has been at all times mentioned herein a continuous stream of trade and commerce, as "commerce" is defined in the

Clayton Act, of said gasolines between respondent's refineries, terminals and bulk stations and said Texaco dealers purchasing said gasolines in the Portsmouth-Norfolk-Virginia Beach, Virginia, area, and other areas. All of such purchases by said Texaco retail dealers are and have been in the course of such commerce. Said gasolines after transportation into the State of Virginia and other areas by respondent and after sale by respondent to said Texaco dealers is then offered for resale and sold by the said Texaco dealers to motorists and others in the aforementioned areas, as well as other areas.

PAR. 5. Respondent, in the course and conduct of its business, is now, and during the times mentioned herein has been, in substantial competition with others engaged in the production, sale and distribution of gasoline and othe petroleum products in commerce between and among the various States of the United States and of the District of Columbia.

PAR. 6. Respondent, in the course and conduct of its business, has discriminated in price between different purchasers of its gasoline, of like grade and quality, by selling it to certain of its customers at higher prices than it did to other of its customers. Since on or about November 1956, respondent, in the course and conduct of its business as above described, has sold its gasoline to certain dealers located in and around the Portsmouth-Norfolk-Virginia Beach, Virginia, area, and other areas at prices substantially lower than the prices charged by the respondent to its other retail purchasers for gasoline of the same grade and quality in the same competitive market area. This practice of respondent has been followed in other areas of the United States as well as the aforementioned Norfolk-Portsmouth-Virginia Beach, Virginia, area.

PAR. 7. The effect of the aforesaid discriminations, or of any appreciable part thereof, has been or may be substantially to lessen competition or to injure, destroy or prevent competition with those retailers of respondent's gasoline who received the lower prices, in the resale of said gasoline at retail in the Portsmouth-Norfolk-Virginia Beach, Virginia, area, and other areas.

PAR. 8. The foregoing alleged discriminations in price made by respondent, The Texas Company, are in violation of subsection (a) of Section 2 of the Clayton Act, as amended.

COUNT II

PAR. 9. The allegations of Paragraphs One through Six of Count I of this complaint are hereby adopted and incorporated herein by reference and made a part of this Count II the same as if they were repeated herein verbatim.

PAR. 10. Respondent sells its gasoline to a number of retail dealers located in the area comprising Portsmouth, Norfolk, and Virginia Beach, Virginia, as well as in other areas in different States of the United States. In these various areas respondent, as outlined in Paragraph Three herein, has entered into certain contracts or leases, now in force, obligating respondent to sell and deliver to such retail dealers all of their respective requirements of respondent's brands of gasoline during the terms of such contracts. For the purpose of supplying said customers and of making deliveries pursuant to said contracts, respondent ships or otherwise transports its gasolines from its refineries located in various States across State lines to bulk stations and other distributing or terminal points in or near the specified area or areas from which it is delivered to said retail dealers. There is now and has been at all times mentioned a continuous stream of trade and commerce, as "commerce" is defined in the Federal Trade Commission Act, of said gasolines between respondent's refineries, terminals and bulk stations and said retail dealers purchasing said gasolines in the areas mentioned herein. All of such purchases from respondent by the said Texaco retail dealers are and have been in the course and furtherance of such commerce. Said gasolines are sold by respondent for resale in the Portsmouth-Norfolk-Virginia Beach, Virginia, area and other areas.

PAR. 11. Except to the extent that competition has been hindered, frustrated, lessened and eliminated as set forth in this complaint, respondent has been and is now in substantial competition with other corporations, individuals and partnerships engaged in the sale and distribution of gasoline in "commerce" as that term is defined in the Federal Trade Commission Act.

PAR. 12. It is now and has been the policy of respondent The Texas Company for a number of years to grant to its lessee retail dealers, temporary discounts from the regular tank wagon price of its gasolines.

The granting of such discounts generally occurs in areas where there is a price disturbance, usually in the nature of a local or area price war.

The policy of granting such discounts is conditioned upon the retail dealer agreeing to request such assistance and at the same time agreeing to post such prices as may be dictated by respondent The Texas Company. Failure or refusal on the part of the lessee retail dealer to post the prices dictated by respondent is regarded by the respondent as sufficient basis to not allow such discount, or in those cases where it has been granted, to terminate such discount even though such

discount is still being given to other lessee retail dealers in the same competitive area.

PAR. 13. Beginning on or about November 1956, and at different times thereafter, respondent entered into a combination, planned common course of action, agreement and understanding with certain of its lessee retail dealers in the Portsmouth-Norfolk-Virginia Beach, Virginia, area and other areas under the terms and conditions of which the aforestated discount policy of respondent was placed into effect, maintained and carried out.

PAR. 14. Pursuant to and in furtherance of the aforesaid unlawful combination, planned common course of action, understanding and agreement, respondent, acting together and in combination with the aforesaid retail service station dealers, agreed to fix and maintain and did fix and maintain, the retail price at which gasolines were sold or were to be sold at said retail service stations, and, further, agreed to and adhered to certain discounts, rebates, allowances, terms and conditions upon which said gasolines would be sold to said retail service stations and to the purchasing public.

PAR. 15. This alleged unlawful planned common course of action is singularly unfair, oppressive and to the prejudice of the public and respondent's competitors and retailers of gasoline in the Portsmouth-Norfolk-Virginia Beach, Virginia, area, and other areas, and has a dangerous tendency to unduly restrain, hinder, suppress and eliminate competition between and among respondent's retail dealers, or others, in the sale and distribution of gasoline in commerce within the meaning of the Federal Trade Commission Act, and constitutes an unfair method of competition and an unfair act and practice in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Rufus E. Wilson and *Mr. Paul D. Scanlon* for the Commission.

Mr. Milton Handler and *Mr. Amzy B. Steed* of New York, N.Y.; with *Mr. Fred A. Freund*, *Mr. Frank D. Gorman*, *Mrs. Cecelia H. Goetz;* and *Mr. James M. Brachman* of New York, N.Y., for the respondent.

COMPLAINT*

AUGUST 7, 1959

The Federal Trade Commission, having reason to believe that the above-named respondent has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C.,

*Reported as amended by order of Hearing Examiner dated Sept. 7, 1960.

Sec. 45), 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 as follows:

PARAGRAPH 1. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its principal office and place of business located at 910 South Michigan Avenue, Chicago, Illinois.

PAR. 2. Respondent is now and for many years has been primarily engaged in the business of refining, storing, transporting, distributing, and selling gasoline and other petroleum products to various wholesale and retail buyers throughout the United States, as hereinafter more fully set forth, for resale through service stations to the consuming public. Respondent's gasoline enjoys wide public acceptance wherever it is marketed and is considered a major brand product.

Respondent is a fully integrated company in that it is engaged in the acquisition and exploitation of oil producing properties in the United States and elsewhere and the refining of crude oil and the subsequent manufacture therefrom of various petroleum products, including gasoline. Respondent is one of the Nation's leading producers and marketers of gasoline and other petroleum products. In 1956 respondent's total assets of $2,425,000,000 and total income of $1,912,000,000 placed it third in size in the entire field. In 1957 respondent was the fifth largest oil company in terms of total assets, surpassed only by Standard Oil Company (New Jersey), $7.9 billion; Gulf Oil Company, $2.9 billion; Socony-Mobil Oil Company, $2.8 billion; and The Texas Company, $2.5 billion. It is the ninth largest industrial corporation in the Nation in terms of total assets, exceeded only by General Motors, U.S. Steel, Ford Motor Company and E. I. du Pont de Nemours & Co. in addition to the aforementioned oil companies.

In the United States respondent is the second largest refiner and the fourth largest producer of crude oil. In 1956, respondent refined about eight percent of all crude oil in the United States, and its sales, including an average of 323,694 barrels per day of refined gasoline, represented eight percent of the Nation's total. Its pipeline movements, through some 14,890 miles of crude oil pipelines, represented about sixteen percent of the Nation's total.

Respondent's primary marketing area is in the fifteen States known as the midwest and mountain States. These States are Montana, Wyoming, Colorado, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Minnesota, Iowa, Missouri, Wisconsin, Illinois, Michigan, and Indiana. In addition respondents has affiliates who market in some thirty-three States: Utah Oil Co. (Utoco), five States; American Oil

Company (Amoco), twenty-eight States. Thus, the consolidated company has marketing representation in forty-eight States.

In 1956 respondent and its affiliates served 29,890 or more retail outlets. Approximately sixty percent of respondent's gasoline is marketed in the fifteen State area mentioned above under the name of Standard White Crown (premium) and Standard Red Crown (regular or house brand), through some 15,654 retail outlets. Of this number, some 3,602 stations are company-owned service stations leased to dealers and some 6,930 stations are privately owned service stations sub-leased to dealers. Included in the foregoing are some 842 stations designated as lessee-consignee stations. Respondent also has some 96 company operated service stations and sells to some 5,017 other stations under supply agreements. The forty percent remainder of its gasoline production is sold directly to various commercial users and other commercial accounts.

In the entire fifteen State market area mentioned above, respondent is one of the major gasoline marketers engaged in selling its gasolines throughout the area, if not the major one, and occupies a dominant position or status in the area, as it has for many years.

PAR. 3. In the delivery and sale of its gasoline to its various marketing outlets located in the fifteen State area, respondent ships or otherwise transports its gasoline from its various refineries located in Whiting, Indiana; Sugar Creek, Missouri; Wood River, Illinois; Mandan, North Dakota; Neodesha, Kansas; Casper, Wyoming; Texas City, Texas; El Dorado, Arkansas; Destrehan, Louisiana; Yorktown, Virginia; Salt Lake City, Utah; Baltimore, Maryland; and Savannah, Georgia, through the facilities of its pipelines, barges, tank cars and trucks interconnecting the various refineries with its marine and other terminals and bulk stations across State lines, from which the said gasolines are distributed to service stations, dealers and other customers located in the various States in which it does business. Accordingly, respondent is now, and has been at all times mentioned herein, engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, in the shipment and transportation of such gasoline between respondent's various refineries, terminals and distribution points, its bulk storage plants and said wholesalers, jobbers and retail dealers purchasing said gasoline in the fifteen State area. All of such purchases by wholesalers, jobbers and retail dealers in these States are and have been in the course of such commerce.

PAR. 4. Except to the extent that competition has been hindered, frustrated, lessened and eliminated, as set forth in this complaint, respondent has been and is now in substantial competition with other

corporations, firms and individuals engaged in the sale and distribution of gasoline in "commerce" as that term is defined in the Federal Trade Commission Act.

PAR. 5. Respondent has a number of retail outlets through which its refined petroleum products, including gasoline, are sold to the consuming public, as mentioned above. A substantial number of these outlets are operated by independent businessmen, or who would be such in the absence of the power and control exercised over them by respondent, who lease or sub-lease their service station properties from respondent and who have entered into supply contracts for gasoline and certain other requirements with respondent.

Respondent markets its gasoline through the retail outlets mentioned above by the medium of contracts or lease agreements under the terms of which respondent agrees to sell and deliver and the dealers agree to buy all of their requirements of gasoline from the respondent.

There are more than 10,000 such dealers operating service stations as respondent's lessees in the fifteen State area mentioned above.

PAR. 6. Commencing on or about December 1955, respondent devised, and in combination, concert, or by agreement, express or implied, with certain of its lessee-dealers, adopted and caused to be placed in effect a course of dealing, scheme, plan, method, device or policy applicable to the sale of gasoline to its retail lessee-dealers and the consuming public which has been placed in operation in different marketing areas as follows:

Minneapolis-St. Paul, Minnesota;
Kansas City, St. Louis, Missouri;
Evansville, Indiana;
Eau Claire, La Crosse, Wassau, Racine, Fond du Lac, Kenosha, Oshkosh, Wisconsin;
Peoria, Decatur, Springfield, Danville, Champaign-Urbana, Kanakee, Illinois;
Sioux Falls, Huron, South Dakota;
Omaha, Nebraska; and
Des Moines, Sioux City, Iowa.

Said policy is variously referred to, designated, or otherwise known as the "1956 Retail Marketing Plan," the "Twin Cities Plan," the "Minneapolis Plan," or the "Suggested Competitive Retail Price Plan," commonly known and hereinafter referred to as SCRP. Under SCRP respondent discontinues the traditional posting of its dealer tank wagon gasoline price at its bulk plants; purports to ascertain through surveys the prevailing retail price levels of various classes of unbranded gasoline resellers; and purports to determine an appro-

priate differential between branded and unbranded products as a class, to reflect realistically the difference in public acceptance between the two classes of products, taking into consideration:

a. posted prices of unbranded resellers;

b. discounts from posted prices;

c. value of stamps, premiums and other give-aways.

On the basis of the foregoing, respondent then determines a "suggested competitive retail price." The price of gasoline to Standard's lessee-dealers is then determined by a percentage discount from the suggested competitive retail price, excluding taxes. In no event does the percentage discount allowed the lessee-dealer amount to what he was receiving as his normal margin of profit on each gallon of gasoline.

By means of various provisions in the leases, sub-leases and supply contracts and through a system of policing the business operations of the said independent lessee-dealers by constant inspection and surveillance, the respondent is able to and does, to a substantial extent and degree, dominate and control the lessee-dealers in the operation of the service stations leased or sub-leased from respondent. Such domination and control is exercised, exerted, and used by respondent to persuade, influence, coerce and induce said independent lessee-dealers to abide by, agree to, adhere to, follow or acquiesce in, various plans, policies or methods of doing business which may be suggested by respondent or which respondent may desire or elect to place in effect and operation, including SCRP. At all times the independent lessee-dealer is conscious and aware of the power of respondent and is influenced by such power in the everyday decisions made by him in the conduct of his business.

To help effectuate and carry out the SCRP plan in the different market areas hereinbefore set forth, respondent caused meetings to be held between representatives of respondent and certain of respondent's lessee-dealers, in the particular market or markets among others, at which time the details, aims and purposes of the SCRP plan were explained and discussed. These procedures and their implementation had the tendency to and did persuade, influence, and otherwise induce or cause respondent's independent lessee-dealers to agree to adopt or follow the SCRP plan and policies, when placed in operation.

As a result of such agreement, either express or implied from a course of dealing or other circumstances, cooperation, combination, understanding, and planned common course of action, respondent and certain of its lessee-dealers have been able to effectively establish, fix

and maintain prices of gasoline in those market areas where the SCRP plan has been placed in effect.

PAR. 7. The combinations, agreements, understandings, acts, practices, systems, policies, course of dealing and planned common course of action of respondent and its lessee dealers, as alleged, have had a tendency to unduly restrain, hinder, suppress, prevent and eliminate competition between and among respondent's lessee-dealers; between respondent's lessee-dealers and others in the various areas in which SCRP has been and is now in force and effect; have a tendency to create a monopoly in the sale and distribution of gasoline in commerce within the meaning of the Federal Trade Commission Act; and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Rufus E. Wilson and *Mr. A. M. Minotti* for the Commission.

Mr. Hammond E. Chaffetz and *Mr. Walter T. Kuhlmey* of *Kirkland, Ellis, Hodson, Chaffetz and Masters*, Chicago, Ill., for respondent.

Mr. Mervin Bristol, *Mr. M. J. Keating*, of counsel.

COMPLAINT

OCTOBER 16, 1962

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated, and is now violating, the provisions of subsection (a) of Section 2 of the Clayton Act (U.S.C., Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, and the provisions of Section 5 of the Federal Trade Commission Act, as amended (U.S.C., Title 15, Sec. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, charging as follows:

COUNT I

PARAGRAPH 1. The respondent, Shell Oil Company, 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 50 West 50th Street, New York, New York.

PAR. 2. Respondent is now, and for several years last past has been, among other things, primarily engaged in the business of distributing and selling gasoline and other petroleum products throughout the

United States and the District of Columbia under the brand name of "Shell". Products, and particularly automotive gasoline, sold under this brand name are nationally advertised and enjoy a wide public acceptance as a standard product by motorists in their own and other parts of the country.

Respondent occupies a major position in the petroleum industry, being among the Nation's leading producers and marketers of gasoline and other petroleum products. Respondent is an integrated organization in all aspects of the oil industry and operates throughout the United States and the District of Columbia in one or more phases of the oil industry.

Respondent's principal marketing areas in the United States are the West Coast, the East Coast, the Middle West, and the Deep South. Located within these areas, respondent has 16 or more marketing regions or divisions subdivided into numerous districts.

In 1959 respondent's assets were in excess of $1 billion and its total revenue exceeded $1.8 billion. Its over-all production, including royalty oil, averaged 366,000 barrels per day during 1959 as compared to 347,000 barrels per day during 1958, and this volume represented a gain of 5.5%. In 1959 respondent served 23,000 or more gasoline retail outlets. Respondent's sales for automotive gasoline through its company-owned and leased service stations increased in 1959 over the preceding year some 7 percent.

PAR. 3. Respondent markets its automotive gasoline and other petroleum products in the aforementioned areas through wholesalers, company operated stations and through retail service stations operated by dealers who either own or lease their stations. In the latter category, respondent has entered into dealer contracts with such independent dealer-purchasers, located in the Smyrna-Marietta, Georgia, trade area, as well as in other trade areas in the United States and the District of Columbia, which are now in force and effect, pursuant to the provisions of which respondent supplies such independent dealer-purchasers with all of their respective requirements of respondent's brand of automotive gasoline during the terms of such contracts.

For the purpose of supplying said independent dealer-purchasers and of making deliveries pursuant to said contracts, respondent ships or otherwise transports its automotive gasoline in tank cars, tankers, pipe lines and trucks from its different refineries, terminals and distribution points, located in various States of the United States to distributing points located within the State of Georgia, as well as in other States of the United States from which it is distributed to said independent dealer-purchasers.

Accordingly, there is now and has been at all times mentioned herein a continuous stream of trade in commerce, as "commerce" is defined in the Clayton Act, of said gasoline between respondent's different refineries, terminals and distribution points, located in various States of the United States and said independent dealers purchasing said gasoline in the Smyrna-Marietta, Georgia, trade area, and other trade areas in the United States and the District of Columbia.

PAR. 4. In the course and conduct of its said business, respondent has sold, and now sells, its automotive gasoline to independent dealer-purchasers, some of whom have been and are now in competition with each other in the resale and distribution of such gasoline and with customers of competitors of respondent selling competing brands of automotive gasoline.

In the course and conduct of its said business, respondent is now, and during the times mentioned herein has been, in substantial competition with other corporations, partnerships, wholesalers, individuals and firms engaged in the sale and distribution of automotive gasoline between and among the aforementioned trade areas and the District of Columbia.

PAR. 5. Respondent, in the course and conduct of its business above described, has discriminated in price between different purchasers of its automotive gasoline of like grade and quality by selling such gasoline to certain of its purchasers at lower and more favorable prices than it sold to other of its purchasers who compete with the favored purchasers in the resale of such automotive gasoline.

For example, commencing on or about October 1958, respondent sold its automotive gasoline to certain independent dealer-purchasers located in and around the Smyrna-Marietta, Georgia, trade area and in other trade areas in other States of the United States, at lower and more favorable prices than it sold to its other independent dealer-purchasers who resell such automotive gasoline of like grade and quality to consumers thereof, in competition with the independent dealer-purchasers receiving the lower and more favorable prices.

PAR. 6. The effect of the aforesaid discriminations, or of any appreciable part thereof, has been or may be substantially to lessen competition or to destroy or prevent competition with those purchasers of respondent's automotive gasoline who received the lower prices, in the resale of such gasoline at retail in the Smyrna-Marietta, Georgia, trade area and other areas.

PAR. 7. The foregoing discriminations in price are in violation of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

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COUNT II

PAR. 8. The allegations of Paragraphs One through subparagraph two of Paragraph Three of Count I of this complaint are hereby adopted and incorporated herein by reference and made a part of this Count II as fully and with the same effect as if set out herein verbatim.

PAR. 9. In the course and conduct of its business, respondent is now and has been at all times referred to herein engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, in that it ships or otherwise transports its automotive gasoline from the various States of the United States where such gasoline is refined, processed or stored in anticipation of sales and shipment, to its independent dealer-purchasers located in the Smyrna-Marietta, Georgia, trade area and to various other trade areas in other States of the United States and the District of Columbia. All of such purchases by said independent dealer-purchasers and sales by respondent to such dealers are and have been in the course of commerce.

PAR. 10. Except to the extent that competition has been hindered, frustrated, lessened and eliminated as set forth in this complaint, respondent has been and is now in substantial competition with other corporations, partnerships, individuals, and firms engaged in the sale and distribution of gasoline in "commerce", as that term is defined in the Federal Trade Commission Act.

PAR. 11. Commencing on or about the first week in October 1958, respondent, acting through its Division Manager, one R. D. Kizer, and certain of its independent dealer-purchasers engaged in selling respondent's automotive gasoline and other petroleum products in the Smyrna-Marietta, Georgia, trade area, for the purpose of suppressing, preventing, hindering and lessening competition in the sale and distribution in such "commerce" of automotive gasoline, entered into, acquiesced or cooperated in maintaining and carrying out a combination, planned common course of action, course of dealing, understanding and agreement, through which they would fix and maintain, and did fix and maintain, the price at which respondent's automotive gasoline was sold or would be sold at retail in the gasoline service stations leased and operated by the aforementioned independent dealer-purchasers selling respondent's automotive gasoline in the aforementioned trade area.

PAR. 12. Pursuant to and in furtherance of the aforesaid unlawful combination, planned common course of action, course of dealing, understanding and agreement, respondent, acting through and with the aforesaid R. D. Kizer, together and in conspiracy and combina-

tion with the aforesaid independent dealer-purchasers did and performed the following acts and things:

1. Agreed to fix and maintain, and did fix and maintain, the retail price at which respondent's automotive gasoline was sold or to be sold at the various gasoline service stations operated by the aforementioned independent dealer-purchasers.

2. Agreed to adhere to, and did adhere to, certain discounts, terms and conditions upon which respondent's automotive gasoline would be sold by the aforesaid independent dealer-purchasers at their gasoline service stations to the purchasing public.

PAR. 13. This alleged unlawful planned common course of action is singularly unfair, oppressive and to the prejudice of the public and respondent's competitors and retailers of automotive gasoline in the Smyrna-Marietta, Georgia, trade area and has a dangerous tendency to unduly restrain, hinder, suppress and eliminate competition between and among the company-operated stations of respondent and respondent's independent dealer-purchasers and others, located in the same trading area, and has unduly restrained, hindered, suppressed and eliminated competition therein in the sale and distribution of gasoline in "commerce" within the meaning of the Federal Trade Commission Act and constitutes unfair methods of competition and unfair acts and practices in "commerce" within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Rufus E. Wilson and *Mr. Americo M. Minotti* supporting the complaint.

Howrey, Simon, Baker & Murchison, Washington, D.C., by *Mr. William Simon* and *Mr. J. Wallace Adair*, and *Mr. William F. Kenny*, *Mr. S. R. Vandivort*, and *Mr. Donald P. Walsh*, New York, N.Y., for the respondent.

AMENDED INITIAL DECISION AFTER REMAND BY ROBERT L. PIPER, HEARING EXAMINER

SEPTEMBER 28, 1962

PRELIMINARY STATEMENT

On September 26, 1956, the Federal Trade Commission issued its complaint against The Pure Oil Company,[1] a corporation (hereinafter called respondent or Pure), charging it with price discrimination in

[1] Incorrectly referred to as Pure Oil Company in the caption of the complaint and other documents.

violation of § 2(a) of the Clayton Act (hereinafter called the Clayton Act), 15 U.S.C. 12, *et seq.*, as amended by the Robinson-Patman Act, and unfair methods of competition and unfair acts and practices in violation of § 5 of the Federal Trade Commission Act (hereinafter called the Act), 15 U.S.C. 41, *et seq.* Copies of said complaint together with a notice of hearing were duly served on respondent.

The complaint alleges in substance that respondent discriminated in price by the sale of its gasoline to some customers at prices substantially lower than the prices charged other customers, both in the same area and in different areas, and that respondent entered into an agreement with certain of its customer-dealers to fix and maintain the retail price at which such customers sold said gasoline. Respondent appeared by counsel and filed an answer admitting the corporate, competition and certain of the commerce allegations of the complaint, but denying any price discrimination in violation of the Clayton Act or any price-fixing agreement in violation of the Act.

Pursuant to notice, hearings were thereafter held before the undersigned hearing examiner, duly designated by the Commission to hear this proceeding, at various times and places from March 19, 1957, to September 12, 1958. At the conclusion of the case-in-chief, respondent elected to rest.

Thereafter on January 30, 1959, an initial decision was issued by the undersigned, finding a price discrimination in the primary line of competition and dismissing the alleged price discrimination in the secondary line and the alleged price-fixing agreement. Thereafter both parties appealed to the Commission, neither appealing the dismissal of the alleged price discrimination in the secondary line. On September 25, 1959, the Commission remanded the case to the undersigned for the limited purpose of receiving additional evidence relating to prices charged by respondent in areas other than Birmingham, and directing the undersigned to indicate any changes he might wish to make in the initial decision in the light of such additional evidence. On October 30, 1959, pursuant to motion of respondent, the Commission broadened the scope of the remand to include the reception of respondent's defense to the charge of geographical price discrimination and such rebuttal evidence as might be offered by counsel supporting the complaint. The Commission stated that further direction to the hearing examiner as to the form of initial decision was not necessary. Thereafter, hearings for the receipt of such additional evidence and respondent's defense were held at various times and places from January 21, 1960 to January 4, 1962.

Both parties were represented by counsel, participated in the hear-

ings and afforded full opportunity to be heard, to examine and cross-examine the witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof. Both parties filed proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof. All such findings of fact and conclusions of law proposed by parties, respectively, not hereinafter specifically found or concluded are herewith specifically rejected.[2]

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following amended:

FINDINGS OF FACT

I. *The Business of Respondent*

The complaint alleged, respondent admitted, and it is found that respondent is an Ohio corporation with its principal office and place of business located at 35 East Wacker Drive, Chicago, Illinois.

II. *Interstate Commerce and Competition*

The complaint alleged, respondent admitted, and it is found that it is now, and for several years has been, engaged in the offering for sale, sale and distribution of gasoline and other petroleum products in various States of the United States, including the city of Birmingham, Alabama, and adjacent territories. In the course and conduct of such business, respondent ships or otherwise transports its gasoline in tank cars, tankers, pipe lines and trucks from its different refineries, terminals and distribution points located in various States of the United States to retail dealers located in the Birmingham, Alabama, area and in various other States of the United States. In the course and conduct of this busines, respondent is in direct and substantial competition in commerce with other corporations, individuals and partnerships likewise engaged in the sale and distribution of gasoline in commerce.

The record establishes and it is found that respondent's sales to said retail dealers are and have been in the course of commerce, and that there is now and has been at all times mentioned herein a continuous stream of trade in commerce of said gasoline and petroleum products between respondent's refineries, terminals, and distribution points and said retail dealers.[3]

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[2] 5 U.S.C. § 1007(b).

[3] *Standard Oil Co.* v. *FTC,* 340 U.S. 231 (1951).

III. *The Unlawful Practices*

A. *The Issues*

The complaint contains two counts and three basic issues, primary-line price discrimination in violation of the Clayton Act, secondary-line price discrimination in violation of the Clayton Act, and price-fixing in violation of the Act. They are considered *seriatim*.

B. *Primary-Line Price Discrimination*

The complaint, as amended by the bill of particulars, alleges that since December 29, 1955, respondent discriminated in the sale of its gasoline by selling it to certain dealers located in and around Birmingham, Alabama, at prices substantially lower than respondent charged other retail purchasers located (1) in and around Birmingham, (2) in the State of Alabama, and (3) in other States of the United States. The facts are not in substantial dispute, and the same circumstances are relied upon to support the alleged primary-line and secondary-line price discrimination as well as the alleged price-fixing. Respondent denied that it had discriminated in price among its dealers located in the Birmingham area, and the record establishes, as will be seen hereinafter, that respondent in fact did not discriminate in price among such dealers but charged a uniform wholesale price throughout Jefferson County, Alabama, which includes the Birmingham area.

In general respondent sells its gasoline and other products to independent contractors who operate under the Pure Oil name filling stations either owned by them or leased from respondent. During the period in question, respondent had dealer contracts with approximately 120 such independent contractors in Jefferson County. Respondent delivers its gasoline to the filling stations operated by such dealers from its bulk plant, and, as is customary in the trade, posts at the bulk plant the wholesale price of gasoline, generally referred to as the tank wagon price.

For the purposes of this decision, respondent markets what is known in the trade as a major brand of gasoline. Major brands of gasoline are those which have a well-known, well-established and well-advertised brand name and are marketed by large, usually integrated oil companies, normally operating throughout a large regional area of many States or the entire United States. Such distributors market their gasoline through filling stations uniformly identified conspicuously with their respective brand name and distinguishing colors and decor, nearly always operated by independent contractor dealers, and employ the use of credit cards accepted throughout the entire area in which

they operate. Such stations provide additional substantial services, such as lubrication, washing, minor repairs, and the supplying of tires, batteries, and other automobile accessories. The marketers of major brand gasolines expend millions of dollars annually in advertising their respective brand names and the superiority of their gasolines. As a result of these methods of operation, major brand gasolines enjoy wide public acceptance, and are generally considered by the public superior to non-major brands of gasoline.

Pure operates in this manner and markets what is known in the industry and accepted by the public as a major brand of gasoline. Other well-known major brands of gasoline which are marketed in the same manner are Standard Oil, Texaco, Gulf, Shell, Sinclair, and Pan Am (Standard of Indiana). There are numerous other major brands. While some of the major brand companies operate in limited areas, such as Standard of Ohio, and some are not integrated oil companies, such as Standard of Kentucky, nevertheless, because of the wide general public acceptance and reputation of the Standard Oil name, they are uniformly considered and accepted by the public as distributors of major brand gasoline. In general, all of the other distributors of major brand gasoline operate either over wide areas or nationally and are fully integrated oil companies.

In addition to the distributors of major brand gasoline, gasoline is also marketed by other distributors, which gasoline is generally referred to in the industry as private brand gasoline. Such distributors normally, although not in all cases, purchase their gasoline from other sources. Some private brand distributors sell at both the wholesale and retail level while others sell only at the retail level. All of the private brand operators, even the most substantial, are much smaller in overall sales and assets than any of the major brand distributors. Spur, the largest private brand, with 304 stations in 21 States in 1957, was sold for a total purchase price of $18,700,000. Yet Pure, one of the smallest of the majors, had over 15,000 outlets in 24 States with assets in excess of $400 million in 1955. Of course, when a private brand is purchased by a large corporation with vast assets, such as Sears-Roebuck, Kerr-McGee, Murphy, etc., it may be said to have comparable assets available, but if the operation remains unchanged and the brand name is not converted to a major brand by comparable advertising, methods of operation, credit cards, and the other factors outlined above, it is not considered or accepted by the public as a major brand, and consequently cannot compete successfully without some retail price differential. In a very few markets one or two private brands may have acquired a brand reputation equal to that of a major brand and can

sell at the same retail price, such as Pate in Milwaukee, but this is the exception to the rule. If brand name is an insignificant factor in consumer acceptance, as respondent contends, then all of the experienced major brand marketers are wasting millions of dollars in advertising their respective brands.

Private brand gasoline is not as widely advertised and in some cases not at all, its brand names are not as well known and in some cases are virtually unknown, and the method of operation is substantially different, in that the filling stations are owned by the distributor and not by independent dealers, national or regional credit cards are not employed, and lubrication, washing and repair facilities are not available at the filling stations. As a result, private brand gasoline does not have the public acceptance and reputation enjoyed by the major brand gasolines and is generally, but not universally, considered inferior in quality to major brand gasoline. Some private brand gasoline is inferior in quality to major brand regular grade gasoline. Nevertheless, as respondent contends, most private brand regular grade gasolines are equal in quality to the regular grade major brand gasolines. In fact, many private brand operators purchase their gasoline from major brand distributors. However, these facts are not generally known to the public and hence do not enter into the general public opinion and acceptance of the product.

As a result of such lesser public acceptance, in the Birmingham area private brand gasoline is sold at a retail price below that generally prevailing for major brand gasolines. There is a wide divergence among the Birmingham area private brand operators. Some of them operate throughout wide areas of many States, engage in advertising, have good station locations, although the facilities do not equal those of the major brand distributors, and have acquired a degree of public acceptance for their brand names. Others have poor locations, little or no public acceptance of brand name, in some cases inferior quality gasoline, and operate primarily on a cut-price basis. Necessarily their gasoline has less public acceptance than the more substantial private brand operators.

For the purposes of this decision, the private brand operators in the Birmingham area in general fall into three categories, price-leading private brands, medium price private brands, and lowest price private brands. The record establishes that there is a usual and customary differential, normally one cent, between the retail prices of the regular grade gasolines of the three classes of private brand operators. In addition, there is a usual and customary retail price differential between the prevailing price of the major brand regular gasolines and

the price-leading private brands. The record establishes that in the Birmingham area the retail price differential between the major brand and the price-leading private brand regular gasolines in normal market periods was generally two cents a gallon, with the prices of the other private brands correspondingly lower. For the purposes of this decision normal market periods mean when no severe price disturbance or price war was taking place. Respondent contends that two cents is not the competitively necessary differential.

Because of the public acceptance of major brand gasoline and the general belief that it is superior in quality, as hereinabove found, both the record as well as logic establish that it is essential that there be some retail price differential between the major brands and the private brands, or the private brands would cease to exist. It is self-evident that a large majority of the public believes that major brand gasoline is superior to private brand gasoline. In every substantial market area, including the Birmingham area, the total sales of major brand gasolines exceed those of private brands in spite of the fact that private brands sell at retail from one to five cents a gallon less. It is an established economic principle that an homogenous product cannot successfully command a higher price then competing homogenous products known to be identical. Yet the major brands, charging a higher price, always in toto outsell the private brands in toto. This inevitably leads to the conclusion that if the private brands tried to sell at the same retail price, they would fail. Certainly if a large majority of the public believes major brands to be superior in quality, private brands would sell practically nothing at the same prices. Respondent concedes that price is one of the leading factors in public acceptance. If the major brands were not considered superior in quality certainly at higher prices they would not consistently outsell the private brands. This conclusion is further bolstered by the fact that the major brand distributors spend millions of dollars advertising why their brands are superior, e.g., Shell's TCP, Socony's Megatane, Texaco's Climatized Gasoline, etc. Certainly experienced marketers would not expend such sums unless they considered it effective.

Since the remand, the record contains very substantial and reliable evidence that a more competitively realistic retail price differential between the major brands and the *price-leading* private brands in the Birmingham area for regular grade gasoline is one cent a gallon, with the correspondingly greater differences between the prices of the major brands and the medium- and lowest-price private brands. Although the record discloses that a two-cent retail differential between the major brands and the price-leading private brands was more frequent,

it also establishes that when the differential was one cent, *and* the corresponding differentials existed between the medium- and lowest-price private brands, the private brand operators were not injured and did not suffer loss of market share to the major brand distributors. This is not meant to infer that the private brand operators did not suffer injury and loss of market share when the retail differential was reduced to one cent with substantially *all* of them, thus eliminating the usual and customary differentials between the price-leading, medium- and low-priced private brand distributors, as considered hereinafter.

The record establishes that with a usual two-cent retail differential for regular gasoline between the major brands and the price-leading private brands, with the correspondingly greater differential for the other private brands, the private brand operators had acquired a substantially increasing share of the market over the years. These facts necessarily lead to the conclusion, as contended by respondent, that a one-cent differential between the major brands and the price-leading private brands is more competitively realistic in that market. Respondent proposed numerous findings incorporating a conclusion that the appropriate or competitively necessary retail price differential between the major brands and the price-leading private brands for regular gasoline during the relevant period was one cent a gallon, and it is so concluded and found. The record establishes that such a differential had no adverse competitive effect upon the private brand operators.

However, the record also establishes that when the retail price differential was reduced below a one-cent differential between the major brands, the price-leading, the medium- and the lowest-price private brands, respectively, the private brands lost and the major brands gained substantial shares of the market. This was brought about by a compression of the private brand prices into one level, as a result of the lowest prices posted by the major brands in December 1955 and March 1956, during the two price wars, to be considered hereinafter. The prevailing retail prices of the major brands then were such that a price one cent below meant that all of the private brands were selling at or near cost, all of them were operating at a loss, and hence they were unable to maintain the necessary differentials between the price-leading, medium- and lowest-price brands. As a result, substantially all of the private brands were forced to post within one cent of the major brands and still operated at a loss. During the earlier stages of the two price wars, as the prices dropped, the private brands were able to maintain the necessary competitive differentials, *i.e.*, the price-leading brands one cent below the major brands, the medium-price brands one cent below the price-leading private brands, and the

lowest-priced private brands one cent or more below the medium-price private brands. When the prices reached a level at which all of the private brands were operating at a loss this was no longer financially possible, and eliminated the differentials between the price-leading, medium- and lowest-priced brands, with substantially all of them only one cent below the prevailing retail price of the major brands.

