

IN THE MATTER OF
THE GOODYEAR TIRE & RUBBER COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914

Docket 2116. Complaint, Mar. 1, 1935¹—Decision, Mar. 5 1936

DISCRIMINATION IN PRICE—CLAYTON ACT, SEC. 2—SAVING PROVISOS—QUANTITY DISCOUNTS OR PRICES—WHETHER JUSTIFIED—COST AS CRITERION—ANNUAL SALES VOLUME AS BASIS FOR DISCOUNT

In arriving at a price on account of quantity sold, some standard of comparison is necessary and that is the relation between price and quantity, and in arriving at this relation, factors that go to make up price because of quantity are to be taken into account and given reasonable weight in determining whether a price discrimination is legal or illegal, and a difference in price is not on account of quantity within the meaning of the proviso in question, unless it is based on a difference in cost and is reasonably related to and approximately no more than such difference, since otherwise the discrimination would create an unjust preference and unfair competitive conditions. Thus, while quantity sales are cheaper than small sales and, to this extent, economically justified, quantity discount based on the amount of annual sales constitutes price discrimination in violation of the provisions of the section unless it can be shown that it represents and fairly approximates lower costs.

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2—SAVING PROVISOS—QUANTITY DISCOUNTS OR PRICES—WHETHER JUSTIFIED—QUANTITIES INVOLVED—WEIGHT—ECONOMIC UTILITY OF LARGE PURCHASES AS DICTATING ULTIMATE BOUNDS

In weighing the question of quantity under the proviso in question and the effect to be given same, it is clear that said proviso could only have been intended to preserve to the large buyer the inherent economies of large purchases and that quantity discounts are exempted because they involve some economic utility that should be preserved so that a difference in quantity under the proviso does not permit discrimination in price without limit or restraint but constitutes only a factor which must be given reasonable weight in determining whether the discriminatory price is warranted. The quantity proviso, interpreted to mean that a manufacturer could discriminate with respect to quantity to any extent he desired, would render the section meaningless and ineffective.

DISCRIMINATION IN PRICE—CLAYTON ACT, SEC. 2—SAVING PROVISOS—QUANTITY DISCOUNTS OR PRICES—WHETHER JUSTIFIED—COST AS CRITERION—APPLICATION—RULE OF REASON—EQUALITY TO PURCHASERS AS UNDERLYING PRINCIPLE

In weighing a discount as respects the legality thereof under the quantity proviso, the discount is not to be condemned merely because it does not mathematically accord with cost differences, and such differences, where remote and unsubstantial, may be disregarded. The problem is a practical one

¹Amended.

and must depend on the intent and effect of the scheme as a whole, the principle back of the section being one of equality to purchasers, which requires that the difference in price or discount be reasonably related to difference in cost and not a covert means of favoritism, since, if left to the manufacturer, he could easily make the discount so high as practically to be open to the largest dealers only, and thus hand over the entire trade in his line of commerce to a few dealers, or to a single one, or, by making the discount equal to or greater than the usual profit in the trade, eliminate the competition of those who could not secure the same.

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2—SCOPE AND PURPOSE—DISPROPORTIONATELY LARGE DISCOUNTS TO LARGE AND POWERFUL PURCHASERS—MANUFACTURER'S OBLIGATION

The practice of giving large and powerful purchasers a disproportionately large discount is not justified, since such a discrimination, when made merely on account of size, tends toward monopoly and the suppression of competition, and a manufacturer under said act is under a duty to comply with the law and may not make his bargains according to his own interest by discriminating as he pleases, however honest and however justifiable such course might be from the standpoint of commercial principles. The giving of a discrimination to one or more of a number of competitors whose selling prices are competitively limited, means increasing by the amount of the discrimination the profit of the favored competitor, while correspondingly prejudicing everyone not thus favored, and large industrial companies, through price discrimination, can control competitive business conditions among their customers to the extent of enriching some and ruining others. Under said act, a manufacturer has no right to put dealers to any such destructive disadvantage by any unjustified discrimination. While a manufacturer has an interest in making attractive offers to secure as much business as possible, such interest can only be consulted and acted upon in subordination to law.

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2—SAVING PROVISOS—QUANTITY DISCOUNTS OR PRICES—WHETHER SECRET OR OPEN

It is not contemplated by the statute that a discriminatory price made on account of quantity may be a secret price, but the statute contemplates a price open to all of the seller's customers who may desire to purchase a similar quantity at like prices or like terms.

