

COMPLAINT IN THE MATTER OF THE ALLEGED VIOLATION OF SECTION 5 OF AN ACT OF CONGRESS APPROVED SEPTEMBER 26, 1914, AND OF THE ALLEGED VIOLATION OF SECTION 3 OF AN ACT OF CONGRESS APPROVED OCTOBER 15, 1914.

Docket 305.—September 27, 1920.

SYLLABUS.

Where an individual competitively engaged in buying and selling petroleum products, and in transporting and marketing such products, and also engaged in leasing pumps, tanks, and other equipment for the storage and handling of petroleum products in competition with manufacturers and sellers of such equipment, to his retail customers, of whom relatively very few required more than a single pump outfit in the conduct of their business;

Leased to such retailers pumps, tanks, and equipment at a nominal rental, not affording him a reasonable profit on his investment upon the condition that they should use the same only for the purpose of storing and handling his products, a practice not followed by many competitors, having for its purpose the furtherance of his petroleum business, and resulting in loss of customers by competitors:

Held, (a) That the use of such leases constituted, under the circumstances set forth, an unfair method of competition in violation of section 5 of the act of September 26, 1914;

(b) That the effect of such leases, under the circumstances set forth, might be to substantially lessen competition and tend to create for him a monopoly in the business of selling petroleum products, and that the use of the same constituted a violation of section 3 of the act of October 15, 1914.

COMPLAINT.

I.

The Federal Trade Commission, having reason to believe, from a preliminary investigation made by it, that Thomas K. Brushart, doing business under the trade name of Motor Fuel & Lubricating Co., hereinafter referred to as the respondent, has been using unfair

methods of competition in interstate commerce in violation of the provisions of section 5 of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and it appearing that a proceeding by it in respect thereof would be to the interest of the public, issues this complaint, stating its charges in that respect on information and belief as follows:

PARAGRAPH 1. That the respondent, Thomas K. Brushart, is doing business under the trade name of Motor Fuel & Lubricating Co., with his principal office and place of business located at the city of Baltimore, in the State of Maryland; that for more than four years last past respondent has been engaged in the business of purchasing and selling refined oil and gasoline and the leasing and loaning of oil pumps, storage tanks or containers and their equipments in various States of the United States and the District of Columbia in competition with numerous persons, firms, corporations, and copartnerships similarly engaged.

PAR. 2. That the respondent, in the conduct of his business as aforesaid and as hereinafter more particularly described, purchases refined oil and gasoline, hereinafter referred to as "products," and also purchases oil pumps, storage tanks, or containers, hereinafter referred to as "devices," the said devices being used to contain said products, the said products and devices then being handled and stored in the various States of the United States and transported in interstate commerce; that the aforesaid products are sold and the aforesaid devices are leased or loaned by respondent to various persons, firms, corporations, and copartnerships; that in the conduct of his business of purchasing and selling such products and selling, leasing, or loaning such devices the same are constantly moved from one State to another by respondent, and there is conducted by respondent a constant current of trade in such products and devices between various States of the United States; that there are numerous competitors of respondent who in the conduct of their business in competition with respondent purchase similar products and purchase and manufacture similar devices, the said devices being used to contain said products, the said products and devices then being handled and stored in the various States of the United States and transported in interstate commerce; that the aforesaid products are sold and the aforesaid devices sold, leased, or loaned by such competitors of respondent to various persons, firms, corporations, and copartnerships; that in the conduct of their business as aforesaid, competitors of respondent constantly move such products and devices

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from one State to another, and there is conducted by said competitors a constant current of trade in such products and devices between the various States of the United States; that respondent and many of his competitors have conducted their said businesses in a similar manner to that above described throughout the past four years.