Pure's principal major brand competitors in the Birmingham area were Standard of Kentucky, Gulf, Texaco, Shell, Sinclair, and Pan-Am (Standard of Indiana). The principal private brand competitors who sold at the retail level were Billups, Direct, Huffstutler-Walters, Moore, Mutual, Nunis, Peoples, Sentell, Site, Spur, Trackside, and Thoni. In October of 1955 a drastic price war in gasoline broke out in the Birmingham area. On October 20, Mutual, the largest private brand seller in the area, advertised gasoline in the local newspaper for sale at 25.9 cents on October 21 and 22. The prevailing retail price of regular gasoline of the major brand dealers at the time was 30.9 and 31.9, and the prevailing retail price of the price-leading private brands was 28.9. The record establishes that some few major brand dealers, both Pure and otherwise, regularly posted a price either one or a few cents higher than the prevailing price of the other major brand dealers, because of peculiarly advantageous circumstances, such as a neighborhood station with an established clientele not particularly price conscious or susceptible to price fluctuations, but in general most major brand dealers posted a competitive price, *i.e.*, the same price as their major brand competitors.

On October 21, Hudson, a private brand, advertised gasoline for sale on October 22 and 23 at the price of 22.9. The actions of Mutual and Hudson precipitated the ensuing price war. On October 26 Mutual, Hudson and Billups posted a price of 23.9, and on October 28 Trackside and Spur reduced their prices from 28.9 to 23.9. By October 29, the major brands had entered the price war and in general the dealers, including Pure, posted a price of 25.9. Pure's tank wagon price for regular gasoline, including all taxes, was 26.4 throughout the entire period in question. Instead of reducing its posted tank wagon price, Pure granted its dealers a temporary allowance, which had the same effect. The allowance granted at the opening of the price war on or about October 29 was 4.5 cents, reducing the net price to 21.9, so that the dealers were operating on a gross margin of four cents a gallon during the price war period. The record establishes that in normal periods their margin was at least five and usually more than five cents per gallon.

The price war continued throughout November with the posted

prices of the major brand dealers within one or two cents of the price-leading private brand operators, with correspondingly lower prices among the medium- and lowest-price Private brands. The price war continued in December and prices continued to decline. By December 3 most of the major brand dealers were posting a price of 23.9, and substantially all of the private brand operators, including the medium- and lowest-price brands, were posting 22.9. Pure and the other major brand distributors had increased their temporary allowances to the dealers to 6.5 cents, thus permitting them to maintain their four-cent margin at the 23.9 price. At this level many of the private brands were selling either at, or slightly above or below, their wholesale cost and operating at a loss. These prices continued until December 29. On December 27, a Birmingham newspaper reported that the price war was ending the following day and that Standard of Kentucky intended to post a price of 29.9 at its company-operated stations. True to prediction, on December 28 or 29 the majority of major brand company-owned stations posted a price of 29.9, most of the major brand dealers posted a price one or two cents higher, and substantially all of the private brands posted a retail price of 27.9.

The record establishes that Pure had been losing market share in both Alabama and Birmingham for a number of years prior to the relevant period. Pure's market share in Alabama had declined from 13.5% in 1946 to 9.9% in 1955. In Birmingham Pure's market share had declined from 13% in 1948 to 10% in September 1955, and 9.7% in October 1955, a small portion of which fell within the first price war period. Nevertheless, Pure was the third largest in sales in the Birmingham market, exceeded only by Standard of Kentucky and Gulf. Texaco and Shell were fourth and fifth, and all of the other major and private brands were lower in market share. During the October–December price war, the total gallonage of gasoline sold in Jefferson County increased substantially. As a result everyone's sales increased, including Pure. However, while the overall share of the total market of the other six major brands increased substantially in December, that of the private brands declined substantially, and Pure's market share did not increase but in fact declined slightly. These facts were not known at the time because the statistics did not become available until later. However, Pure knew that its gallonage had increased substantially, and was of the view that if its dealers continued to post a more competitive retail price, *i.e.*, lower than the usual two-cent differential between the major brands and the price-leading private brands which had prevailed prior to the price war, Pure could increase

its overall share of the market and try to arrest its steadily declining market position.

Accordingly, Pure's officials decided to recommend to its 120 dealers in Jefferson County (the Birmingham area) the adoption of what is referred to in the record and herein as the "one-cent plan." Throughout the record, the proposed findings, and the prior initial decision, counsel supporting the complaint, counsel for respondent, and the undersigned frequently referred to this plan as a recommendation to reduce the theretofore prevailing differential of two cents a gallon between Pure and the *price-leading* private brands to a differential of one cent a gallon between them. As a matter of fact, this was not the plan. Instead it was apparently a recommendation, and in any event in actual operation amounted to, a reduction of retail prices to one cent above the "average" price of all of the private brands, which as will be seen hereinafter was necessarily lower than one cent above the prevailing price of the price-leading private brands. The record is not entirely clear whether respondent recommended to all of its dealers that they post retail prices within one cent of the prevailing prices of the price-leading private brands or within one cent of the prevailing average price of all private brands, but in any event in operation it is clear that the prices posted pursuant to the plan were within one cent, or lower, of the "weighted average," as determined by respondent by means of selective surveys, and not within one cent of the prevailing price of the price-leading private brands. In order to enable its dealers who elected to do so to follow this plan, and continue to do so as such average price might drop, respondent granted and increased from time to time as required a county-wide temporary allowance in an amount which permitted its dealers to realize a four or four and one-half-cent margin if they posted a price one cent above what respondent had determined to be the "weighted average" price of the private brands. The dealers who elected to follow this plan paid no attention to the posted prices of any private brands, including those in their competitive areas, but merely posted a retail price which was uniformly either four or four and one-half cents above their net tank wagon price and always terminated in .9 cents.

The record establishes that the granting of the allowance was not conditioned upon any required acceptance of the plan. Respondent did not limit the reduced price to those dealers following the recommendation but made it available to all dealers in the county whether or not they elected to follow the one-cent plan. In fact, more than a majority of dealers elected not to follow the plan, yet all of them received the allowance established by Pure. Obviously those who

elected not to follow the plan realized a margin in excess of four cents, because they posted prices more than one cent above the weighted average private brand price. No agreement was entered into with any of the dealers, and each was free to follow the plan or not as he chose. Respondent sent its salesmen and other representatives to see each dealer. They pointed out that Pure had improved its gallonage during the October–December price war when the dealers had been selling at prices more competitive with the private brands, and, accordingly, Pure was recommending this plan to each dealer and establishing the allowance so that each dealer could follow the plan if he chose to do so, in an effort to capture for himself and respondent a larger share of the Birmingham market.

Accordingly, the plan was that when the price war ended and the market returned to normal, the dealers who elected to follow it would post a price one cent above the average price of the private brands. This necessarily would be below the price of the other Pure dealers and other major brands if the usual and customary differentials between the major brands and the various private brands were again established. On December 29 when the major brand company-owned stations posted 29.9, and substantially all of the private brands posted 27.9, some 25 to 30 Pure dealers elected to follow the plan recommended by respondent, and accordingly posted a price of 28.9. In order to enable them to do this, respondent granted a temporary allowance of 1½ cents, or a net tank wagon price of 24.9. At this time, substantially all of the private brands were posting the same price. The record establishes that upon the termination of a severe price war, this was customary, but that in a short time after such termination, the various price levels were again restored. Because of this temporary circumstance, at the outset of the one-cent plan, but never thereafter, the prices posted by the Pure dealers pursuant to the plan were one cent above the price-leading private brands.

Although respondent contends that it had the same tank wagon price and allowance as the other major brands on December 29, the record establishes the contrary. Pure's posted tank wagon price was 26.4, and Pure granted all of its dealers in Jefferson County a one and one-half-cent allowance in order to enable them to post a price one cent above the average price of the private brands and still maintain a four-cent margin of profit. Mr. Shepard, Pure's Division Manager, testified that Pure's net tank wagon price after the allowance was one cent less than that of the other majors. In addition, Pure's subsequent one-half cent reduction of its tank wagon price on January 19, at which time the posted prices of the dealers following the one-cent

plan remained unchanged, demonstrates that Pure had a net tank wagon price from December 29, 1955 to January 19, 1956 different from the other majors. On January 19 the other major brand distributors reduced their tank wagon prices one cent in order to enable their dealers to meet the price posted by the Pure dealers following the plan, namely, 28.9. Pure thereupon reduced its tank wagon price one-half cent, retroactive to December 29, in order to meet the tank wagon price of the other major brand distributors, thus demonstrating that its prior net tank wagon price had been lower. In addition, it is immaterial whether or not Pure had the same net tank wagon price as the other major brand distributors when the plan went into operation on December 29, 1955. There is no contention in the case that Pure's price discriminations had any statutorily prohibited effect upon Pure's major brand competitors. In any event, every subsequent reduction pursuant to the plan, to be considered hereinafter in detail, meant that Pure was granting a net tank wagon price lower than all of the other major brand distributors until they reduced their prices in order to meet this competition.

The record herein includes certain tax records of Jefferson County, which reflect the overall sales of gasoline for the entire county during the relevant period. Since the remand, these records have been corrected and modified by adjustments reflecting late tax payments and penalties for such late payments. These records include only "bonded" distributors who paid the tax to the county, and hence do not include all of the private brand retailers, some of whom purchased tax-paid gasoline from wholesalers and thus were not included in these tax records. However, since the remand, substantially all of the sales figures of such private brand operators from their own books and records have been incorporated in this record, so that a comparison of shares of the market involving substantially all of the major brand and private brand distributors is possible.

Respondent attacks the reliability of these tax records, particularly because of the late payments, increased purchases for inventory in months when the prices were low, months which contained a few more delivery dates than other months, and because some of the major brand distributors sold some tax-paid gasoline to private brand operators. However, respondent relies upon these records in numerous instances to demonstrate Pure's share of the market and the alleged effect, or lack of it, upon the private brands at certain times during the relevant period. While these records are not completely accurate with respect to the exact gallonage of each distributor, for the reasons indicated above, the undersigned is satisfied and finds that they reflect

a generally accurate picture of the shares of the market of substantially all of the distributors, particularly when used in conjunction with the sales figures from books and records produced by substantially all of the private brand operators whose sales were not reflected in the tax records. Because under the law somebody was required to pay the county tax on every gallon sold, it is apparent that the tax records accurately reflect the overall gallonage or market universe. In addition, for reasons to be discussed more fully hereinafter, the nature of respondent's one-cent plan and price discrimination was such as necessarily to eliminate and destroy private brand competition in the area ultimately, regardless of whether it had any effect upon market shares during the period it was in operation. Under such circumstances, as will be seen, proof of loss of market share, although present here, is not essential.

The above tax and business records include the gallonage sales figures for Jefferson County for substantially all of the major brand and private brand distributors for the years 1955 and 1956, which years include the October–December price war discussed above, and the subsequent price war precipitated in January 1956, by respondent's inauguration of the one-cent plan on December 29, 1955. Overall gallonage increased substantially during both price wars, hence market share rather than respective gallonage is the meaningful comparison to evaluate the effect of the price wars. As found above, nobody had these statistics available at that time and hence did not know what was happening to shares of the market, although each seller knew that his gallonage had increased.

As a matter of fact, Pure guessed wrong. While the share of the market of the other major brand distributors did increase substantially during both price wars, and the share of the market of the private brand operators decreased substantially when the price differentials were compressed to within one cent of substantially all of them, Pure's share of the market did not increase, except for the 21-day period in January when approximately one-fourth of its dealers were the only major brand sellers posting retail prices within one cent of the prevailing average price of the private brands. Since the first price war started in late October, most of that month was a normal market. During November of the first price war, which was before the prices declined approximately to the costs of the private brand operators, the customary differentials were maintained and the private brands' share of the market was substantially unchanged, although the share of the market of the six other leading major brand distributors increased approximately two percent. The record contains the market gallonage of

the seven leading major brands enumerated above, including Pure, for the years 1955 and 1956, and the market gallonage of ten of the largest selling private brands for the same years. Counsel supporting the complaint's proposed findings contain a statistical compilation of the market shares of each of these distributors. There are several other private brand operators included in these statistical compilations whose sales records were not available for the two-year period. In addition, no meaningful records were produced by private brand operator Nunis. Hence they are not included in the comparison made herein.

The ten private brands included in this comparison are Peoples, Spur, Thoni, Huffstutler-Walters, Mutual, Billups, Trackside, Sentell, Direct and Company "X," a private brand operator whose sales records were received in camera. The total share of the market accounted for by the six leading major brand distributors other than Pure and the ten private brand operators during the two-year period was from 66 to 71 percent of the overall market. During the nine months of 1955 preceding the first price war, namely January through September, the average share of the market accounted for by the six other major brands on a month-to-month basis was 55.4%, which did not vary substantially from month to month. Pure's average share was 10.44%. In October when the prices of the private brands were substantially lower during approximately the last week, the six major brands' share of the market was 55.5%. Pure's share was 9.7%. In November the six major brands' share was 57.6.% Pure's share was 10.1%. During the same nine months' period, the average share of the overall market accounted for by the ten private brands was 11.26%, ranging from a low of 10.7 to a high of 12.1%. In October their share of the overall market was 11.6%. In November their share of the market was 11.5%. In December, during substantially all of which the price was depressed to a point where substantially all the private brands were compelled to post prices one cent below the 23.9 price posted by the major brands, the six major brands' share of the market increased to 60.7% and the share of the ten private brands declined to 10.4%. Pure's share was 9.6%. As noted above, this price war ended December 29, at which time Pure's one-cent plan was inaugurated.

On December 29, 1955, 25 to 30 of respondent's dealers adopted the one-cent plan and posted a price of 28.9. For about twenty days the market remained quiescent with most major brand company stations posting 29.9, most major brand dealers posting 30.9 and higher, most Pure dealers posting 29.9 and higher, 25 to 30 Pure dealers posting 28.9, and most of the private brands posting 27.9. On January 19, exactly what Pure should have known would happen did happen. Led

by Standard of Kentucky, the major brand distributors reduced their tank wagon prices in order to enable their dealers to post retail prices of 28.9 to meet the competition of the Pure dealers. The Pure dealers not following the plan were also competitively forced to reduce their posted prices to 28.9 when all of the major brands did so. Respondent argues that if this had not happened the one-cent plan would have had no adverse effect upon the private brand operators, would not have caused a price war, and that respondent had no reason to believe that the major brand dealers would meet the prices posted by the 25 to 30 Pure dealers following the one-cent plan. However, the record establishes, and it seems self-evident, that the various major brand distributors and their dealers cannot or will not long let another major brand gasoline undersell them in the retail market. In addition, assuming *arguendo* that when Pure inaugurated the plan on December 29, it had no reason to believe that the other major brand distributors and dealers would act to meet this lower retail price of a competitive major brand, after such action by them on January 19 in every reduction inaugurated by Pure thereafter Pure had every reason to know, and knew, that the other major brands would reduce their prices to meet the competition of the lower prices of the Pure dealers.

Nevertheless, at regular intervals thereafter, to be considered hereinafter in detail, Pure reduced its tank wagon price to bring about a corresponding reduction in retail price by its dealers following the plan, knowing that the other major brands would meet this reduction and in turn force the private brands to reduce their prices in order to preserve the necessary differentials. In January 1956, when only one-quarter of Pure's dealers were posting the 28.9 price, Pure increased its share of the market from 9.6% in December to 10.8%, while every one of the other six majors lost shares of the market held in December. Pure argues that its brand has substantially less public acceptance in the Birmingham area than other major brands. The foregoing fact, as well as the fact that Pure has consistently been the third largest seller in the market, above several much larger major brand distributors, demonstrates the contrary. The action of the market in January also demonstrates why the other major brand distributors reduced their prices in order to meet Pure's competition.

It is correct, as Pure contends, that the private brand operators did not lose market share during January, realizing approximately the same as they had in October and November. However, after the other major brands met Pure's prices, and the prices continued to decline as a result of the operation of the one-cent plan, the private brand operators lost substantial shares of the market during February and March.

If Pure had discontinued its price reductions after the other major brands met its dealer retail prices on January 19 and the private brand operators restored the requisite competitive price levels, presumably the market shares would have remained substantially unaffected and there would have been no effect other than a one-cent per gallon reduction in profit by all concerned.

After the other major brands reduced their prices on January 19 to meet those of Pure's dealers, thus bringing substantially all of the major brand prices within one cent of substantially all of the private brand operators, the medium- and lowest-price private brand operators were forced to reduce their prices in order to preserve their sales. However, a substantial number of the price-leading private brands stayed at 27.9, within one cent of the generally prevailing major brand price.

Pursuant to the plan, on January 22 Pure conducted a price survey of 23 private brand stations which revealed six at 27.9, four at 27.4, eleven at 26.9, and two at 25.9. It will be noted that the price-leading private brands were within one cent of the Pure dealers following the one-cent plan. For reasons not disclosed in the record, Pure conducted another survey on the following day, January 23, of only 17 private brand stations. Five of the six private brand stations posting the highest price of 27.9 were dropped from the survey, twelve of the stations surveyed on January 22 were included, and five new stations were added, two Spur stations, and three stations of small operators, Christie, Taylor and Thoni. This selective survey revealed a "weighted" average of 26.9, inasmuch as 13 stations were posting 26.9 and four, 25.9. Pursuant to this survey, on January 23 Pure increased its temporary price allowance from two to two and one-half cents, and its dealers following the plan promptly posted a retail price of 27.9. In short order, this retail price was met by substantially all of the other major brand dealers.

This necessarily brought the prevailing major brand price even with the price-leading private brands and one cent above the medium-price private brands, who were forced to reduce their prices in order to restore the necessary differentials. On January 28 Pure conducted its next survey, including therein 21 private brand stations. These were the same 17 stations surveyed on January 22 plus the addition of 4 small private brand stations. The five higher-priced stations included in the January 22 survey were again omitted. This survey disclosed 7 stations at 26.9, 12 at 25.9, and two at 24.9. As a result, on January 29, Pure increased its tank wagon allowance to four cents and the dealers following the plan reduced their posted prices to 26.9, meeting on the

nose 7 of the private brand stations included in the January 28 survey. Again the same thing happened. The major brands and other Pure dealers reduced their prices to 26.9 to meet this competition and the private brand dealers in turn were forced to reduce their prices.

On February 1, 2, and 3, Pure conducted three surveys of 23, 27, and 30 private brand stations, respectively. The surveys of the first and second of February showed a majority of stations within one cent of 26.9. The survey on February 3 revealed 11 private brand stations at 25.9, 14 at 24.9, and 5 at 23.9. The same day Pure increased its allowance to 4½ cents and the dealers following the plan posted 25.9, exactly meeting the prices of 11 private brand stations in the February 3 survey and 14 of those in the February 2 survey. Again, the same sequence of events occurred. Pure made two more surveys on February 5 and 6. Although the survey on February 6 revealed three private brand stations at the Pure dealers' prices of 25.9, 14 at 24.9, 7 at 23.9, 10 at 22.9, and 2 at 21.9, nevertheless, on February 7 Pure reduced its tank wagon price two cents and the dealers following the plan posted a retail price of 23.9, which was below the prices of 17 of the private brands surveyed and even with the prices of 7. Thus it was the same as or below two-thirds of the private brands surveyed. This final reduction did not follow the "one-cent plan" of posting retail prices one cent above the "weighted average," since the price posted as the result of Pure's reduction was substantially below one-cent above such average no matter how computed. Again, the major brands and other Pure dealers met this price. The private brands were again forced to reduce their prices. At 22.9 substantially all of them were selling at a loss. This caused the compression in prices previously referred to among the price-leading, medium- and lowest price private brands. The market remained at this level for over two months, until April 10. Pure did not conduct any additional surveys during this period.

During February and March shares of the market shifted from the private brands to the major brands in much the same manner as but more drastically than in December. As in December, during all of February after the sixth and all of March, substantially all of the private brand dealers were selling within one cent of all of the major brands, instead of their customary differentials, because even at that price they were operating at a loss. In February, the market share of the six other major brands, increased to 60.4% while the market share of the 10 private brands declined to 9.7%. Pure's share was 9.9%. In March, the major brands' share increased to 62.2% and the private brands' share declined to 9.1%. Pure's share was 9.7%.

On April 10, as in December, the price war suddenly ended. A sub-

stantial number of the private brands raised their prices to 29.9 and 28.9. Apparently, although the record is not clear, the other major brands posted higher retail prices on April 10. The prices of the Pure dealers following the plan remained at 23.9. Pure conducted surveys on April 10 and 11, which showed, *inter alia*, 8 private brand stations at 29.9 and 14 at 28.9 on April 10, and 7 at 29.9 and 19 at 28.9 on April 11. On April 12 Pure reduced its allowance from 6.5 to 1.2 cents and the dealers following the plan posted 29.9, again even with a substantial number of private brand stations. About April 17 Pure ascertained that the private brands in general had reduced their prices to 27.9, although no survey was conducted. At this point, because Pure realized that to increase its allowance one cent and thus reduce the prices of the dealers following the plan would probably start another price war, Pure decided to abandon its one-cent plan. A survey conducted by Pure on May 7 revealed 20 private brands at 27.9 and 2 at 26.9. At that time Pure and the major brands generally were posting 29.9.

The above findings demonstrate that when Pure and the other major brands were posting prices one cent above the price-leading private brands, with correspondingly greater differentials with the medium- and lowest-price private brands, the private brands did not lose share of the market, but held their own, as in November of the first price war. However, when the prevailing major brand price became one cent above the price of substantially all of the private brands, ultimately brought about by reason of the one-cent plan regularly reducing the major brand price to a level even with and below the price of the leading private brands, and thus compressing the private brand price differentials into one bracket as a result of driving their prices down to where they were operating at a loss, then substantial shares of the market shifted to the major brands with corresponding losses in share among the private brands.

Pure argues that the private brands could have ended the price war at any time by accepting a level one-cent below all the major brands. This ignores the fact that the medium- and lowest-price private brands could not sell competitively with the same prices as the price-leading private brands. Pure points out that when the differential between the prevailing major brand price and the price-leading private brands was one cent, the private brands suffered no loss of sales. While correct, as found hereinabove, this was not the manner of operation or effect of the one-cent plan. This plan caused prices to be reduced to one cent above the weighted average, which was necessarily lower than one cent above the price-leading private brands. As long as the private

brands were able to restore the necessary one cent differentials by further reductions, they did not suffer loss of market share, but inevitably they had to reduce again as a result of the weighted average dropping with each such reduction, until they no longer could do so financially. When finally they were selling at a loss causing a compression of all private brand prices at a level one cent below the major brands, they lost substantial shares of the market.

Wholly aside from the question of whether the one-cent plan caused a substantial loss of share of the market by the private brands, it was so designed as to have the ultimate and inevitable effect of driving the private brand distributors out of the market. Each reduction that Pure made, except the final one which was even more severe, caused the prevailing price of all major brands to *meet* the price of the price-leading private brands. It necessarily caused this as a result of posting a price one cent above the "weighted average" of the private brands. No matter what the private brands did they were doomed. If the price-leading private brands stood still, they would be unable to sell at the same price as that posted by all the major brands. Even if they did not reduce prices, the medium-price private brands would be only one cent below all of the majors, and competitively would be forced to move down. This would reduce the "weighted average" again, and Pure followed by the other major brands would then post prices one cent below the price-leading private brands. If, on the other hand, as they actually did, the price leading private brands moved down one cent to restore a one-cent differential with all of the majors, this was followed by corresponding reductions by the medium- and lowest-price private brands, the "weighted average" inevitably was again reduced, and the plan continued to force the downward spiral. Inexorably it had to arrive at the point where it did: all the private brands were operating at a loss and thus could no longer maintain the competitively necessary differentials.

Thus, no matter what course they elected to follow, in the end, if continued indefinitely, they would have been driven from the market entirely. If they elected to stand pat, with the prevailing major brand prices equal to the price-leading private brands, and one and two cents above the medium- and lowest-price private brands, they would have been unable to sell and thus frozen out of the market. If they moved down to restore their necessary differentials, they had to be driven down to selling at a loss, because each such restoration drove the "weighted average" down. When this level was reached, if continued indefinitely, they would be compelled to drop out of the market by continued sales at a loss. Additionally, at this level the medium- and

lowest-price private brands would suffer a drastic loss of sales because of their loss of differential with both the price-leading private brands and the major brands. Of course, as Pure points out, many of the private brand sellers operated over large regions and being driven from the Birmingham market would not put them out of business. However, if applied from market area to market area, the pattern for monopoly and ultimate effect become evident, as observed by the Supreme Court in *Moore*.[4] In addition, there were a few purely local private brands who quickly would have been eliminated from the market.

It is not clear in what manner the final reduction by Pure on February 6 was pursuant to its plan. The survey relied upon showed two-thirds of the private brands even with or above the price selected by Pure, which was supposed to be one-cent above the "weighted average." The largest group in one price range, which seems to have been the criterion followed in the prior price reductions, was the 14 at 24.9. Yet Pure, followed of course by all the major brands, caused a price reduction "pursuant to its plan" one-cent below this "prevailing" price. Instead of being one-cent above the "average," it was the same as or below two-thirds of all the private brand stations surveyed. However, this merely expedited the inevitable, as a result of the operation of the plan as found above. Even if Pure had continued only with reductions resulting in a price one-cent above the "weighted average," this inevitably would have driven the private brands down until they stopped reducing prices because of selling at a loss. The market situation existing from February 6 until April 10, with substantially all of the private brands selling at one cent below the major brands and operating at a loss, would have arrived in short order in any event.

The record establishes clearly that Pure charged substantially lower prices in Jefferson County than it charged to other purchasers in other areas, as alleged in the complaint. Pure had more than 500 bulk stations throughout its 24-State area, each charging a different tank wagon price, except coincidentally. At the outset of the one-cent plan, when Pure granted a one and one-half cent allowance, its net tank wagon price in Jefferson County, exclusive of taxes, was 14.9. This price was substantially lower than the net tank wagon price charged in a vast majority of other areas. Of 15 representative cities selected, only 3 had lower prices at the outset, with the prevailing average being 15.7 cents, .8 of a cent higher. However, by February 6 Pure, pursuant to its plan, had reduced its Jefferson City tank wagon price to 9.9, substantially below all of said cities, their prevailing average

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[4] *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954).

then being 6.2 cents higher. Of the over 500 bulk stations, at the outset of the plan only 21 had a price equal to or lower than 14.9. It is a reasonable assumption that few, if any, had a price as low as 9.9 after February 6, 1956. Of the 21 lower on December 29, 1955, only one had a price below 9.9.

The Supreme Court in its *Anheuser-Busch* decision [5] has settled the point that a price difference among customers, whether or not competing, is a price discrimination within the meaning of § 2(a) of the Clayton Act. The Court stated:

> Rather, a price discrimination within the meaning of that provision is merely a price difference.

This of course does not mean that a price difference or discrimination standing alone is a violation of the Clayton Act. The requisite statutory effect must also be shown. Rather, it is the first step, or prerequisite, to proof of a violation. As will be discussed hereinafter, and as the Supreme Court made clear in the same decision, such price differences, while price discriminations, "constitute but one element of a Sec. 2(a) violation."

RESPONDENT'S CONTENTIONS

Among other things, Pure contends that its price reductions, *i.e.*, the price discriminations, as distinguished from the price reductions of its dealers at the retail level, caused no injury and concerned no competitors. It is correct that Pure's tank wagon price reductions, standing alone, did not cause the statutorily proscribed effect found herein. Pure argues that since its dealers are independent, and whatever effect occurred was a result of their resale prices, Pure cannot be responsible therefor. This entire argument overlooks the obvious: that it was Pure's discriminatory price reductions, *coupled with* its one-cent plan, which caused the injury. The plan caused the dealers following it to reduce prices and in turn cause the effect found above. Without the plan, the dealers would not have reduced prices below those competitively needed, and below their customary margins. Without Pure's price reductions, the plan could not have continued. Without the assistance of each price reduction, the dealers could not financially have continued to reduce prices. If Pure had, without any plan or recommendation, reduced its tank wagon prices, the dealers would not have posted prices pursuant to the plan's formula, *i.e.*, even with and finally below the price-leading private brands. No dealer who testified suggested a need for prices the same as or lower than the

[5] *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536 (1960).

private brands, and all conceded the existence of and competitive need for some differential. To argue that Pure is not responsible because Pure's tank wagon reductions did not cause the immediate injury is to ignore cause and effect. It was Pure's discriminatory lower prices, pursuant to the plan, which actually caused the statutorily proscribed effect.

In spite of having proposed numerous findings to the effect that the competitively necessary price differential between the major brands and the price-leading private brands was one cent, as amply sustained by the record and found above, Pure argues that as a matter of law there is no justification for any differential. This apparently is an argument that Pure has a right to meet competition in good faith by meeting, or causing to be met, the retail prices of the private brands. As part of this argument, Pure contends that the Commission and the courts have no right, as a matter of law, to require any differential, and that no case has ever so held. Although citing it for numerous other purposes, Pure apparently overlooks the fact that this was the key point decided in the *Porto Rican Tobacco* case,[6] the one case most similar to the instant case.

The Court of Appeals there held that causing a price reduction of a product, Lucky Strike cigarettes, to meet exactly the price of a competitive local cigarette, was not a good faith meeting of competition, because Lucky Strikes had greater public acceptance and traditionally sold at a retail price three cents higher, i.e., 15 cents versus 12 cents. By reducing the price to the same level, American Tobacco beat, rather than met, competition, and forced the local company to reduce its prices to maintain sales, causing it to sell at a loss. It is interesting to note that in that case, as here, it was not the wholesale price reduction by American which caused the injury, but the concomitant price reduction at retail by American's customer pursuant to plan or agreement.[7] In addition, although subsequently reversed on other grounds, the Commission in *Anheuser-Busch*[8] held that a price reduction of a premium product of greater public acceptance, theretofore commanding a higher price, to the same price as like competing products of less public acceptance was a beating rather than meeting of competition within the meaning of § 2(b).[9]

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[6] *Porto Rican Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234 (2d Cir. 1929).

[7] The Supreme Court has held that the § 2(b) defense is restricted to individual competitive situations and does not apply to a pricing plan or system. *FTC* v. *Staley Mfg. Co.*, 324 U.S. 746 (1945); and *Standard Oil Co.* v. *FTC*, 340 U.S. 231 (1951); 355 U.S. 396 (1958).

[8] *Anheuser-Busch, Inc.*, 54 F.T.C. 277 (1957).

[9] See also, *FTC* v. *Standard Brands*, 189 F. 2d 510, 514 (2d Cir. 1951); *Minneapolis-Honeywell Co.*, 44 F.T.C. 351, 396 (1948); and *American Oil Co.*, 60 F.T.C. 1786, Docket No. 8183 (1962).

Respondent also argues that in order to establish a violation by means of price discriminations other than those among competing customers, *i.e.*, the so-called secondary line, a showing of predatory price cutting is necessary. The contrary is established by the decisions of the Commission and the Courts of Appeal in *Muller*, *Balian*, *Maryland Baking*, and *Atlas Building*,[10] where the Commission and the Courts held that, while relevant, proof of predatory intent is clearly not required under § 2(a). Regardless of purpose, if the statutorily proscribed effect occurs, the statute has been violated.[11]

CONCLUSIONS

Section 2(a) prohibits price discriminations "where the effect may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

In view of the foregoing words, "may be," it is now well-settled that it is not necessary to prove that a price discrimination actually has such proscribed effects, but only that such effect may be, *i.e.*, that there is a reasonable possibility or probability of such effect. Hence, although proof of actual effect is often present in such cases, particularly those involving geographic or area discriminations as distinguished from discriminations among competing customers, it is not essential to prove actual injury.

It is also well-established that where such discriminations are among competing customers and are substantial, without more it properly may be inferred that the effect may be substantially to lessen competition, etc., *i.e.*, there is a reasonable possibility or probability of the proscribed effects.[12] Where a competitor is given a lower price on the same product for resale, the effect upon his direct competitors in reselling is self-evident. However, it is equally self-evident that where such price discriminations are made among persons not in competition with each other, that fact alone does not give rise to any inference of injury to competition. Obviously it cannot injure competition which does not exist among the recipients. The injury, if any, must occur to others than the recipients, *i.e.*, the competition of the

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[10] *Muller & Co.* v. *FTC*, 142 F. 2d 511 (6th Cir. 1944); *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356 (9th Cir. 1955); *Maryland Baking Co.* v. *FTC*, 243 F. 2d 716 (4th Cir. 1957); *Atlas Bldg. Products Co.* v. *Diamond Block Co.*, 269 F. 2d 950 (10th Cir. 1959).

[11] As the Court pointed out in *Balian, supra*, "Of course intent is not an essential factor to a Sec. 2(a) violation, although, if the intent to destroy were found to exist, it might tend to render the injury probable."

[12] *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948).

grantor or of his customers. In other words, the mere existence of such price differences, standing alone, does not create a reasonable probability of competitive injury.

That this is so is made evident by a simple example. If a seller gives a lower, different, and hence discriminatory price to a customer in one area than to one in another not at all in competition, and such lower price is higher than or does not undercut (including appropriate differentials) any of the seller's competitors, patently it could not possibly have any effect upon competition. It follows therefore, as the decisions make clear, that in cases of area price discriminations not among competing customers, there must be evidence adduced to establish a reasonable possibility or probability of the proscribed effects. As the Supreme Court observed in *Anheuser-Busch*,[13] an area price discrimination not among competing customers, such price discriminations "constitute but one element of a Sec. 2(a) violation." As noted above, this does not mean evidence of actual effect, but evidence which warrants an inference of reasonable possibility or probability.

There are at least two fact situations which may give rise to an inference of a reasonable possibility or probability of a substantial lessening of competition in an area price discrimination case. One is a substantial increase in the grantor's share of the market as a result of the lower price, with a corresponding decline in share on the part of its or its customers' competitors, which would establish injury to such competitors and might well justify an inference of probability of injury to competition. This was the fact situation found and relied upon by the Commission and the Courts of Appeals in the *Muller* and *Maryland Baking* cases,[14] by the Court of Appeals in *Atlas*,[15] and by the Commission in *Anheuser-Busch*.[16] In each of these cases the area price discrimination caused a substantial loss by the local competitor of share of the market in which applied, but did not establish that such competitor would be driven out of the market. In each case it was found that such injury, *i.e.*, substantial loss of market shares, justified an inference of reasonable probability of the proscribed effects.

Two, even though during the time the discrimination occurs no shares of the market are increased or decreased substantially, if the price cut or discrimination has the necessary and inevitable effect, if continued, of eliminating competitors from the market by reason of either preventing their sales or causing them to sell at a loss, thus

[13] Footnote 8, *supra*.
[14] Footnote 10, *supra*.
[15] *Idem*.
[16] Footnote 8, *supra*.

eventually eliminating them, such discriminatory prices give rise to an inference of a reasonable probability of a substantial lessening of competition. It seems clear that the total elimination of area competitors would create a stronger presumption of a lessening of competition than a shift in market shares, which might level off and not have as great an effect upon competition. Elimination of competitors necessarily increases concentration, tends toward monopoly and creates a reasonable probability of a substantial lessening of competition. As the Court stated in *Atlas:* "For, surely there is no more effective means of lessening competition or creating monopolies than the debilitation of a competitor." [17] Such an inference depends not upon loss of market shares but upon the logically predictable effect of elimination, by reason of either no sales because of higher prices, or continuing sales at a loss. In *Porto Rican* [18] there was no suggestion of a loss of share of market, but instead a finding of selling at a loss. Such discrimination was found to have a reasonable probability of substantially lessening competition, even though it did not increase sales or share of the market because it was met by the affected competitor. As a matter of logic, if a competitor meets such discriminatory prices by restoring the previous competitive price levels and thus selling at a loss, in all probability there would be no loss of market share, just as in *Porto Rican, supra.* Yet patently, if continued, the smaller competitor must be driven from the market by such continued losses.

A plan which inevitably continues to drive down prices, which leaves only the alternative of not reducing prices and losing the market, or reducing prices and selling at a loss, necessarily must result in the elimination of a financially weaker competitor or competitors and a reasonable probability of a substantial lessening of competition. It is far more effective than a mere single discriminatory price reduction, not forcing sales at losses, which could be met and thus restore the competitive status quo, albeit with less profit. As the Court pointed out in *Porto Rican:* [19]

> * * * If this competition, resulting in such loss, continued, it is fair to assume that the appellee could not continue in business, and its elimination as a competitor was certain. Thus the appellant's discrimination will substantially lessen competition.

All the private brands except those, if any, equal in resources to Pure ultimately would be eliminated from the market area. Thus the fact that the record does not establish a permanent decrease in market

[17] Footnote 10, *supra.*
[18] Footnote 6, *supra.*
[19] *Idem.*

share by the private brands is not conclusive. If continued, either the private brands had to sell at a loss or not sell. Under such circumstances, it must be concluded there is a reasonable probability of a substantial lessening of competition and/or tendency toward monopoly.

The injury here was not to Pure's direct competitors, but to the retail private brand operators, who were in direct competition with Pure's dealers and other major brand dealers. This was the same situation present in *Porto Rican*,[20] where the effect was not directly caused by American Tobacco's wholesale price reduction, but by the corresponding reduction at the retail level. Section 2(a) clearly prohibits such discrimination where the effect may be to "injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." If the private brands be considered as Pure's competitors, the injury is to competition with the one who granted the discrimination. If the private brands be considered as Pure's dealers' competitors, the injury is to competition with its customers.

A preponderance of the reliable, probative and substantial evidence in the entire record convinces the undersigned, and accordingly it is found, that respondent, by engaging in the above-found acts and practices, has discriminated in price between different purchasers of commodities of like grade and quality, and that the effect thereof may be substantially to lessen competition, tend to create a monopoly and to injure, destroy, and prevent competition with respondent and its customers, in violation of § 2(a) of the Clayton Act. It is further concluded and found that such price discrimination was not made in good faith to meet an equally low price of a competitor.