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2—SAVING PROVISOS—WHETHER MADE IN GOOD FAITH TO MEET COMPETITION

The provision in question is available to a concern only if its competitors have already made an equally low and discriminating price to the recipient of the discrimination in question. Thus, if a powerful concern starts a campaign of price cutting in a particular community and to particular customers in violation of the instant act, a competitor does not violate the same by meeting such competition by a corresponding discrimination, since it is such action in good faith for defensive, not offensive, purposes, that is sanctioned. The theory of the law is that, in addition to the cause of action afforded for treble damages against an offensive price discriminator, and in addition to the right to apply to the Commission for cease and desist order, there is an immediate right of self-defense, available, however,

only if the discrimination started with the competitor and if exercised in good faith. Interpreted otherwise the effect of the whole section would be nullified.

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2—"WHERE THE EFFECT OF SUCH DISCRIMINATION MAY BE TO SUBSTANTIALLY LESSEN COMPETITION", ETC.—QUANTITATIVE COMPETITIVE CRITERIA

The words "where the effect may be" are obviously used merely to indicate that it is *tendency* and *probable effect*, rather than the *actual results* that are important, so that the words "substantially lessen competition" are not to be taken in a purely quantitative or arithmetical sense requiring a finding that a difference in price—or any other unfair acts, for that matter—will result in, say, five percent or ten percent less competition than there was before. Such interpretation would make the law entirely unworkable, for competition is not a thing that can be measured with a yardstick, and would, moreover, be inconsistent with the intent of Congress as expressed in the act, the purpose of which is to insure fair and honest competition based on efficiency.

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2—"WHERE THE EFFECT MAY BE TO SUBSTANTIALLY LESSEN COMPETITION OR TEND TO CREATE A MONOPOLY"—SCOPE IN GENERAL

The words "may be" indicate neither bare possibility nor certainty, but probability to be deduced from intent or inherent character of the acts themselves and must be construed to go with the whole section and be taken all together to indicate generically the distinction between fair and unfair competition, the meaning of the qualification as a whole being simply that the discrimination must have the effect of imposing an unlawful restraint on competition as distinguished from normal competitive methods.

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2—SCOPE AND PURPOSE—MONOPOLY AND UNFAIR METHODS OF COMPETITION—WHERE PRICE DISCRIMINATION NOT JUSTIFIED ON BASIS OF COST AND EFFICIENCY

The theory of the law is that monopoly on the whole is an unnatural product which results from unwholesome competitive methods and which will not ordinarily result where methods of competition are fair, and the law is designed to prevent lessening of competition by unfair acts or methods which always tend to monopoly, and, absent which, and given fair methods, competitive conditions will prevail. Price discriminations not justified on the basis of cost and efficiency, according to the hypothesis underlying the section, create unfair competitive conditions, and such discriminations are specifically condemned because they are deemed by the Congress to be unfair and injurious.

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2—SAVING PROVISOS—QUANTITY DISCOUNTS OR PRICES—WHETHER JUSTIFIED—OUTSTANDING TIRE MANUFACTURER'S SECRET PRICE PREFERENCES IN CONSIDERATION OF OUTSTANDING MAIL ORDER-CHAIN STORE CONCERN'S BUSINESS—WHERE MANUFACTURER'S QUANTITY COST SAVINGS FAR EXCEEDED BY CONCESSIONS ACCORDED AND COMPETITIVE EFFECTS DESTRUCTIVE AND FAR-REACHING

Where the largest manufacturer and distributor of pneumatic rubber tires in the United States, controlling and operating through its variously engaged

subsidiaries, cotton and rubber plantations and textile mills, here and abroad, and engaged in the distribution of its said product to and through independent service-station dealers and wholesalers, chain retail stores and mail-order houses, and through approximately 25,000 local retailers, in competition with other manufacturers and wholesalers of tires—

Secretly and substantially discriminated in price over a period of years, pursuant to secret agreements involving large and important bonuses of cash and stock and beneficiary's business, in favor of a concern reputed to be the largest mail order-chain store operator in the United States, through sale of its said products thereto upon the basis of cost plus 6 percent, and, later, 6½ percent, so that the net average sales price discrimination over the entire period, in favor of said concern over said manufacturer's prices to independent tire dealers, for tires of comparable grade and quality, after deductions from such dealer prices for discounts and allowances and transportation, varied from 25 percent to 40 percent on eight sizes, net price discrimination, after due allowance for selling and transportation costs, ranged from 11 percent to 22 percent on eight popular sizes, and total aggregate net discrimination in favor of said mail order-chain store concern, after deductions for discounts, allowances and transportation, amounted to about \$41,000,000 or about 23 percent of the aggregate net sales price to the independent dealers on a volume comparable to that sold to it;