PAR. 3. That respondent in the conduct of his business, as aforesaid, with the effect of stifling and suppressing competition in the sale of the aforesaid products and in the sale, leasing, or loaning of the aforesaid devices and other equipments for storing and handling the same, and with the effect of injuring competitors who sell such products and devices, has within the four years last past sold, leased, or loaned and now sells, leases, or loans the said devices and their equipments for prices or considerations which do not represent reasonable returns on the investments in such devices and their equipments; that many such sales, leases, or loans of the aforesaid devices are made at prices below the cost of producing and vending the same; that many of such contracts for the lease or loan of such devices and their equipments provide or are entered into with the understanding that the lessee or borrower shall not place in such devices, or use in connection with such devices and their equipments, any refined oil or gasoline of a competitor; that only a small proportion of the dealers in gasoline and refined oil under such agreements and understandings deal also in similar products of respondent's competitors and that only a small proportion of such dealers require or use more than a single pump outfit in the conduct of their said business; that there are numerous competitors in the sale of such products who are unable to enter into such lease agreements or understandings because of the large amount of investment required to carry out such lease agreements as a competitive method of selling refined oil and gasoline; that there are numerous other competitors of respondent engaged in the manufacture and sale of said devices and their equipments who do not deal in refined oil and gasoline, and therefore do not sell or lease said devices and their equipments for a nominal consideration on a condition or understanding that their products only are to be used therein; that the said numerous competitors who were unable to enter into such lease agreements or understandings, as aforesaid, have lost numerous customers in the sale of refined oil and gasoline to respondent because of the business practices of respondent hereinbefore set forth; that the said numerous other competitors of respondent who manufacture and sell said devices and their equipments but do not sell refined oil and gasoline, as aforesaid, have lost numerous customers and prospective customers for the purchase of their devices and

equipments because of the said business practices of respondent, as hereinbefore set forth.

II.

The Federal Trade Commission having reason to believe from a preliminary investigation made by it, that Thomas K. Brushart, doing business under the trade name of Motor Fuel & Lubricating Co., hereinafter referred to as the respondent, has been using unfair methods of competition in interstate commerce in violation of the provisions of section 3 of an act of Congress approved October 15, 1914, entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," and it appearing that a proceeding by it in respect thereof would be to the interest of the public, issues this complaint, stating its charges in that respect on information and belief as follows:

PARAGRAPH 1. That the respondent, Thomas K. Brushart, is doing business under the trade name of Motor Fuel & Lubricating Co., with his principal office and place of business located at the city of Baltimore, in the State of Maryland; that for more than four years last past respondent has been engaged in the business of purchasing and selling refined oil and gasoline and the leasing and loaning of oil pumps, storage tanks or containers, and their equipments, in various States of the United States and the District of Columbia in competition with numerous persons, firms, corporations, and copartnerships similarly engaged.

PAR. 2. That the respondent in the conduct of his business as aforesaid, and as hereinafter more particularly described, purchases refined oil and gasoline, hereinafter referred to as "products," and also purchases oil pumps, storage tanks, or containers, hereinafter referred to as "devices," the said devices being used to contain said products, the said products and devices then being handled and stored in the various States of the United States and transported in interstate commerce; that such products are sold and such devices sold, leased, or loaned by respondent to various persons, firms, corporations, and copartnerships; that in the conduct of his business of purchasing and selling such products and selling, leasing, or loaning such devices the same are constantly moved from one State to another by respondent and there is conducted by respondent a constant current of trade in such products and devices between the various States of the United States; that there are numerous competitors of respondent who in the conduct of their businesses in competition with respondent purchase similar products and purchase and manufacture similar devices, the said devices being used to con-

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tain said products, the said products and devices then being handled and stored in the various States of the United States and transported in interstate commerce; that such products are sold and the aforesaid devices sold, leased, or loaned by such competitors in competition with respondent to various persons, firms, corporations, and copartnerships; that in the conduct of such business, as aforesaid, respondent's competitors constantly move such products and devices from one State to another, and there is conducted by said competitors of respondent a constant current of trade in such products and devices between the various States of the United States; that respondent and many of his competitors have conducted their said businesses in a similar manner to that above described throughout the four years last past.

PAR. 3. That the respondent, for four years last past, in the conduct of his business, as aforesaid, has leased and made contracts for the lease and is now leasing and making contracts for the lease of said devices and their equipments to be used within the United States, and has fixed and is now fixing the price charged therefor on the condition, agreement, or understanding that the lessees thereof shall not purchase or deal in the products of a competitor or competitors of respondent, and that the effect of such leases or contracts for lease, and conditions, agreements, or understandings may be and is to substantially lessen competition and tend to create a monopoly in the territories and localities where such contracts are operative.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER.

(Amended.)