C. *The Alleged Secondary-Line Price Discrimination* [21]

The complaint also alleged that the above-found facts constituted a secondary-line price discrimination, *i.e.*, a price discrimination among competing customers. Although the complaint alleged that respondent charged different prices to its retail customers in the Birmingham area, the record establishes, and counsel supporting the complaint now concede, that respondent did not discriminate in price among its dealers in Jefferson County and in fact at all times herein charged such dealers the same wholesale price. The secondary-line violation is based upon a fringe situation concerning a few dealers in the town of Oneonta, Blount County, where admittedly respondent did not charge the

[20] Footnote 6, *supra*.

[21] Because this alleged violation was neither appealed nor remanded, the findings of fact in this section remain unchanged.

same price as it did in Jefferson County where the one-cent plan was in operation. As previously pointed out herein, area price discriminations are not necessarily illegal because a respondent charges different prices in different areas to noncompeting customers.

As was pointed out by the Commission in its 1948 statement of policy:

> There are strong reasons why the concept of injury adopted by the Court in the *Morton Salt* case should not be applied automatically to discriminations arising under geographic pricing systems in which purchasers paying different prices are differently located and the price differences generally diminish as the distances diminish between purchasers' locations. In these circumstances competition between purchasers paying significantly different prices may occur in quite limited areas or only along the fringes of trade territories. Seeming advantages in price may be materially affected by disadvantages of location. These and other considerations make it clear that in geographical price discriminations inferences of injury to competition drawn merely from the existence of price differences between purchasers who compete in some degree would have no sound basis. The minimum determination of injury should be based upon ascertained facts that afford substantial probability that the discriminations, if continued, will result in injury to competition.

Substantially the same conclusions were expressed in the *General Foods* and *Purex* cases.[22] It is well-established that the policy of Congress and the holdings of the Commission and the Courts are that geographic or area pricing alone is not illegal. To hold otherwise would require uniform prices everywhere. Nevertheless, it is apparent that no matter what area may be chosen, there will always be fringe or peripheral effects on the borderline of such areas between customers within the area and customers without. If a showing is not made that the reasonable probability of such situations is substantially to lessen competition, then the geographic pricing system is not in violation of the Clayton Act.

Such is exactly the situation herein. After March 1, 1956, Pure's price in Blount County admittedly was higher than its price in Jefferson County. In the town of Oneonta, some forty miles from Birmingham, Pure had four small dealers who were paying the Blount County price. Their total combined sales averaged only 10,000 to 12,000 gallons per month. One of Pure's dealers in Jefferson County was on the highway near the Blount County line, about 16 miles from Oneonta. During the period in question, from January to April, the dealer near the county line increased his gallonage, but there is no showing that this was at the expense of the four dealers in Oneonta. In fact, two of the four dealers in Oneonta sold more gallonage dur-

[22] *General Foods Corp.*, 50 F.T.C. 885 (1954), and *Purex Corp.*, 51 F.T.C. 100 (1954).

ing this period than they had during the same period of 1955. The third one, who was not in business in 1955, sold more gallonage during these four months than in the same period in 1957. One dealer, McPherson, sold less gallonage during this period than during the same period in 1955, but more gallonage than during the same period in 1957. In all, only a few thousand gallons were involved compared to the 12 million and more gallons sold per month in Jefferson County. In addition, the record reveals that the increased business enjoyed by the Jefferson County dealer near Oneonta came from many other sources in addition to any slight increase of gallonage which might have been diverted from Oneonta.

The total sales of the four Oneonta dealers were greater during the period in question than in the same period in 1957. There is no showing that whatever loss of gallonage McPherson may have incurred was not acquired by his Pure dealer competitors in Oneonta, whose gallonage increased during the period in question. In addition, contrary to the facts as found in the *Sun Oil* decision and the *Enterprise* case,[23] there is no substantial evidence that the Oneonta dealers and the Jefferson County dealer near the county line were actually in competition with each other. It is concluded and found that counsel supporting the complaint have not met the burden of proof of establishing by reliable, probative, and substantial evidence that the effect of respondent's price discrimination may be substantially to lessen competition in the secondary line of commerce, among competing customers of respondent.

Counsel supporting the complaint also urge a finding that respondent's price discriminations are in violation of § 5 of the Act. The complaint contains no such allegation, but specifically alleges the price discrimination as a violation of § 2(a) of the Clayton Act. The only violation of § 5 of the Act alleged is that of price fixing, hereinafter considered. Since the issue was not alleged and therefore not litigated, under well-established principles of due process it cannot be found.

D. *The Alleged Price-Fixing*[24]

The second count of the complaint alleged that the one-cent plan of respondent constituted a combination or agreement between respondent and its dealers to fix prices in violation of § 5 of the Act. It is, of course, firmly established that price-fixing is illegal per se under

[23] *Sun Oil Co.*, 55 F.T.C. 955 (1959); *Enterprise Industries, Inc.* v. *The Texas Company*, 136 F. Supp. 420 (D.C. Conn. 1955).

[24] Because this count was not reopened by the remand, the findings of fact in this section remain unchanged.

both the Sherman Act and § 5 of the Act. However, the facts herein, as found above, establish no understanding, agreement, conspiracy or arrangement between respondent and its dealers to fix prices. Actually the facts establish the contrary. As found above, respondent recommended the plan to its 120 dealers in an effort to capture a larger share of the market. The dealers were told specifically that they could elect to follow the plan or not as they chose, that the posting of a retail price one cent above the private brands was entirely their own choice and a unilateral decision, and that whether or not they elected to follow the plan all of them would receive the discount established by respondent. The record establishes that a substantial majority, from 90 to 95 of the dealers, did not follow the plan, did not post prices within one cent of the private brands until forced by the price reduction of all of the majors to do so, and nevertheless all of the dealers received each price allowance granted by respondent. The mere recommendation of the plan or pricing policy by respondent does not establish an agreement or conspiracy between respondent and its dealers, contrary to the undisputed facts.

Each dealer was advised that he did not have to agree to the plan or follow it, and that in any event he would get the same discount. The proof of the pudding is in the eating. A majority of the dealers did not follow the plan, yet all received the same discount. Counsel supporting the complaint's argument with respect to circumstantial evidence, while legally correct, is misapplied inasmuch as the circumstantial evidence herein indicates the absence of any agreement. A suggestion cannot be equated with an agreement. As established by the facts, there was no offer and acceptance, nothing was agreed to, and no consideration existed inasmuch as all received the discount whether or not they adopted the suggestion. It is clear that the dealers who followed the suggestion did so as a matter of choice, inasmuch as three-quarters or more of the dealers elected not to follow the plan. There is no evidence that respondent's price discount was conditioned upon the adoption by the dealers of the plan or of a particular resale price, such as was found in the *Enterprise* and *Sun Oil* cases, *supra*. The courts have repeatedly held that a suggested resale price does not establish an agreement to fix prices. It is concluded and found that counsel supporting the complaint have failed to establish by a preponderance of the reliable, probative and substantial evidence that respondent entered into an agreement, conspiracy, or any other arrangement to fix and maintain prices.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce, and engaged in the above-found acts and practices in the course and conduct of its business in

commerce, as "commerce" is defined in the Act and in the Clayton Act.

2. The effect of the acts and practices of respondent hereinabove found in Section III(B) may be substantially to lessen competition, tend to create a monopoly, and to injure, destroy and prevent competition with respondent and its customers, in violation of § 2(a) of the Clayton Act.

3. Respondent has not, as alleged in the complaint, engaged in price discrimination among competing customers, i.e., the secondary line of commerce.

4. Respondent has not, as alleged in the complaint, entered into any agreement, conspiracy, or other arrangement to fix and maintain prices.

It is ordered, That respondent, The Pure Oil Company, a corporation, and its officers, representatives, agents and employees, individually or collectively, directly or through any corporate or other device, in the sale of "Pure" branded motor gasoline of like grade and quality in commerce, as "commerce" is defined in the Clayton Act, in any market area where respondent is in competition with any other seller, do forthwith cease and desist from discriminating in price, directly or indirectly, by selling such gasoline for resale under the "Pure" brand name to any purchaser at a net price which is lower than the net price charged any other purchaser engaged in the same line of commerce, where such lower price is accompanied by a suggestion, recommendation or plan for, or results in, a reduction in the retail prices of such gasoline, which reduces or narrows in such market area the customary retail price differentials, if any, between "Pure" branded gasoline and private brand gasolines of comparable grade and quality, respectively; or where such lower price is lower than the price at which any purchaser for resale is able to purchase in the same market area from another seller private brand gasoline of comparable grade and quality.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

DECEMBER 1, 1962

PRELIMINARY STATEMENT

On September 27, 1957, the Federal Trade Commission issued its complaint against Texaco, Inc.,[1] a corporation (hereinafter called respondent or Texaco), charging it with price discrimination in violation of § 2(a) of the Clayton Act (hereinafter called the Clayton Act), 15

[1] During the pendency of this proceeding respondent changed its name from The Texas Company to Texaco, Inc.

U.S.C. 12, *et seq.*, as amended by the Robinson-Patman Act, and unfair methods of competition and unfair acts and practices in violation of § 5 of the Federal Trade Commission Act (hereinafter called the Act), 15 U.S.C. 41, *et seq.* Copies of said complaint together with a notice of hearing were duly served on respondent.

The complaint, as amended and supplemented, alleges in substance that respondent discriminated in price by the sale of its gasoline to some customers at prices substantially lower than the prices charged other customers in the same competitive market area, and that respondent entered into agreements with certain of its customer-dealers to fix and maintain the retail price at which such customers sold said gasoline.

Respondent appeared by counsel and filed answer generally denying all of the substantive allegations of the complaint and the alleged violations and affirmatively alleging a good faith meeting of competition defense under § 2(b) of the Clayton Act by means of its Chicago Plan, attached to and made a part of its answer.

Pursuant to notice, hearings were held at various times and places before the undersigned hearing examiner duly designated by the Commission to hear this proceeding. At the conclusion of the case-in-chief, respondent's motion to dismiss certain portions of the complaint for want of proof was denied.

Both parties were represented by counsel, participated in the hearings and were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file proposed findings of fact, conclusions of law, and orders together with reasons in support thereof. Both parties filed proposed findings of fact, conclusions of law, and orders together with reasons in support thereof. All such findings of fact and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded are herewith specifically rejected.[2]

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. *The Business of Respondent*

Respondent is a Delaware corporation with its principal office and place of business at 135 East 42d Street, New York 17, N.Y.

[2] 5 U.S.C. § 1007(b).

II. *Interstate Commerce and Competition*

Respondent is now and for several years last past has been, among other things, engaged in the offering for sale, sale and distribution throughout the United States of gasoline under the brand names of "Fire Chief" and "Sky Chief," and of other petroleum products under the brand name "Texaco." Said gasoline is nationally advertised and enjoys wide public acceptance. Respondent is an integrated organization engaged in various aspects of the oil industry, operates throughout the United States in one or more phases of the oil industry, and is among the Nation's leading producers and marketers of gasoline and other petroleum products. Respondent is engaged in oil production and operates pipe lines, marine equipment, refineries, terminals, and bulk stations. Among other things, respondent markets its gasoline in all States of the United States through sales to independent retail dealers under contracts which provide for the purchase and sale of specified minimum and maximum amounts of gasoline, including such dealers located in Portsmouth, Norfolk, South Norfolk, and Virginia Beach, Virginia.

In the course and conduct of such business, and for the purpose of supplying said Virginia customers, respondent ships or otherwise transports its gasoline from its refineries located in various States across State lines to its terminal and bulk station in Norfolk, Virginia, from which it is distributed to said retail dealers, who in turn sell it to the public. Respondent's sales to said retail dealers are and have been in the course of commerce,[3] and there is and has been at all times mentioned herein a continuous stream of trade in commerce of said gasoline between respondent's refineries, terminals, and bulk stations and said retail dealers. In the course and conduct of this business respondent is in substantial competition in commerce with others engaged in the production, sale and distribution of gasoline in commerce.

III. *The Unlawful Practices*

A. *The Issues*

Count I of the complaint alleges price discrimination in violation of the Clayton Act among competing customers, *i.e.*, secondary-line price discrimination, in the Portsmouth, Norfolk, South Norfolk, and Virginia Beach area. Count II alleges a vertical price-fixing combination, agreement or understanding, in violation of the Act, between Texaco and certain of its dealers in the Portsmouth, Norfolk, South

[3] *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231 (1951).

Norfolk and Virginia Beach area and the Detroit, Michigan, area. For reasons of clarity, the alleged price-fixing agreement is considered first.

B. *Vertical Price Fixing*

Both the alleged price-fixing agreement and the alleged price discrimination involve in general the same factual situation, namely, the adoption and implementation by Texaco of its so-called "Chicago Plan" in the designated areas. As set forth in Texaco's answer to the complaint and established by the evidence in the record, the Chicago Plan was a method whereby Texaco granted lower wholesale or tank wagon prices by means of temporary discounts to certain of its dealers, when in the opinion of Texaco they needed such lower prices because of lower prices posted by competitive stations of rival brands, usually during a price disturbance or price war, which might affect the sales and gallonage of such Texaco dealers in the same competitive area. The plan was originally conceived and adopted by Texaco in the late 1940's and early 1950's, and was formalized by the so-called Hochuli letter of Texaco on August 22, 1952, which was attached to and made a part of respondent's answer. Under this plan respondent granted price assistance or discounts, to some degree in conformity with the conditions set forth in such letter, and in actual practice as described in the evidence in this record.

Count II of the complaint alleges that such discounts were conditioned upon the dealer requesting such assistance and agreeing to post such resale prices as dictated by Texaco, and that the failure or refusal of the dealer to post the prices dictated by Texaco meant that the allowance would be terminated or refused, respectively, by Texaco. Respondent contends that the allowances were granted to assist dealers to meet competition, and that there was no agreement, understanding or condition concerning the retail prices at which such gasoline was to be resold.

The record clearly establishes that allowances were not given under the Chicago Plan if the dealer in any way indicated that he would not post the competitive price selected by Texaco and upon which its allowance was based, that the allowance was canceled or withdrawn if after receipt the dealer did not in fact meet the competitive price upon which it was based, that in at least one such instance the dealer was required to refund the amount of the allowance, and that the dealers were given to understand that the allowance was conditioned upon their meeting competition, that is, posting the price of their competitors or the price selected by Texaco as the prevailing competitive price, or else the allowance would be refused or canceled.

While many dealers testified that they were free to post whatever prices they wished, the overall record makes clear that many had reference to gasoline purchased without allowance under the Chicago Plan, under which circumstance there is no question but that they were free to post whatever price they selected. All of the dealers were free to accept or reject Chicago Plan allowances, and as Texaco points out, were not coerced or required by Texaco to take such allowances. In this sense, of course, by rejecting Chicago Plan allowances the dealers were free to select and post whatever prices they wanted. However, as a practical matter, when competitive retail prices declined substantially they were not able to do this because the prevailing tank wagon price was nearly equal to, and in some instances higher than, competitive retail prices, and hence, being required to resell the gasoline at prices much higher than surrounding competition, they were economically compelled to accept Chicago Plan allowances and agree to post competitive prices.

The policy of Texaco with respect to its Chicago Plan allowances is set forth in the Hochuli letter and the attachments thereto, referred to therein as Exhibits A and B. Relevant portions of the Hochuli letter are here set forth:

COMPETITIVE PRICE CONDITIONS—CHICAGO PLAN

* * * * * * *

We know that to be successful, the Texaco dealer must be competitive in price as well as in the service. Should he fail to meet the price of competitive dealers, his gallonage—and therefore his opportunity to do business profitably—will suffer. On the other hand, should the peculiar circumstances of his individual competitive problem require him to meet the competition of lower prices, with no change in the price which he must pay, his margin will suffer.

* * * * * * *

1. The Texaco dealer should request assistance in writing. (A dealer request for assistance which indicates in any way the retail price at which he intends or proposes to sell is unacceptable for the reason that such statements may lead to the unwarranted inference that assistance is based on the dealer's adherence to certain prices—he is an independent businessman and may sell at whatever price he chooses—our assistance is purely voluntary and is based solely upon our determination, in good faith, of his need for assistance.)

2. Evidence of lower prices (sales slips or verified postings) of competitive dealers must be obtained.

3. It should appear that the gallonage of the Texaco dealer has fallen off or is in imminent danger of falling off.

4. It should appear that the dealer cannot meet competition and operate profitably without assistance.

5. Each dealer request should be received, investigated and handled on an individual basis.

A competitive dealer is one whose lower prices directly affect the business of the Texaco dealer involved. He may be in the immediate area or on the same street or highway, yet some blocks or distance away. No rigid formula of competition can be established—each case should be considered on its individual merits.

* * * * * * *

Whenever it has been decided to extend assistance to a dealer under this plan, a letter in the form attached as Exhibit B should be addressed and delivered to the dealer and a record of its delivery to him should be kept in the file.

The amount of allowances may vary as between dealers and/or areas due to differing individual competitive situations and none are intended to create a precedent * * *.

In all of our handling it should be clearly understood by the entire organization, particularly our field people, that we should not:

1. Insist that the dealer meet competitive prices.
2. Specify to the dealer the particular retail prices at which he should sell.
3. Make our allowances, or the amount, or the continuance of our allowance, contingent upon the dealer's agreement to adhere to certain prices or upon his meeting competitive prices. The initiative in meeting and continuing to meet competitive prices should always be in the sole discretion of the dealer.

* * * * * * *

It is entirely proper in our internal consideration and handling (from field to New York) to compute our allowance in relation to the retail prices which our investigation tells us is the real competition of the dealer. Thus, a change in the competitive price or the price at which the dealer sells may justify to us an increase of, or a reduction in, or the elimination of, an allowance.

The assistance which we give to a dealer is purely voluntary on our part and our decision to assist him initially or to continue or discontinue assisting him rests in our sole discretion. It cannot be made the subject of any agreement or understanding between the Company and the dealer. We reserve the right to increase, decrease or withdraw the assistance at any time when in our judgment we deem it advisable to do so. Thus, we may decide in our discretion that a dealer does not require assistance if he has determined, on his own initiative, that he need not meet competitive prices. But, to discuss impelling reasons for our decision with the dealer may give rise to the unwarranted assumption on his part that the matter of assistance is the subject of some understanding between him and us, which is undesirable as well as improper. When an allowance has been withdrawn or reduced it is sufficient (and no more should be said) that in our judgment it appears that he has no further need for the allowance.

Among other things, it will be noted that the Hochuli letter states that "a dealer request for assistance which indicates in any way the retail price at which he intends or proposes to sell is unacceptable." It also requires that "evidence of lower prices of competitive dealers must be obtained." The Hochuli letter defines a competitive dealer as "one whose lower prices directly affect the business of the Texaco dealer involved. He may be in the immediate area or on the same street or highway, yet some blocks or distance away." In addition to requiring that the dealer request for assistance be in writing, it re-

quires the delivery of a written reply, a form letter, to each dealer receiving assistance. It further requires that "we should not: make our allowances, or the amount, or the continuance of our allowance, contingent upon the dealer's agreement to adhere to certain prices or upon his meeting competitive prices." In spite of the foregoing, it also provides: "Thus, a change in the competitive price or the price at which the dealer sells may justify to us an increase of, or a reduction in, or the elimination of, an allowance."

Exhibit A was the form used by Texaco to survey dealers of other brands competing with the dealer requesting assistance. It was prepared by Texaco personnel. It included a listing of the brands, locations and posted prices of such competitive dealers, a determination of the "prevailing" competitive retail price, a computation of the allowance recommended, and a determination of gross margin. The "prevailing" competitive price was normally the lowest major brand price listed, which frequently was the price posted by all or most of the listed major brand stations, but occasionally was the price of only one such station, lower than the prices prevailing among those stations geographically nearest to the Texaco dealer. Having determined such "prevailing" competitive price, Texaco granted the dealer an allowance which would permit him to realize a "reasonable" margin if he posted that competitive price. This margin was less than the usual and customary margin realized by the dealers in normal markets when Chicago Plan allowances were not being granted. All of the dealers knew that the margin received under Chicago Plan allowances was less than their usual margin, which also evidences their understanding that Chicago Plan allowance was conditioned upon their meeting the competitive retail price selected by Texaco. In those instances where the prices of immediately surrounding stations did not necessitate a dealer posting the "prevailing" competitive price selected by Texaco, were it not for such understanding the dealers normally would have posted a price which would have afforded them all or most of their customary margin.

The Chicago Plan required that the dealer request the assistance in writing. No prepared form of such request existed and the dealers prepared their own letters, numerous of which are in evidence. Exhibit B attached to the Hochuli letter is the form letter reply to such requests under the Chicago Plan, which Texaco personnel were required to deliver to all dealers to whom such allowances were granted. Exhibit B reads as follows:

Dear Sir:

We have received and considered your written request for assistance in *meeting competitive price* conditions affecting your business as a Texaco Dealer. We

note that you believe it is impossible for you to sell Texaco gasoline at a reasonable profit and to *meet the prices* of your competitors unless we make some adjustment in our price to you and that your sales of gasoline are likely to decrease unless you can *meet such prices.* After investigation, we are satisfied that this is true and we have concluded that we may, in good faith, *assist you in meeting this competition.* Accordingly, we have authorized a temporary per gallon allowance payable to you by credit memorandum monthly.

It should be clearly understood that this arrangement is entirely voluntary on the part of The Texas Company and *may be changed or discontinued at any time.* Of course, the price at which you sell gasoline is a matter for your sole judgment and decision as an independent businessman.

Very truly yours, (Emphasis added.)

Respondent calls attention to the fact that the Exhibit B reply advised the dealers that the price at which they sold was a matter for their sole judgment and decision as evidence that the dealers were not required to meet competitive prices in order to secure such allowances. However, it will be noted that such reply stressed the fact that the requesting dealer intended to meet competition, that the allowance was granted for such purpose, and that it could be changed or discontinued at any time by Texaco. A careful analysis of this letter indicates that the dealers were given to understand that the allowance was only for the purpose of meeting the prices of their competitors, and could be discontinued at any time. As a matter of fact, as will be seen hereinafter, this interpretation coincides with the understanding, derived from discussions with Texaco personnel, of the dealers who received such allowances, with the exception of those who, having unilaterally determined that they wanted to post the same prices as their competitors, had no occasion to discuss any requirement or condition with Texaco in seeking assistance.

The relevant periods of time set forth in the complaint as amended in connection with the price-fixing count were from November 1956, through June 1957, in the Virginia cities and from June 1957, through June 1958, in the Detroit area. In the latter part of October 1956, a price disturbance occurred on upper Hampton Boulevard in Norfolk. Affected Texaco dealers requested assistance from respondent. On October 26 the use of the Chicago Plan in the area was authorized by Texaco. In the early part of November, the Sun Oil Company adopted a "consignment plan" and posted lower prices, ultimately causing the price war to spread throughout Portsmouth, Norfolk, South Norfolk, and Virginia Beach. As a result, Texaco from time to time granted its dealers, who requested assistance in writing, allowances pursuant to the Chicago Plan in the manner described hereinabove. Also from time to time instead of Chicago Plan allowances, Texaco granted general

allowances, without request or condition, to all of its dealers, which general allowances will be discussed more fully hereinafter in connection with the price discrimination count. The Chicago Plan was introduced into the Detroit area in the spring of 1957. Its use there is alleged in the complaint only as part of the price-fixing count, and evidence concerning it was not offered as proof of the price discrimination count.

As hereinabove noted, the record clearly establishes that Chicago Plan allowances were conditioned upon the dealers posting the prevailing competitive price selected by Texaco, and were refused or withdrawn if the dealers would not agree to post such price or refused to do so after receiving the allowance. The dealers who were questioned concerning the basis or condition for receipt of the allowance testified that it was given to them with the understanding that they were to meet the prevailing competitive price. Those dealers who testified that they were free to post any price they wished were either those who competitively badly needed and wanted assistance and had unilaterally elected to meet the competitive prices, and thus did not discuss the latter subject with Texaco, or those who believed that since they were free to accept or reject the allowances they were free to post whatever price they selected. In addition, the actions and admissions of Texaco demonstrate that those who requested or received the allowance under the Chicago Plan were required to post the prevailing competitive price or the allowance would be refused or canceled. The actions taken by Texaco with respect to dealers Torbert and Gayle, hereinafter considered, as well as with respect to other dealers who failed to post the competitive price selected by Texaco, clearly demonstrate this.

Mr. Branton, a Portsmouth dealer, testified that he knew from Texaco that in order to get assistance under the Chicago Plan he would have to meet the price of his competitors in his neighborhood. Many dealers testified that in order to get Chicago Plan assistance they were required to meet competition, and that they understood meeting competition to mean posting the same price as their competitors. The record demonstrates beyond dispute that in this industry "meeting competition" is understood to mean posting the same price as a competitor. The record establishes that, after having requested and received Chicago Plan allowances, additional increased allowances would be granted without request if the competitive prices further declined. Mr. Branton, when asked to explain how he knew what the competitive price was which he was expected to meet under such circumstances, stated that he based his posted price upon the allowance he received from Texaco. In other words, he decreased his posted

price in the same amount as the increase in allowance, thus maintaining the same margin.

Mr. Garner, a Texaco dealer on Route 17 south of Portsmouth, testified that he was supposed to meet competitive prices to receive assistance, and that if he did not do so he would not get the assistance. He stated that on one occasion he posted "regular" prices and tried to get assistance but did not because he hadn't posted the lower prices. He also stated that Texaco, not he, determined the competitive price that he was expected to post, and that the allowance was based upon that price. He testified that he knew that the competitive price to post was his invoice price, which reflected the allowance, plus the established reasonable margin, which at that time was 4½ cents. Thus both he and Branton knew at all times the competitive price they were to meet.

During the early use of the Chicago Plan in the Virginia cities, the reasonable margin used by Texaco to compute the allowance of a dealer to meet the competitive price was 4½ cents per gallon. Later it became 5 cents per gallon. The allowance granted was simply the amount necessary to bring the dealer's net margin when posting the competitive price up to 4½ or 5 cents, as the case might be. In May of 1957, the dealer's margin was modified by the adoption of what was called the 80 percent plan, which was a different method of computing the allowance to be given a dealer, but which did not modify the Chicago Plan in any basic respect. It consisted of giving the dealer an allowance of 80 percent of the difference between the margin which would be realized at the prevailing competitive price and 6 cents, which latter amount was determined by Texaco to be a normal or usual margin, but in no event less than 5 cents. This resulted in each dealer receiving a net margin of either exactly 5 cents or more usually more than 5 cents but less than 6 cents. This change was adopted in order to increase the actual net margins realized by the dealers following the Chicago Plan. When necessary, these computations also included local sales tax, which did not affect the plan or the amount to be realized by the dealer.

In the same manner as when the allowance was computed to net the dealer 4½ or 5 cents, under the 80 percent method the dealer knew that the competitive price to be posted was that price ending in 0.9 of a cent which fell between 5 and 6 cents above his net invoice price. Thus, even though the dealer did not know what the competitive prices in his neighborhood were, or, in other instances, what competitive price Texaco had selected which was different from those of his nearby competitors, in every instance the dealer knew the com-

petitive price upon which the allowance was computed and which he was expected to post. In some instances the "prevailing" competitive price selected by Texaco was considerably farther away from the dealer and was considerably lower than the stations immediately surrounding him, yet the dealer posted such competitive price. Many of the dealers never bothered to ascertain the prices of their nearby competitors but merely posted prices according to the above formulae. Naturally, in most instances, because of the prevalence of the price war, the price posted by the Texaco dealer was that of his surrounding competitors.

The dealers were contacted periodically by their respective Texaco salesmen, who explained to them the Chicago Plan allowances and their availability after its adoption in the Virginia cities. Mr. Braithwaite, one of the Texaco dealers in Virginia Beach who received the allowance, testfied that he was told that he would be entitled to an allowance if he met competition, which he understood to mean selling at the same price his "area" was selling. Mr. Phelps, another Virginia Beach dealer who received the allowance, testified that his salesman advised him that he would get an allowance which would give him a margin of 4½ cents per gallon. Mr. Walters, a Texaco dealer in Norfolk, testified that it was his understanding from Texaco that the purpose of the allowance was to drop the retail price and level it off with the rest of the stations in his vicinity. He testified that he had not been told to drop his prices, but that he had been told that if he should desire to drop his prices Texaco would go along with a certain percentage of his losses. As noted above, although Texaco dealers were free to refuse Chicago Plan allowances and post whatever prices they desired, as a practical matter all of them except one ultimately were compelled to accept the allowances.

Mr. McFadden, another Portsmouth Texaco dealer, testified that Mr. Harris, then a Texaco salesman, told him that he should get his prices in line with competition. McFadden also said that Harris told him that he would have to request assistance in writing and would have to lower his prices to meet competition in order to receive such assistance. McFadden stated that the competitive price to be met was determined by adding a margin of 4.4 cents to the invoice price of gasoline, which McFadden understood to be the amount that Texaco was guaranteeing the dealer no matter how low the price went. At that point of time 4.4 cents was the allowance Texaco was granting. The reasonable margin was set by Texaco at 4.5 cents, McFadden's prevailing competitive price was 0.1 of a cent above the tank wagon price, and hence the allowance Texaco was granting was 4.4 cents. McFadden was mistaken

by 0.1 of a cent in referring to the 4.4 cents allowance as the margin, which at that time was 4.5 cents. Apparently he was overlooking the 0.1 of a cent difference between the prevailing competitive price and the tank wagon price, which the dealer also realized, making a net total of 4.5 cents. McFadden stated that Harris told him that if he would put the request in writing it would be granted. McFadden testified that he had about 7,000 gallons of gas in the ground at the time, did not want to sell it at a loss, advised Harris that if Texaco would reimburse him for it he would be glad to get in line with competition, but that Harris advised him that Texaco could not do that. After the termination of the price war, Texaco did furnish a number of its dealers one additional load of gasoline at reduced prices under Chicago Plan allowances, apparently in consideration for their having reduced their prices to meet competition on gasoline which they already had in their tanks and had purchased at the higher tank wagon price. This particular action by Texaco will be considered in greater detail hereinafter in connection with the price discrimination count, but it further evidences the existence of an agreement to post the prevailing competitive prices.

Mr. Maxwell, another Texaco dealer on Route 17 south of Portsmouth, testified that if he did not meet competition he would not receive the allowance, and that if he received the allowance he would have to meet competition. He was the only dealer who testified that if he posted a price higher than the competitive price selected by Texaco his allowance would be prorated downward. He testified that if he posted one cent above the competitive price and the allowance was 4.5 cents it would be reduced to 3.5 cents. All of the other dealers testified that the allowance would be withdrawn if they failed to post the competitive price. As a practical matter, the proration Maxwell referred to was meaningless and would never have been utilized by any dealer. If the allowance was prorated as a result of the dealer charging a higher price, he would net exactly the same amount as at the lower price. No dealer would do this. By raising his price but not increasing his margin he could only reduce his sales. Under such circumstances, if he were to realize the same margin every dealer obviously would post the lower competitive price. Although Texaco officials also testified that under such circumstances the allowance might be prorated rather than canceled, there is no evidence in the record of a single instance where this occurred. As pointed out above, the reason is obvious.

Mr. Lee, one of Texaco's principal officials in this Virginia area, admitted that when information came to the attention of Texaco that dealers receiving allowances had increased their prices, Texaco would

cancel such allowances, because this indicated that "they no longer needed the allowance to be competitive." The record contains numerous exhibits revealing that as soon as a dealer raised his price above his prevailing competitive price his allowance under the Chicago Plan was canceled. An example thereof is Commission's Exhibit 56, a letter from Harris to Lee, which referred to a telephone conversation between them concerning several Norfolk dealers who had removed their price signs and raised their retail prices. The letter stated that in accordance with Lee's instructions allowances were discontinued immediately to all dealers who were not meeting competitive prices. Another example is an exchange of telegrams between Messrs. Lee and Rhodes, the latter another Texaco official, in which Lee advised Rhodes that many Texaco dealers "receiving assistance on their written requests to be competitive are not competitive. This defeats purpose of plan and cannot be perpetuated." In reply, Mr. Rhodes stated that the Norfolk organization had "been instructed to take necessary steps to correct this unsatisfactory condition." Lee also testified that if a dealer raised his price 3 cents above his prevailing competitive price Texaco would either discontinue the allowance or adjust it downward. He stated that Texaco basically was helping the dealers to be competitive. He then conceded that when "the competitive level changes" the allowance is discontinued or adjusted. It is apparent that he had reference to a dealer raising his price above his prevailing competitive price. As noted above, if the allowance under the Chicago Plan was prorated when the dealer increased his price this would effectively prevent him from doing so.

Mr. Harris, who during a portion of the relevant period was a Texaco salesman and subsequently was promoted to a higher position, described how the dealer's allowance and margin were computed on the Exhibit A's. He pointed out that after Texaco ascertained the prevailing competitive retail price the dealer's allowance was computed by adding to whatever margin would be realized at the tank wagon price an amount necessary to enable the dealer to meet competition and realize a minimum reasonable margin. This amount necessarily varied depending upon whether the then "reasonable" margin selected by Texaco was 4.5 cents, 5 cents, or the amount computed under the 80% method. The computations on the Exhibit A's showed first a margin realized, which was simply the difference between the prevailing tank wagon price and the prevailing competitive price, and then showed the "gross margin" realized, which consisted of the above margin plus the allowance granted. In explaining the Exhibit A's, Harris testified that the gross margin was "simply the margin the dealer makes, or

the gross margin that the dealer would actually realize after the allowance recommended was received." This further demonstrates Texaco's requirement that the dealer was to post the prevailing competitive price selected by Texaco based upon which the allowance was computed on the Exhibit A's. Clearly this would not be the margin a dealer would actually realize unless he actually posted the prevailing competitive price set forth thereon.

As previously noted, unlike Chicago Plan allowances, a general allowance was one granted throughout an entire area to all dealers without request or condition. An exchange of telegrams between Messrs. Lee and Cathcart, the latter one of the top officials in Texaco's home office, further indicates that Chicago Plan allowances were given upon condition that the dealers meet the prices of their competitors. On January 18, 1957, Cathcart wired Lee as follows: "In view of principal competitors you mention extending general allowances, am wondering why you do not meet in same manner rather than use Chicago Plan allowances. What are retail prices on which you have computed Chicago Plan allowances." Mr. Lee replied: "We prefer continuing Chicago Plan allowances so as to help dealers requesting assistance to be competitive."

Contrary to the requirement of the Hochuli letter that dealer requests for assistance were not acceptable which indicated in any way the retail price at which he intended or proposed to sell, many of the requests for assistance received in evidence did in fact indicate the price at which the dealer intended to sell. For example, such requests advised respondent that the dealer wanted assistance in order to reduce his prices to meet the competitive prices in his vicinity, due to prices all around him he was asking assistance to meet them, because competitive stations on all sides of him had reduced their prices he could not possibly compete with them without assistance, and to back him up when he cut prices to meet the competition.

That Texaco would not grant Chicago Plan allowances to a dealer unless he agreed to meet competitive prices, *i.e.*, the prevailing competitive price, or if he indicated in any way an intention not to meet such competitive price, is fully illustrated by the actions taken by Texaco concerning dealer Torbert's request for such assistance. Torbert was a Portsmouth dealer on High Street, one of the main thoroughfares of Portsmouth, with many competitive stations including seven other Texaco stations within a radius of a mile. On December 10, 1956, after six of the other seven Texaco stations had received Chicago Plan allowances and the prevailing price in Torbert's area was only 0.1 of a cent above the tank wagon price which he was pay-

ing, he wrote Texaco requesting price assistance, stating: "During this gasoline war the Texas Company has been giving the stations who have cut their prices a discount on their gasoline. I haven't cut my prices which I don't believe I should, but I do think I am entitled to the same discount as the other stations. The other Oil Companies are also giving the same consideration to *all* of their stations. Needless to say this war has hurt my business considerably, and I would appreciate your help in this matter."

It cannot seriously be disputed that this was a request for price assistance. However Torbert said that he did not believe he should cut his prices. Two days later Mr. Rhoades, another Texaco official, wrote Lee concerning Torbert's request for the same allowance granted other dealers in his vicinity, pointing out that Torbert did not wish to meet competitive prices. On January 28, 1957, a month and a half later, Lee replied to Torbert's request, stating: "I am certain that any price differentials in your area were made to enable retailers of Texaco products to meet the equally low price of competing retailers. If at any time you desire similar assistance we shall be pleased promptly to consider your request for it." Torbert's request was denied. One week later Torbert gave in and wrote a second request for assistance, as follows: "Due to the price situation in Portsmouth I am forced to meet the competition. So, I am asking for any subsistence you can give to enable me to continue operation." Thereupon assistance was furnished to Torbert.

Torbert testified that when the other Texaco stations were selling at 24.9 cents he was paying 24.8. He discussed the situation with Harris, asking him if he could get the same discount the other dealers were getting. Harris advised Torbert that the only way he could get the assistance was to request it in writing and state that he wanted to meet the competition, and that he would then get the same assistance as the other dealers. Torbert stated that the competition Harris referred to was the lower prices of the dealers of other brands in his vicinity, and that he had been refused assistance because he had not reduced his price to meet such lower prices. Torbert further stated that his second request for assistance was drafted by Harris, and that Torbert understood it to mean that he was agreeing to meet the competitively lower prices.