With the result that said mail order-chain store concern, as a result of such discriminatory prices, which were not offered by said manufacturer to meet prices at which any competitor of financial responsibility ever solicited said concern's business, nor to other dealers for products of comparable quality, nor were available from others to said concern's dealer competitors, was enabled to undersell at a profit all retail tire distributors of said manufacturer's product and of products of latter's competitors; said concern's aggressive competition in persistently, systematically and substantially underselling dealers in pricing and pushing by excessive guarantees, free tube offers and trade-in allowances and in various ways for the consumer market the tires thus purchased by it from said manufacturer at prices ranging, with one exception, from 20 percent to 25 percent lower than prices placed upon tires of comparable grade and quality sold by other retailers, was a major factor in, (a) driving out of business a large number of retailers through reducing their volume of sales or curtailing their profit or both, and in (b) curtailing number of independent tire dealer competitors and in substituting therefor such mass distributors as operators of company chain stores and other large volume dealers, and (c) as the direct and inevitable result of such curtailment and substitution in the driving out of business of numerous small tire manufacturers and the continued reduction of the number of independent manufacturers and dealers; its own percentage of the total industry renewal sales was substantially increased, as was its dominant position therein; and said price discriminations substantially lessened competition between said manufacturer and other manufacturers and wholesale distributors of such products on the one hand, and between said mail order-chain store operator concern, and competitive retail tire distributors, on the other, had the tendency and capacity to create a monopoly in said manufacturer in sale and distribution of such products to wholesale and retail tire dealers owned

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or controlled by it throughout the several States, and tended to create in it and said mail order-chain store concern, a monopoly in the retail distribution and sale thereof:

Held, That such price discrimination was not justified on account of differences in grade, quality, or quantity of commodity sold, or by difference in cost of selling or transportation, or by good faith to meet competition, and had the effect of substantially lessening competition and tending to create a monopoly, and that said price discriminations were therefore in violation of the provisions of Section 2 of the Act of Congress approved October 15, 1914.

Before *Mr. John W. Bennett*, trial examiner.

Mr. Everett F. Haycraft and *Mr. PGad B. Morehouse* for the Commission.

Covington, Burling, Rublee, Acheson & Shorb, of Washington, D. C., *Tolles, Hogsett & Ginn* and *Mr. Grover Higgins* and *Mr. Chapman Rose*, of Cleveland, Ohio, and *Mr. Harold G. Capron*, *Mr. Frederick Wahl* and *Mr. R. E. Sheldon*, of Akron, Ohio, for respondent.

AMENDED COMPLAINT

This matter having come on to be heard upon the motion of counsel for the Commission that the complaint herein issued on September 13, 1933, be amended as to paragraph 5 thereof to conform to the evidence adduced in the record during the taking of testimony herein, and respondent having answered that without waiving its right to contend on the final argument on the issues of the case that the allegations of the complaint as amended are not supported by the evidence and without waiving any questions of law in respect of such amended allegations, the Federal Trade Commission, being fully advised in the premises, now issues this its amended complaint and charges that respondent, Goodyear Tire & Rubber Co., hereinafter called respondent, has violated and is violating the provisions of Section 2 of an Act of Congress approved October 15, 1914 (the Clayton Act), entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", and states its charges in that respect as follows:

PARAGRAPH 1. Respondent, Goodyear Tire & Rubber Co., is a corporation organized under the laws of the State of Ohio, having its principal office and place of business located in the city of Akron, in the said State. Respondent now is, and for many years last past has been, engaged in the manufacture and sale of rubber tires, inner tubes and other tire accessories and appliances for use on motor trucks, passenger automobiles, airplanes, motorcycles, and bicycles.

Said respondent has tire factories at Akron, Ohio, Gadsden, Ala., and one operated by a subsidiary corporation at Los Angeles, Calif. In addition, said respondent operates either directly or through subsidiary corporations textile mills, coal mines, cotton plantations, and rubber plantations at various points throughout the world. In 1926, said respondent was, and since that time has continued to be, the largest rubber tire manufacturer in the world. During 1931, said respondent sold over one-fourth of the motor vehicle tires made in the United States.