A complaint having been issued by the Federal Trade Commission in the above-entitled proceeding, and the respondent therein named having filed its answer herein, and the attorneys for the respective parties in said cause having stipulated to submit, and having submitted to the Commission, subject to its approval, an agreed statement of facts in said cause, which agreed statement was to be taken in lieu of testimony as to those facts stipulated, and it having been agreed that as to other facts the evidence to be taken in a formal hearing was to become the evidence as to such other matters as were made an issue herein; and the Commission having duly appointed a time and place for the taking of testimony, and the respondent having appeared by counsel at the time and place as designated, and the Commission having duly heard evidence on behalf of the Commission and respondent, and the Commission having

given due consideration to the complaint and answer herein and the stipulation as to the facts and the evidence submitted by the Commission and by the respondent, and being fully advised in the premises, reports and finds as follows:

FINDINGS AS TO THE FACTS.

PARAGRAPH 1. That the respondent is an individual trading under the firm name and style of the Motor Fuel & Lubricating Co., with its office and place of business located in the city of Portsmouth, in the State of Ohio; that during all the time hereinafter mentioned respondent has been and now is engaged in the business of buying gasoline and other oils and lubricants, hereinafter known as "products," and in transporting and marketing said products, and in buying and selling and leasing pumps and tanks and their equipments, hereinafter known as "equipments," in competition with numerous other persons, firms, copartnerships, and corporations similarly engaged.

PAR. 2. That the respondent, in the conduct of its business as aforesaid, buys said equipments in various States of the United States, and sells and leases and delivers the same to various persons, firms, corporations, and copartnerships in various States other than those in which the said equipments are purchased by the respondent, and from which they are delivered to the said users; that in the course of commerce in buying and selling said equipments said equipments are moved to, through, and among various States of the United States, and that there is a constant current of trade in the conduct of its said business in buying and selling said equipments among said various States of the United States.

PAR. 3. That during all of said period respondent, in the course of commerce among the several States and Territories of the United States and the District of Columbia, and in the conduct of its business as aforesaid, has been and now is selling and leasing to retailers of its petroleum products said equipments for use by such retailers in storing and handling respondent's said petroleum products; that respondent in leasing such equipments aforesaid has entered during said period and is now entering into contracts with lessees; that the rental or lease charge provided by such contracts is but a nominal sum of money and that no other consideration for the leasing of such equipments by respondent is provided for in said contract other than that hereinafter mentioned in paragraph 4 hereof; that such equipments are leased at nominal rentals as aforesaid to further respondent's petroleum business; that such rentals do not afford a reasonable profit to respondent on the amount invested in such equipments; that respondent leases such equipments in competition in interstate

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commerce with manufacturers of similar equipments who are engaged in the sale of the same in such commerce and who also do a substantial part of all the business done in such equipments in the territory in which respondent conducts its business; that the practice of leasing such equipments at a nominal rental is an unfair method of competition in interstate commerce as against its competitors engaged in the manufacture of such equipments and in the sale of the same for profit in the territory where respondent leases such equipments and also as against any of its competitors engaged exclusively in the petroleum business.

PAR. 4. That the contracts mentioned in the preceding paragraph also provide that such equipments shall be used by the lessee only for the purpose of holding and storing the respondent's petroleum products; that a small proportion of such lessees handle similar products of respondent's competitors, and that only a small proportion of such lessees as handle similar products of respondent's competitors require or use more than a single pump outfit in the conduct of their said business; that as a result of the leasing of such equipments by respondent in the manner and under the terms aforesaid its competitors have lost numerous customers to respondent; that the effect of the practice of leasing by contract such equipments where such contracts contain the said provision restricting the use of the same to the storage and handling of respondent's products as aforesaid may be to substantially lessen competition and tend to create for the respondent a monopoly in the business of selling petroleum products.

CONCLUSIONS.

That the methods of competition and the business practices set forth in the foregoing findings as to the facts are, under the circumstances set forth therein, unfair methods of competition in interstate commerce in violation of the provisions of section 5 of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and are in violation of section 3 of an act of Congress approved October 15, 1914, entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes."

ORDER TO CEASE AND DESIST.