Lee testified that Torbert's first letter was in fact a request for assistance, but that it did not meet the requirements of the Chicago Plan because the dealer had to advise Texaco that he wanted the assistance "to be competitive," and that Torbert's letter indicated that he did not want to be competitive because he stated: "I haven't cut my prices

which I don't believe I should." Lee testified that Torbert's request letter was unusual and hence was given more consideration, which accounted for the time which elapsed before his reply. Lee said that it was unusual because Torbert said that he saw no need to cut his prices, which Lee characterized as a statement that Torbert saw no need to be competitive. When asked whether Torbert couldn't be given an allowance and permitted to post whatever price he desired, Lee replied: "He could post anything he wanted to, but the assistance would be based on his being competitive." Lee further testified that there was no necessity to investigate the competitive prices affecting Torbert as was done with other dealer requests because he had stated that he did not wish to meet competitive prices, which was a prerequisite to obtaining assistance. Lee stated that Torbert's request was denied on the basis of Torbert's and Rhoades' letters.

The foregoing clearly establishes that Texaco would not grant Chicago Plan allowances unless the dealer intended or agreed to post the prevailing competitive price. Stated otherwise, the allowances were granted upon the condition that the dealer would meet such prevailing competitive price, and were rejected if the dealer indicated in any way that he did not intend to do so. In the face of this, respondent's argument that the granting of Chicago Plan allowance was not conditioned upon the dealer meeting the competitive price upon which the allowance was based, and that the dealer was free to post whatever price he selected, is without merit. As soon as Torbert filed a request stating that he intended to meet the competitive price, an allowance was granted.

That Texaco would cancel or discontinue Chicago Plan allowance to a dealer who in fact did not post the prevailing competitive price after he had received such an allowance, or would not then agree to post such price, is demonstrated by the actions of Texaco with respect to a Chicago Plan allowance granted to dealer Gayle. Gayle was one of the three Texaco dealers in Virginia Beach. The other two had been receiving such allowances. By November 15, 1956, competitive prices around Gayle had declined to 24.9, one-tenth of a cent over the tank wagon price Gayle was paying. Gayle had orally discussed price assistance with his salesman, Mr. German. Gayle had indicated that he did not like the Chicago Plan. German had advised Gayle that he would have to request assistance in writing and post lower prices to meet competition in order to secure assistance. After the prevailing price declined to approximately Gayle's tank wagon price and his sales were falling off, he decided to request assistance and reduce his prices. He called the Texaco office and so advised them. As a result, Chicago

Plan assistance was granted Gayle on one load of gasoline delivered to him on November 29, 1956. The next day German brought Gayle curb signs to post the lower "price war" price.

However, Gayle changed his mind, did not lower his prices to meet competition, and did not write the letter of request which he had been advised was necessary. The following day German called and advised Gayle he had to write the letter requesting assistance and had to post the competitive price or he could not have the allowance. The next day German came to the station and told Gayle substantially the same thing. German also told Gayle that if he did not post the prevailing price he would have to reimburse Texaco for the allowance granted, whereupon Gayle said he would reimburse Texaco. Gayle was required to and did reimburse Texaco for the allowance granted on the one delivery of gasoline. Gayle also testified that German had said the dealers would receive a four-cent margin under the Chicago Plan in posting the prevailing competitive price, whatever it might be.

Gayle continued to pay substantially more for his gasoline than those dealers who received Chicago Plan allowance and subsequently retained an attorney to try to collect this difference. The exchange of correspondence between Texaco and Gayle's attorney casts further light upon this incident. On March 16, 1957, Gayle's attorney wrote Texaco requesting reimbursement of the amount charged Gayle in excess of that charged other Texaco dealers in the area. On March 21, Harris, who had been promoted to a district representative supervising all salesmen in the relevant area, wrote Lee with respect to Gayle's demand. Among other things, Harris stated:

> * * * [t]his dealer heard that other Companies were giving all of their dealers a voluntary allowance regardless of whether or not they were posting competitive retail prices on gasoline. Our policy under the "Chicago Plan" provides for the voluntary allowance only when the dealer requests assistance to enable him to meet competitive retail prices. Mr. Gayle did request this assistance as he intended to meet competition in his area. However he later changed his mind and decided to raise his retail prices after he had received one load of gasoline on which he received the voluntary allowance. The voluntary allowance was charged back to him and he reimbursed us accordingly.

The foregoing admission is too clear to require comment. On March 27 Lee wrote Cathcart of the home office requesting advice concerning the letter from Gayle's attorney. Among other things, Lee stated:

> Mr. Gayle did not reduce his prices or request any assistance, therefore, none was granted.
>
> On November 29th Mr. Gayle advised verbally that he had decided to meet competition and asked for the allowance on a load of gasoline he was receiv-

ing that afternoon, saying that he was confirming this request in writing. This was arranged, but when the salesman went down the next morning to get the written request Mr. Gayle stated that he had changed his mind and would not drop his price. He agreed that since he had requested the allowance in order that he might be competitive, and had decided not to do so, we could charge him for the difference on that one delivery. This we did and he paid it.

Lee then referred to the granting of Chicago Plan allowances to two other dealers in the Virginia Beach area because "they were meeting competitive dealer postings." Lee further stated:

> * * * The other two were withdrawn on February 27th, the date on which a general allowance was placed in effect for the entire area to meet Major competition. This general allowance is still in effect and Mr. Gayle has been receiving it although he is not competitive in his retail price postings.

On April 30, Lee replied to the letter of March 16 from Gayle's attorney, advising him that when Texaco had charged other dealers in Virginia Beach a lower price than Gayle,

> * * * we did so at the request of such other dealers for assistance to enable them to meet competition, and after our investigation established such assistance was necessary.
>
> We would have been happy to have considered any similar request from Mr. Gayle. Actually, on one occasion late in November, 1956, Mr. Gayle did request and receive such assistance while a delivery of gasoline was being made to him, but the very next day decided he did not need any assistance, and, subsequently, paid us an amount equal to the allowance he had requested and received.

Contrary to Lee's assertion, Gayle never decided that he did not need assistance. As both Lee and Harris admitted in their intracompany letters quoted above, Gayle decided not to lower this price to meet the prevailing competitive price, and this was the reason the allowance was canceled and Gayle was required to reimburse Texaco.

The foregoing facts clearly establish that the granting of Chicago Plan allowances was conditioned upon the dealer's posting the price determined to be prevailing in his competitive area, and that Texaco would not continue such an allowance if the dealer did not in fact do so, and in fact required reimbursement thereof if the dealer failed to do so. Respondent argued that its "requiring" of its dealers to meet competition, *i.e.*, post the same price as the "prevailing" competitive price, was required under the provisions of § 2(b) in order to establish its "good faith" in assisting the dealer to meet an equally low price of a competitor, which argument will be considered hereinafter in detail in connection with the price discrimination count. Suffice it to say at this point that the record establishes, and it is found, that Chicago Plan allowances were granted only upon condition that the

dealer post a price determined by Texaco to be his prevailing competitive price, and were refused or canceled if the dealer did not agree to do so or did not continue to do so.

The evidence with respect to both Torbert and Gayle establishes that, contrary to the contentions of respondent, allowances were not granted to dealers because they needed or wanted assistance, or in order to aid them to meet competition as they saw fit, but only if they agreed to meet the competitive price selected by Texaco, and/or continued to do so after receiving such an allowance. Torbert needed and wanted assistance and requested it in writing. Respondent knew that he was surrounded by stations posting lower prices, including other Texaco stations. But because Torbert indicated that he did not intend to meet the competitive prices in his area, and thus that he would not agree to do so, his allowance was refused. Yet when Torbert filed a later request clearly indicating that he agreed to meet competitive prices his allowance was granted. Torbert knew from his salesman exactly why his allowance was refused and what he had to do to get one.

Gayle also needed, wanted, and requested assistance, which was granted upon his oral promise to meet his prevailing price, and was canceled and reimbursement required upon his failure to do so. In the face of these facts, plus the many dealers whose allowances were canceled as soon as they raised their retail prices, respondent's contention that the dealers receiving Chicago Plan allowance were free to post any price they wanted is without merit. A certain amount of confusion exists in the record because the dealers were free to post any prices they wanted if they did not receive Chicago Plan allowances, and were free to accept or reject the Chicago Plan arrangement. This freedom of choice was greatly curtailed by the economic realities of the situation. With the single exception of Gayle, all of the dealers, including those such as Torbert who refused Chicago Plan assistance at the outset, were compelled by the price war and their declining gallonage ultimately to accept the arrangement.

An additional undisputed fact heretofore considered is that after the termination of price wars and the need for Chicago Plan allowances, Texaco delivered an additional load of gasoline with Chicago Plan allowance to the dealers who participated in the price war, apparently in consideration for their entering the price war and posting lower competitive prices upon gasoline which they had already purchased at the higher tank wagon price and upon which Texaco would not grant Chicago Plan allowances. This, too, evidences an understanding or agreement with respect to resale prices.

While not controlling in this case, Texaco's Chicago Plan has been construed by the Federal District Court and the Court of Appeals in the *Enterprise* case [4] as a price-fixing agreement. It is undisputed in the present record that the Chicago Plan was adopted in the late 1940's, formalized by the Hochuli letter in 1952, and used in various parts of the country in the same manner as in this case. Thus the Chicago Plan considered by the courts in the *Enterprise* case was the same plan as that here considered. Among other things, Judge Smith found:

It was established that * * * price allowances were made by defendant to its dealers in the Hartford area, competing with one another in the sale of defendant's * * * gasoline, *on condition that* the dealers drop their retail prices to a level competitive with neighboring dealers in rival brands. By "competitive" was meant equal * * *.

If accompanied by *a price fixing agreement* similar to that tied to Texas' "allowances" in fact if not in name, * * *.

The opportunity offered to plaintiff to obtain rebates or allowances * * * does not destroy the discrimination, for * * * it was *conditioned on* * * * *meeting a price.* This hampered plaintiff's freedom to set his own prices at retail, a restriction defendant had no right to impose. (Emphasis added.)

While reversing on the lack of proof of damages, the opinion of the Court of Appeals makes clear its agreement with the construction of the Chicago Plan as an agreement to fix prices.

Additional proof with respect to the Chicago Plan of a similar nature, although not as detailed or persuasive, was received in the Detroit area. Since the evidence heretofore considered clearly establishes the existence of a price-fixing agreement, no useful purpose would be served by reviewing it in detail.

While the evidence in this record establishes the existence of an understanding or agreement between Texaco and its dealers to fix the retail prices at which the gasoline was to be resold, it is well established that a price-fixing agreement or conspiracy may be inferred from circumstantial evidence and does not have to be proved by direct evidence.[5] Even assuming that the evidence herein does not constitute direct evidence of such an agreement, the facts and circumstances which lead logically to an inference of a price-fixing agreement may be summarized as follows: (1) The dealers knew that Chicago Plan allowances were conditioned upon their meeting and continuing to meet the prevailing competitive price selected by Texaco upon which the allowance was based; (2) the dealers' knowledge of the estab-

[4] *Enterprise Industries* v. *Texas Company,* 136 F. Supp. 420 (D.C. Conn. 1955), 240 F. 2d 457 (2d Cir. 1957).

[5] *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208 (1939); and *Theatre Enterprises, Inc.* v. *Paramount,* 346 U.S. 537 (1954).

lished minimum margin and their observance thereof; (3) when the competitive price was not posted Texaco canceled the allowance; (4) Texaco would not grant the allowance if the dealer did not agree to meet the competitive price or indicated that he did not intend to do so; (5) Texaco required reimbursement after the allowance was granted if the competitive price was not met; (6) Texaco required written requests for such assistance and personally delivered written replies advising the dealer that the allowance was for the purpose of meeting competition and could be withdrawn by Texaco at any time; (7) the alleged policy of adjusting or prorating allowances if the prevailing competitive price was not met; (8) the dealers posted a retail price netting them a lower than usual margin, when such price was not the price of the stations surrounding them or they were unaware of the actual competitive prices but such posted price was the prevailing competitive price determined by Texaco; and (9) Texaco granted additional allowances after the price wars and the need for them had ceased in consideration for having met competitive prices during such wars.

It is, of course, well settled that all price-fixing agreements, whatever may be their purpose or intent, and regardless of good faith, are illegal *per se* under the Sherman Act and hence under § 5 of the Act. As the Supreme Court observed in *Socony-Vacuum:* [6]

> * * * Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference * * *. Hence, prices are fixed within the meaning of the *Trenton Potteries* case if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. They are fixed because they are agreed upon. And the fact that, as here, they are fixed at the fair going market price is immaterial * * *.

A preponderance of the reliable, probative and substantial evidence in the entire record convinces the undersigned, and accordingly it is found, that respondent and certain of its dealers entered into, maintained and carried out a planned common course of action, combination, agreement, and understanding to fix and maintain the retail price at which such dealers were to resell gasoline, all to the prejudice and injury of the public, respondent's competitors, and said dealers' com-

[6] *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 222 (1940).

petitors, which constitutes an unfair method of competition and an unfair act and practice in commerce within the intent and meaning of § 5 of the Act.

C. *Price Discrimination*

(1) The Issue

Count I of the complaint alleges price discrimination among competing customers, *i.e.*, secondary-line price discrimination, in violation of § 2(a) of the Clayton Act. This count was limited to Portsmouth, Norfolk, South Norfolk and Virginia Beach and to the period of time from November 1956 through June 1957. As found hereinabove, this count dealt primarily with the same factual situation, namely, the granting of Chicago Plan allowances, or lower prices, to some but not all dealers. The complaint alleged that respondent sold gasoline of like grade and quality to certain dealers in the named Virginia cities at prices substantially lower than it sold to other dealers in the same competitive market area, Portsmouth, Norfolk, South Norfolk and Virginia Beach. Council supporting the complaint took the position that all Texaco dealers in this geographic area were in competition with each other.

Respondent admitted that it gave Chicago Plan allowances to some dealers in the area and not to others, but contended that this was done in good faith in order to assist the dealers to meet their competition in conformity with § 2(b) of the Clayton Act, denied that such dealers were in the same competitive area or were in competition with each other, and denied that the alleged discrimination had any statutorily prohibited effect, *i.e.*, that the effect "may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." Respondent's answer also admitted the granting, from time to time, of general allowances in the area, which were not individual allowances pursuant to the Chicago Plan but were tank wagon price reductions to meet the lower tank wagon prices of respondent's competitor suppliers of gasoline. The subject of general allowances will be considered in greater detail hereinafter.

(2) Different Prices

It is undisputed in this record that Texaco did in fact give different prices to its dealers in the area. It is now well settled that a difference

in price is a price discrimination within the meaning of the Clayton Act.[7]

(3) Competition Among Customers

In addition, it is of course essential that in a secondary-line case such as this competition among the recipients and non-recipients must be established. Without such competition patently the discrimination could have no competitive effect upon the non-recipients. Having established the price difference or discrimination, it next becomes essential to establish the existence of such competition.

Contrary to respondent's contention, the record clearly establishes the existence of competition between and among many of its dealers in the alleged area. In essence, respondent contended that each of its dealers was in an isolated geographic location or area, and did not in fact compete with any other Texaco dealer. There seems to be some confusion concerning exactly how many Texaco dealers there were in the four-named Virginia cities, which are more or less geographically adjacent. Although respondent proposed no specific finding with respect to the number of such dealers, many of its proposed findings incorporate the "fact" that there were 66 such dealers. However, in its brief in support of its motion to dismiss at the conclusion of the case-in-chief, respondent contended that there were 79 such dealers, supporting this with record citations. Commission Exhibit 407-B, a Texaco record, shows that there were 85 dealers in the relevant area. The point is not of great importance inasmuch as a violation is established if there is a showing of price discrimination among some competing customers resulting in the proscribed statutory effect. It is not necessary to establish such discrimination or effect among or upon all of them.

Pursuant to its Chicago Plan requirements, whenever an allowance was requested and before it was granted, Texaco conducted a survey of the prices of dealers of other brands in the neighborhood of the Texaco dealer requesting assistance, using the Exhibit A form attached to the Hochuli letter previously described. As required by that policy letter and as specifically stated in the Exhibit A form, the dealers of other brands who were listed thereon were "competitive" dealers, *i.e.*, those "whose lower prices directly affect the business of the Texaco dealer involved." This, of course, conformed to respondent's contention that Chicago Plan allowances were granted only in order to enable a dealer to meet the lower prices of his competitors. The record establishes that in numerous instances such listed competitive

[7] *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536 (1960).

dealers were located either immediately adjacent to another Texaco dealer or farther away from the Texaco dealer requesting assistance than another Texaco dealer. Yet these were the dealers whose prices competitively affected the Texaco dealer requesting assistance, and whose competition respondent was in "good faith" assisting the requesting dealer to meet.

Texaco had three dealers in Virginia Beach, a small resort community east of Norfolk on the Atlantic Ocean. Mr. Gayle was located at 17th and Arctic Streets. Seventeenth Street was one of the two branches of U.S. Highway 58, the main artery from Norfolk to the beach. Mr. Braithwaite was located at 24th and Atlantic, nine blocks from Gayle. Atlantic was the main oceanfront thoroughfare and Arctic was two blocks west of it. After Braithwaite requested Chicago Plan assistance, Texaco's Exhibit A survey listed seven stations as competitive dealers all of whom were farther away from Braithwaite than Gayle. Even more significantly, the prevailing competitive price which was used by Texaco to determine the allowance Braithwaite was to get was that of a Sun station two blocks farther away than Gayle, and in fact two blocks west of Gayle on the same side of 17th Street. Yet respondent contends that Braithwaite was not in competition with Gayle. In addition to the admission of competition established by Texaco's survey and resultant action, both Gayle and Braithwaite testified that they were in competition with each other.

Another example of competition among geographically adjacent Texaco dealers concerns Mr. Torbert, whose station was located at High and Second Streets in Portsmouth. Within a radius of approximately one mile of Torbert were seven other Texaco dealers, all of whom requested and received Chicago Plan assistance. In addition to the record evidence of geographic proximity and traffic patterns, respondent's Exhibit A's reveal that most, if not all, of these other Texaco dealers were in competition with Torbert. High Street was a main thoroughfare of Portsmouth, being also U.S. Highways 17 and 58. Torbert testified that most of his customers came from a radius within ten blocks of his station. The seven other Texaco dealers and their distances in blocks from Torbert were: Askew, 6; Baines, 6; Branton, 7; Hassell, 7; Sechler, 9; Hagy & Gardner, 12; and McFadden, 13. McFadden, the farthest away, testified that he was in competition with Torbert.

Texaco's Exhibit A form for Torbert listed only two competitive dealers. The Exhibit A for Askew, who was only six blocks from Torbert, listed four competitive dealers, two of whom were the same as those listed on Torbert's Exhibit A. Both were on the same street as

Askew. Obviously, if they were in competition with Torbert, Askew was in competition with Torbert. Baines was only six blocks from Torbert on the same side of the same street, thus experiencing the same traffic flow. The Exhibit A for Sechler, who was three blocks north of Baines, listed as a competitive dealer a Shell station next door to Baines, yet respondent contends that Baines and Sechler, as well as Torbert, were not in competition. McFadden was only one block from Hagy & Gardner.

Another example involves two Portsmouth dealers, Dodd and Schumaker. Their Exhibit A's contain exactly the same competitive dealers. Yet another involves two Norfolk dealers, Eason's Parking Service at Duke and College Streets, and D. D. Jones at Main and Jackson Streets. Eason's Exhibit A listed three competitive dealers, one across the street. Jones' Exhibit A contained all three of the same competitive dealers. The Exhibit A used for Smith, a Norfolk dealer at 35th and Colonial Streets, contained two competitive dealers. Both such competitive dealers were farther away than another Texaco station, Walters at 38th and Colley Streets, and one was immediately across the street from another Texaco dealer. Walters testified that all Texaco stations near him were in competition with him, and that it was necessary for him to post the same prices as such stations or he would lose customers. There are numerous other Exhibit A forms which list dealers of other brands, determined by Texaco to be competitive with the dealer requesting assistance, who were either farther away or at the same location as the nearest Texaco dealer. In addition, a number of Texaco dealers testified that they were in competition with the Texaco dealers nearest to them and that customers would switch from one station to the other if the prices varied.

In spite of the numerous Exhibit A's prepared by Texaco in the actual application of its Chicago Plan listing as competitive many dealers farther away than, or at the same location as, another Texaco dealer, nevertheless, Texaco contends that none of its dealers was in competition with any other. This contention is based upon a Texaco policy to attempt to locate stations so that they would not be in direct competition, and upon a survey conducted during the course of the hearings and expert testimony based thereon, to the effect that each Texaco station was not in competition with any other Texaco station.

The admissions and actual practices of Texaco prior to the issuance of the complaint, namely the Exhibit A's, are entitled to greater weight than testimony concerning its general policy and self-serving declarations after the commencement of the case. Obviously Texaco

cannot have it both ways. In support of its contention that Chicago Plan allowances were granted in good faith only to enable its dealers to meet their competition, Texaco established the prevailing competitive price by means of the Exhibit A's, which determined those dealers of other brands in competition with the requesting Texaco dealer in conformity with the instructions of the Hochuli letter. As hereinabove found, occasionally the prevailing competitive price upon which the allowance was established would be that of such a dealer farther away than, or at the same location as, another Texaco dealer, which was a finding by Texaco that such dealer was in direct competition with and affecting its requesting dealer. If in fact such other dealers were not in competition with the requesting dealers, then the allowances were not granted in good faith to enable the dealers to meet their competition. On the other hand, if such dealers were in competition with the requesting dealer, then clearly a Texaco dealer closer, or at the same location, would also be in direct competition with the requesting dealer, not even considering the factor of consumer preference for a specific brand.

Thus it is clear not only that Texaco's contention that none of its dealers were in competition with each other is contrary to the facts and its own admissions, but if correct, would in fact negate its contended good faith meeting of competition. Additionally, this contention of Texaco overlooks the factors of geographic location, traffic patterns and flow, brand preference, and, most particularly, the mobility of the customers, who could readily transfer their custom a few blocks or miles in order to take advantage of a lower price. Such factors were considered and relied upon by the Commission in its *Sun Oil* and *American Oil* decisions and by the District Court in the *Enterprise* case as evidencing both competition and effect.[8]

Counsel supporting the complaint contend that all Texaco dealers in the four Virginia cities "area" were in competition. Exactly the same factors discussed above which establish competition among adjacent Texaco dealers, *i.e.*, geographic location, traffic patterns and flow, and distance, clearly establish that all such dealers were not, and could not be, in competition with all others. For example, Virginia Beach is at least 20 miles east of Norfolk and South Norfolk and farther from Portsmouth. As found hereinafter under "General Allowances," the dealers in Portsmouth were not in competition with

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[8] *Sun Oil Company*, 55 F.T.C. 955 (1959); *American Oil Co.*, 60 F.T.C. 1786, Docket No. 8183 (1962); *Enterprise Industries, Inc.* v. *The Texas Company*, 136 F. Supp. 420 (D.C. Conn. 1955). See also *Elizabeth Arden* v. *FTC*, 156 F. 2d 132 (C.A. 2, 1946); *FTC* v. *Simplicity Pattern*, 360 U.S. 55 (1959); and *Liggett & Myers Tobacco Co., Inc.*, 56 F.T.C. 221 (1959).

those in the other three cities. It is concluded and found that all Texaco dealers in the area were not in competition with all others.

(4) Discrimination Among Competing Customers

The record reveals numerous instances where Texaco granted lower prices by means of Chicago Plan allowances to a dealer while not granting such lower prices to other dealers directly competing with the favored dealer. Dealer Gayle in Virginia Beach was never given an allowance whereas the other two Virginia Beach dealers, Braithwaite and Phelps, were granted an allowance of 4.4 cents for a period of approximately two months. Gayle and Braithwaite were in direct competition with each other. In fact, Braithwaite's prevailing competitive price determined by Texaco was that of a station farther from him than Gayle and located on the same street as Gayle only two blocks from him. Phelps was located at 31st and Pacific Streets, approximately one mile north of Gayle. Pacific is a boulevard providing easy access from Gayle's to Phelps' location. In addition, U.S. Highway 58, the main route from Norfolk to Virginia Beach, has alternate branches entering Virginia Beach, one being 17th Street and the other 31st Street. Hence, persons regularly traveling to and from Norfolk could readily use either branch, and as a result pass both stations on alternate trips. While Braithwaite and Phelps were selling Fire Chief at 24.9 cents, Gayle was trying to sell the same gasoline at 32.9 or 31.9. The record reveals that his gallonage declined from 25 to 30% during that period.

Seven other Texaco dealers were within a radius of approximately one mile of Torbert's station in Portsmouth. From on and about November 16 to various dates in December and January such other dealers received 4.4 cents allowance. Torbert was refused an allowance until February 8. It has been found that most, if not all, of these stations were in competition with Torbert. McFadden, who was farther from Torbert than any of the others, testified that he was in competition with Torbert. As in the case of Gayle, Torbert was trying to sell his gasoline for approximately 31.9 cents while the rest of the competitive Texaco dealers were posting 24.9. During December Torbert's sales declined 3,638 gallons compared with October when no allowances were being given in his area.

The operation of the Chicago Plan resulted in other discriminations among the same seven dealers. For example, Hagy & Gardner received no allowance until January 7 whereas McFadden, one block west of them on the same highway, received 4.4 cents from November 26. Hassell, also on High Street, received the same allowance from

November 17 through January 10, whereas Baines, one block east on High Street, received it only through December 22. Substantially the same situation applied with respect to dealers Dodd and Schumaker in Portsmouth and Eason's and Jones in Norfolk, previously mentioned, as well as Maxwell and Garner on Route 17 south of Portsmouth.

(5) General Allowances

In lieu of Chicago Plan allowances, respondent from time to time granted general allowances throughout an area to all dealers without requirement or condition in order to meet general tank wagon price reductions of its supplier competitors. Counsel supporting the complaint contended that these general allowances also were price discriminations in violation of § 2(a). The facts are that for about a six weeks' period respondent granted a general allowance in Portsmouth which was two cents greater than the general allowance being granted in Norfolk, South Norfolk and Virginia Beach. As previously found, all of the Texaco dealers in all four cities obviously were not in competition with each other. As a matter of fact, there was no substantial or direct competition between the dealers in Portsmouth and those in the other three cities. Portsmouth is west of and separated from Norfolk and South Norfolk by the Elizabeth River and its branches. The only means of access between them are either a toll bridge or toll tunnel costing minimums of fifty and sixty cents a round trip, respectively, or a toll free round trip to the south of approximately 26 miles. Virginia Beach is approximately 20 miles east of Norfolk. Even ignoring the time factor, obviously a saving of two cents a gallon on a tankful of gasoline would not equal the cost of any of such trips. While a few persons worked in Portsmouth who lived in Norfolk and South Norfolk, there is no substantial evidence in the record that there was any direct or substantial competition between the dealers in Portsmouth and the dealers in the other three cities. Hence a price differential of two cents between the two areas could not have had any effect upon competition.

In addition, assuming such competition, the record establishes that Texaco's general allowances in Portsmouth were granted in order to meet area tank wagon price reductions of Texaco's major supplier competitors. There is no contention or suggestion in the record that such prices of competitors were unlawful. Accordingly, it is concluded and found that Texaco's general allowances were made in good faith to meet the equally low price of a competitor within the meaning of § 2(b).

(6) Probable Effect

While the foregoing findings establish that the price discriminations had the effect of injuring competition with the recipients of respondent's lower prices, it is now well settled that it is not necessary to prove that a price discrimination actually has such an effect, but only that there is a reasonable possibility or probability of such effect. Section 2(a) prohibits price discrimination "where the effect may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." The Supreme Court held in *Corn Products:* [9]

It is to be observed that Section 2(a) does not require a finding that the discriminations in price have in fact had an adverse effect on competition. The statute is designed to reach such discriminations "in their incipiency," before the harm to competition is effected. It is enough that they "may" have the prescribed effect.

It is also well established that where such discriminations are among competing customers and are substantial, without more it properly may be inferred that the effect may be substantially to lessen competition, etc., *i.e.*, that there is a reasonable possibility or probability of the proscribed effects. As the Supreme Court stated in *Morton Salt:* [10]

We think that the language of the Act, and the legislative history just cited, show that Congress meant by using the words "discrimination in price" in Section 2 that in a case involving competitive injury between a seller's customers the Commission need only prove that a seller had charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors * * *. Here the Commission found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay. The findings are adequate * * *. That respondent's quantity discounts did result in price differentials between competing purchasers sufficient to influence their resale price was shown by evidence. This showing in itself is adequate to support the Commission's appropriate findings that the effect of such price discriminations "may be substantially to lessen competition * * * and to injure, destroy and prevent competition." * * * The committee reports on the Robinson-Patman Act emphasized a belief that Section 2 of the Clayton Act had "been too restrictive in requiring a showing of general injury to competitive conditions * * *." The new provision, here controlling, was intended to justify a finding of injury to competition by a showing of "injury to the competitor victimized by the discrimination." * * *

The Commission here went much further in receiving evidence than the statute required. It heard testimony from many witnesses in various parts of the country

[9] *Corn Products Refining Co.* v. *FTC,* 324 U.S. 726 (1945).
[10] *FTC* v. *Morton Salt Co.,* 334 U.S. 37 (1948).

to show that they had suffered actual financial losses on account of respondent's discriminatory prices * * *. It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a "reasonable possibility" that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence.

There can be no doubt but that the differences in wholesale prices here between the favored and non-favored competing dealers were substantial. In addition, the difference in retail prices between favored and unfavored competing dealers was frequently as much as seven and eight cents a gallon. As the Commission recently observed in the *American Oil* case,[11] "we think that at that distance [one mile] a difference in price of one or two cents would be sufficient to divert business from one to the other."

(7) Meeting Competition Under § 2(b)

Respondent's principal defense to the price discriminations among its dealers was that Chicago Plan allowances were made in good faith in order to assist its dealers to meet their competition within the meaning of § 2(b) of the Clayton Act. Section 2(b) provides in pertinent part:

* * * *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price * * * to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor * * *.

At the outset it must be noted that the question of whether or not § 2(b) applies to the granting of a lower price to a customer in order to enable him to meet his competition, as distinguished from the competition of the seller, is presently pending before the Supreme Court in the *Sun Oil* case.[12] The undersigned and the Commission held in that case that it did not but the Court of Appeals reversed. Counsel supporting the complaint contends that it does not. Since the outcome of the appeal in the Supreme Court will definitively resolve this problem, no useful purpose would be served by again reviewing it here.

Assuming *arguendo* that the § 2(b) proviso does apply where a seller reduces his prices in order to enable a customer to meet his competition, it is clear that the defense is without merit in this proceeding because the lower prices by means of allowances were given pursuant

[11] Footnote 8, *supra*.
[12] Footnote 8, *supra*.

to an unlawful agreement or condition to fix resale prices, as hereinabove found. Consequently, it cannot be held that such lower prices or price discriminations were made in "good faith." Inasmuch as all forms of price-fixing agreements are illegal *per se* under the Sherman Act, and motive or intent is immaterial, it could not be concluded that the granting of such prices pursuant to such an illegal agreement could be in good faith within the meaning of the proviso. The Supreme Court has observed that Congress in the Sherman Act laid down broader antitrust principles than in the Robinson-Patman Act.

Respondent argues that its requirement or condition, that the allowances be refused or canceled unless the dealers met the competitive prices, was necessitated by that portion of § 2(b) which provides that the lower price be made "to meet an equally low price of a competitor," and hence does not evidence a price-fixing agreement. In other words, respondent argues that the proviso would not permit it in good faith to grant a lower price unless it be used by its customer to meet exactly a price of a competitor, and hence any refusal so to do or refusal so to agree would not permit respondent in good faith to grant the lower price. This contention is without merit and involves a misconstruction of § 2(b). The purpose of the amended language, "to meet an equally low price of a competitor," was to prevent the undercutting or beating of a competitor's price as a meeting of competition, as the prior § 2 had been construed, and not to require the exact meeting of the price of the competitor. The argument is illogical. Patently a seller may reduce his price to meet competition, without necessarily reducing it as low as the price of a competitor, and still be within the protection of the proviso.

Respondent's argument amounts to contending that a larger discrimination resulting in greater effect is legal under the proviso, but a smaller discrimination with correspondingly less effect is not permissible. Clearly if a seller is able to retain a customer or elects to meet competition by means of a lesser discrimination, he may do so within the meaning of the Section. A part cannot exceed the whole. Thus respondent's argument that it was required by the proviso not to give allowances to dealers unless they in fact intended to, and did, meet exactly the prices of their competitors is without merit. The decision of the Supreme Court in *Standard Oil* [13] indisputably is the leading case construing the scope and applicability of § 2(b). The record in that case established that the discriminatory prices which Standard Oil was granting to some of its customers to meet competi-

[13] *Standard Oil Co.* v. *FTC*, 340 U.S. 231 (1951).

tion were not in fact as low as the competitive offers. Nevertheless, the Supreme Court held such prices to have been made in good faith to meet an equally low price of a competitor within the meaning of § 2(b).

Another fact which establishes that the lower prices pursuant to Chicago Plan allowances were pursuant to agreement and were not in fact a good faith meeting of competition was the granting by respondent of an additional delivery of gasoline, at prices reduced by Chicago Plan allowances after the termination of the price war, to those dealers who had been active in the price war and had posted competitive prices pursuant to the Chicago Plan. Commission Exhibit 70 reveals that after the competitive retail prices had returned to "normal" respondent delivered an extra load of gasoline with Chicago Plan allowances to such dealers. Since the retail prices had been raised and the price war had terminated, obviously this price discrimination could not have been in good faith to meet competition but must have been in consideration for the agreement hereinabove found. Whatever the reason was, it constituted price discrimination which could not have been to meet lower prices which no longer existed. It is concluded and found that respondent's price discriminations pursuant to its Chicago Plan were not made in good faith to meet the equally low price of a competitor within the meaning of § 2(b).

Respondent also contends that if a dealer indicated that he would not, or if after assistance he did not, meet competition by posting the same price as his competitors, *i.e.*, the prevailing competitive price determined by Texaco, such dealer did not "need or want" assistance and hence Texaco could not grant it in good faith. This contention is also without merit. Obviously the dealers who were refused assistance both needed and wanted it, being confronted by substantially lower competitive prices, in most instances the same as those upon which the allowances were granted to other dealers. They not only were entitled to the same price as the other Texaco dealers but were entitled to use it in the manner they best saw fit. Some of them might well have elected to reduce their prices to a lesser degree, maintain a more normal margin, and use the increased income to improve their services in other respects. By maintaining a larger margin, albeit a lower gallonage, a dealer might well be better off competitively. As Judge Smith observed in the *Enterprise* case: [14]

> Had plaintiff been able to purchase at the lower price offered its competitors it would have had the benefit of the allowance on all the gas purchased by it and could have used it competitively in any way it wished, if not price

[14] Footnote 8, *supra*.

wise perhaps in furnishing additional services to neighborhood customers, or other inducements to win them back from the competing dealers, as it had attempted during the early days of the gas war.

(8) Conclusion

A preponderance of the reliable, probative and substantial evidence in the entire record establishes, and accordingly it is found, that respondent by means of its Chicago Plan allowances has discriminated in price in commerce between different purchasers of commodities of like grade and quality, and that the effect thereof may be substantially to lessen competition or to injure, destroy, or prevent competition with retailers of respondent's gasoline, in violation of § 2(a) of the Clayon Act. It is further concluded and found that such price discrimination was not made in good faith to meet an equally low price of a competitor.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce, and engaged in the above-found acts and practices in the course and conduct of its business in commerce, as "commerce" is defined in the Act and the Clayton Act.

2. The acts and practices of respondent hereinabove found in Section III(B) are all to the prejudice and injury of the public and competition, and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Act.

3. As a result thereof, substantial injury has been done to competition in commerce.

4. The effect of the acts and practices of respondent hereinabove found in Section III(C) may be substantially to lessen competition, and to injure, destroy and prevent competition with the recipients of respondent's discrimination, in violation of § 2(a) of the Clayton Act.

5. This proceeding is in the public interest and an order to cease and desist the above-found acts and practices should issue against respondent.

ORDER

It is ordered, That respondent, Texaco, Inc., a corporation, its officers, directors, agents, representatives or employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of its gasoline products in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Clayton Act, do forthwith cease and desist from:

A. Discriminating in price by selling such gasoline of like grade and quality to any purchaser at net prices lower than those

granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of respondent's gasoline;

B. Entering into, continuing, cooperating in, or carrying out, or attempting to do so, any planned common course of action, understanding, agreement, combination or conspiracy with any person or persons not parties hereto, to attempt to, or to establish, fix, adopt, maintain, or adhere to, by any means or method, prices at which said gasoline is to be resold; and

C. Granting any discounts, rebates, price reductions or other form of consideration for the purpose or with the effect of fixing or maintaining the prices at which said gasoline is to be resold.

Initial Decision by Walter R. Johnson, Hearing Examiner

OCTOBER 5, 1962

The complaint herein was issued on August 7, 1959, and charges respondent with violating Section 5 of the Federal Trade Commission Act in respondent's use of its "Suggested Competitive Retail Price" plan, hereinafter called SCRP.