PAR. 2. Said respondent in the course and conduct of its said business sells and distributes its said products through subsidiary corporations, which have branches in the principal cities of the United States, through which said products are distributed to the consuming public. Sales are made direct to consumers through retail stores located in the principal cities of the United States, which said subsidiaries own and operate, and to approximately 25,000 retail tire dealers located in the various towns and cities in the several States of the United States under one-year "service station agreements" wherein the said dealers agree to actively engage in the sale and distribution of Goodyear rubber tires, inner tubes and other tire accessories for use on motor trucks and passenger automobiles to consumers, and are granted the privilege of purchasing said products at prices established from time to time by the said respondent. Said respondent also sells said products to various wholesalers, chain retail stores, and mail-order houses, who resell the same under their own private brands or trade-marks.

Said respondent transports or causes to be transported the said products, when sold, from their said places of manufacture to the purchasers thereof located in the several States of the United States other than the States wherein they are manufactured, and there is and has been at all times herein mentioned a current of trade and commerce in said rubber tires, inner tubes, and other tire accessories for use on motor trucks and passenger automobiles, between the States wherein respondent's factories are located, and the other various States of the United States.

Said respondent sells and distributes its said products in competition with other manufacturers and wholesale distributors of rubber tires and inner tubes and other tire accessories for use on motor trucks, passenger automobiles, airplanes, motorcycles, and bicycles.

PAR. 3. Sears, Roebuck & Co. is a New York corporation with its principal office and place of business located in the city of Chicago, State of Illinois, and is engaged in selling, among other articles of commerce, rubber tires, inner tubes, and other tire accessories and

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appliances for use on motor trucks and passenger automobiles, direct to consumers in the United States by means of mail orders and catalogs, and also through approximately 300 retail stores owned or controlled by it.

On May 1, 1926, said respondent entered into a special contract in writing with Sears, Roebuck & Co. whereby the said company agreed to buy and respondent agreed to sell a minimum quantity of rubber tires and inner tubes for use on motor trucks and passenger automobiles, over a fixed period of time in return for a special price. Said products thus purchased were then and now are sold by said Sears, Roebuck & Co. to consumers under its own brand names or trade-marks. Said contract was renewed on May 17, 1928, and again on October 5, 1931, with a few minor changes in allowance for adjustments on tires returned, to remain in effect until October 5, 1941, after which date said contract will continue in effect unless a written notice of cancellation is given by either party thereto one year in advance.

PAR. 4. Said respondent in the course and conduct of interstate commerce, as set forth in paragraphs 1, 2, and 3 hereof, has, since May 1, 1926, discriminated in price, and is now discriminating in price, between the different purchasers of its said products, by giving and allowing said Sears, Roebuck & Co. a lower price than given or allowed other purchasers competitively engaged in said line of commerce, and also by giving and allowing said Sears, Roebuck & Co. certain secret rebates or discounts from said price in the form of cash and valuable stock bonuses. Said discrimination in price has not been made, and is not now made, on account of differences in the grade, quality, or quantity of the commodity sold, nor has said discrimination made only due allowance and it does not now make only due allowance for difference in the cost of selling or transportation; nor has said discrimination in price in the same or different communities been made, and it is not now made in good faith to meet competition. The said discrimination in price in favor of Sears, Roebuck & Co. was concealed by said respondent from the said other purchasers of said products from respondent.

PAR. 5. Said discrimination in price made by said respondent, as set forth in paragraph 4 herein, has had, and now has, the effect of substantially lessening competition in the sale and distribution of rubber tires and inner tubes for use on motor trucks and passenger automobiles, between the said respondent and other manufacturers and wholesale distributors of said products, and between the said Sears, Roebuck & Co., and other retail tire dealers, engaged in the sale and distribution of rubber tires and inner tubes in competi-

tion with said Sears, Roebuck & Co., including retail tire dealers engaged in the sale and distribution of Goodyear branded products; and said discrimination also tended and now tends, to create a monopoly in said respondent in a line of commerce, namely, the sale and distribution of rubber tires and inner tubes for use on motor truck and passenger automobiles, to wholesale and retail tire dealers, including those dealers now owned or controlled by the said respondent, located throughout the several States of the United States; and said discrimination also tended, and now tends to create a monopoly in said respondent and the said Sears, Roebuck & Co., and each of them, in a line of commerce, namely, the retail distribution and sale to the public of rubber tires and inner tubes for use on motor trucks and passenger automobiles, throughout the several States of the United States.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions 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" (38 Stat. 730), the Federal Trade Commission, on September 13, 1933, issued and served its complaint in this proceeding upon the respondent, The Goodyear Tire & Rubber Co., a corporation, hereinafter referred to as Goodyear or respondent, charging it with discriminating in price between different purchasers of tires in violation of Section 2 of said Act.