A complaint having been issued by the Federal Trade Commission in the above-entitled proceeding, and the respondent therein named having filed its answer herein, and the attorneys for the respective parties in said cause having stipulated to submit and having sub-

mitted to the Commission, subject to its approval, an agreed statement of facts in said cause, which statement was to be taken in lieu of testimony as to those facts stipulated, and it having been agreed that as to other facts the evidence to be taken in a formal hearing was to become the evidence as to such other facts as were charged in the complaint herein or made a defense in the answer, and the Commission having duly appointed a time and place for the taking of testimony, and the respondent having appeared by counsel at the time and place so designated, and the Commission having duly heard evidence on behalf of the Commission and respondent, and the Commission having made its report and findings, as elsewhere set forth, and having concluded upon such report and findings that the respondent has been guilty of unfair methods of competition in interstate commerce in violation of section 5 of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and that the respondent has violated section 3 of an act of Congress approved October 15, 1914, entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," which report, findings, and conclusions are hereby referred to and made a part hereof: Now, therefore,

It is ordered, That respondent, Thomas K. Brushart, shall cease and desist from:

1. Directly or indirectly leasing pumps or tanks, or both, and their equipment for storing and handling petroleum products in the furtherance of its petroleum business at a rental which will not yield to it a reasonable profit on the cost of the same after making due allowance for depreciation and other items usually considered when leasing property for the purpose of obtaining a reasonable profit therefrom, and from doing any matter or thing which would have the same unlawful effect as that resulting from the practice herein prohibited and by reason of which this order is made.

2. Entering into contracts or agreements with dealers in its petroleum products or from continuing to operate under any contract or agreement already entered into whereby such dealers agree or have an understanding that as a consideration for the leasing to them of such pumps and tanks and their equipment, the same shall be used only for storing or handling the products of respondent, and from doing anything having the same unlawful effect as that resulting from the practice herein prohibited and by reason of which this order is made.

Provided, however, That as to such pumps and tanks and equipments as are now leased by respondent contrary to the orders com-

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tained in paragraphs 1 and 2 herein, respondent shall have four months from the date hereof to enter into new contracts or agreements with respect to the same which shall not be incompatible with the spirit and intent of this order.

And it is also ordered, Under and by virtue of the authority conferred on the Commission by paragraph B of section 6 of "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, that the said Thomas K. Brushart, respondent, shall, within 20 days after the expiration of the time allowed within which respondent shall fully comply with the order to cease and desist hereinabove set forth, report in writing to the Federal Trade Commission, fully setting forth the nature of the changes made in the conduct of its business with respect to the subject matter involved in the order to cease and desist, and there shall be set forth in such report in complete detail the plan or plans adopted for the lease, loan, gift, or sale of any oil tanks and pumps for use in storing refined oil or gasoline, which plan or plans are in use or are proposed to be put in use, and also attached to such report any contracts used by the respondent in the conduct of such business.

The Commission has also issued similar orders in other cases involving substantially the same facts, as shown by the following:

TABLE.

Date.	Docket No.	Respondent.	Location.	Answer, stipulation, or trial.
1920.				
Sept. 27	85	Standard Oil Co. of Indiana ¹	Chicago, Ill.....	Answer, stipulation, and trial.
27	133	Standard Oil Co. of Indiana ²	do.....	Answer and stipulation.
27	314	C. L. Smith Oil & Gasoline Co.....	St. Louis, Mo..	Answer and trial.
27	317	The White Star Oil Co.....	Eaton, Ohio....	Do.
27	318	The Paragon Refining Oil Co.....	Toledo, Ohio....	Answer, stipulation, and trial.
27	319	Hickok Producing Co.....	do.....	Answer and trial.
27	321	The Columbus Oil Co.....	Columbus, Ohio.	Answer, stipulation, and trial.
27	322	Carbonless Oil Co.....	Kenton, Ohio....	Do.
27	323	The Canfield Oil Co.....	Cleveland, Ohio.	Do.
27	326	The Independent Distributing Co.....	Columbus, Ohio.	Answer and trial.
27	327	The Lilly White Oil Co., Inc.....	Lima, Ohio.....	Answer, stipulation, and trial.
27	330	Iowa Oil Co.....	Dubuque, Iowa.	Answer and trial.
Dec. 18	690	Standard Oil Co. of Ohio ³	Cleveland, Ohio.	Answer and stipulation.

¹ See case reported in II F. T. C. 26.

² See case reported in II F. T. C. 46.

³ Amended findings and order entered as of Sept. 27, 1920 (Docket 132) against the same respondent were rescinded by the Commission in an order dated Dec. 18, and the above findings and order in Docket 690 entered as stipulated, on certain evidence taken, and on all evidence introduced and stipulated in the proceeding in Docket 132, respondent reserving, however, all questions of jurisdiction. The findings and order referred to in Docket 132 were set aside, because the complaint, which charged a violation of section 2 of the Clayton Act, as well as section 5 of the Federal Trade Commission act, was not supported by the testimony.

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