The complaint alleges that commencing on or about December 1955, respondent, in combination, or by agreement with certain of its lessee-dealers, placed SCRP in effect in twenty-two named metropolitan areas in the States of Illinois, Indiana, Iowa, Minnesota, Missouri, Nebraska, South Dakota, and Wisconsin, that under SCRP respondent discontinued the traditional posting of its dealer tank wagon gasoline price, ascertained through surveys the prevailing retail price levels of unbranded gasoline resellers and determined an appropriate differential between branded products and unbranded products as a class, reflecting realistically the difference in public acceptance between the two classes of products, taking into account posted prices, discounts, and value of giveaways. It was alleged that on the basis of the foregoing, respondent determined a "suggested competitive retail price" and that a percentage discount from such suggested price determined Standard's price to its lessee-dealers.

It was also alleged that respondent dominates and controls its lessee-dealers in the operation of their service stations, that such domination and control was used by respondent to persuade and coerce such dealers to agree to or acquiesce in various plans and policies, including SCRP. It was further alleged that respondent persuaded or coerced such dealers to agree to adopt or follow SCRP, that as a result of such agreement respondent and certain of its lessee-dealers have effectively established, fixed, and maintained prices of gasoline

where SCRP has been placed in effect, and that the combinations or agreements of respondent and its lessee-dealers have had a tendency to create a monopoly, and constitute unfair methods of competition and unfair acts and practices.

Respondent answered, denying any violation of law and, among other things, denying that it dominates and controls its dealers, that any domination or control was used by respondent to persuade or coerce such dealers to agree to SCRP, that such dealers agreed to adopt or follow SCRP, that respondent and its dealers have fixed prices of gasoline, and that there were any combinations or agreements of respondent and its dealers to fix prices. Respondent averred that SCRP involved solely its lawful exercise of its right to suggest resale prices to its customers.

Counsel supporting the complaint presented evidence relating to the Twin Cities, St. Louis, Peoria, Evansville, Kansas City, and seven Wisconsin cities, where SCRP was introduced, and to Detroit where SCRP was not introduced. After denial of respondent's motion to dismiss at the close of Commission counsel's case, respondent introduced evidence applicable to each of the metropolitan areas in which SCRP was in use and as to which counsel supporting the complaint had offered any evidence. Commission counsel waived rebuttal.

Hearings for the taking of evidence occupied all or a substantial part of twenty-four days. Including the transcript of two pre-hearing conferences and of one session of oral argument, the record exceeds 3,500 pages of transcript and some 4,500 pages of exhibits. But for the procedures agreed to by counsel for the parties at the prehearing conferences relating to production and listing of documents and the listing of prospective witnesses, and the like, the evidentiary hearings would have consumed additional weeks or months.

Proposed findings of fact, conclusions of law, and order, and briefs in support thereof were filed by counsel for the parties, to which the Hearing Examiner has given full consideration. The proposed findings filed by counsel for respondent present a fair and accurate portrayal of the facts herein and the conclusions to be drawn therefrom. Although the details thereof will not be set forth in their entirety in this initial decision, the same are approved and adopted. Such proposed findings submitted by complaint counsel as are inconsistent therewith are rejected.

Upon consideration of the entire record herein, the Hearing Examiner makes the following findings of fact and conclusions:

Respondent, Standard Oil Company, is a corporation organized, existing and doing business under and by virtue of the laws of the

State of Indiana, with its principal office and place of business at Whiting, Indiana, and its executive office at 910 South Michigan Avenue, Chicago, Illinois.

Standard with its subsidiaries is now, and for a number of years has been, primarily engaged in refining, storing, transporting, distributing and selling gasoline and other petroleum products throughout the United States for resale through service stations to the consuming public. Its gasoline enjoys wide public acceptance wherever it is marketed and is considered a major brand product.

Standard itself markets in fifteen midwest and mountain States: Montana, Wyoming, Colorado, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Minnesota, Iowa, Missouri, Wisconsin, Illinois, Michigan, and Indiana. One or another of its affiliates markets in thirty-three other States.

In Standard's fifteen-State marketing area it is one of the major gasoline marketers engaged in selling its gasoline throughout the area. In 1957 about sixty percent of Standard's brands of gasoline was marketed under the names of Standard Gold Crown (premium) and Standard Red Crown (regular) through approximately 15,654 retail outlets. Of this number some 10,532 were leased or sub-leased by Standard to dealers, including 842 lessee-consignee stations. Standard also had 96 company-operated stations; and it sold to approximately 5,017 other stations under supply agreements. Forty percent of Standard's gasoline was sold direct to commercial users and other commercial accounts.

Standard has refineries at Whiting, Indiana; Sugar Creek, Missouri; Wood River, Illinois; Mandan, North Dakota; Neodesha, Kansas; and Casper, Wyoming. From these refineries Standard transports its gasoline by pipeline, barge, tank car, and truck to terminals and bulk stations in its fifteen-State marketing area, and from these terminals and bulk stations said gasoline is distributed to service stations and other customers. Standard is now and has been at all times herein mentioned engaged in commerce, as commerce is defined in the Federal Trade Commission Act, in the shipment and transportation of gasoline between its various refineries in some States and its terminals and bulk storage plants in other States, and between such terminals and plants in some States to jobbers and retail dealers purchasing said gasoline in still other States. Such purchases by wholesalers and retail dealers are and have been in the course of such commerce.

Standard has been and is now in substantial competition with other

corporations, firms and individuals engaged in the sale and distribution of gasoline in commerce. Such competitors include so-called "majors" whose brands of gasoline are well-known in various areas of the country, such as Gulf, Socony-Mobil, Texaco, Sinclair, Shell, Cities Service, Pure, Skelly, DX, Phillips, and Conoco.

Competitors of Standard also include so-called "independents" or "unbranded" or "cut-rate" marketers (hereinafter called independent or unbranded) whose brands are typically not as well known over as wide an area as the majors, such as Direct Service, Mileage, Zephyr, Clark, Erickson, Holiday, Super America, Hudson, Site, Mars, Fina, Apco, Atco, Derby, M and H (Miller and Holmes), Consolidated, Star, Red Bird, Owens, Thoni, and Wisco. Some of these independents own their own refineries or have an interest in a refinery; others do not. Many of the independents own and operate their own stations; others do not.

Under SCRP Standard suggests retail prices to its dealers which are based on, and are designed to enable its dealers to be competitive with, the independent stations' prices. Standard discontinues the traditional posting of its dealer tank wagon gasoline price at its bulk plants. It ascertains through surveys the prevailing retail price levels of various classes of independent or unbranded gasoline resellers. It determines an appropriate differential between branded products and unbranded products as a class reflecting realistically the difference in public acceptance between the two classes of products, taking into consideration: (a) posted prices of unbranded resellers; (b) discounts from those posted prices; and (c) the value of stamps, premiums, and other give-aways. On the basis of the foregoing, and using the best judgment of its local sales managers, Standard then determines a "suggested competitive retail price." Standard's price to its dealers is then determined by a percentage discount from the suggested competitive retail price, excluding taxes. All of its dealers in the area are charged the same price by Standard, regardless of their resale prices.

The question presented here is whether or not the Standard Oil Company agreed with its dealers or coerced its dealers in such a fashion that the retail price of the Standard dealers was fixed.

Counsel supporting the complaint contend that the illegality of SCRP is abundantly clear when viewed with (1) certain economic factors and industry practices in the gasoline market of the areas in which SCRP has been instituted and (2) the acts and practices following as a means of carrying out its objectives. In relation to such contentions, complaint counsel submit a proposed finding:

Seventh Proposed Finding:

It is found that:

By virtue of the various provisions in the leases, sub-leases, and supply contracts; through a system of policing the business operations of the said independent lessee-dealers by constant inspection and surveillance; through the unspoken, but always present fear of lease cancellation; through the competitive effects of company owned and operated stations and consignment (LC) stations; through news media price change announcements which generate customer comment and pressure; through salesmen comment and pressure; and through the use of curb price signs encouraged and made available by Standard, respondent is able to and does to a substantial extent and degree, dominate and control the lessee-dealers in the operation of the service stations leased or subleased from respondent. Such domination and control has been exercised, exerted, and used by respondent to persuade, influence, induce and otherwise coerce certain of its said independent lessee-dealers, initially unwilling to adhere to and post its "SCRP" prices, to abide by, agree to, adhere to, follow or acquiesce in, and thus to post and place in effect said "SCRP" prices.

There is no evidence in the record herein that will support such a finding.

The plan was first introduced and used in the Twin Cities area on January 5, 1956. At one of the prehearing conferences, it was stated by complaint counsel: "Mr. Wilson: * * * I think the whole plan, as we envision it in the complaint, will more or less be based on evidence adduced in the Twin Cities area." At a hearing held at Minneapolis, Minnesota, considerable documentary evidence offered by complaint counsel was received in evidence and twelve witnesses were called for and on behalf of the Commission. The witnesses were Mr. H. J. Hilliard, Standard's Manager for the Twin Cities Division at the time the plan was introduced; Mr. Thomas B. Murphy, Vice President of Western Oil & Fuel, an independent marketer; and ten dealers or former dealers for Standard. Pertinent portions of the testimony of each of such witnesses will be reviewed in some detail.

Mr. Hilliard, accompanied by his Assistant Manager and Sales Manager of the Minneapolis office, attended meetings in Chicago where they met with various members of the sales promotion department of Standard, at which times the new proposed plan was discussed and developed. Mr. Hilliard testified in part:

By Mr. Wilson:

* * * * * * *

Q. Being a manager in an area where you are not keeping up with your competition, you surely heard from top management, did you not? When you were not keeping up with competition, Mr. Hilliard?

A. We were not even following the speed with which our people were going on price cutting. We were behind. I think we had probably the poorest showing output per company location in the country at that time.

Q. Had you been called on the carpet so to speak prior to that time?

A. I am constantly reminded I was not doing the best job.

* * * * * * *

Q. When in your knowledge, Mr. Hilliard, did the plan in its final form, and as it was subsequently introduced in the Twin Cities area become formalized and known as S.C.R.P.?

A. We had two stages of that. One, where we were given a complete briefing on the entire plan as it was suggested to put it in as an experimental thing to try. We were given that and later on, I believe, it came out in letter form. I believe a letter form that came out later on, but our instructions were in the original for a testing pattern.

Q. You were given a complete briefing?

A. Yes, sir. As to how it was to be put in.

* * * * * * *

Q. Who gave the briefing in Chicago?

A. It was by the sales promotion department, and we had our lawyers there, and really telling us that this was one that had to be exact and that we could have no intimation of any kind, coercion, and any pressure, of our demanding anybody to agree to anything, and that was a very severe admonition on the part of the legal people, anything of this kind to leave the dealer completely free to do what he wanted to do.

After the Chicago meetings and before the plan was put into effect in the Twin Cities area, the dealers in the area, numbering from 200 to 230, were informed of the plan. This was done at a series of meetings, at which time Mr. Hilliard or one of his assistants explained the plan to the dealers and it "was stressed again and again and repeatedly they were to select their own retail prices" if the plan was initiated. At these meetings, dealers discussed the plan and from what was said Mr. Hilliard got the impression that the general attitude of the dealers was favorable to the plan.

On January 3, 1956, Mr. Hilliard sent a letter to Standard's General Manager of the Sales Department in Chicago, in which he recommended a suggested competitive resale price for the Twin Cities area. In response thereto on January 4, 1956, Mr. Hilliard by Western Union message received approval of his recommended prices and instructions with reference to putting the plan in effect. The message (CX 23A–B) reads in part:

Based upon your recommendation that the suggested competitive retail prices in Twin Cities metropolitan area should be 25.9¢ for Red Crown and 27.9¢ for White Crown gasoline including 7¢ per gal. tax, you have our approval effective Jan. 5, 1956 to allow your dealers a discount of 4.7¢ per gal. Below the suggested competitive retail prices on each grade.

* * * * * * *

"It should be clearly understoood that suggested competitive retail prices are for the guidance of our dealers only. We intend thereby to give you the benefit

of extensive analysis which we have made and will continue to make of competitive conditions in the Twin Cities area."

On January 4, 1956, a letter (CX 24) announcing the initiation of the plan was sent to the dealers:

TO STANDARD DEALERS IN THE TWIN CITIES AREA

Enclosed is a copy of a statement which I am releasing to the newspapers concerning this Company's new price policy for gasoline sales to dealers effective January 5 in the Twin Cities area. As you will note, under the new policy Standard will not post dealer tank wagon prices but will sell to its dealers at discounts from suggested competitive retail prices.

We are suggesting at this time a competitive retail price of 25.9 cents for Red Crown and 27.9 cents for premium White Crown. Standard's price to dealers will be computed on the basis of discounts below these suggested competitive retail prices of 4.7 cents per gallon. Suggested competitive retail prices and the discounts at which our products will be priced to dealers will change from time to time. You will be notified of such changes as they occur.

It should be clearly understood that suggested competitive retail prices are for the guidance of our dealers only. We intend thereby to give you the benefit of extensive analysis which we have made and will continue to make of competitive conditions in the Twin Cities area.

Yours truly,

H. J. HILLIARD.

The press release (CX 25A–B) referred to in the foregoing letter reads in part:

Standard Oil Company (Indiana) today announced a change in price policy applicable to sales of gasoline to its dealers in Minneapolis and St. Paul, Minnesota. In a statement by Dwight F. Benton, vice president in charge of sales, the new policy was outlined as follows:

"Henceforth Standard will sell gasoline to its Twin Cities dealers at a discount from 'suggested competitive resale prices.' The suggested retail prices will be designed to reflect competitive conditions, including, particularly, other retail prices in the Twin Cities, taking into account not only posted prices but rebates of any kind, premiums, trading stamps, and other forms of price concessions by competitors.

* * * * * * *

"We, of course, can only recommend that our dealers post our suggested retail prices. What each chooses to do is a matter of individual decision. Our prices to our dealers will be computed at a discount from the suggested resale prices, regardless of the prices actually posted by our dealers."

When questioned with reference to the posting of suggested prices by the dealers, Mr. Hilliard had this to say:

By Mr. WILSON:

Q. This plan went into effect January 5, 1956, Mr. Hilliard, is that correct?

A. Yes, sir.

Q. How many of your dealers in the geographical area in which the plan was

placed into effect posted according to the suggested price at that date or subsequent thereto?

A. I couldn't answer for that exact date, but we made a number of checks just to find out what the general trend was, and it is my recollection that in all these checks that at no time was there even two thirds of them on the suggested price. Many times there were as little as a third of them on it and the general averaging out of this, I don't think would be—it would be right around 50 percent mark, that they were following the general suggested price, that I am sure.

Testimony of the ten dealer witnesses will now be discussed.

James Russell Ball has been a lessee dealer of Standard since September 1951, operating a Minneapolis station under a year to year lease. Since May 1956 he has obtained his gasoline under a consignment contract with Standard. Mr. Ball testified in part:

On Direct Examination

By Mr. LIZOTTE:

* * * * * * *

Q. Mr. Ball, on the basis of what you saw and heard at that meeting, what did you think was Standard's purpose in holding that meeting and explaining the plan to the dealers?

* * * * * * *

The WITNESS. I honestly—it was for the benefit of the dealers.

* * * * * * *

Q. In the period between January and May, 1956, did you generally follow the suggested prices?

A. Yes, sir.

Q. Could you explain why?

A. There was absolutely no reason to follow it. My closest competition was the same price, which is the Mobil station, and he posted the same price as I did.

Q. Did you ever post higher than the Mobil station?

A. Not for any length of time, no, sir.

Q. Was there any particular reason why you could not post higher for any length of time, higher than this Mobil station, Mr. Ball?

A. No.

* * * * * * *

Q. Mr. Ball, did you ever hear of announcements in the press concerning changes in the suggested price of Standard gasoline?

A. Just in the newspapers when the price was changed, that is all.

Q. What effect, if any do these announcements in the press have on you in the operation of your business?

* * * * * * *

A. It didn't have any effect on the business.

Q. It had no effect?

A. No, sir.

* * * * * * *

Q. Have you ever been advised or encouraged by anyone to use these price signs?

A. No, sir.

Q. Does a price sign or the use of a price sign or curb sign have any particular significance to you?

A. No, sir.

On Cross Examination

By Mr. KUHLMEY:

* * * * * * *

Q. As a matter of fact, Mr. Ball, prior to this plan, had you not been posting at your pumps whatever price you wanted to put on that pump?

A. Yes, sir.

Q. And wasn't that true after the plan went into effect?

A. Yes, there was no do or don't's business of prices.

Q. As a matter of fact had not Standard suggested to you some prices to put on the pump from time to time prior to this plan going into effect?

A. Yes, sir.

Q. Wouldn't the salesman from time to time tell you maybe what the Mobil Station was charging down the street?

A. Yes, sir.

Q. But the decision prior to the plan and during the time when you—before going on your consignment arrangement in 1956, as to your prices on the pumps, the decision was always yours?

A. That is correct.

Q. Yours alone?

A. Mine alone.

* * * * * * *

Q. Are you fearful that Standard is going to cancel out because you are on one year?

A. I just signed a new lease for three years.

Q. Your new lease is a three year lease?

A. Yes.

Q. It is not yet in effect?

A. Not until September, no, sir.

On Redirect Examination

By Mr. LIZOTTE:

Q. Does the fact that you're a lessee dealer play any part or enter into your thinking in decisions that you make or reach in the conduct of your business?

A. No, sir.

Ruben Zamansky, who has been a Standard Oil dealer for 25 years, leasing a station located in St. Paul, Minnesota, had this to say:

On Direct Examination

By Mr. LIZOTTE:

* * * * * * *

Q. Has it ever happened that any of these Standard stations or any of them, has posted within the past four or five years as much as two or three cents a gallon lower than what you have posted or had been posting in that period?

A. Yes.

Q. What effect, if any, was felt by you in your business?

A. It had an effect on the business.

* * * * * * *

Q. Did it ever occur within the last four or five years that you were two or three cents lower than any of these other Standard stations?

A. Yes.

Q. What result if any did you experience in your business?

A. Probably a little influx in business.

Q. By influx, you mean increase?

A. Yes, increase.

* * * * * * *

Q. Are they for example—strike that. Could you explain to me why you generally follow the suggested price on your Red Crown gasoline?

A. Competition, more or less. You have to be in line with competition. Competition is something you follow.

* * * * * * *

Q. Mr. Zamansky, if you had wanted to, could you have reduced the price on your Red Crown gasoline?

Mr. KUHLMEY. We object unless he specifies the time he is talking about.

Mr. LIZOTTE. From any time, from the inception of S.C.R.P. plan in this area.

The WITNESS. I could reduce it any time you want to lose money. It is a hard question. You have to have a certain margin to operate, depends on what—

* * * * * * *

Q. Now, I believe you testified that on occasions you varied from the suggested price with respect to your Gold Crown gasoline?

A. Yes, sir.

Q. Was this called to your attention by anyone?

A. Possibly a few, yes.

Q. When you say a few, how many do you mean?

A. A very small percentage of customers buying.

Q. Customers?

A. Yes.

Q. Would anyone else ever call this to your attention?

A. That I was higher than the suggested price?

Q. Yes.

A. Yes.

Q. Was this someone from the oil company? or from an oil company?

A. Yes.

Q. Would anyone from Standard Oil Company tell you?

A. Possibly.

Q. Did anybody from Standard Oil Company ever mention it to you?

A. Yes, with reference to what competition is doing.

Q. Did they make any recommendations to you?

A. No.

Q. Who was the person who mentioned it to you?

A. I can't recall the exact person.

Q. What was his title?

A. A salesman.

Q. What type of reference to it did he make?

A. I don't remember.

* * * * * * *

Q. Are the prices which you post at your station surveyed by anyone, if you know?

A. From time to time, yes.

Q. By whom?

A. Different oil companies.

* * * * * * *

Q. Mr. Zamansky, do you have a price sign or a curb sign?

A. Yes, I have one.

* * * * * * *

Q. Have you ever been advised or encouraged by anyone to use this curb sign?

A. During price situations, yes.

Q. By whom?

A. Standard Oil, for one.

Q. Has this occurred within the last four years?

A. Yes.

Q. What does a price sign mean to you, Mr. Zamansky?

A. A disruption in the market, we figure the retail market.

* * * * * * *

Q. Mr. Zamansky, finally in conducting the operation of your station, are you mindful or conscious of the fact that you are a lessee dealer?

A. Yes.

Q. Mr. Zamansky, in the operation and conduct of your business, what effect if any does the location of a consignee or company owned station have on your business?

* * * * * * *

The WITNESS. Generally not any. Generally not any bearing on the normal operation.

On Cross Examination

By Mr. KUHLMEY:

* * * * * * *

Q. Do you have any fear that your lease is not going to be renewed by Standard Oil Company?

A. None whatsoever.

Q. Have you ever been afraid or had any fear in your 25 years as a dealer that your lease would not be renewed?

A. Never.

* * * * * * *

Q. As to your retail price, Mr. Zamansky, you have testified that by and large during the period of suggested price plan you followed the suggested price on Red Crown?

A. That is right.

Q. And was the decision to post whatever price on your Red Crown pumps your own decision exclusively?

A. Yes.

* * * * * * *

Q. And now on the Gold Crown pumps, they suggested a price and you did not post that price on the Gold Crown pumps, is that right?

A. That is right.

Q. And this was your own decision whether or not you put the suggested price on the Gold Crown pumps, is that right?

A. That is right.

Frank Albert Churchill is a Standard Oid dealer, 54 years of age, who has been in the same location in St. Paul for 30 years. The witness owns his own station which he leases to respondent and in turn takes a lease from it. He testified:

On Direct Examination

By Mr. WILSON:

* * * * * * *

Q. Again, the first suggested price by Standard Oil Company, to you, have you posted such prices or have you deviated from such prices?

* * * * * * *

A. Generally, I have stayed about half a cent above their suggested price.

* * * * * * *

Q. When you have the curb sign, you still stay a half cent above them?

A. Yes.

Q. What if anything has the company salesman said to you about being a half cent above the suggested price?

A. I don't think they have ever noticed. No mention has ever been made to me. That is, not from Standard Oil—other companies have. That is other companies make surveys.

Q. Are you able to state that after your attendance at this meeting, whether or not you had any choice to either accept or reject the proposed new pricing plan?

* * * * * * *

The WITNESS. I think I had all the choice in the world to be honest. I didn't think there was anything. There is no pressure at all brought to bear on it. It is my decision whether I accept it or not.

* * * * * * *

Q. Do you recall seeing any newspaper announcements in the newspapers, Mr. Churchill from 1956 and part of 1957 pertaining to the suggested price from Standard Oil?

A. Just the announcements in the paper.

* * * * * * *

Q. No customers commented?

A. Never had it.

* * * * * * *

Q. Tell us whether or not suggestions made by Standard Oil to you for your conduct of your business is given very strict attention and consideration?

* * * * * * *

The WITNESS. Well Standard Oil has been in the business a long time. Their ideas and ways of running a station whether it belongs to you as a private station, or whether it belongs to a company are good. They are solid, I believe. I have worked with them a long time and I see they get results, and I do follow within reason, their suggestions. That is, in the conduct of my business.

By Mr. WILSON:

Q. Do you on occasions follow the suggestions of Standard when you are perhaps in doubt as to the value in following them?

A. That is hard to answer, but I doubt it. If there is any doubt, any question about it being the right thing to do, I doubt if I would do anything until I find out.

* * * * * * *

Q. You mentioned, Mr. Churchill, that you only used curb signs during a market disturbance or price war, isn't that what you said?

A. Yes.

Q. Why do you use them then?

A. Well, I think we have got a superior product and we have a better product than the other people, at least the so-called cut rater, and if we can sell it within—if we can market within two or three cents of them, it is to my advantage to let them know it, and that is why I put it out—just as a matter of business. I think it works to my advantage.

Q. Was it effective? Has it proved to be effective insofar as your business is concerned?

A. I think so.

* * * * * * *

Q. During a price far, Mr. Churchill, when you are using curb signs and your closest Standard Oil competition is also using curb signs were both of you advertising the same price?

A. At times, I suppose, but other times I have been a half cent above them. If you stay within your penny—by that I mean—like here, if it is 29.4 or 29.9, it does not make any difference. One sign is just as effective as the other. If you get over the penny, over the 29, it does.

Q. If you get over a penny the public will notice?

A. Yes.

Q. They are not too conscious until you get over a penny?

A. It is the way it seems to me.

Q. In those instances where another Standard station had curb signs out under selling you by two cents, would that be detrimental to your business?

A. I should say so. I would say it would.

On Redirect Examination

By Mr. WILSON:

Q. Would you state whether or not after your attendance at this meeting at which time the suggested pricing plan was proposed that you left this meeting in full sympathy with the plan?

A. Actually, I don't think I had very much hopes for it at the time. It was thrown at us rather suddenly and I don't think I came to a decision right then. I was happy to see it worked, and to be honest, we have been through pretty tough times.

Phillip Robert Hillman was a Standard lessee dealer in the Twin Cities area for a period of eleven months beginning August 9, 1955. His lease was cancelled by Standard and immediately thereafter he became a lessee dealer of Socony Mobil Oil Company at a location approximately a block and a half away from the Standard station which he operated. He was a Socony dealer from July 15, 1956 to July 12, 1960. In his testimony, Mr. Hillman, among other things, had this to say:

By Mr. WILSON:

* * * * * * *

Q. Now, was there ever a time when you were operating the station that these other Standard stations were posting prices lower than you were posting, if you know?

A. Yes, they were posting lower in 1956. I know for sure.

Q. What effect if any did that have on your operations at your station?

A. I will say that is a hard question to answer accurately. I will say this: I never got any complaints from my customers about it saying, "I can get gasoline at this Standard Service station cheaper than that," that I can remember. I may have. I cannot remember any definite complaint from my customers. Of course, you must take into consideration these prices were being suggested in the newspaper and people were very price conscious in certain areas and it was a topic of conversation like the weather, but I sincerely believe in my area, price was not paramount, that service was. My average customer was a professional man or business man. I think they average appraisals of the homes there as 28 thousand. To the average, that was my belief, whether I was right or wrong would probably be argued for years, but I believed in building my business on service, that was my belief at the time. It still is.

* * * * * * *

Q. Now, Mr. Hillman, going back to the latter part of 1955, perhaps the early part of 1956, did there come a time when you received an invitation from the Standard Oil Company to attend a meeting?

A. Yes.

* * * * * * *

Q. Now, would you describe to the best of your recollection and in as full detail as possible the events and details at that meeting?

A. Yes. Mr. Hilliard opened the meeting. He was at the head table like you would be and he said that this meeting has been called to see what we can do about this price situation, which is so ridiculous in the Twin Cities, or words to that effect. It might not be those words.

Q. At that time, what was the situation in the Twin Cities area as to prices?

A. The prices were depressed. They were below normal.

Q. In other words, was there a price war going on?

A. Yes, I would say so.

Q. Excuse me for interrupting you.

A. Mr. Hilliard's next statement was that you just come in cold out of the cold and then to have it brought to you, I didn't realize the full impact here. Here are the words as I get it. We have a plan that has been checked by our lawyers as being air tight and that Mr. Kemper will explain this plan. This plan, according to the new pricing policy on here. We are going off the tank wagon price on to a new plan. This plan has been checked by our lawyers and is legal and he didn't use the word, air tight. He said "legal", perfectly legal. Mr. Kemper had a blackboard, a small blackboard over there. He made this statement. I remember now. At first this may not seem to be the best for you, but we assure you we thought this out. This has been well planned and in the long run, this is the best for you dealers and he explained the plan to us. As I remember, I had a napkin and I penciled on it and figured it without the plan, was that we would get 25 percent over the wholesale price excluding government and state tax, as I figured it out on my napkin we had lost another 12 percent of our profit going from the tank wagon to the suggested price. I raised my hand and mentioned that, but I did not get an answer to it. That is about all to the meeting except—I remember one other thing, and this is probably where I had misunderstood the company. They said, "and remember you are private individual businessmen and it is perfectly all right for you to keep the price the way you want it," or words to that effect, in your own competitive area, or words to that effect. And Mr. Kemper said, "Thank you gentlemen for coming, and remember, gentlemen, Standard Oil has never let you down, and God bless you all."

I notice you asked if I had any impressions. My impression when I left that meeting was, it was not a good plan, but it didn't make too much difference to me in my area. I don't think I was in such a competitive area as say the average station was in the Twin Cities.

* * * * * * *

Q. When Mr. Kemper said, "remember now Standard Oil won't let you down, and God bless you all," did he say, "we will now turn the meeting over for discussion"?

A. No, that was the end of the meeting. We left then.

Q. Was there any time at all during the tenure of this meeting that discussion was invited?

A. Not that I can remember. If it was, it was informal and very brief. I cannot remember any. There was no vote or what do you think of this plan or anything like that, that I can remember.

* * * * * * *

Q. That was my next question. Did you generally follow the suggested price?

A. No, I didn't follow it. I couldn't see how I could stay in business and pay good wages and get competent help at that gallonage at that market.

Q. Was this called to your attention by anyone from Standard Oil, anyone from Standard Oil Company talking to you about it, Mr. Hillman?

A. Definitely.

Q. Who was it?

A. Bill Tandy was primarily the one because he is my salesman in that area and he pointed out to me that it would be better for my volume to keep competitive and he said people are price conscious and gave me a number of instances

of why I should drop my price and my argument or my opinion I should say, as I have seen it before, I believe I was in a little different area. Although I didn't appreciate the fact of them putting the price in the papers and that eventually, we had to drop. Eventually, eventually, we had to. For the sake of example, I was opening up my station one morning putting the key in the lock. I was a little droggy like you are in the morning. I put in a long day before, and a customer drove up to the pump and said, "Boy you are way out of line on prices. You are three cents higher than you are supposed to go." And I didn't know a thing about it. Possibly I got a letter. I had not opened it, I do not know, but he as much as called me an unfair businessman or something and he said that he had seen the price in the paper. I think the price was 25.9 and I think mine was 28.9. Even if I had known about it, I would have dropped down a little bit but it is pressure like that on the radio, on the TV, and they watch your pumps, more when the prices are going up and down. Pressure like that, you can't resist, and eventually, I did go down and I did put up a price down on the boulevard for ten days or two weeks. And another time, I put a price sign in my window. I had this one time that it was strongly suggested that I go down in price. All right, I will try it and I tried it for 10 or 12 days and I don't know any appreciable amount in my volume, so I took my signs away and went back up again.

You must also take into consideration a moral responsibility with the other stations in my area. I was more or less kind of giving them a dirty deal if I went down. We were all happy and all satisfied. Glen's customers had been trading with him from two to 12 years and wouldn't trade at the station across the street. He had grown up in the volunteer police and he was a solid citizen, and his customers, you would never get away from him. My customers, I was building a steady business and to my way of thinking I had to have five cents a gallon to operate.

Q. You went down for this ten day period and you had your signs on the curb?

A. I had one on the boulevard and two in the windows.

Q. During that time when you took your signs off the curb and increased your pump prices, what happened to your business, Mr. Hillman?

A. Nothing. I can't go by incidence, or because the price was down. I do not know.

Q. What did Mr. Tandy say?

A. He said I was making a mistake.

Q. Did he say anything else?

A. No.

Q. As a result of Mr. Tandy's call, what if anything did you do?

A. Nothing. I just decided well this is my decision and this is it.

* * * * * * *

Q. During the time you operated this Standard Station, were you mindful or conscious of the fact that you were a lessee dealer and eventually you would have to negotiate a new lease, Mr. Hillman?

A. Oh yes, definitely.

Q. What importance is that, if any, in your attitude toward suggestions made by Standard Oil?

Mr. KUHLMEY. Your Honor, we object to that. This is certainly leading a witness. This is supposed to be direct examination. We have here the attitude

toward Standard Oil. What importance has this got in your attitude toward Standard Oil, and so on.

Mr. WILSON. As to the suggestions by Standard Oil. That is a heart-part of the government's charges here.

HEARING EXAMINER JOHNSON. Read the question.

(Last question read.)

HEARING EXAMINER JOHNSON. He may answer.

Mr. WILSON. I will rephrase that again so I get it right.

HEARING EXAMINER JOHNSON. It may help a little.

By Mr. WILSON:

What important part, if any, do you attach to such a fact, when considering suggestions made by Standard Oil?

Mr. KUHLMEY. Same objection.

HEARING EXAMINER JOHNSON. He may answer.

The WITNESS. I imagine that in my case in particular, we had many grounds of disagreement; that if it was an unsatisfactory relationship, that I would not be able to have another lease, that was my opinion and to a short term lease like a year, of course, to a short term lease, I don't think a businessman can build a business for a long haul. That is one of the reasons I wanted my margin form the first month on. In all fairness to a company, any company, if a person goes sour, has financial or domestic trouble or something it would be to the benefit of the public and the company to get rid of that lessee. However, I had in my particular instance strong feelings that I would not be welcome a second year because I didn't go along with not only this price plan, but other things that came up.

Mr. KUHLMEY. Your Honor, I move that the last answer be stricken. If my memory serves me right, he started out "I imagine" and everything else was his imagination.

HEARING EXAMINER JOHNSON. Let the answer stand.

Jerome J. Wasick, age 37, who has been a Standard lessee dealer for 15 years, operating a service station with a partner located in Minneapolis under a 3 year lease, testified:

On Direct Examination

By Mr. WILSON:

* * * * * * *

Q. Where is the nearest Standard station to yours?

A. That would be on Tenth Street and Third Avenue South.

Q. That's Mr. Ball's station, isn't it?

A. Yes, Jim Ball.

Q. And where is the next nearest one?

A. That would be on Fourth and Portland; that's Mr. Tice.

Q. Fourth and Portland?

A. Yes.

Q. How many blocks would that be?

A. Seven blocks.

* * * * * * *

Q. During the last four years, Mr. Wasick, has there ever been a time when either of these two stations were posting retail prices lower than yours?

A. Either Jim Ball's or——

Q. (Interrupting.) Mr. Tices.

A. Yes.

Q. How much, if you recall?

A. I don't believe—I don't believe that Mr. Tice, to my knowledge, Mr. Tice was never below us on price, but at times Jim Ball has been a cent and a half or two cents below us.

Q. On such occasions, what, if anything, did you do; that is in relation to your own prices?

A. Well, one thing, Jim usually was below us, because we give trading stamps and Jim Ball doesn't. We add the cost of the price—we add a half a cent a gallon to the price of our gas to compensate for the trading stamps. Jim Ball is usually below us, at times when we may have been a cent or cent and a half or two cents higher; chances are very possible that it was during the price war, and we raised our prices as we saw fit.

Q. Mr. Wasick, you were already higher, so you wouldn't be raising your prices, would you?

A. Possibly.

Q. Even though you were a cent and a half higher than Mr. Ball, you still would increase the prices?

A. We were probably a half cent, probably a half a cent higher than Jim; this happened during the last price war which ended the first of July or so. We were a half cent higher than Jim. Jim Ball. and we did raise the price of our regular another cent; I don't believe we raised the ethyl.

Q. How did you happen to raise the price of your regular, if Mr. Ball's station up the street just a few blocks was underselling you at the time?

A. Well, we just felt that possibly we would lose some business by doing it, but we also felt that we would probably come out ahead with dollars in the bank.

Q. What did Mr. Tice do, then, if you know?

A. I don't know his particular situation; in fact, each particular situation is peculiar to itself. I'm not familiar at all with the way Mr. Tice prices his gas down there. Apparently price-wise, he has no competition; apparently these people that deal with him park there, and he probably gets very little business off the street.

Q. In your estimation, is Mr. Ball's station in competition with your station?

A. Oh, yes; yes, it is.

Q. Can you sell gasoline just a few blocks from Mr. Ball at a cent and a half higher price?

Mr. MacDonald. He's just testified that he did.

Mr. Wilson. And keep up your volume?

Mr. MacDonald. Your Honor, he just answered that question.

Hearing Examiner Johnson. He's already answered.

The Witness. It wouldn't be every day in the year that this would happen; no doubt we would feel it occasionally during the price war week, yes.

By Mr. Wilson:

Q. Was there a special reason?

A. Yes.

Q. What was it?

A. We had so many people who are normally cut-rate customers coming into our place that my legs got awfully tired, and I said, "Let's raise the price of our gasoline and send these people back to where they belong," that's no kidding. When you get these people in there and you run all day long, when you go home at the end of the day your legs are all tied up in knots, so I thought, to hell with it.

Q. You were deliberately trying to drive them away?

A. Absolutely.

Q. I notice a while ago you said "we"?

A. My partner and I.

Q. I didn't inquire, who is your partner?

A. His name is Frank Jackson.

Q. As I understand it, the lease is in your name?

A. Yes.

HEARING EXAMINER JOHNSON. Under what name do you do business?

The WITNESS. Wasick's Standard Tire and Battery Service Station.

HEARING EXAMINER JOHNSON. How far is your station from the Ball station?

The WITNESS. About four blocks.

HEARING EXAMINER JOHNSON. All right.

By Mr. WILSON:

Q. Just one thing more, Mr. Wasick. Did that happen at any other time during the past four years?

A. Yes, I'm sure that very thing probably happened almost every time we had a price war.

Q. For the same reason?

A. For the same reason, yes.

Q. Where is the closest unbranded or cut-rate station to you?

A. There's one on Fifteenth Street and Third Avenue South.

Q. Do you know the name of it?

A. I believe it changed names recently; it used to be Zephyr, I don't know whether it is now.

Q. Where is the next closest one to you?

A. There's one on Eighth Street and Fifteenth Avenue, I believe; whether that's the next closer one, I'm not sure.

Q. Do you know how long the stations have been there?

A. As long as I can remember.

Q. In general, what affect, if any, do those stations have on your business?

A. No direct effect other than the fact that the cut-rate or unbranded stations have a certain percentage of the market, and they take some business from me; they take some business from everybody on the line.