After the issuance of said complaint and the filing of respondent's answer thereto, testimony and evidence in support of the allegations of said complaint were introduced by Everett F. Haycraft and PGad B. Morehouse, attorneys for the Commission, before John W. Bennett, an examiner of the Commission, theretofore duly designated by it; and in defense of the allegations of the said complaint by Covington, Burling, Rublee, Acheson & Shorb, and Tolles, Hogsett & Ginn, attorneys for the respondent; thereafter this matter came on to be heard upon the motion of attorneys for the Commission that the aforesaid complaint be amended in certain particulars to conform to the evidence adduced in the record during the taking of testimony therein, and respondent having consented to said amendment (without waiving its right to contend that the allegations as amended were not supported by the evidence taken), the Federal Trade Commission, on March 1, 1935, issued and served upon respondent its amended complaint herein; respondent filed its answer thereto, and further proceedings were had before the aforesaid

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examiner, and testimony and documentary evidence were offered and received, both in support of and in opposition to the allegations of the amended complaint; and all of the aforesaid testimony and evidence was duly recorded and filed in the office of the Commission. Thereafter the proceeding regularly came on for final hearing before the Commission on the said complaint and amended complaint, the answers thereto, testimony and evidence, briefs in support of the complaint and in defense thereto, and the oral arguments of counsel aforesaid; and the Commission having duly considered the same, and being fully advised in the premises, makes this its findings as to the facts, and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

SECTION 1.—*Description of Respondent.*

Respondent, the Goodyear Tire & Rubber Co., is a corporation organized under the laws of the State of Ohio on August 23, 1898, with an authorized capital stock of \$100,000. From time to time thereafter said corporation increased its authorized capital stock, until on November 17, 1919, said capital stock was increased to \$200,000,000, \$100,000,000 common and \$100,000,000 7% cumulative preferred stock.

Respondent was reorganized as of May 11, 1921, at which time shares of stock issued were limited to 2,910,000 in number, and were divided into four classes, as follows: (1) 400,000 shares prior preferred stock, par value \$100 per share, with 8% annual cumulative dividends; (2) 10,000 shares of management stock valued at \$1.00 per share, with a contingent preference as to a 6% annual dividend and preference in sharing assets on liquidation; (3) 1,000,000 shares of preferred stock, par value \$100 per share, made junior to prior preference preferred stock (described in (1)) and to management stock as to dividend; (4) 1,500,000 shares of no par value common stock, which may be disposed of at not less than \$1.00 per share, said stock being junior in voting rights to prior preference preferred stock and to management stock, and junior to all other capital stock as to dividends.

Respondent, on May 2, 1930, filed amended articles of incorporation authorizing a capital stock of 6,981,620 shares classified into first preferred, preferred and common stock, of which 996,408 shares are of a par value of \$100 per share, and 5,985,212 shares are without par value. Said first preferred stock, under the amended articles of incorporation, numbered 985,212 shares, no par value, said stock being entitled to annual dividends of \$7.00 per year, before any

dividends could be paid on the said preferred stock or common stock. A sinking fund of 10% of the consolidated net earnings of said corporation, under the terms of the said amended articles of incorporation, is set aside from year to year for the redemption of the said first preferred stock, which sinking fund, however, is junior to first mortgage collateral trust bonds, to 5% corporation first mortgage and collateral trust bonds, and to some other securities and to income taxes.

SEC. 2.—*Respondent's Business.*

Respondent is engaged principally in the manufacture and sale of pneumatic rubber automobile, bus and truck tires, including casings and inner tubes, solid cushion truck tires, motorcycle tires and tubes, airplane tires, and carriage tires, although it also manufactures and sells other miscellaneous rubber products.