* * * * * * *

Q. You said when these stations were posting prices, three, four, five cents lower than you on occasion during the last five years, it had some effect on your business; in what way was that reflected?

A. My customers went over to their place, and my legs didn't get tired any more. It does, usually at the start of a gasoline war, a price war, usually the cut-rates are the first to drop, and for a few days they sit three, four, five cents below us. And it makes a difference, because the customers that do come in, they start telling us about the price signs they see around, as if we didn't know; our volume drops.

Q. What, if anything, do you do when that happens?

A. There again, I get a hold of my representative of the Standard Oil Company, and I explain to him that we can't do business sitting that high above him, and usually some relief is forthcoming.

Q. Did you do that within the last five years?

A. Yes.

Q. And do you generally get relief?

A. Yes.

Q. You get authorization to lower your prices?

A. We get——

Mr. MACDONALD (interrupting). Could I object to that question; that's a leading question.

Mr. WILSON. I'll withdraw it.

By Mr. WILSON:

Q. In what form is this relief given, and how are you notified?

A. We are notified by letter, usually, of the new suggested selling price.

Q. Yes, sir.

A. And from that, usually, then the new suggested selling price is lower; and from that our margin is figured so that we can buy our gasoline at a lower price to compete with the lower prices that are in the area.

Q. As a result of that, does it sometimes result in a lower margin for you?

A. Yes.

Q. Now, is this under the suggested pricing policy that Standard put in of January, '56, or some other form of help; if you know?

A. Well, currently it's under the suggested selling price program; previous to that, it was quite similar, it was done in very much the same manner as it is now; I don't know what it is called.

Q. You say previous to that?

A. Previous to——

Q. (Interrupting.) Previous to the suggested selling price plan?

A. Yes.

Q. After you call them, approximately how long is it when you hear in one way or another from Standard Oil?

A. Well, that varies. Usually our contact with the Standard Oil Company is our reseller's salesman; usually he's right on top of the situation, he knows about it; really, the only reason we call is to prod him a little bit.

* * * * * * *

Q. Now, you have called the company, and you told him about the situation and prodded the salesman, so to speak. Do you do anything until you hear from Standard about that price—what I'm getting at—do you go ahead and lower it or increase it, or do anything at all?

A. We don't lower it until we find that we have a new buying price.

Q. I see.

A. Sometimes we raise it before we find we have a new selling price.

* * * * * * *

Q. Now, we've referred just very faintly to the suggested price program of Standard Oil, Mr. Wasick, and I would like to ask you some questions now

about that program. Do you recall on or about the time that that plan was proposed for this market, by Standard Oil?

A. Yes.

* * * * * * *

Q. And approximately when did you first hear of that plan?

A. Well, that was about the first part of the year, 1956, January, early part of January, or it may have been just prior to the first of the year.

Q. Yes. Now, were you invited to a—or asked to attend a specific meeting?

A. Yes.

* * * * * * *

Q. Who did the presentation to you at that time?

A. Mr. Hilliard.

* * * * * * *

Q. Now, as best you can, Mr. Wasick, what did Mr. Hilliard say to you on that occasion about this plan; the purposes of it, and everything that you can recall?

A. Mr. Hilliard was very much aware of the fact that we had been in a lengthy price war. It happened to be through our busy season, this price war started, I believe, the last week of August 1955. The fall of the year, of course, is our busy time. While we need gasoline volume, most of us would rather sell four hundred gallons at five cents a gallon than five hundred gallons at four cents a gallon. If I remember right, the price was pretty low, the price of gasoline was pretty low during this price war, and it had gone on for about three months. The dealers were unhappy, all of us were unhappy, they were wishing the price war would end. I'm sure Mr. Hilliard was in sympathy with us, and to my knowledge, he was instrumental in thinking of this suggested price plan. This was to be handled on what was termed a weighted volume type of thing. Are you familiar, Mr. Lizotte, with what that is?

Mr. LIZOTTE. In a sense, yes.

The WITNESS. I thought you were Mr. Lizotte; I mean Mr. Wilson.

Mr. WILSON. That's all right.

The WITNESS. You know what it is?

Mr. WILSON. Yes.

* * * * * * *

Q. Did Mr. Hilliard tell you at that time that it was his belief that the placing of this plan in effect would end the gas war or help?

A. No, I don't believe he said it would, but he said, "Fellows, if you would like to try it, let's try it."

* * * * * * *

Q. Were you asked by Mr. Hilliard at this meeting, Mr. Wasick, to—strike that. Were you or any of the other dealers asked by Mr. Hilliard at this meeting what you thought of the plan?

A. Yes.

Q. Did you all discuss it?

A. We had a chance to discuss it, yes.

Q. At that time, what did you say to Mr. Hilliard?

A. Well——

Mr. MACDONALD (interrupting). If anything.

The WITNESS. Yes. When he said, "Fellows, let's try this, it's better than what we have," there wasn't too much discussion on it, really. It—in very plain language, that's what happened; we were sick and tired of the price war we were in, this looked like it might be a way to end it. We felt it was good. We felt that the percentage of discount could have been better than it was. I believe it was 25 percent, we would have liked thirty or thirty-five, but I guess that's just normal.

* * * * * * *

Q. Now, did you generally follow the suggested price?

A. Quite closely.

Q. Why?

A. Well, why? Usually because that price was quite common around the area, I would just love to be sitting with Standard two cents above it, but I'm afraid my customers would drift. Usually the suggested selling price is quite prevalent in South Minneapolis.

Q. The stations were posting the same price?

A. Most every station was posting the price; either the price or maybe a half a cent or a cent above it.

Q. Now, you've testified that you gave stamps?

A. Right.

Q. Did you generally add half a cent or a cent to the suggested price for the cost of those stamps?

A. Yes.

* * * * * * *

Q. Were there occasions, Mr. Wasick, when you posted prices that were a cent or a cent and a half higher than the suggested prices, even with your stamps?

A. Yes.

Q. On those occasions, what, if anything, was said to you by anyone from Standard Oil?

A. I don't recall that anyone from Standard Oil ever did say anything about it.

* * * * * * *

Q. Have you ever seen announcements of changes in the suggested prices in the newspapers?

A. Yes.

Q. What effect, if any, do these announcements in the press have on you in the operation of your business?

A. Probably none.

Q. What effect, if any, would it have on you in the posting of prices?

* * * * * * *

The WITNESS. Usually when the price is announced in the newspaper, that price doesn't usually include the cost of premiums, such as stamps, which is more or less a premium; occasionally we'll get someone in the station soon after that appears in the paper, who will comment on it, but it doesn't really make too much difference to us, we quite often forget that. Sometimes these prices that are published are not a true indication of what's going on in the gasoline market, that's what I'm trying to say. Now, I will say that in the past few years, they've usually been quite close, but they usually publish the lowest possible price, and we just have to explain to our customers why it costs more, either someone made a mistake or we have to add the price of our trading stamps.

* * * * * * *

Q. Have you ever seen in the newspapers an announcement by Standard Oil of their suggested selling prices?

A. Yes.

Q. Now, do you recall the question?

A. Yes. Usually an announcement like that appears at the time when the price of gasoline is either going down or up.

Q. Yes, sir.

A. Usually at a time like that, we conform quite closely to that price, adding the value of our trading stamps.

Q. Yes, sir. Why do you, at those particular times, conform closely to that suggested price?

A. Because almost everybody reads the newspaper, and they can tell us what the price of our gas should be, according to The Minneapolis Star.

Q. Yes, sir.

A. And if a person is too far out of line, by saying that, if you're higher than that, right then is the time when you're going to lose friends and customers.

Q. And again, some of them might not say anything to you?

A. Some might not say anything to you; you just don't see them again.

Q. Yes. Now, do you have a curb sign, a price sign at your station?

A. Yes.

Q. Do you have them up today?

A. No.

Q. When do you use those curb signs?

A. During a price war.

Q. At the time this plan went into effect in this market, what, if anything, was said to you by representatives of Standard Oil as to the use of curb signs, if you know?

A. It may have been advocated.

Q. Do you know, as a matter of fact, that it was advocated?

A. Yes; yes, I'm sure it was.

Q. What does the presence of curb signs—strike that. Does the presence of curb signs at various service stations in a particular market mean anything to you?

A. Yes.

Q. What does it mean?

A. It usually means that there's a price situation of some kind.

* * * * * * *

Q. Mr. Wasick, in the conduct and operation of your business, are you mindful or conscious of the fact that you are a lessee dealer of Standard Oil?

A. Yes.

On Cross Examination

By Mr. MacDonald:

* * * * * * *

Q. Do you and your partner set the price at which gasoline is sold at your pumps?

A. Yes.

Q. I take it from your previous testimony, Mr. Wasick, correct me if I'm wrong, this price sometimes does and sometimes does not coincide with Standard's suggested price?

A. Right.

Q. When it happens to coincide with Standard's suggested price, Mr. Wasick, is this because you and your partner feel in your best judgment that this is a proper price to set for gasoline?

A. Yes.

Q. Mr. Wasick, directing your attention to the period of time prior to the suggested price plan, you at that time had a salesman come out and visit you from Standard Oil; is that correct?

A. Yes.

Q. Would that salesman, or would any Standard Oil representatives, at that time suggest, make suggestions pertaining to your business, mention things that they thought would improve it?

A. Yes.

Q. Might they not even at that time, before the suggested price plan, have suggested to you what they thought your price should be?

A. Yes.

Q. So that at the present time, is this, the suggested price plan, any more than sort of a formalized method of what was going on before?

A. Really, that's all it is.

* * * * * * *

Q. Directing your attention to the meeting about which counsel supporting the complainant has been questioning you, that is the meeting before the suggested price plan was inaugurated; do you recall at that meeting Mr. Hilliard saying that he could only suggest prices, and that the prices set on your pump would be your own?

A. In that many words?

Q. Something to that effect?

A. I'm sure that he said something to that effect, yes.

Q. Do you recall him saying that Standard Oil Company could not agree with its dealers as to prices that should be set?

A. Yes.

Robert W. Schuck, who has been a Standard lessee dealer for a little over 6 years operating a station located in St. Paul, testified:

On Direct Examination

By Mr. WILSON:

Q. Where is the next closest Standard service station to you?

A. Well, that's pretty close, between Larry Anthony on Cleveland and Randolph, and George Gibis, on Armstrong and West Seventh; it's a matter of a couple of blocks either way.

Q. Do you know where the nearest lessee-consignee or company-operated stations are located?

A. There's an L.C. station, I think that would be a toss-up between Larry Nelson down on West Seventh or Norm Johnson over in Highland Village.

Q. How far away would you say in blocks?

A. Oh, two miles.

Q. Two miles. Now, has it ever occurred within the past four years that any of those Standard stations posted gasoline two, three cents lower than you?

A. Out of those that I've mentioned?

Q. Yes, sir.

A. No, sir ; I posted it lesser than them.

Q. You posted it less than them?

A. That's right.

Q. How much less, Mr. Schuck?

A. Three cents.

Q. Three cents?

A. That's right.

Q. When was this, sir?

A. I would say it was, let's see, a year ago last December.

Q. This was lower than other Standard prices?

A. Lower than those further away from downtown.

Q. Yes, sir. What, if anything, did those Standard dealers say to you at that time, if they said anything?

A. Nothing.

Q. Nothing?

A. No, they were happy, their volume was holding.

Q. What effect did it have on your business?

A. It jumped it a little bit.

* * * * * * *

Q. I see. Now, after the meeting and after the suggested price plan went into effect, how were you notified of the suggested prices that you were to post?

A. Through a letter.

Q. Through a letter?

A. That's right.

Q. Did you generally follow such prices?

A. Yes.

Q. And did those—you gave stamps, I believe you testified?

A. That's right.

Q. Did you generally add maybe a half cent or a penny to that suggested price to take care of the charge for your stamps?

A. Yes.

Q. Now, did there ever come times when you varied from the suggested price, other than by the addition of a half cent or a cent because of the stamps?

A. I vary sometimes a penny higher on ethyl.

Q. But not the house brand?

A. Pardon me?

Q. But not the house brand ; the regular?

A. Oh, the regular ; no.

Q. Why would you vary on the premium and not vary on the house brand?

A. Well, we all have our idea of what the traffic will bear, where the business is to make money.

* * * * * * *

Q. I understand. Now, did you ever see announcements of changes in the suggested price of gasoline by Standard in the newspapers?

A. No.

Q. You haven't?

A. Newspapers, television, and so on and so forth, it's always under a major oil spokesman.

Q. Do you ever hear of a major oil—I mean a spokesman from Standard?

A. No.

Q. Have you ever had customers come in and complain that your prices were higher than they were at other Standard stations?

A. Oh, yes.

Q. At the time, did they say—did they relate to you how they knew that your prices were higher than they were at the other stations?

A. Basically, about the only time I am ever higher, it's a standing joke with all my customers, I'm the first one up, and the last one down.

Q. Well, as far as you know, did you and Mr. Zamansky—were you and Mr. Zamansky generally posting the same prices for your house brand?

A. Yes; but right now he's a penny a gallon higher on ethyl than I am.

* * * * * * *

Q. Under the SCRP plan, suggested pricing plan, what, if anything, did Standard Oil or the salesman say to you about pricing, if anything?

A. The easiest way to answer that question is to say I can't remember; but I think—I don't want to get anybody in trouble, but I don't think I've seen my Standard Oil salesman for five weeks or called him on the telephone.

* * * * * * *

Q. In the conduct and operation of your business, including the posting of pump prices, are you mindful or conscious of the fact that you are a lessee dealer of Standard Oil?

A. Well, I'm very conscious that I'm a lessee dealer of the Standard Oil Company, but I also, since I have been one and for the last three or four years, I have had a chance to go with competition both across the street and up and down the street.

Q. Yes.

A. So, in other words, no, I'm not being pushed or anything like that; I've got ample opportunity to go across the street, if I want to.

Q. You mean by going across the street, post prices according to what the man across the street has, or what do you mean?

A. I can go over and become a lessee of that major oil company.

Q. You mean you could give up Standard?

A. That's right.

Q. And take a job as a dealer elsewhere?

A. That's right.

Q. With another company?

A. So I'm not tied down to—I don't even think you can call signs company policy.

Q. Call what?

A. Price signs as a company policy. I've never had any heat put on me to post them, if that's what you're driving at, for some number of years.

Q. You've never had any heat put on you, you say?

A. That's right.

* * * * * * *

On Cross Examination

By Mr. Kuhlmey:

* * * * * * *

Q. Is the price you put on your pumps for gasoline decided upon individually by you?

A. Yes.

Q. O.K. Having in mind what price your competition is posting at the time, is that right?

A. That's right.

John E. Bonstrom, at the time he appeared as a witness, was a filling station owner and operator in the Twin Cities area handling Mobil Oil products. He had sold such products for three years and about two months. For the five years prior thereto, he was a Standard dealer at the same location under an arrangement whereby he leased the station to Standard and in turn took a lease from standard. The leasing arrangement was cancelled by Standard just prior to the time Mr. Bonstrom started to handle Mobil products. With reference to the cancellation, he testified:

Q. Now, you were with the Standard Oil Company, as I understand it, until on or about May 1, 1957, sometime in there?

A. That's right.

Q. Did you voluntarily quit the Company, or just what happened; would you tell us?

A. Well, they cancelled me out, I think; I wasn't even there when they cancelled me. My brother-in-law accepted the registered letter, and to this day, I still don't know why they did it. That's why I've asked people why they cancelled me, it didn't matter to me, I just took another product and carried on. I was in the business of making money, that's all, I didn't worry about what happened or why they did it.

Q. Did you or did you not receive any notice from Standard that you would be cancelled at the end of your lease, or that they wouldn't renew it?

A. It was a ten-year lease, three years ago.

Q. It was actually a cancellation rather than a non-renewal?

A. That's right. The fellow I brought it from tried to inquire, I don't know if he found out much about it. The deal was three years previous to that; they tried to buy it out from the fellow who owned it, they wouldn't sell it, then; then they cancelled the remainder after three years.

Included in his direct examination, he testified:

By Mr. WILSON:

* * * * * * *

Q. Now, have you heard of the Standard Oil's suggested pricing plan, Mr. Bonstrom?

A. Yes.

Q. In connection with that plan, did there ever come a time when you attended any meetings of dealers here in Minneapolis or St. Paul, at which time the plan was explained?

A. No, I never attended the meetings.

Q. How did you learn about the plan?

A. They just sent me a letter, with the suggested price, and then I just—I never dropped when they would send that, just when I got a little pressure I'd get from the customers, then I'd drop. Up to then, I'd try to hang on, you know, and sell the gas I could.

Q. As I understand your testimony, you followed the suggested prices, or——

A. (Interrupting.) When I had to, when I got the pressure to go down, I got it, you know, from the customers.

* * * * * * *

Q. Were you contacted from time to time during the time when your prices were higher, by the Standard Oil salesman?

A. They were going through the drive every day.

Q. What, if anything, did they say to you?

A. Usually he didn't talk to me.

Q. He wouldn't talk to you?

A. He'd check the prices, and I think he still does.

Q. But he didn't say anything to you at that time about your prices?

A. No, very little, he never bothered me, though, the salesman.

Q. During your operation of this Standard station, did you have occasion from time to time to notice announcements of Standard's suggested prices in the newspapers?

A. The people once in a while would see it, too, they'd see it.

Q. Was that when you were posting lower or higher than the suggested prices?

A. I'd be higher; I'd have to go down to meet the competition, you'd really have to.

Q. At that time, did you put curb signs out?

A. I put them out after a while.

Q. Were you asked to do that by Standard Oil?

A. I don't know if they—I don't think they did.

On Cross Examination

By Mr. KUHLMEY:

* * * * * * *

Q. Mr. Bonstrom, as I understand your testimony, you put your price on your pumps as your own best judgment indicated; is that right?

A. No, I went down when I had to.

Q. When you had to?

A. I held my price when they went down, until as I said, I got enough heat and then I went down to where the guys were going in competition.

Q. The heat came from your local competition in the area?

A. Sure.

* * * * * * *

Q. So far as you know, there is no relationship between their cancelling you out, as you put it, and any of the things that you did at your service station; is that right?

A. I don't know what it was; that's what I would like to know. If a salesman comes out and says, "John, you're doing this wrong, or do that," we'd gladly change. We never got any heat from the salesman, and no heat from the office.

Q. You didn't get any heat from Standard Oil, is that right?

A. We didn't get any heat, we sold the product, if we're going to make money on it; the stuff you couldn't make money on, we wouldn't handle it. Why didn't the guy come out and say, "Hi, John, we're going to cancel you," I think it's something more than just—they wanted me out of the neighborhood.

Lawrence J. Anthony, a Standard dealer for approximately eleven years in St. Paul and currently operating under a three year lease, testified:

On Direct Examination

By Mr. LIZOTTE:

Q. Mr. Anthony, you have heard of the suggested price plan of the Standard Oil Company?

A. Yes.

Q. When did you first hear of this plan?

A. That's a pretty—I would say a few years back. I couldn't put my finger on it; I would say three or four years back.

Q. Do you recall where you first heard of the plan?

A. I don't know; I just couldn't say where or when.

Q. Do you recall anything about how the plan was presented to you?

A. No, I really don't; I just can't recall that.

Q. Well, after the plan went into effect in the Twin Cities area, how were you notified of changes in the suggested prices?

A. Usually by mail.

Q. Did you generally follow those suggested prices?

A. Fairly close.

Q. On both Red Crown and Gold Crown?

A. Very close on Red Crown, and fairly close on Gold Crown.

Q. What do you mean, fairly close on Gold Crown?

A. Well, when we dropped a little bit, I usually held my Gold Crown a penny higher than the normal suggested price of Standard's.

Q. Why was this, sir?

A. I just thought that I should have it in my margin of profit since I was giving stamps.

Q. Was the fact that you were perhaps a little bit higher than the suggested price with Gold Crown gasoline ever called to your attention by anyone?

A. Once in a great while, by some of my customers.

Q. And in what manner would they do so?

A. They would just say, "Aren't you a little high on your gas?"

Q. Did they indicate to you how they knew what the suggested price of gas was?

A. Sometimes they may have read it in the paper, a few times, it was in the newspapers, but our price had changed—the price was posted in the paper of what they thought the gas was going to be sold at.

Q. Did you ever see an announcement in the newspaper made by Standard concerning a change in its suggested prices?

A. Yes.

Q. What effect does this have, if any, on your business?

A. None whatsoever, as far as I can see, because when we drop, I have a Shell across the street from me, they dropped before me, if not at the same time, so it was a general drop of all stations, of all gas, not just the Standard, as far as I can see.

Q. Mr. Anthony, do you own a price sign?

A. Do I own a price sign?

Q. Yes.

A. Yes, I do.

Q. Do you use this price sign?

A. During price wars I do.

Q. Have you ever been advised by anyone to use the price sign?

A. No.

* * * * * * *

Q. I see. Mr. Anthony, has anyone ever checked the prices posted by you on your pumps, if you know?

A. Oh, I'd say quite a few times.

Q. Do you know who such people are?

A. No, I'd say many competitors, who they are I don't know, but I've seen Texaco, Skelly, or something, drive in and just say, well, "I'm from Skelly, I'm just checking prices," and drive out again.

Q. And has anyone from Standard checked your pump prices within the last four years, from Standard?

A. I don't recall.

Q. Does the salesman check them when he comes in.

A. He may have, he never mentioned it to us.

Q. Do you yourself ever check prices?

A. During a critical price war or something, I do.

Q. And exactly what do you do?

A. I get in my car and drive around to see what my competitors are doing, but usually they'll tell me by the signs out in the street.

Q. And has it ever happened that when you're making such a check that you found you were posting above your competitors?

A. Yes, that has happened.

Q. What do you do in a case like that?

A. I possibly stop at a few more competitors and find out what is going on, why he is higher or why he is lower.

Q. And then what do you do?

A. Very possibly I call Standard's office and ask them or tell them that some competitor down the street is selling his gas cheaper than I am.

Q. And what would happen then, if anything?

A. Well, either—most of the time they would send a salesman out to find out something, information for me as to why he was lower or higher, if our price was changing, or whatever it was.

Q. Well, Mr. Anthony, why did you call Standard, why did you not, for example, set your own price?

A. Well, because if I'm going to drop, I'd like to have a little bit of protection. I don't want to be selling my gas on a three-cent margin at the time, three and a half or four, whatever it may be, then dropping it a half a cent and dropping it on my own. I don't feel that I can afford to take that half a cent, or whatever it might be, on my own. That's just bad business, and if Standard gave me the authorization, that they would drop their price to me, then I'm not footing that whole load myself.

* * * * * * *

Q. Mr. Anthony, I believe that you previously testified that you followed the suggested price pretty much on your Red Crown gasoline; would you explain to us why you followed it?

A. Because of my competitors putting their price up, let's put it this way, I'm never the first one to drop. Quite a few times, I'm one of the last to drop my prices, and when I do drop, I drop to meet my competition, 90 percent of the time the signs are already on the street of what my competitors are selling their gas at, posting their regular gasoline rather than your premium. I should say at the time, for example, they were selling their gas at 25.9 up and down these streets, all major brands would have their price signs out, 25.9 for their regular gasolines, so when I did drop I dropped to meet my competition. And I put a sign out—more than likely I put my own sign out to inform my customers or whoever may be driving down the street that I was selling my gas at the same price.

Q. Did it ever happen that the price—well, we'll use the one that you mentioned as an example—25.9, that it was a new suggested price for the area?

Mr. MacDonald. If he knows.

By Mr. Lizotte:

Q. If you know?

A. Yes. You mean if I got a—yes, it would be.

Q. Could you explain that a little bit more, if you will, please?

A. Well, yes, I would get a letter saying that the suggested price for Red Crown was 25.4, and if you were giving premiums of any kind, you could, or actually, if you wanted to you could take that 25.9, which 99 percent of the dealers took, whether they were giving premiums or not. So, as it turned out, just about all the time, I would say 100 percent of the time, it would be the competitive price of all competition in that area; or, I would say in my area.

Q. My question was really directed, Mr. Anthony, at whether there was any particular time sequence in the dropping of these prices between you and your competition?

A. No, they never told me when I had to drop. All they would do was to tell me that their price to me dropped, effective August 1, or whatever it may be, that their price to me dropped; they never told me when I should drop my price.

Q. I see.

A. Their price to me dropped.

Q. Was a new suggested price also mentioned to you at that time?

A. Yes.

Q. Would this be before or after, or did it ever occur before—strike that, please. At the time that you received the letter noted by you, with the new suggested price, were the stations around you already posting that suggested price, or something very close to it?

A. Most of the time, yes; that I can recall.

Q. How long would they have been posted at that price?

A. Possibly that same morning, maybe a day before.

Q. I see. And how long after you received a letter announcing a new suggested price did you change the prices on your pumps?

A. Not very—that varied; it might be a week, it might have been that evening; I usually held out—I don't know, it varied. That varied, I couldn't answer that.

Q. If I understand you correctly, sir, you might remain at the posting that you had previously for as long as a week?

A. Well, yes, I might have.

Q. This would be on the regular gasoline?

A. On all my gasoline.

Q. On all your gasoline?

A. Yes.

Q. Would this be mentioned to you by anyone?

A. No.

* * * * * * *

Q. Does the fact that you are a lessee dealer in any way influence you in your decisions in operating your station?

A. No, I don't think so; you mean rather than owning my own property and what not? No, I don't think so.

On Cross Examination

By Mr. MacDonald:

* * * * * * *

Q. When the price of gasoline is set at your pumps for resale to your customers, who sets that price?

A. I do.

Q. Is your judgment in setting the price influenced, I take it, by this competition that you have just mentioned?

A. That's correct; the competition and the price I'm paying for gas.

On Redirect Examination

By Mr. Lizotte:

Q. Mr. Anthony, I think you testified that before the suggested price plan went into effect that the salesman would from time to time notify you that prices would go down, and by that I believe you stated that he meant the tank wagon price to you would be decreased, is that correct?

A. The price Standard Oil was selling the gas to me would drop.

Q. Right now, on occasions when you did receive such notification, what did you do, if anything?

A. If I thought it was time to drop, we'd drop; if I didn't think it was time, I didn't drop.

Q. What do you mean by I thought it was time?

A. By my competition; when my competition hurt me enough on my gallonage or I was afraid I was going to lose the customers I had at the time, then I dropped, but if I thought that my gallonage wasn't to be hurt, I didn't drop.

Q. One other point, Mr. Anthony. I think it was agreed here that your salesman did mention prices to you, this is prior to the introduction of the suggested price plan. Could you tell me, very briefly, how your relations were with your salesman?

A. Friendly.

Q. Friendly; was there ever a time when you were not friendly?

A. I would say yes, some years ago or so; I had a little difference in opinion.

Q. Would you explain that briefly, sir?

A. Well, he told me then that I should drop my prices, or they would have another man for my station.

Q. And what did you do?

A. I told him to get out.

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Q. At this time, was there any discussion or mention concerning price since?
A. I can't recall, I think so, I wouldn't say a definite yes or a definite no on that.
Q. I see. When you told the salesman to get out, what did you do about the price?
A. Excuse me; he wasn't a salesman.
Q. I'm sorry, who was he?
A. He was a representative of Standard Oil Company, but he wasn't a salesman.
Q. He was a representative of the Standard Oil Company?
A. Yes, he was.
Q. You told him to leave the station?
A. Yes.
Q. What did you do about your price at that time, if anything?
A. Nothing.
Q. Nothing?
A. Nothing.
HEARING EXAMINER JOHNSON. Have you finished?
Mr. LIZOTTE. I have no further questions.
HEARING EXAMINER JOHNSON. All right, Mr. MacDonald?

Recross Examination

By Mr. MACDONALD:
Q. I just wanted you to follow through about the story concerning the representative, Mr. Anthony, after you told him to get off your driveway?
HEARING EXAMINER JOHNSON. You told him to get out?
The WITNESS. Yes.
By Mr. MACDONALD:
Q. Did you then call Standard Oil Company?
A. I did.
Q. What did you tell them?
A. I told them that I didn't want him in the station or on my property again, ever, and if they wanted my key, they could have it.
Q. Did he ever come back to your station?
A. No.
Mr. MACDONALD. That's all.
HEARING EXAMINER JOHNSON. Did you ever suffer any consequence as a result of that call?
The WITNESS. No, I didn't.

George H. Fitzenberger, together with a partner named Arthur Turner, was a Standard dealer in Bloomington, Minnesota, a suburb of Minneapolis, for a period of a little over six years. On January 31, 1960, he checked out of the Standard Oil station and on April 7, 1960 he became a Skelly Oil Company lessee. With reference to his leaving Standard, we find this explanation:

By Mr. WILSON:
Q. Now, Mr. Fitzenberger, how did you happen to leave Standard Oil?
A. My lease was not renewed.
Q. Were you ever notified as to why your lease was not renewed?

A. I got a notice from them, 30 days in writing, which—that was all they should have done.

Q. They just indicated in that notice that they were not renewing your lease?

A. Yes.

Q. They didn't say why?

A. I don't know, there's a lot of pros and cons on that.

Q. They didn't say why in that notice?

A. No, sir.

Mr. Fitzenberger testified he had not attended any meeting just before the suggested pricing plan came into effect, but his partner might have attended one. He further testified:

Q. Now, in the operation of your Standard station, Mr. Fitzenberger, did you not from time to time receive notification from Standard Oil as to suggested prices?

A. Yes, they used to send—give us a chance, you know, to buy some fuel to revamp the fuel losses and so forth; they'd let us know in advance. We got notice from time to time, sometimes it was verbal; I recall both.

Q. Now, did you post your prices from time to time upon receipt of those letters according to the contents of them, as suggested by Standard?

A. I would usually wait for the neighborhood to change.

* * * * * * *

Q. There was another Standard service station at Seventy-eighth and Nicollet, was there not?

A. Yes, sir.

Q. Was that at that time a Company-operated station?

A. At first it was leased by a Mr. Vernon Conway, and then he left; I don't recall if anybody was in there after that or not. They said it was Company-operated, that the employees drew their checks directly from Standard Oil.

Q. Were there occasions when the station—this station that we're talking about at Seventy-eighth and Nicollet—was posting prices lower than the prices you were posting at your station?

A. Yes, because I didn't—sometimes I suppose it would happen, that was because maybe I didn't abide by lowering my pump prices at given times.

Q. Did anyone, either customers or anyone from Standard Oil say anything to you at that time about that?

A. I don't think anybody from Standard Oil, my customers maybe, also their customers up there, we would catch a little heat on it, surely; after a price war everybody is price-conscious; that's all you hear on that.

* * * * * * *

Q. Now, do you recall seeing announcements in the newspapers from time to time in the last five years, Mr. Fitzenberger, announcing the suggested prices of Standard?

A. Yes—well, it would be major companies have gone up, so and so, and that maybe all Standard Oil Stations, the suggested retail price is so much money, I think it was something like that.

Q. Yes, sir. Do you recall any customers making any comments to you relative to your prices and to these advertisements, to these announcements, at any time?

A. Like I say, after a price war there's a lot of controversy on gasoline; we would service quite a few of the salesmen's cars, who do spend a lot of money on vehicles, and if they can nip off a little money, they want it for their own pocket. Yes, I'm sure; I can't recall any instance, but I'm sure there were situations like that.

* * * * * * *

Q. In the conduct and operation of your business as a Standard dealer, a few years ago, were you mindful or conscious of the fact that you were a lessee dealer of Standard Oil?

A. There wasn't any doubt in my mind that I was a lessee.

Allan Charles Fritsche at the time he testified was operating the Trend Bar which he had owned for three months. Prior thereto, he had been a Standard lessee dealer for twelve years at stations in the Twin Cities area. After naming the major hand stations located in the area of his stations, he testified:

By Mr. LIZOTTE:

* * * * * * *

Q. Excluding the Standard stations, did it ever happen that any of these major stations were posting a price lower than what you were posting? That's within the last four years?

A. Yes. Standard Oil station; Herb Nelson on Larpenteur and Eustis, he was about a penny lower, I believe; of course, he had the Old Colony.

Q. Did this have any effect on your business?

A. No, I don't think so.

Mr. Fritsche, after stating he had heard of Standard's suggested price plan at a meeting four or five years ago, was questioned as follows:

Q. Would you describe, to the best of your recollection, what occurred at that meeting?

A. I don't think I could very well, I know we discussed the situation in town at that time, the dealers, none of us were making much money at that time. As a matter of fact, we were just getting by. We had Old Colony and quite a few other cut-rates that were really cutting in, small ones, Old Colony was hurting everybody real bad. We talked that over among other things; I suppose the chief topic was gas prices at that time, margins, especially margins.

Q. Do you recall any discussion at all about market share position?

A. I can't recall at that time, what do you mean by that?

Q. The position of market enjoyed by the Standard Oil Company, by unbranded stations, do you recall any discussion along those lines?

Mr. KUHLMEY. Your Honor, I believe he just answered that.

HEARING EXAMINER JOHNSON. He may answer.

The WITNESS. Well, I don't know if they come out with how much gas percentage-wise that the majors were pumping or others, I imagine it could have been discussed; we discussed practically everything about that.

Q. Did the dealers discuss this among themselves after, if you can recall, after the plan was presented to them?

A. Well, I would say we did, because mostly everything we talked about, we talked about in private also.

Q. I see. Can you recall any of this discussion?

A. Not any more I can't.

Q. Do you recall whether, as a general statement, the dealers favored the plan, opposed the plan, or had any reaction to the plan?

Mr. KUHLMEY. Your Honor, I object to the question; he just now testified he didn't recall.

HEARING EXAMINER JOHNSON. He may answer it, if he can.

The WITNESS. Well, to make an answer, it was in 1957, I had a very wonderful year in business.

HEARING EXAMINER JOHNSON. You're talking about the meeting, what your impression was at that time; that was the question?

Mr. LIZOTTE. That's correct.

HEARING EXAMINER JOHNSON. Did you have an impression?

The WITNESS. I suppose we did at that time. I suppose we figured anything was worthwhile going into; we were in pretty dire straits at that time.

By Mr. LIZOTTE:

Q. Mr. Fritsche, after the meeting and after the suggested price plan went into effect, how were you notified of changes in the suggested prices?

A. We received letters from Standard Oil Company, about the prices.

Q. Did you generally follow the suggested prices?

A. Well, yes, it all depended on our gas supply. If I received a load, I waited until the price dropped or waited until the competitor across the street, until he dropped; I was never the first one to drop.

Q. Were there ever times when you varied from the prices that were suggested and posted a price different from the suggested price?

A. Over the year, not the recent years, I followed pretty close. There have been times when the prices were higher, years ago.

Q. When you say years ago, when do you mean?

A. In the early 50's, '49 or '50.

Q. That's well beyond the period of this particular plan. I'm confining most of these questions, Mr. Fritsche, to the period from 1956 until you went out of business or checked out of the business in 1960. During that time, did you follow the suggested prices?

A. Yes.

Q. Could you explain why?

A. Well, because we want to stay competitive with our competition, too, the Pure Oil Station one block from me dropped before I did; I had to meet his competition.

Q. Again, from the period of 1956 until the time you terminated your association with the Company, were there ever times when you varied from the suggested prices?

A. Well, now, in a way you might say I varied all the time; usually the stations carrying stamps carried half a cent higher. I didn't give premiums, but I carried the full price, the same as the stations giving premiums.

Q. Did you ever receive any comment as to this?

A. Never.

Q. From any source, did you ever see any announcements of changes in the suggested price of gasoline in the press?

A. Yes.

Q. Were these announcements which you saw, as far as you know, announcements by the Standard Oil Company?

A. Yes, I believe it was.

Q. And what effect, if any, did these announcements have on the operation of your business?

A. Well, that I don't know for sure. I would have dropped, we would have dropped, any one, I don't think it meant that——

Q. (Interrupting.) Did anyone call your attention to the fact that these announcements were in the press?

A. Yes.

Q. Who would they be?

A. The customers, I imagine.

Q. Mr. Fritsche, did you own a price sign?

A. Yes.

Q. Where did you get it?

A. From the Standard Oil Company.

Q. Were you ever advised or encouraged to use that price sign?

A. No. As I recall, I even asked the Standard Oil Company if they had a price sign, that I would like to buy the numbers. We were painting them on it, they didn't look very well, so I requested, that if they had a sign, I would like to buy it and I bought it.

Q. Does a price sign have any significance to you. the appearance of a price sign at the curb?

A. It does when the cut-rates, when my competition has the price signs up, yes; people look for prices.

On Cross Examination

By Mr. KUHLMEY:

* * * * * * *

Q. Mr. Fritsche, would you tell us whether you yourself decided to check out of the service station that you had prior to this year?

A. Yes, it was my own decision.

Q. I've forgotten for the moment; when did you leave the station?

A. In May.

Q. Was it your decision to go into the dispensing of beverages business?

A. Yes.

Q. And during your years with the Standard station, was there any pressure put upon you by the Company concerning what retail prices you would charge?

A. Well, in all fairness to the Company, they were very fair to me at all times.

On Redirect Examination

By Mr. LIZOTTE:

* * * * * * *

Q. Mr. Fritsche, do you intend to remain in your current occupation?

A. No.

Q. Do you have any plans as to what you will attempt to do in the immediate future?

A. I imagine I do, yes.

Q. Would you care to state what the plans are?

A. I may be back in the gas business very shortly.

Q. Would you have any preference as to which company you would like to go with?

A. Yes.

Q. Would you state that preference, please?

A. Standard Oil Company.

Q. Thank you. Have you made any negotiations to return with the Standard Oil Company as a dealer?

A. I have talked with one person from Standard Oil Company, yes.

Mr. LIZOTTE: I have no further questions.

Mr. KUHLMEY. Just one or two on recross. I'm sorry, your Honor, I know it's late.

Recross Examination

By Mr. KUHLMEY:

Q. Has the conversation that you just referred to with someone at Standard Oil had any influence whatsoever on your testimony here today?

A. No, I have been here and saying as truthfully as I can say it * * *.

The testimony of Thomas B. Murphy relates primarily to the marketing of gasoline by his company and other independents, as well as the major companies, including Standard. In that it does not deal with the plan involved insofar as it pertains to the relationship of Standard with its dealers, his testimony will not be discussed.

There was received in evidence documents (CX 120AS through CX 134AK) offered by complaint counsel, which show the tabulations of surveys made by Standard in the Twin Cities of prices charged by all, or nearly all, of its dealers on 19 dates from January 21, 1956 to May 3, 1958. On only five of these 19 dates were as many as half of the dealers charging the prices suggested by Standard for both grades of gasoline, taking either the prices as posted on the dealers' pumps or after adjusting those posted prices for the value of trading stamps given by some dealers. Even if the comparison is limited to the regular grade of gasoline, less than 30 percent of the dealers were posting the suggested price on five of these dates and the average for the 19 dates was only 58 percent. The dealers differed from the suggested prices by amounts varying from $\frac{1}{10}$ cent to 4 cents per gallon. It should be noted that dealers who testified at Minneapolis that, where and when they charged the suggested prices, they did so by reason of their own individual decision and in the light of their own local competition.

The record contains evidence relating to the plan in eleven other areas, namely, Kansas City, St. Louis, Eau Claire, La Crosse, Wausau, Racing, Fon du Lac, Kenosha, Oshkosh, and Peoria. Such evidence gives a picture similar to that painted by the witnesses who testified at Minneapolis with reference to SCRP in the Twin Cities area.

There is no evidence in the record herein of any agreement between the respondent and its dealers to fix the latters' retail prices, nor does the evidence establish that the respondent coerced its dealers to follow the suggested prices. Before the plan was put into effect in any area, when the plan was explained to the dealers, it was emphasized that the dealers would remain free to decide upon their own retail prices. The dealers recognized that it was up to them individually to decide the price at which they were to sell their gasoline. A large number of the dealers sold at prices other than those suggested and Standard did nothing about it. When the dealers charged the prices suggested, they did so pursuant to their own individual decisions and in the light of their own local competition.

If adherence to the prices suggested had been agreed to or compelled, there would be a violation of law. State in the proposed findings are the basic facts of *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441 (1922), relied on by Commission counsel here. Beyond question Beech-Nut dealers were restrained by the company and had no freedom to sell Beech-Nut products at prices chosen by themselves. The Supreme Court, in *United States* v. *Parke, Davis and Company*, 362 U.S. 29 (1960), analyzed the facts of *Beech-Nut* as follows:

> In *Beech-Nut* the company had adopted a policy of refusing to sell its products to wholesalers or retailers who did not adhere to a schedule of resale prices. Beech-Nut later implemented this policy by refusing to sell to wholesalers who sold to retailers who would not adhere to the policy. To detect violations the company utilized code numbers on its products and instituted a system of reporting. When an offender was cut off, he would be reinstated upon the giving of assurances that he would maintain prices in the future. The Court construed the Federal Trade Commission Act to authorize the Commission to forbid practices which had a "dangerous tendency unduly to hinder competition or create monopoly." 257 U.S., at 454. The Sherman Act was held to be a guide to what constituted an unfair method of competition.
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> * * * because Beech-Nut's methods were as effective as agreements in producing the result that "all who would deal in the company's products are constrained to sell at the suggested prices," 257 U.S., at 455, the Court held that the securing of the customers' adherence by such methods constituted the creation of an unlawful combination to suppress price competition among the retailers. 362 U.S. 29 at 40–42.

In *Parke, Davis*, the company had a policy of dealing only with drug wholesalers who observed its price schedules; it made it known to the wholesalers that it would refuse to deal with them if they did not adhere to its price policy or if they sold Park, Davis products to retailers who did not observe suggested minimum retail prices; and

both the wholesalers and the company refused to fill orders of retailers who actually sold below suggested minimum prices.

As in *Beech-Nut*, the retailers had no freedom of choice as to their retail prices. The Supreme Court made this clear:

> * * * Parke Davis did not content itself with announcing its policy regarding retail prices and following this with a simple refusal to have business relations with any retailers who disregarded that policy. Instead Parke Davis used the refusal to deal with the wholesalers in order to elicit their willingness to deny Parke Davis products to retailers and thereby help gain the retailers' adherence to its suggested minimum retail prices. The retailers who disregarded the price policy were promptly cut off when Parke Davis supplied the wholesalers with their names * * *.
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> * * * * * * *
>
> * * * With regard to the retailers' suspension of advertising, Parke Davis did not rest with the simple announcement to the trade of its policy in that regard followed by a refusal to sell to the retailers who would not observe it. First it discussed the subject with Dart Drug. When Dart indicated willingness to go along the other retailers were approached and Dart's apparent willingness to cooperate was used as the lever to gain their acquiescence in the program. Having secured those acquiescences Parke Davis returned to Dart Drug with the report of that accomplishment. Not until all this was done was the advertising suspended and sales to all the retailers resumed. *In this manner Parke Davis sought assurances of compliance and got them, as well as the compliance itself.* It was only *by actively bringing about substantial unanimity among the competitors* that Parke Davis was able to gain adherence to its policy. (Emphasis ours.) 362 U.S. at 45–46 (1960).

In fundamental contrast with the factual situations in both *Beech-Nut* and *Parke, Davis* is the situation in the case at bar: (1) it was emphasized, and the dealers understood, that the dealers remained free to post prices of their own choosing; (2) the dealers, without exception, decided on their own retail prices; (3) almost all of the dealers resold at prices other than those suggested by Standard, and (4) when dealers did resell at prices other than those suggested, they received no pressure or criticism from Standard.

Obviously Standard dealers were free to, and did, set their gasoline prices as they chose. To paraphrase *Parke, Davis*, "Standard did not seek assurances of compliance, it did not get them, and there was no compliance itself." Because the dealers' pricing freedom was left untouched, there was and could have been no violation of law.

The various authorities make plain that where the dealers have individual free choice concerning their prices, there is no law violation; but where that free choice no longer exists by reason of agreement with, or coercion by, the manufacturer, the law is violated. The majority opinion in *Parke, Davis* itself points out that if a manufacturer is unwilling to rely on the individual self-interest of its customers

to bring about voluntary acquiescence with suggested prices and takes affirmative action to achieve uniform adherence, the law is violated: "* * * the customers' acquiescence is not then a matter of *individual free choice* prompted alone by the desirability of the product." (Emphasis added.) 362 U.S. at 47. Plainly if, as in the case at bar, prices are suggested and then it is left up to the dealer as "a matter of individual free choice" whether or not those prices will be followed, the actions of all concerned are lawful. See also *Frey & Son* v. *Cudahy Packing Co.*, 256 U.S. 208, 210–11 (1921), and *United States* v. *Schrader's Son, Inc.*, 252 U.S. 85, 99–100 (1920).

CONCLUSIONS

The Hearing Examiner concludes that SCRP is a lawful plan which did not and does not constitute an unfair method of competition or unfair acts and practices under Section 5 of the Federal Trade Commission Act, and does not in any other manner violate that Act.

ORDER

It is ordered, That the complaint herein be, and the same hereby is, dismissed.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

OCTOBER 1, 1963

The Federal Trade Commission issued its complaint against respondent on October 16, 1962, charging that respondent had violated subsection (a) of Section 2 of the Clayton Act, as amended, by discriminating in price between different purchasers of its automotive gasoline of like grade and quality by selling such gasoline to certain of such purchasers at lower and more favorable prices than it sold to other non-favored purchasers who compete with the favored purchasers.

The complaint also alleged in a separate count that respondent had engaged in a course of action, understanding, and agreement with certain of its independent dealers-purchasers to fix and maintain the retail price of gasoline sold at various gasoline service stations. It was alleged that this course of action between respondent and certain dealers in fixing and maintaining the retail price of gasoline constituted unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act.

Respondent in its answer denied that it had unlawfully discriminated in price between competing customers; that any alleged dis-

criminations had the effect of substantially lessening competition; and that it had engaged in any unlawful combination with any of its dealer-purchasers. Respondent's answer also asserted the defense of meeting competition. Following a prehearing conference at which respondent was advised that in addition to the example of discriminations alleged in the complaint to have occurred in the Smyrna-Marietta, Georgia, trade area, evidence would be offered regarding discriminations in the Seattle, Washington, area; thereafter, respondent filed an amendment to its answer in which it denied that the sales of gasoline by it to purchasers in the State of Washington were in interstate commerce, and further asserted the defense that any price differences alleged in the complaint to be discriminatory made only due allowance for differences in cost of manufacture, sale, or delivery resulting from differing methods or quantities in which such gasoline was sold or delivered.

This proceeding is before the hearing examiner for final consideration upon the complaint, answer, testimony and other evidence, and proposed findings of fact and conclusions filed by counsel for respondent and by counsel supporting the complaint. Consideration has been given to the proposed findings of fact and conclusions submitted by both parties, and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected as being inaccurate or as not being material, and the hearing examiner, having considered the entire record herein, makes the following findings of fact, conclusions drawn therefrom, and issues the following order:

FINDINGS OF FACT

The respondent, Shell Oil Company, is a Delaware corporation with its principal office and place of business located at 50 West 50th Street, New York, New York.

Respondent is now, and for several years last past has been, among other things, primarily engaged in the business of distributing and selling gasoline and other petroleum products throughout the United States and the District of Columbia under the brand name of "Shell." Products, and particularly automotive gasoline, sold under this brand name are nationally advertised.

Respondent is an integrated organization in all aspects of the oil industry.

Respondent's principal marketing areas in the United States are the West Coast, the East Coast, the Middle West, and the Deep South.

In 1959 respondent's assets were in excess of $1 billion, and its total revenue exceeded $1.8 billion. Its over-all production, including royalty

oil, averaged 366,000 barrels per day during 1959 as compared to 347,000 barrels per day during 1958, and this volume represented a gain of 5.5 percent. Respondent's sales for automotive gasoline through its company-owned and leased service stations increased in 1959 over the preceding year some 7 percent.

Respondent markets its automotive gasoline and other petroleum products in the aforementioned areas through wholesalers, company operated stations, and through retail service stations operated by dealers who either own or lease their stations. In the latter category, respondent has entered into dealer contracts with such independent dealer-purchasers, located in various trade areas in the United States and the District of Columbia, which are now in force and effect, pursuant to the provisions of which respondent supplies such independent dealer-purchasers with all of their respective requirements of respondent's brand of automotive gasoline during the terms of such contracts.

For the purpose of supplying said independent dealer-purchasers and of making deliveries pursuant to said contracts, respondent ships or otherwise transports its automotive gasoline in tank cars, tankers, pipe lines, and trucks from its different refineries, terminals, and distribution points, located in various States of the United States to distributing points located within the State of Georgia, as well as in other States of the United States from which it is distributed to said independent dealer-purchasers.

Accordingly, there is now and has been at all times mentioned in the complaint a continuous stream of trade in commerce, as "commerce" is defined in the Clayton Act, of said gasoline between respondent's different refineries, terminals, and distribution points, located in various States of the United States, and said independent dealers purchasing said gasoline in Smyrna and Marietta, Georgia.

In the course and conduct of its said business, respondent has sold and now sells its automotive gasoline to independent dealer-purchasers, some of whom have been and are now in competition with each other in the resale and distribution of such gasoline and with customers of competitors of respondent selling competing brands of automotive gasoline.

In the course and conduct of its said business respondent is now, and during the times mentioned herein has been, in substantial competition with other corporations, partnerships, wholesalers, individuals, and firms engaged in the sale and distribution of automotive gasoline between and among the aforementioned trade areas and the District of Columbia.

In the course and conduct of its business, respondent is now and has been engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, in that it ships or otherwise transports its automotive gasoline from the various States of the United States where such gasoline is refined, processed, or stored in anticipation of sales and shipment, to its independent dealer-purchasers and to various other trade areas in other States of the United States and the District of Columbia. All of such purchases by said independent dealer-purchasers and sales by respondent to such dealers are and have been in the course of commerce.

Respondent has been and is now in substantial competition with other corporations, partnerships, individuals, and firms engaged in the sale and distribution of gasoline in "commerce," as that term is defined in the Federal Trade Commission Act.

All of the facts found in the foregoing findings of fact were admitted in respondent's answer.

In Marietta and Smyrna, Georgia, and in Seattle, Washington, respondent's brands, "Shell" and "Super Shell," were generally considered to be major brands of gasoline.

Count I. The Price Discriminations

Georgia Discriminations

Respondent, in the course and conduct of its business, has discriminated in price between different purchasers of its gasolines of like grade and quality by selling such gasolines to certain of its customers at higher prices than it did to other of its customers. Commencing on or about October 1958, respondent sold gasolines to certain dealers located in and around Smyrna, Georgia (Trade Area 4), at lower and more favorable prices than the prices charged by the respondent to its other retail purchasers for gasolines of the same grade and quality located in and around Marietta, Georgia (Trade Area 3). The dealers to whom the lower prices were given were Louis Parker, E. R. Cobb, W. A. Spruill, and Breedlove & McGriff, all of whom were located in and around Smyrna, Georgia. The dealers to whom higher prices were charged were R. E. Flowers, George O. LeCroy, Leland Garland, Herbert G. Alexander, and W. F. Ganues, all of whom were located in and around Marietta, Georgia.

A map of the Smyrna and Marietta areas shows the locations of the Shell service stations in these two closely connected communities. In addition to showing the location of the favored and non-favored Shell dealers during the gasoline "price war" in October 1958, this map

also shows the location of Shell operated retail stations, known as "C" stations. The approximate distance between the city limits of Marietta and the city of Smyrna is two miles (CXs 2 and 1778A–B).

Shell dealers located in and around Smyrna are located in the same competitive market area as the Shell dealers located in and around Marietta. All of the dealers involved, whether located in or around Smyrna or Marietta, testified that they drew customers from in and around both communities. As the difference in the posted price to consumers increased, during the period the lower prices prevailed in Smyrna, the volume of business that was diverted from Marietta dealers to Smyrna dealers increased. (Tr. 407, 597, 520–21, 652–53, 379, 835–36, 949–51, 274, 986, 742.)

Beginning on October 9, 1958, respondent granted a price advantage up to 10 cents per gallon in favor of the four dealers located in and around Smyrna. Among the competing dealers to whom an equally low price was not given were those named above who were located in and around Marietta. The contrast in respondent's tank wagon prices per gallon (regular gasoline) from October 9 to October 28, 1958, is shown by the following tabulation:

Date	Smyrna dealers tank wagon price	Total reduction	Marietta dealers tank wagon price	Total reduction	Net differential in favor of Smyrna dealers
10/1	25.9¢	0	25.9¢	0	0
10/9—opening hour	23.9¢	2¢	25.9¢	0	2¢
10/10—2:30 p.m.	21.9¢	4¢	25.9¢	0	4¢
10/11	21.9¢	4¢	25.9¢	0	4¢
10/12	21.9¢	4¢	25.9¢	0	4¢
10/13—5:00 p.m.	19.9¢	6¢	25.9¢	0	6¢
10/14—11:15 p.m.	17.9¢	8¢	25.9¢	0	8¢
10/15	17.9¢	8¢	25.9¢	0	8¢
10/16—1:00 p.m.	16.4¢	9.5¢	25.9¢	0	9.5¢
10/17—opening hour	14.9¢	11.0¢	22.9¢	3¢	8¢
10/18	14.9¢	11.0¢	22.9¢	3¢	8¢
10/19	14.9¢	11.0¢	22.9¢	3¢	7¢
10/20—noon	12.9¢	13.0¢	22.9¢	3¢	10¢
10/21	12.9¢	13.0¢	22.9¢	3¢	10¢
10/22—10:00 a.m.	12.9¢	13.0¢	16.9¢	9¢	4¢
10/23	12.9¢	13.0¢	16.9¢	9¢	4¢
10/24	12.9¢	13.0¢	16.9¢	9¢	4¢
10/25	12.9¢	13.0¢	16.9¢	9¢	4¢
10/26	12.9¢	13.0¢	16.9¢	9¢	4¢
10/27	12.9¢	13.0¢	16.9¢	9¢	4¢
10/28—opening hour	21.9¢	0	21.9¢	0	0

(CX 14 thru 24, and 29A thru 35A; Tr. 2077).

Respondent's dealers in Smyrna and Marietta are not shown to have been highly competitive when posted prices were the same or within a cent or two of being the same. However, the distances between some of the stations is not great, and, as was stated by both of respondent's vice presidents who testified, as price differences increase, the degree

of competition between stations in the same general area also increases (Tr. 2607, 3723, 3640). In the "price war" which took place between October 9 and October 28, 1958, the price difference charged by respondent to its dealers in Smyrna and Marietta was as great as 10 cents per gallon for a few days, and during this period, when there was a substantial difference between respondent's prices to the dealers in these two areas, their posted prices to consumers reflected substantially the same differences (CX 13, 29A thru 36B). According to respondent's zone or trade area pricing plan, which it has had in effect throughout the nation for a number of years, when dealers in a particular zone have their volume affected by lower prices in another zone, prices are cut somewhat to the affected zone. They are not necessarily equalized, but are lowered, and this practice is referred to as "feathering out" (Tr. 3639). Thus, the respondent's pricing plan anticipates that there will be adverse effects in areas near a low-priced area and provides that such effects will be partially or wholly alleviated at some time after the sales volume has been affected.

Of the eleven Shell dealers in Trade Area 3, seven were named by complaint counsel as non-favored. The comparative gallonage of these seven dealers for the months of October 1957, September 1958, and October 1958, and their average monthly gallonage for the year preceding October 1958, is as follows (RX 59):

Dealer Oct. 1958	Gallonage			Oct. 57–Sept. 58 average monthly gallonage
	Oct. 1957	Sept. 1958	Oct. 1958	
K. Kincaid, U.S. 41 at Howard Johnson's	11, 270	10, 298	16, 450	12, 853
R. McPherson, U.S. 41 at Barnes Mill Road	3, 256	3, 579	3, 591	3, 345
Leland Garland, U.S. 41 & Roswell Road	17, 435	16, 437	[1] 23, 613	18, 216
George LeCroy, 222 Atlanta Street	13, 059	13, 030	13, 148	13, 302
H. Alexander, Powder Springs & Trammel	15, 416	15, 178	15, 209	14, 525
R. E. Flowers, U.S. 41 (old) near So. Cobb	13, 090	12, 089	10, 058	12, 238
W. F. Ganues, Upper & Lower Roswell Rd	14, 388	15, 329	[2] 15, 543	15, 209
Total	87, 914	85, 940	97, 612	89, 688

[1] Garland's October 1958 purchases were 22,613 gallons, to which has been added 1,000 gallons representing purchases made by him other than from Shell Oil Company but resold in October 1958 at his station (see transcript pp. 766–7).

[2] Ganues' October 1958 purchases were 14,389 gallons. CX 1347 shows his actual October 1958 sales to be 15,543 gallons. To the extent the greater October sales resulted from sales in October of gasoline purchased in September or prior months, the prior months' sales were necessarily less than prior months' purchases by a comparable amount.

NOTE.—Percent increase total gallonage October 1958 over total gallonage October 1957—11.1 percent.

Respondent's Lower Prices to Dealer Parker, and the Other Dealers in Smyrna, Were Not Made in Good Faith to Meet the Equally Low Prices of a Competitor

Respondent has urged that it has established the defense of meeting the equally low price of a competitor. Respondent's price reductions

to its dealers in Smyrna were such that the dealers were able to meet the posted prices of the private brand Paraland station, which had been opened about 200 yards from the Parker station on October 1, 1958, and to maintain their same margin of gross profit. When the first cut was made to the Smyrna dealers, effective October 9, 1958, the allowance was 2 cents a gallon, which enabled Parker and the others in that zone to post prices which exactly met the Paraland prices, and as Paraland attempted by a series of cuts to maintain a 2 cent lower price than the Parker station, respondent continued to give its dealers in this zone such price allowances as would enable them to meet each reduction in Paraland's posted price.

The terms major oil company and independent oil company are impossible to define from the evidence in the record, but respondent has chosen to separate them into groups in a number of exhibits, and for lack of a better basis the hearing examiner accepts the standards used by respondent (see Respondent's Proposed Findings of Facts, pp. 115–130). As respondent has pointed out, neither size, advertising, integration, volume in the area, nor any other criteria is safe to use in order to classify a marketer in one category or the other.

There were some who found it necessary to sell below the so-called majors, and they are considered by the hearing examiner to be independents. Paraland was one of these. When it opened its station it was an unknown brand in the area and thus had reason to believe that it would be accepted only as an independent, selling at less than the prevailing price of the so-called majors (Tr. 3961–4). This it attempted to do. When Shell learned or believed that the station's operator was getting financial help from Phillips, its supplier, it decided the fight was too expensive and gave it up by starting its prices back to normal (Tr. 3762, 3817).

Since Paraland was generally considered to be an independent or private brand station and was attempting to sell at the same level as other independents, and since each reduction at the Parker station, which kept its price the same as Paraland's added to Parker's volume, it was apparent to respondent that it was enabling Parker to beat rather than merely to meet the competition afforded by Paraland.

Respondent cannot invoke the defense that its lower prices in this area were made in good faith to meet an equally low price of a competitor. The price was not made in good faith. The price was made to Parker in the first instance in an effort to keep the Paraland station from succeeding as is hereinafter found, although the effect of the Paraland station on the Parker station was a factor in the decision. It was apparent, almost from the beginning, if not in advance, that a

similar posted price at Parker's station would either sharply curtail the sales at the Paraland station or continually drive its price below the Shell price, thus the price reductions to Parker, and necessarily under the trade area plan to other dealers in the trade area, did more than meet the competition which Paraland afforded Parker (see price changes above).

The defense of meeting competition is not available to respondent to defend against the charge of discriminations in this area, because the lower prices at which respondent sold to its dealers in the Smyrna area were not shown to have been offered or granted to meet any offer made by any of its competitors to those dealers. This defense is not available to a seller when he grants a lower price to his customer to enable that customer to meet a price of one of the customer's competitors.

The Supreme Court held in *F.T.C.* v. *Sun Oil Company*, 371 U.S. 505 (1963) that a lower price which a seller may meet to establish a defense under Section 2(b) of the Statute is a price offered to a customer of a seller by a seller's competitor, and that the defense is restricted to those situations in which the supplier responds to the price concessions of its own competitors.

It is therefore concluded that respondent's lower prices to dealer Parker and other dealers in Smyrna, were not made to meet an equally low price of a competitor and that this defense has failed, and it is further found that they were not made in good faith to meet competitive conditions.

Effect of the Georgia Discriminations

It is concluded and found that the price discriminations involved here, which resulted in respondent's dealers in the area, designate by respondent as Trade Area 4 (Smyrna), being charged substantially lower prices than competing dealers in the area, designated by respondent as Trade Area 3 (Marietta), caused a substantial diversion of volume of sales away from the non-favored dealers for the short period of time when such prices were in effect, and the effect of such discriminations may have been substantially to lessen competition or to destroy or prevent competition in the resale of gasoline at retail with those purchasers who received the lower prices.

The granting of price assistance, or "feathering out", was not granted fast enough or in a sufficiently large amount to enable the customers in Trade Area 3 to retain their normal volume of business. Respondent's dealers in these two trade areas were competitive in some degree when prices were normal, that is, when the retail prices were

the same or within a cent or two of being the same. When this difference increased, as it did during this "price war", the normal competitive patterns were not maintained. In fact, respondent's trade area plan contemplates that dealers in one area will compete with dealers in other areas during a period of abnormal pricing (Tr. 3723), and "feathering out" does not begin until the injury to the non-favored, competing dealers becomes substantial (Tr. 3772–8). It is not important whether the respondent's trade area boundary was realistically established for normal pricing, the important point is that the boundary between Trade Area 3 and Trade Area 4 was not realistic in separating the two areas during the period of abnormal pricing in October 1958.

The dealers who were favored gained gallonage for a period of about two weeks, and the non-favored dealers lost gallonage during this period. The extent of these losses is not definitely shown, but it is concluded from the testimony of these dealers that they were substantial (Tr. 715, 754, 544, 802, 933, 937, 836; CX 1347). Respondent, on the other hand, has shown the comparative gallonage of the seven non-favored dealers in Trade Area 3 for the months of October 1957, September 1958, and October 1958, and their average monthly gallonage for the year preceding October 1958. These figures show, as specifically found above, that only one of these non-favored dealers failed to show a gain in volume in October 1958, the period of abnormal pricing, over at least two of the periods shown, and only two of the other dealers failed to show a gain in October 1958 over all three of the other periods.

In the matter of American Oil Company, Docket No. 8183 [60 F.T.C. 1786, 1806], the Commission said:

> * * * As the Supreme Court has pointed out, the statute is designed to reach price discriminations before harm to competition is effected and requires only that the effect of the discrimination "may be substantially to lessen competition * * * or to injure, destroy or prevent competition." In this case, the competition alleged to be affected is competition between respondent's customers in the resale of respondent's products. Consequently, proof that the competitive opportunities of any of respondent's customers were injured by reason of the discrimination is sufficient to establish a *prima facie* violation of Section 2(a). Hence, it is unnecessary to determine whether the hearing examiner's finding of actual injury is supported by the record.
>
> The Supreme Court has held in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948), that in price discrimination cases involving competition between buyers, the requisite injury to such competition may be inferred from a showing that the seller charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors and that the amount of this discrimination was substantial. Complete reliance upon this

doctrine, however, is not crucial here. The record in this case contains evidence of a positive character fully justifying a finding of probable injury to competition.

The hearing examiner considers that he is bound by the statement above that "proof that the competitive opportunities of any of respondent's customers were injured by reason of the discrimination is sufficient to establish a *prima facie* violation of Section 2(a)." In this case it is clearly shown that the competitive opportunities of respondent's customers in Trade Area 3 were injured by reason of respondent's discriminations because their sales volume was reduced. It is undoubtedly true that these customers could not have continued to compete for local business if these prices had remained in effect for any extended period of time, although some of them who were located where they could obtain tourist business may have been able to remain in business with a reduced sales volume.

It is also apparent from the Commission's discusion of the *Morton Salt* case that the doctrine of inferring injury from a substantial difference in price to competing buyers states the rule that should govern this case, although the Commission said that it was not necessary to rely upon that doctrine completely in the American Oil case. The clear inference is that it could and should be relied upon and the hearing examiner considers that he is bound to adhere to that doctrine. Although the American Oil case is factually related to the instant case, the hearing examiner is not concerned with any findings of fact in that case which were made from a different record, but he is concerned with, and is bound by, the Commission's statement of the law in its opinion in that case.

It is concluded and found that respondent's discriminations, referred to hereinabove, in and around Marietta and Smyrna, Georgia, may have been to substantially lessen competition or to destroy or prevent competition with those purchasers of respondent's automotive gasoline who received the lower prices.

Seattle, Washington, Discriminations

Respondent has discriminated in price between different purchasers of its automotive gasoline of like grade and quality in the Seattle, Washington, area by selling to certain dealers, which it designated as OD dealers, who either owned their own stations or had some leasehold interest in them at lower and more favorable prices than it sold to other dealers who leased their stations from the respondent. The following chart shows the prices to certain favored as well as non-favored dealers for certain periods within the period of June 20, 1959, to March 29, 1960, and shows the volume of purchases at such prices:

SHELL OIL COMPANY SALES AND NET PRICES OF REGULAR GASOLINE TO ITS SEATTLE, WASHINGTON, OWNER DEALERS (OD) AND LESSEE DEALERS (LD) FOR CERTAIN PERIODS 6/20/59 TO 3/29/60

Date 1959	North of downtown						Downtown area								South of downtown					
	Big 4 (OD)		Tranter (LD)		Maurer (LD)		Cleghorn (OD)		Cain (OD)		Hagens (LD)		Cox (LD)		Pezzella (OD)		Flajole (OD)		Molitor (LD)	
	Gallons	Net price	Gallons	Net price	Gallons	Net price	Gallons	Net price	Gallons	Net price	Gallons	Net price	Gallons	Net price	Gallons	Net price	Gallons	Net price	Gallons	Net price
June 20	3,390	24.4			1,635	28.5														
21																				
22	4,087	24.4																		
23	3,000	24.4			1,690	28.5														
24	3,590	24.4																		
25	1,400	24.4			1,990	28.5														
26	3,580	24.4	2,650	28.5																
27					1,640	28.5	550	24.4												
28	4,040	24.4																		
29	3,392	24.4			1,964	28.5														
30	3,450	24.4																		
July 1	3,478	24.4			1,287	28.5	450	26.45	276	24.4										
2	3,478	26.5	2,150	28.5					276	26.67	300	28.5					2,478	26.5		
3	3,390	26.5			4,590	28.5	370	26.45	300	26.67					4,082	26.5	2,695	26.5	1,985	27.93
4	3,980	26.5															1,977	25.5		
5																				
6	3,980	26.5			1,933	28.5					300	28.5			430	26.5				
7	3,390	26.5							610	26.67							4,074	26.5		
8	4,000	26.5			990	28.5	500	26.45			250	28.5					1,319	26.5	1,900	27.93
9									150	26.67							2,174	26.5		
10	4,022	26.5			1,706	28.5			670	26.67	250	28.5					1,620	26.5		
11	3,394	26.5	3,400	28.5	1,670	28.5	500	26.45	140	26.67					4,233	26.5	3,732	26.5		
12																	300	26.5		
13	4,076	26.5							200	26.67							1,360	26.5	1,700	27.93
14	4,100	26.5			1,300	28.5					200	28.5					1,000	26.5		
15	3,387	26.5					600	26.45	500	26.67	200	28.5					3,795	26.5		
16	3,395	26.5			1,700	28.5			250	26.67	200	28.5			4,660	26.5	3,050	26.5	2,000	27.93
17	3,387	26.5							230	26.67	200	28.5					350	26.5		
18	3,430	26.5	2,340	28.5	1,300	28.5	600	26.45	250	26.67					4,500	26.5	2,700	26.5		
19																				
20	3,400	26.5			1,700	28.5					200	28.5					630	26.5		
21									400	26.67	250	28.5					4,005	26.5	2,200	27.93
22							500	26.45	550	26.67	200	28.5					660	26.5		
23									250	26.67					3,400	26.5	1,750	26.5		

24									400	28.5			2,125	26.5		
25					500	26.45	270	26.67					2,020	26.5	1,980	27.93
26							180	26.67					470	26.5		
27	3,200	28.5	1,702	27.17			335	26.67	250	28.5	3,446	26.5	915	26.5		
28							250	26.67	250	28.5			2,810	26.5		
29			2,000	27.17	300	26.45	220	26.67					2,895	26.5	1,980	27.93
30			1,700	27.17			200	26.67	250	28.5			2,382	26.5		
31							520	24.4	250	28.5	3,590	26.5	1,390	26.5		
Aug. 1					640	26.45	520	26.67					846	26.5		
2			1,658	27.17									804	26.5		
3			2,150	27.17			370	26.67	250	28.5	3,396	26.5	430	26.5	1,958	27.93
4	2,843	28.5	1,660	27.17			250	26.67	250	28.5			3,416	26.5		
5					500	26.45			160	28.5			320	26.5		
6			1,683	27.17			230	26.67	200	28.5	4,026	26.5	1,090	26.5		
7							602	26.67	250	28.5			2,320	26.5	2,000	27.93
8			1,675	27.17	1,050	26.45	210	26.67					2,810	26.5		
9			1,700	27.17												
10							300	26.67	250	28.5	4,130	26.5	240	26.5		
11			1,800	27.17			220	26.67	250	28.5			2,140	26.5	1,985	27.93
12					770	26.45							1,030	26.5		
13	2,700	28.5	1,700	27.17			484	26.67	250	28.5	4,454	26.5	2,166	26.5		
14			1,660	27.17			410	26.67	250	28.5			715	26.5		
15			1,665	27.17	600	26.45	265	26.67	300	28.5	4,024	26.4	2,555	26.5	1,990	27.93
16																
17			2,200	27.17			300	26.67	200	28.5			2,575	26.5		
18			2,090	27.17					200	28.5			212	26.5		
19					400	26.45	200	26.67	200	28.5			3,165	26.5		
20			1,300	27.17			480	26.67					1,270	26.5		
21	3,100	28.5							250	28.5			400	26.5		
22			1,700	27.17	650	26.45	320	26.67	200	28.5			3,818	26.5		
23			1,316	27.17			150	26.67								
24			1,700	27.17			330	26.67	200	28.5			1,210	26.5		
25							300	26.67					305	25.34		
26			1,660	27.17			300	26.67	250	28.5			1,780	25.92		
27							250	26.67	200	28.7			1,780	25.92		
28			1,680	26.42					150	29.0			1,065	25.92		
29	499	28.5	4,000	26.42			600	26.67	200	28.5			3,870	25.92		
30													1,014	25.92		
31									150	29.0			1,496	25.17		
Sept. 1									300	28.5			1,455	25.17		
2													1,255	24.40		
3																
4																
5																
6																

SHELL OIL COMPANY SALES AND NET PRICES OF REGULAR GASOLINE TO ITS SEATTLE, WASHINGTON, OWNER DEALERS (OD) AND LESSEE DEALERS (LD) FOR CERTAIN PERIODS 6/20/59 TO 3/29/60—Continued

Date 1959	North of downtown						Downtown area								South of downtown					
	Big 4 (OD)		Tranter (LD)		Maurer (LD)		Cleghorn (OD)		Cain (OD)		Hagens (LD)		Cox (LD)		Pezzella (OD)		Flajole (OD)		Molitor (LD)	
	Gallons	Net price	Gallons	Net price	Gallons	Net price	Gallons	Net price	Gallons	Net price	Gallons	Net price	Gallons	Net price	Gallons	Net price	Gallons	Net price	Gallons	Net price
Sept. 7																				
8																				
9							300	23.4			200	25.67								
10											200	25.67								
11																				
12							400	23.4			250	25.67								
13																				
14											200	25.67								
15											150	26.17								
16							250	23.4			200	25.67								
17							260	21.4												
18											250	21.9								
19							510	21.4			200	21.9								
20																				
21											200	21.9								
22											200	21.9								
23							680	21.4	230	22.4	200	21.9								
24									250	22.4	250	21.9								
25																				
26							525	21.4	600	21.4	300	21.9								
27																				
28									400	21.4	200	21.9								
29							25	20.4	110	21.4	200	22.4								
30							927	20.4	340	20.4	300	21.9								
Oct. 1									340	22.4	250	22.9								
2									330	22.4	100	22.9								
3							453	21.4	120	22.4	215	22.9								
4																				
5									340	22.4										
6									230	22.4	250	22.9								
7							700	21.4	288	22.4	200	22.9								
8									200	22.4	200	22.9								

9					200	22.9				
10	660	21.4	165	22.4	150	22.9				
11			350	22.4						
12			300	22.4	100	22.4				
13					200	22.9				
14	720	20.4	480	22.4	100	23.4				
15			270	19.4	150	23.4				
16					200	22.9				
17	890	20.4	300	19.4	200	22.9				
18										
19					200	23.4				
20			780	19.4	100	21.4				
21	540	20.4	180	19.4	150	21.4				
22			250	19.4						
23			320	19.4						
24	700	18.4	160	19.4						
25										
26			320	19.4						
27			140	19.4						
28	670	18.4	200	19.4						
1960										
Feb. 17							460	19.9	2,885	18.4
18									1,550	18.4
19									1,525	18.4
20									695	18.4
21									515	18.4
22									1,000	18.4
23									1,005	18.4
24							200	19.9	400	18.4
25									2,625	17.4
26									1,220	17.4
27							800	18.9	3,831	17.4
28										
29									1,015	17.4
Mar. 1									815	17.4
2									3,140	17.4
3									265	17.4
4									1,200	16.4
5							1,005	18.9	1,810	16.4
6									1,800	16.4
7									2,250	16.4
8									550	16.4
9									1,855	16.4
10									1,180	16.4
11									2,735	15.4

SHELL OIL COMPANY SALESAND NET PRICES OF REGULAR GASOLINE TO ITS SEATTLE, WASHINGTON, OWNER DEALERS (OD) AND LESSEE DEALERS (LD) FOR CERTAIN PERIODS 6/20/59 TO 3/29/60—Continued

Date 1959	North of downtown						Downtown area								South of downtown					
	Big 4 (OD)		Trantor (LD)		Maurer (LD)		Cleghorn (OD)		Cain (OD)		Hagens (LD)		Cox (LD)		Pezzella (OD)		Flajole (OD)		Molitor (LD)	
	Gallons	Net price	Gallons	Net price	Gallons	Net price	Gallons	Net price	Gallons	Net price	Gallons	Net price	Gallons	Net price	Gallons	Net price	Gallons	Net price	Gallons	Net price
Mar. 12													151	18.9			765	15.4		
13																				
14																	3,535	15.4		
15																	870	15.4		
16													743	17.9			3,145	15.4		
17																	1,500	15.4		
18													421	16.9			2,145	15.4		
19													1,000	16.9			2,220	15.4		
20																				
21																	2,370	15.4		
22																	4,560	15.4		
23																	1,214	15.4		
24													1,000	16.9			783	15.4		
25																	3,320	15.4		
26																	350	15.4		
27																	1,300	15.4		
28																	1,565	15.4		
29													995	16.9			3,350	15.4		

Source: These figures are taken from numerous invoices and other documents in the record as Commission Exhibits.