Respondent in 1926 operated tire manufacturing plants in the United States at Akron, Ohio, and through a subsidiary corporation, at Los Angeles, Calif. In 1929 respondent established a tire manufacturing plant at Gadsden, Ala. It also owns a tire factory, through a subsidiary, the Marathon Tire Company, at Cuyahoga Falls, Ohio. In 1933 said respondent also maintained and operated tire manufacturing plants in Canada, Australia, Argentina, and England.

It also owns and operates, through subsidiary corporations, cotton plantations in Arizona; rubber plantations in Sumatra and East Indies; textile mills at Decatur, Ala.; New Bedford, Mass.; St. Hyacinthe, Quebec, Canada; Cedartown, Cartersville, and Rockmart, Ga.; and Los Angeles, Calif.

Prior to 1924 the pneumatic rubber tires manufactured by respondent were classified under two designations—high-pressure cords and high-pressure fabrics. Fabric tires were predominant up to and including 1922 but during the following year high-pressure cords exceeded in volume of sales and held this lead until 1926. Volume of high-pressure fabric tires decreased very rapidly after 1923 and became comparatively negligible in 1928. In the meantime the new balloon tire had been developed. By 1926 it was the dominant tire in volume and rapidly increased its advantage from that time on. Respondent, in all, has made more than 500 different sizes of pneumatic rubber tires. Of this variety approximately ten sizes fit the most popular automobiles and comprise the bulk of tires manufactured and sold by it.

The casing of the pneumatic rubber tire is a complicated structure. It has tread, breaker, cushion, plys, flippers, chafers, beads, gum toe, heel, side wall, and ribs, and the principal ingredients are

rubber and cotton. The inner tubes used inside the casing are entirely of rubber compound construction. The quality of the casing depends upon the quality of the rubber composition which goes into the tread; the strength and resiliency of the cord fabric; workmanship; engineering and other factors. Generically the term "tire" includes both the outer casing and inner tube as a unit ready to be put on the wheel. However, in many instances in actual trade practice, the word "tire" is to indicate a "casing", and the phrase "tire and tube" is used to designate the entire unit. Therefore, herein where the word "tire" is used in conjunction with the word "tube" it indicates the outer casing, and where it is used alone the entire unit is indicated.

In 1926 respondent's crude rubber requirements represented nearly one-seventh of the world's total production and exceeded by nearly fifty percent that of any other manufacturer.

Prior to 1926 the principal competing tire manufacturers were the respondent, Goodyear Tire & Rubber Co., the Firestone Tire & Rubber Co., and the B. F. Goodrich Co., all at Akron, Ohio, and the United States Rubber Co. in New York City. These companies, known in the industry as the "Big 4", represented at that time about forty percent of the total production of tires for renewal purposes in the United States.

Other smaller but well known manufacturer competitors of the respondent as of that same time were the Fisk Tire & Rubber Co., Chicopee Falls, Mass.; Kelly-Springfield Tire & Rubber Co., Cumberland, Md.; General Tire & Rubber Co., Akron, Ohio.; Seiberling Tire & Rubber Co., Akron, Ohio.; Dayton Tire & Rubber Co., Dayton, Ohio.; Mohawk Tire & Rubber Co., Akron, Ohio.; and Norwalk Tire & Rubber Co., Norwalk, Conn. Altogether, respondent then, in the manufacture and sale of tires for resale to the consuming public in the United States, was in competition with more than 100 other manufacturers.

SEC. 3.—*Respondent's Subsidiaries.*

Respondent owns or controls all or a majority of the capital stock of the following subsidiary corporations engaged in some phase of the tire business:

- (1) Goodyear Tire & Rubber Co. of Alabama is a wholly owned subsidiary, organized under the laws of Alabama on December 15, 1928, with principal office and place of business located in the city of Gadsden, Ala. The said corporation owns and operates a tire factory at Gadsden, Ala., and its business is directly controlled

and supervised by the officials and Board of Directors of the respondent corporation.

(2) Goodyear Tire & Rubber Co. of California is a corporation organized under the laws of the State of California on July 10, 1919, with an authorized capital of \$20,000,000 divided into 200,000 shares with a par value of \$100 each, of which 100,000 shares amounting to \$10,000,000 shall be 7% preferred and cumulative stock and \$10,000,000 common stock. Said corporation maintains its principal office and place of business at Los Angeles, Calif., and is operated as a manufacturing subsidiary of respondent for tires sold on the Pacific Coast.