The facts regarding interstate commerce in the Seattle area were stipulated (Tr. 1029-41). Shell's gasoline sales in Seattle are made by its District Sales Office, located in Seattle, and the gasoline is delivered from its storage facilities at Harbor Island (Tr. 1029, 2473, 2523). Shell's Harbor Island terminal is located at the south end of Elliott Bay, just outside Seattle, in the State of Washington. All of the dealers herein involved in Seattle were located in metropolitan Seattle, and every delivery to each of them was made from Shell's Harbor Island terminal (Tr. 1029; CX 239; RX 1).

Shell owns and operates a refinery at Anacortes, in the State of Washington, at which it manufactures motor gasoline and other petroleum products. All motor gasoline received at Shell's Harbor Island terminal since January 1, 1959, came from its Anacortes refinery, except for the exchanges.

According to the stipulation, "An exchange is in substance two purchases and sales of like or comparable products, the seller in one being the buyer in the other, and in each of such sales payment is made by the buyer through the medium of a sale of like or comparable product to the other" (Tr. 1030).

These exchanges, which were "spot" transactions, involved receipts of gasoline by tanker and barge (Tr. 1030, 1031). Shell received gasoline by tanker on only four occasions during the four years 1959 through 1962. No gasoline was received by tanker at Harbor Island in 1959 after April 16, 1959 (Tr. 1033), almost three weeks before May 6, 1959, the earliest date on which a sale at a discriminatory price is charged to have occurred (CXs 1019, 1134). It is probable that all of that gasoline would have been delivered to customers prior to May 6, 1959 (Tr. 1040–41). The next tanker receipt of gasoline arrived on August 25, 1960, nearly five months after March 29, 1960, the date of the last sale charged to have been at a discriminatory price (Tr. 1034; CXs 403, 961).

In 1959 Shell received at its Harbor Island terminal deliveries of 1,423,983 gallons of gasoline by barge from the local storage of other companies on Puget Sound, Washington. This amounted to 1.95 percent of the 73,028,373 gallons of gasoline delivered out of that terminal that year (Tr. 1034). Similar receipts in 1960 were 1,312,468 gallons or 1.97 percent of the 66,783,442 gallons of gasoline delivered out of the terminal that year (Tr. 1035).

There were but five barge receipts of gasoline at Shell's Harbor Island terminal, not manufactured at its own Anacortes refinery, during

the period from May 6, 1959, to March 29, 1960. Four of those barge shipments came from Richfield Oil Company (Richfield) and the fifth from Tidewater Oil Company (Tidewater). Both Richfield and Tidewater have terminal facilities in the State of Washington on Puget Sound at or near Seattle. Each of these barge "exchange" receipts came from those companies' terminal storage facilities on Puget Sound in the State of Washington. In each case the motor gasoline received by Shell had been in those terminals in the ordinary course of business. In no case was it known that the gasoline would be exchanged with Shell when it was shipped to that terminal, nor was any gasoline shipped to that terminal for that purpose. Gasoline in the Washington terminals of Richfield and Tidewater had been manufactured both in and out of the State of Washington, but the record does not show where any gasoline delivered to Shell from those terminals was refined. In each case involving a delivery to Shell, the gasoline was loaded out of the seller's terminal into a barge which moved the gasoline across Elliott Bay, in the State of Washington, to Shell's Harbor Island terminal, where the gasoline was pumped from the barge into Shell's storage tanks (Tr. 1031–32).

In *Willard Dairy Corp.* v. *National Dairy Products Corp.*, 309 F. 2d 946, the Sixth Circuit stated that "in an action brought under the Robinson-Patman Act it is necessary to allege and prove that the transactions complained of are actually in interstate commerce * * *." The court held that National's sales did not violate Section 2(a) because:

> In the present case, the price discrimination relied upon was by reason of sales in the area of competition and sales in and around the city of Marion, Ohio. These sales by the defendant were from defendant's processing plant in Shelby, Ohio, and were purely intrastate transactions, not interstate in character, as is necessary to impose liability under the Robinson-Patman Act. The fact that defendant also made interstate shipments from other than its Shelby, Ohio, plant to areas in which the plaintiff did not engage in business is immaterial to the issue in this case. (*Cert. denied,* 373 U.S. 934 (May 23, 1963).)

The crude oil refined by respondent comes into the refinery from Canada, but the complaint does not allege that crude oil is the same commodity as gasoline and there is no evidence to show that crude oil is the same physical and commercial commodity as gasoline. The fact that the raw material used in manufacturing gasoline may travel in interstate or foreign commerce does not make the sale of gasoline in interstate commerce.

The evidence does not show interstate movement of gasoline to the Seattle dealers and does not show any of the transactions between respondent and these dealers to have been in interstate commerce. It is therefore concluded that the evidence fails to show a violation of the Clayton Act, as alleged. Although this finding, if approved by the Commission, would dispose of the Seattle, Washington, discriminations charged, the hearing examiner nevertheless proceeds to make findings with respect to these price discriminations between purchasers and their probable effect, as well as the defense of meeting competition and the cost justification defense which were urged by respondent.

The Seattle, Washington, Trade Area

The evidence of record shows that Seattle, Washington, consists of a single competitive market (Tr. 1047–75, 1083–1112, 1123–73, 1180–1228, 1287–1344, 1353–96, 1431–63, 3592; RXs 80, 81, 90; CXs 239, 240). The area extends narrowly between 17-mile long Lake Washington on the east and Puget Sound on the west, bodies of water only 2½ to 3⅓ miles apart at the business center of the city (CX 239; RXs 81 and 90). The city's topography is punctuated and delineated naturally by hills, valleys, and lakes (Tr. 1383; RX 81), limiting and channeling traffic flow (CX 240). A mountain range east of the city extends southward from Canada. U.S. Route 99 is the principal highway through Western Washington, running from Canada to and through Portland, Oregon, and California (Tr. 1383). Lake Washington is joined to and through another lake to the Puget Sound by an east-west canal running north of Seattle's city center (Tr. 1357; RX 81). In 1959 and 1960 only five roadway bridges crossed such canal, enabling access from northern areas to the city center (CX 240; RX 81). Some roadways with through connections afford superior inter-area access, and have carried far more traffic than others (CX 240). Aurora Avenue, which constitutes U.S. Highway 99 connecting Seattle's city center to principal points north, including Everette, Washington, carried on its bridge about 80,000 vehicles per average weekday, or about 35 percent of the traffic crossing the canal (CX 240).

A river-waterway from the southeast, emptying into Puget Sound southwest of Seattle's city center, is paralleled to its northeast bank by East Marginal Way South (RX 81), upon and near which are situated industrial plants and installations (Tr. 1292), including facilities of the Boeing Company, employing 33,400 as of January 1,

1960 (Tr. 3592). Three principal roadways west of a long north-south hill connect the city center with the industrial and commercial area immediately to its south, and (through East Marginal Way South) with Pacific Highway South, which constitutes U.S. Highway 99 to Tacoma, Washington, and principal points south. One of these three roadways, First Avenue South, connecting with a viaduct which bypasses the city center (Tr. 1289, 1292) and (through a tunnel) joins and becomes Aurora Avenue north of the city center, was until September 1959 designated as the U.S. Highway 99 route through the industrial and commercial area. In that month (September 1959) the three roadways were augmented by completion of a partly elevated express roadway connnecting said viaduct directly to East Marginal Way South, and U.S. Highway 99 designation was shifted from First Avenue South to such express roadway (Tr. 289, 1297). Another of the three roadways, 4th Avenue South, constituted through 1959 and 1960 an alternate or "business route" U.S. Highway 99, and after passing through the city center connected with Aurora Avenue at the latter's juncture with the tunnel north of the city center (RXs 80, 81). North-south traffic is carried over the river-waterway chiefly by bridges on First Avenue South (immediately south of its intersection with East Marginal Way South), on 16th Avenue South (near Boeing plants on East Marginal Way South), and on Pacific Highway South (CX 240). The predominant flow of traffic is north and south, rather than east and west, and it appears that all of the stations on the north-south arteries compete to some degree.

Effect of the Seattle Discriminations

In the matter of *Sun Oil Company*, 55 F.T.C. 976, the Commission said:

Here, we have a number of small independent retailers selling an identical product at the same price and under substantially the same conditions. All were

operating at a small margin of profit and in an area which was a reservoir of potential customers who, because of the geographic situation, had easy access to that dealer who offered an advantage in price or in services rendered. When such a situation is shown to exist, together with proof that one competitor received a discount from a common supplier, an inference of injury to the others may reasonably be drawn from that fact. Even where other evidence showing injury is presented, this inference may be considered in addition to other proof.

The facts hereinbefore found regarding Seattle indicate that the situation there fits this description, and it follows that an inference of injury may be drawn from these facts. There was, in addition, testimony from dealers and ex-dealers which gives some indication of the loss of sales to other dealers who received lower prices (Tr. 1055, 1094, 1129, 1271, 1329, 1275–82, 1448). The evidence of sales to certain favored and non-favored dealers for various periods has been compiled in the following table, which shows the number of gallons of regular grade gasoline purchased from Shell during certain Base Periods and certain Discriminatory Periods by certain favored and non-favored dealers in Seattle, Washington; the percentage of increase and/or decrease of such dealers' average daily gallonage during the Discriminatory Period compared with the Base Period; and the ratios of the favored dealers' average daily gallonage to the average daily gallonage of the non-favored dealers during the Base Period and the Discriminatory Period. Respondent contends that the figures in this table are unreliable for several reasons, among which are that they are based on arbitrary and limited periods of time, that they include only regular grade gasoline when the inclusion of premium grade gasoline would change the resulting ratios substantially, and that the figures show purchases by the dealers rather than sales. It is concluded, however, that in spite of their infirmities these ratios of sales indicate that there was a diversion of business from non-favored dealers to favored dealers.

(5)	(6)	(7)		Base period [3]			Discriminatory period [4]				Ratio of favored dealers to disfavored dealers daily gallonage	
				Period	No. of days	Average daily gallonage	Period	No. of days	Average daily gallonage	Percent change in daily gallonage	Base period	Discriminatory period
	OD	N	Big Four (favored)	8/31- 10/14	45	2,573	6/20- 7/20	31	2,845	+10.6	2 to 1	3.5 to 1
D	LD	N	Maurer (disfavored)	8/31- 10/15	46	1,289	6/20- 7/22	33	821	-36.3		
	OD	S	Flajole (favored)	11/18- 12/29	42	1,506	2/17- 3/28/60	40	1,637	+8.7	8 to 1	11.4 to 1
	LD	D	Cox (disfavored)	11/18- 1/3/60	47	188	2/17- 3/28/60	40	144	-23.4		
	OD	S	Flajole (favored)	5/11- 7/1	52	1,444	7/2 - 9/1	62	1,648	+14.1	10 to 1	11.6 to 1
	LD	D	Hagens (disfavored)	5/11- 7/1	52	144	7/2 - 9/1	62	142	-1.4		
	OD	S	Flajole (favored)	5/27- 6/29	34	1,422	7/8 - 8/16	40	1,608	+13.1	2.9 to 1	3.4 to 1
	LD	S	Molitor (disfavored)	5/27- 7/2	37	483	7/8 - 8/18	42	468	-3.1		
F	LD	N	Maurer (favored)	5/18- 6/19	32	543	7/27- 8/30	35	1,154	+112.5	1.5 to 1	3.3 to 1
	LD	N	Tranter (disfavored)	5/18- 6/25	38	359	7/27- 8/30	35	353	-1.7		
	OD	D	Cleghorn (favored)	9/23- 10/23	31	197	6/27- 8/25	60	158	-19.8	1.3 to 1	1 to 2.2
	LD	N	Tranter (disfavored)	9/23- 10/25	33	598	6/26- 8/28	64	349	-41.6		
	OD	D	Cleghorn (favored)	2/20- 3/22/60	31	125	9/9 - 10/23	45	174	+39.2	1 to 1	1.2 to 1
	LD	D	Hagens (disfavored)	2/20- 3/20/60	29	124	9/9 - 10/21	43	151	+21.8		
	OD	D	Cain (favored)	9/1 - 9/30	30	234	7/2 - 8/31	61	231	-1.3	1.3 to 1	1.7 to 1
	LD	D	Hagens (disfavored)	9/1 - 9/30	30	175	7/2 - 8/30	60	140	-20.0		
	OD	S	Pezzella (favored)	5/23- 7/2	41	913	7/3 - 8/17	46	1,129	+2.3	1.9 to 1	2.4 to 1
	LD	S	Molitor (disfavored)	5/23- 7/2	41	476	7/3 - 8/18	47	461	-3.2		
	OD	D	Cleghorn (favored)	5/6 - 6/30	56	137	9/23- 10/30	38	197	+43.8	1 to 1.5	1 to 1.1
	OD	D	Cain (disfavored)	5/6 - 6/27	53	201	9/23- 10/28	36	222	+12.3		

[3] Base Period is used to indicate the (minimum 30 day) interval during the period May 1959 to March 1960, in which respondent's price differentials between the favored dealers and the disfavored dealers was at or near its minimum.

[4] Discriminatory Period is used to indicate certain periods between May 1959 and March 1960, during which the favored dealers received larger discounts than the disfavored dealers on purchases of Shell regular grade gasoline.

[5] "D" indicates disfavored; "F" indicates favored.

[6] "OD" indicates owner dealer; "LD" indicates lessee dealer.

[7] "N" indicates station located north of downtown area; "S" indicates station located south of downtown area; and "D" indicates downtown or business section of Seattle.

Source: These figures are taken from numerous invoices and other documents in the record as Commission Exhibits.

It also appears that the discriminations were sufficiently large to permit the conclusion that the mere loss of additional profits by the non-favored dealers adversely affected such dealers' ability to compete.

It is therefore concluded and found that the effect of the price discriminations in Seattle may have been substantially to lessen competition or to destroy or prevent competition in the resale of gasoline at retail with those purchasers who received the lower prices.

The Cost Justification Defense

Respondent has urged that the lower prices granted to its customers who own their own stations and are generally referred to in the record as OD dealers were justified because of the difference in respondent's cost of marketing through these dealers as opposed to lessee dealers who operated the stations leased from respondent.

Respondent's West Coast vice president and its Seattle sales supervisor both testified that in their opinion respondent's cost of supplying an OD customer, as compared to a lessee customer, resulted in a cost saving in excess of 1½ cents per gallon (Tr. 2483, 3464).

The firm of Price Waterhouse & Co., which is a well known public accounting firm, was employed by respondent to analyze the costs of marketing gasoline to the five lessee dealers, which had been named as non-favored dealers, as compared with the cost of marketing to the five OD dealers which had been named as favored dealers, and if there were differential costs to report the amounts thereof in terms of cents per gallon. Mr. Robert Field, one of the partners of this firm, conducted a cost study for use in this proceeding, and it has been received in evidence as Respondent's Exhibit 94A, B & D.

In this cost study the costs of marketing through these two groups of customers were compared. The two groupings were of customers who owned their stations and customers who were tenants of respondent. The members of each group were not shown to be substantially alike and their grouping was not justified for the purpose of comparing "differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

The cost analysis offered by respondent included in the first category of expenses many items of landlord expense similar to those which the Commission considered in the matter of *Standard Oil Company*, 41 F.T.C. 263 (1945) were not costs of selling contemplated by the Statute. It is concluded and found that the items in category "Reseller expenses" in Respondent's Exhibit 94B are not costs of selling contemplated by the Statute. Differences in the delivery cost were

not considered significant and were not included in respondent's cost study.

The second broad category of expenses included in the cost study is district office and divisional office salaries and travel expenses. These expenses include sales, real estate, and engineering. "Under the company's regular accounting practice, District Office expense is allocated to Tank Wagon Reseller (service stations) class of trade for 1959 and 1960 on the basis of time analyses for the salesmen, engineers and other personnel assigned to the District Office" (RX 95D). These allocations are reported quarterly in the regular course of business by Shell and "results in assigning to the reseller class of trade the direct expenses for salaries and travel of the salesmen and engineers, classified by sales, real estate, engineering and merchandising functions together with a portion of District Office overhead" (RX 95D).

Since, for the purpose of the cost study, it was necessary to determine the amount of such allocated reseller expense among types of service stations, each of the four functions was reviewed and a means of allocation by station type was determined for sales, real estate, and engineering. Expenses allocated to merchandising (promotion, etc.) were not included in the cost study since it appeared that there were no distinctive features of this activity which differed by type of service station. The procedure used was to allocate the overhead of $102,000 to the four categories, namely, "sales," "merchandising," "real estate," and "engineering" in accordance with the relative dollars in each of these categories to arrive at total district office tank wagon reseller expense applicable to sales, real estate, and engineering. It was then necessary to take the amount of direct sales, including overhead, and allocate it to types of dealers. This was done in accordance with the company records of the salesmen's efforts represented by what is called a "weekly work plan" (Tr. 2887–89; RX 95).

Shell has three types of salesmen selling gasoline to service stations. The principal salesman, known as a dealer salesman, is normally assigned to a metropolitan area and has prime responsibility for sales to service stations (Tr. 3330). General line salesmen normally work in the suburban or outlying areas and handle all types of business, including service stations, jobbers, and commercial accounts (Tr. 3331). Merchandise men spend much of their time training lessee dealers in Shell Training schools. Since the dealers are the only contact Shell has with the motorist, it is important that they be trained to give good service and to be good merchandisers. Therefore, the Shell merchandising salesmen spend the majority of their time train-

ing dealers to satisfy the needs and desires of motorists (Tr. 2581, 3332).

"Sales" expenses for lessee dealers are considerably greater than for OD dealers because most ODs are longtime, experienced service station operators with a large investment in the station, which promotes stability. On the other hand, there is constant turnover, and thus need for training in lessee stations. As Shell's sales supervisor explained, the salesmen "will spend between four to five times more time * * * in the L [lessee] category, then they will in the OD category * * * in a metropolitan area like Seattle. In the outlying areas it would probably be ten to one" (Tr. 3337).

Such differences in the cost of selling which have been shown are not shown to have resulted from differing methods of selling or quantities sold to two distinct classes of purchasers. Insofar as the cost of making the original sales contract is concerned, there is nothing to show that the method of making such contracts differed or that the costs of making sales contracts differed between different classes of customers.

Also it appears that the costs which have been shown relate to calls made by the sales force on the dealers in order to aid the dealers in the resale of respondent's gasoline. It is not shown that any difference in method is used but merely that the salesmen spent more time doing the same thing in the lessee stations than in the OD stations. The only thing all the members of the OD group were shown to have in common was that they owned their stations and the only thing all the members of the lessee group were shown to have in common was that they leased their stations from respondent. In *U.S.* v. *Borden Company, et al.*, 370 U.S. 460, at page 468, the court said:

Although the language of the proviso, with some support in the legislative history, is literally susceptible of a construction which would require any discrepancy in price between any two purchasers to be individually justified, the proviso has not been so construed by those charged with its enforcement. The Government candidly recognizes in its briefs filed in the instant case that "[a]s a matter of practical necessity * * * when a seller deals with a very large number of customers, he cannot be required to establish different cost-reflecting prices for each customer." In this same vein, the practice of grouping customers for pricing purposes has long had the approval of the Federal Trade Commission. We ourselves have noted the "elusiveness of cost data" in a Robinson-Patman Act proceeding. *Automatic Canteen Co.* v. *Federal Trade Comm'n*, 346 U.S. 61, 68 (1953) [5 S.&D. 531, 537]. In short, to completely renounce class pricing as justified by class accounting would be to eliminate in practical effect the cost justification proviso as to sellers having a large number of purchasers, thereby preventing such sellers from passing on economies to their customers. It seems hardly necessary to say that such a result is at war with Congress' language and purpose.

But this is not to say that price differentials can be justified on the basis of arbitrary classifications or even classifications which are representative of a numerical majority of the individual members. At some point practical considerations shade into a circumvention of the proviso. A balance is struck by the use of classes for cost justification which are composed of members of such selfsameness as to make the averaging of the cost of dealing with the group a valid and reasonable indicium of the cost of dealing with any specific group member. High on the list of "musts" in the use of the average cost of customer groupings under the proviso of § 2(a) is a close resemblance of the individual members of each group on the essential point or points which determine the costs considered.

The only cost referred to in the Statute which is found in respondent's cost study, is an item of sales costs which is allocated to each group of customers on the basis of the salesmen's time estimated to be spent with each class of customers (CX 95D). Promotion of sales at the stations to motorists is the primary function of respondent's salesmen (Tr. 2568). There is no item shown for the cost of making the original sales contracts with the various stations or the various groups of stations. In any event, if the portion of the district office's salesmen's salaries and expenses allocated to the two groups of dealers in Respondent's Exhibit 94 can be considered to reflect differences in the cost of selling, this difference which is a small fraction of a cent per gallon does not justify the price differences between the two classes of dealers.

It is therefore found that respondent has failed to show that the price discriminations hereinabove found made only due allowances for "differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

Respondent's Meeting Competition Defense in Seattle

Respondent has attempted to prove that its price discriminations shown to have been granted in Seattle were made in good faith to meet equally low prices of competitors. It is clear that the granting of dealer assistance, which was by far the largest constituent portion of the discriminations, was only granted to meet the retail prices which were posted by competitors of respondent's customers (Tr. 3547). This question is more fully discussed hereinbefore in a discussion of respondent's evidence relating to this same defense, which was offered in defense of the discriminations in Georgia. It is concluded here, as there, that the respondent may not defend by showing that its price to its customer met a competitor's price to that competitor's customer, but may invoke the defense only when it has met a price offered its own customer, and this respondent has failed to prove.

Respondent also offered evidence which indicated that the 1½ cents

and 2 cents per gallon concessions made to the dealers who owned their own stations (OD dealers) were responsive to offers of competitors, but it is concluded that respondent has failed to establish by competent evidence that the granting of this concession was in good faith to meet equally low bona fide offers of specific competitors. This is the concession which was reduced to about ½ cent per gallon through the granting of dealer assistance (Tr. 1472).

It is therefore found that respondent has failed to establish that the price discriminations charged in Seattle were made in good faith to meet the equally low price of a competitor.

COUNT II. PRICE FIXING

Count II of the complaint alleges that "Commencing on or about the first week in October 1958, respondent, acting through its Division Manager, one R. D. Kizer, and certain of its independent dealer-purchasers engaged in selling respondent's automotive gasoline and other petroleum products in the Smyrna-Marietta, Georgia, trade area * * * entered into, acquiesced or cooperated in maintaining and carrying out a combination, planned common course of action, course of dealing, understanding and agreement, through which they would fix and maintain, and did fix and maintain, the price at which respondent's automotive gasoline was sold or would be sold at retail * * *" by the aforementioned dealer-purchasers. It is further alleged that pursuant to such agreement, respondent acting through R. D. Kizer and in combination with the independent dealer-purchasers did fix and maintain retail prices and did adhere to such prices. The dealer-purchasers alleged to have conspired with Shell through Mr. Kizer were identified as four Trade Area 4 dealers who were Parker, McGriff, Spruill and Cobb (RX 2E and F). Each of these dealers was called as witnesses in support of this charge, and neither their testimony nor any other evidence offered sustains the charge that they agreed with respondent, as alleged, to fix or maintain retail prices of gasoline.

There are at least two instances in the direct testimony of Mr. Cobb (Tr. 258) and Mr. McGriff (Tr. 951–55) in which there were clear statements that these dealers had agreed with respondent's employees, or respondent's distributor or his employees, to fix retail prices, but the evidence of dealer Cobb is confusing and not persuasive on this point, and upon consideration of all of the evidence, including that of respondent's employee Pierce and respondent's distributor's employee Brooks, it is concluded that this charge has not been sustained by the evidence.

Sometime in 1958, well in advance of the construction of the Para-

land station in Cobb County, respondent's marketing vice president, Mr. Jordan, had a discussion with respondent's division manager, Mr. Kizer, in which they discussed the subject of Phillips' marketing of unbranded gasoline through certain jobbers who were already marketing Phillips' branded gasoline. Mr. Jordan was concerned about this practice, about its possible effect upon respondent's jobbers and upon respondent's sales, and authorized Mr. Kizer to meet this threat at any place where the dealer of respondent was hurt by Phillips' private brand Paraland (Tr. 3698–3821).

Mr. Pierce, respondent's supervisor of sales of the Atlanta District, kept his district manager advised of the progress of the Paraland station being constructed in Smyrna, and following dealer Parker's request for assistance and claim of losing volume to the Paraland station, called upon Parker with respondent's distributor Brooks and Brook's son, who was an employee. He recommended a price reduction be given to Parker which under respondent's trade area plan would also require a reduction to all respondent's dealers in Trade Area 4 (Tr. 848, 8327–33). Thereafter, respondent granted the dealer assistance, hereinbefore found, to all the dealers in Trade Area 4. Whether Pierce was originally convinced that Parker needed some dealer assistance to enable him to meet the Paraland price or whether he merely used this as an excuse to put in effect a price which was calculated to stop the owners of the Paraland station from becoming established as an independent jobber engaged in dual marketing of branded and unbranded products cannot be definitely determined from the record. The record does show that the sales of the Paraland station had been almost negligible up to this time (CXs 1736B–1741B). It is clear, however, that it was the aim of Shell's marketing vice president, Mr. Jordan, to stop any Phillips' jobber, attempting to market both branded and unbranded gasolines, from succeeding in marketing unbranded gasoline in any station where a dealer or respondent was being injured (Tr. 3821). Although the Paraland station was operated by a separate corporation, the Shell employees on the scene considered it to be the same as the corporation which was the Phillips jobber in the area. Except for entering into a retail price-fixing agreement, and it is found here that this has not been proved by the evidence, respondent had every right to attempt to stop such an operation from succeeding by making price reductions. This does not take into account, of course, the matter of price discriminations, which are dealt with elsewhere in this decision, but is merely concluding that respondent was within its rights to independently cut its prices to meet or beat the prices of any branded or unbranded gasoline in the area. The record shows that respondent did suggest

retail prices to its dealers (Tr. 611, 962–74), but fails to show the price fixing agreement charged in the complaint. It is probably true that these dealers in Trade Area 4 knew that they were expected to reduce their retail price each time the price to them was reduced, and believed that they would not long continue to receive these price reductions if they failed to pass them on to their customers, but this, as well as the other circumstances, are not sufficient to give rise to an inference that an agreement to fix prices had been reached.

The charge that respondent, through Kizer, agreed with dealers to fix gasoline retail prices is not supported by the greater weight of the evidence. It is also charged that the dealers acquiesced in lowering prices, and this has been established, but the examiner finds nothing unlawful or unusual in this action of the dealers passing on their price reductions to the public. Whether true or not, it would be reasonable for them to expect they would not continue to receive the reductions very long unless they did pass them on.

As is found above, there are fragments of testimony of two of the dealers that they agreed with someone to cut the price, but their testimony as a whole is convincing that they merely passed on the reductions without agreement, but with the knowledge that it was expected that they do so. The dealers knew that a price war was in progress and that by getting price reductions early they should increase their sales.

It is therefore found that the evidence does not support the charge of unlawful action in Smyrna and Marietta, Georgia, as is alleged in Count II of the complaint.

Motions

At the close of the case in chief in support of the complaint, respondent made several motions on the record. The hearing examiner advised the parties at a later hearing that he would reserve ruling on these motions until the close of the case, and he now disposes of these motions.

The first was a motion to dismiss the complaint with respect to the Seattle discriminations for failure to show interstate commerce. As indicated hereinbefore, it is found that the evidence fails to establish that the sales in Seattle were in interstate commerce or that the sales were of gasoline which was in interstate commerce. This motion is therefore granted.

Another motion was to dismiss Count II of the complaint for the reason that the allegations of this count were not proved. As herein-

before found, the allegations of this count were not proved and this motion is hereby granted and Count II of the complaint is dismissed.

Respondent also moved to dismiss the price discrimination charge of Count I as to the Georgia discriminations on the ground that a prima facie case had not been established. This motion is hereby denied.

Respondent further moved to dismiss the price discrimination charge of Count I as it related to the Seattle area on the ground that a prima facie case had not been established. It is not necessary to rule on this motion since this portion of the case has been dismissed on the narrow ground that sales in interstate commerce or sales of a product in interstate commerce had not been shown.

Respondent also moved to dismiss the Georgia phase of the case on the ground that there had been no showing of interstate commerce. It it considered that respondent's answer admitted that the gasoline sold in Georgia was in interstate commerce, but whether or not this is correct the evidence shows that it was. This motion is therefore denied.

After the record was closed for the reception of evidence, respondent moved, on August 2, 1963, that the hearing examiner take official notice of certain maps. Since this motion was filed too late for counsel supporting the complaint to have an opportunity to disprove any facts or conclusions which could be drawn from these documents, and since counsel supporting the complaint opposed the motion, it is hereby denied.

CONCLUSIONS

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

The aforesaid acts and practices of respondent of granting price discriminations in Georgia as herein found constituted violations of subsection (a) of Section 2 of the Clayton Act as alleged in Count I of the complaint. The evidence did not establish violations of Section 5 of the Federal Trade Commission Act as alleged in Count II of the complaint.

ORDER

It is ordered, That respondent, Shell Oil Company, a corporation. and its officers, directors, agents, representatives or employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of gasoline in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from discriminating in price by selling gasoline of like grade and quality to any purchaser at net prices higher than the

net prices charged any other purchaser who competes in the resale or distribution of gasoline with the purchaser paying the higher price.

It is further ordered, That the charges in Count II of the complaint herein are dismissed.

Dissenting Opinion

DECEMBER 28, 1964

By MacIntyre, *Commissioner:*

These cases are of vital importance, not only to the public but to the businessmen engaged in the petroleum industry. Likewise, it is of importance that the vital issues involved in these adjudicative cases be resolved. This the Commission has decided to avoid. In its order the Commission states that the cases are being dismissed "without rendering decisions adjudicating any issues of law or fact involved." This is error. The "aggrieved" are entitled to a resolution of the issues involved here. This is demanded by not only the equities involved but also as a matter of moral right and by at least the spirit of the Administrative Procedure Act.

The majority excuses its action by stating that these adjudicative matters are being dismissed "In the exercise of the Commission's administrative discretion" and "without rendering decisions adjudicating any issues of law or fact involved." I respectfully submit that the portion of the Administrative Procedure Act commencing with Section 5 under the heading of "Adjudication" contemplates no such treatment. Moreover, the further excuse is advanced through the indication that if remedial measures should be required regarding any practice, it would be attempted following the initiation of a broad inquiry into the problems of competition in the marketing of gasoline. In that connection, it is stated that orders to cease and desist, if entered in these cases, would not provide a complete or effective solution to the competitive problems of the oil industry. Let it be understood my dissent here is not directed against the absence of cease and desist orders in these cases: rather, I am dissenting to action by the Majority which avoids adjudication of the vital issues involved. The Majority has not fulfilled its responsibility for making findings of fact and stating its conclusions thereon regarding the practices involved. Thus, it is advising no one concerning the existence or the significance of any of the practices involved.

I am mindful of a statement in the Commission's "Final Order" to the effect that "there is no quorum of the Commission at the present

time for rendering adjudicative decisions on the merits." With that assertion I emphatically disagree. The Commission has mustered a quorum sufficient to act and with which it is acting on these cases. I agree that if the members of the Commission, who are acting to dismiss these cases without an adjudication of the issues, should undertake to adjudicate the issues involved, it would be appropriate for them to hear re-arguments on the appeals.

It is the position of the Majority that it would be inappropriate to hear re-arguments on the appeals. Reference is made to the limited resources available to the Commission. Re-arguments in these cases would not unduly draw upon the limited resources of the Commission. No convincing proof has been advanced which would show the need of any substantial additional allocation of funds or personnel to provide for re-argument of these cases. The work is done and the funds allocated to the cases have been spent. In passing, it should be noted that the Commission's records disclose that the tax payers contributed substantially to those funds. For example, the records show that the government has spent between $125,000 and $200,000 in covering the costs of the litigation in these cases. Undoubtedly the respondents spent much larger sums on the cases in the course of litigation. The result we get is the disposition of the issues without deciding the appeals on the merits.

The opinion of the Majority points to an intent to try the use of industry-wide methods for dealing with the problems and practices said to exist in the petroleum industry and for advising businessmen about their responsibilities concerning such problems and practices. On its face, this expression of intent is admirable. I hope, however, that I may be pardoned, under the circumstances, for finding this formula less than reassuring. The two most obvious avenues to an understanding of gasoline marketing problems are either making findings in the pending adjudicative cases or in the rule making fact finding proceeding requested by important segments of the industry. The proposed "broad inquiry" does not expressly provide for the Commission to make findings of fact on the data submitted as it is obliged to do in adjudicative cases or in a trade regulation rule proceeding.

Unfortunately, I am unable to discern an interest here to find the facts and act on them in grappling with these challenging problems. Indeed, our present inability to act seems part and parcel of a more extensive malady. A recent line of Commission decisions evince a regrettable trend toward disposing of adjudicatory matters on proced-

ural grounds, thus avoiding difficult legal and policy problems.[1] Undoubtedly this is a convenient formula, at least in the short run, for those of us responsible for administering these statutes. On final analysis, however, it plainly constitutes an abdication of the Commission's functions, which is charged with advising businessmen of their obligations under the law.

As a member of the Commission who participated with other members of the Commission in hearing appeals in these cases, I am convinced from what I have learned in hearing and considering these cases that undoubtedly in some of the cases the Commission on some issues would have found complaints not sustained. Findings on those issues in those cases undoubtedly would have been differentiated from findings on other issues in other cases. I repeat, here we avoid dealing with those troublesome problems in cases where records on facts have been made. Indeed, we are here confessing bankruptcy in our efforts to find the facts and make judgments on these problems. Certainly, this is true to this date, insofar as the marketing problems of the oil industry are concerned. Although I am unable to accept as justifiable this bankruptcy at this point in time, I do find some consolation in the promise of the Commission that after a "broad inquiry" in the future the Commission will undertake to make some determination whether competitive problems really exist in the petroleum industry in the marketing of gasoline.

Final Order

In the exercise of the Commission's administrative discretion, and without rendering decisions adjudicating any issues of law or fact involved,

It is ordered, That the initial decisions in the above-captioned proceedings be, and they hereby are, set aside, and that the complaints be, and they hereby are, dismissed, for the following reasons:

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[1] *E.g., S. Klein*, 60 F.T.C. 388, 419 (1962). A case involving a most important commerce question was dismissed without reason for that action. In *General Electric Company*, Docket 8487, 64 F.T.C. 1238 (February 28, 1964), a case involving very significant questions under Section 2(d) of the Robinson-Patman Act, as well as issues of price fixing under Section 5 of the Federal Trade Commission Act, was dismissed on February 28, 1964, "without adjudicating any issue of fact or law contested on this appeal." In *The Papercraft Corporation*, Docket 8489, 63 F.T.C. 1965 (December 24, 1963), a charge of fictitious pricing was dismissed, although the issue had been fully tried because "* * * in the particular circumstances of this case, the public interest requires that the initial decision be vacated, and the complaint and complaint counsel's appeal dismissed, without determination of the merits of the charge." Further, the Commission refused to initiate a trade regulation rule proceeding, although requested to do so by representatives of the Gift Wrappings Industry, who contended such practices were rife in the industry. The Commission, in *Papercraft*, therefore, while abandoning the "case by case" basis, at the same time failed to act on an industry-wide basis in response to an industry-wide problem.

(1) In three of these cases, there is no quorum of the Commission at the present time for rendering adjudicative decisions on the merits and issuing any orders to cease and desist based upon findings of violation of law. Adjudication of these cases would require reargument of the appeals. The specific practices challenged in these cases occurred almost a decade ago, in the mid-1950's, and competitive conditions in this dynamic and rapidly changing industry appear to have altered significantly since then.

(2) The Commission has this date announced the initiation of a broad inquiry into the problems of competition in the marketing of gasoline. Orders to cease and desist entered against a few oil companies—orders which would probably not become final, if at all, until completion of lengthy review proceedings in the Federal Courts of Appeals and the Supreme Court—could not provide complete or effective solution to the competitive problems of the gasoline industry. It would appear to be more desirable, from the standpoint of effective administration of the law, that the Commission concentrate its necessarily limited resources on a comprehensive industry-wide approach to the problems of competition in the marketing of gasoline.

Commissioner Dixon not participating and with Commissioner MacIntyre dissenting for the reasons stated by him in the accompanying dissenting opinion.

IN THE MATTER OF

CROWN PUBLISHERS, INC., ET AL.

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8593. Complaint, Sept. 5, 1963—Decision, Dec. 28, 1964

Order requiring a New York City corporation, engaged in publishing, selling, and distributing books and other publications to retailers for resale to the public, to cease preticketing deceptively high prices on their reprinted books, including the reprint edition of "High Iron," by such practices as placing on the jacket thereof a price higher than the prevailing retail price with a printed wavy line through it suggesting a hand drawn ink line, thereby conveying the impression that said books were reduced by retailer.

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 Crown Publishers, Inc., a corporation, also doing business as Bonanza Books, and Nathan