(3) Goodyear Tire & Rubber Co., Inc., is a corporation organized under the laws of the State of Delaware on December 5, 1921, with its principal office and place of business located at Akron, Ohio, and is operated by said respondent as a sales subsidiary, handling all tires manufactured by respondent and its subsidiaries sold east of the Rocky Mountains.

(4) Goodyear Tire & Rubber Co. of California, Inc., is a corporation organized under the laws of the State of Delaware on October 5, 1923, with its principal office and place of business located in Los Angeles, Calif., with a capital stock of \$50,000 divided into 500 shares of \$100 each. It operates as a sales corporation of said subsidiary, Goodyear Tire & Rubber Co. of California, and sells the products manufactured by said Goodyear Tire & Rubber Co. of California in the United States west of the Rocky Mountains.

(5) Goodyear Service, Inc. of Ohio, is a corporation organized under the laws of the State of Ohio on July 16, 1931, and is engaged in the conduct of garages and the buying and selling of tires at retail.

(6) Goodyear Service, Inc., of Alabama, is a corporation organized under the laws of the State of Alabama on March 14, 1932, and is also engaged in the buying and selling of tires, tubes, lubricants, gasoline, and other merchandise at retail.

(7) Goodyear Service, Inc. of California.

SEC. 4.—*Respondent's Financial Condition.*

At the close of the year 1926 respondent had issued and outstanding \$80,089,600 in cumulative preferred stock, and 830,734½ shares no par value common stock with a stated value of \$1,000,000. Its funded debt was \$53,977,300 and the funded debt of its subsidiaries was \$9,941,642.63. Its current debts were \$10,537,088.37. It had special raw material reserves amounting to \$2,750,000 and a surplus of \$30,705,014.07 after dividends of \$8,743,444 had been paid. It had

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total assets of \$208,254,088.26 which included property, plants and equipment valued at \$83,128,708.21 after depreciation had been deducted; cash items of \$20,584,362.84; accounts and notes receivable, less reserve, of \$15,615,823.49 and inventories, at market or at cost, which ever is lower, of \$67,915,299.69. Its net sales (returns, discounts, freight allowances and inter-company sales deducted) amounted to \$230,161,356.57.

During 1927, respondent's sales amounted to approximately \$222,000,000 and its total profits for the year amounted to approximately \$18,000,000 and after necessary deductions were made the amount of profits carried to the surplus account amounted to approximately \$13,000,000. The surplus account on December 31, 1927 showed a balance of approximately \$25,500,000, after dividends had been paid. The total sales of tires, respondent's principal product, showed an increase of 15% over 1926.

During 1928, respondent's sales amounted to approximately \$250,700,000 and its total profits for the year were approximately \$15,150,000 and after necessary deductions were made the balance of approximately \$13,300,000 was carried to the surplus account, which on December 31, 1928 amounted to approximately \$19,300,000 after dividends had been paid.

During the year 1928 the common stock of the respondent was increased by the issuance of 207,602 shares at \$50 per share. The proceeds of the sale of said stock was used for the retirement of the company's three year gold notes and to reimburse the treasury in part for the increase of the manufacturing capacity. During this same year, the board of directors authorized the expansion of respondent's manufacturing facilities by the establishment of a manufacturing plant at Gadsden, Ala.

The total unit sales of tires, respondent's principal product, increased more than 32% in 1928 over 1927.

During 1929 respondent's sales amounted to approximately \$256,000,000, the largest in the history of the company, its total profits for the year amounted to approximately \$21,300,000 and after deductions were made, the balance carried to the surplus account amounted to approximately \$18,600,000, also the largest in the history of the company. The surplus account on December 31, 1929, was approximately \$26,600,000.

During 1929, unit sales of tires, respondent's principal product, increased 14.6% over 1928. Expenditures on additions to property during the year were \$29,421,570, principally in connection with increased production capacity in tire factories.

During 1930, respondent's net sales amounted to approximately \$204,000,000 and the profits were approximately \$11,300,000. After necessary deductions were made the balance carried to surplus account amounted to approximately \$10,000,000. The surplus account in December 31, 1930, amounted to approximately \$23,800,000.

During 1931, respondent's net sales amounted to approximately \$150,500,000 and its profits were approximately \$6,700,000. After necessary deductions were made the balance carried to the surplus account amounted to approximately \$1,300,000. The surplus account on December 31, 1931, after dividends had been paid amounted to approximately \$16,000,000.

During 1932, respondent's net sales amounted to approximately \$109,000,000 and its total profits, before interest was charged off, amounted to approximately \$3,000,000. A net loss of approximately \$850,000 was carried to the surplus account. On December 31, 1932, after dividends were paid, the surplus account amounted to approximately \$10,000,000.

During 1933, respondent's net sales amounted to approximately \$109,600,000 and its total profits, before interest and other charges were charged off, amounted to approximately \$7,800,000. The amount carried to earned surplus amounted to about \$6,000,000 after certain adjustments were made. The surplus account in December 31, 1933, amounted to approximately \$14,400,000, after dividends were paid on preferred stock.

SEC. 5.—Respondent's tire capacity, production, and shipments.

Respondent began to manufacture and sell automobile tires about 1900. Beginning in 1926, when the transaction giving rise to these proceedings originated, the daily capacity of respondent's factories was approximately 54,000 casings and 62,000 tubes. During that year it operated its factories to about 85% of their capacity. The capacity of the respondent's factories increased in 1927 to approximately 59,600 casings and 66,000 tubes and it operated to approximately 85% of the capacity of its factories. In 1928, respondent further increased the capacity of its plants to approximately 63,000 casings and approximately 68,000 tubes and during that year it operated to practically the full capacity of all its factories. In 1929, respondent further increased the capacity of its existing plants and added a new factory at Gadsden, Ala., so that its total capacity during that year was approximately 90,000 casings and 82,000 tubes and it operated at approximately 85% of its capacity in its factories except at Gadsden, which was only making casings and which operated at 70% of its capacity. In 1930 respondent's capacity re-

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mained about the same although a slight decline is indicated in its Akron casing plants and an increase in its tube plants, its total casing capacity during that year being approximately 88,000 and its tube capacity being approximately 88,500. During that year, it operated at about 88% of its capacity in all its plants except Gadsden where it operated 73% of the plant's capacity.

In 1931, the year the last or current contract was made with Sears, Roebuck & Co., the transaction involved in this proceeding, respondent's total casing capacity was about 84,000 and its tube capacity remained about 88,500. During that year, respondent operated about 65% of its capacity in Akron and 52% in its California plant and 90% of its capacity at Gadsden.

In 1932, the casing capacity of respondent's factories was about 90,000, an increase having been made in the plants at Akron and Gadsden, while the tube capacity was also about 90,000, an increase having been made in the tube plants in California. During that year respondent operated at about 48% in Akron, 38% in California and 53% in its Gadsden plant.

In 1933, the casing capacity of respondent's plants was increased to about 95,000, the tube capacity remaining the same, the increase in casing capacity being in the Gadsden plant. During that year, respondent operated at about 51% of its capacity at Akron, 27% in California and 42% in Gadsden.

The total production of pneumatic casings and tubes, respectively, by the respondent in the several factories owned by it directly or through its subsidiaries during the years 1926 to 1933, both inclusive, is set forth as follows:

Goodyear and special brands (excepting Sears, Roebuck & Co.)

	<i>Casings</i>	<i>Tubes</i>
1926.....	11, 409, 259	12, 124, 169
1927.....	12, 339, 565	12, 115, 226
1928.....	15, 002, 582	14, 443, 523
1929.....	15, 610, 297	15, 421, 429
1930.....	12, 337, 582	12, 441, 249
1931.....	11, 392, 462	10, 539, 558
1932.....	8, 616, 931	7, 867, 512
1933.....	9, 609, 019	8, 923, 025

The following statement sets forth the sales and shipments of tires and tubes by respondent to its renewal customers including independent dealers and special brand customers except Sears, Roebuck & Co.:

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	<i>Casings</i>	<i>Tubes</i>	<i>Dollars</i>
1926.....	5, 699, 455	6, 461, 403	90, 941, 970. 26
1927.....	6, 890, 261	7, 599, 806	94, 458, 224. 22
1928.....	8, 280, 549	8, 397, 940	102, 338, 158. 95
1929.....	8, 802, 041	9, 064, 551	102, 250, 269. 93
1930.....	8, 170, 986	8, 667, 149	90, 238, 769. 61
1931.....	7, 685, 151	7, 228, 745	71, 159, 158. 12
1932.....	6, 533, 407	6, 048, 241	53, 112, 901. 59
1933.....	5, 806, 013	4, 986, 657	47, 293, 886. 12

The difference between the volume of production and the volume of sales and shipments as indicated in the foregoing tables is accounted for by sales to automobile manufacturers and dealers for original equipment on new cars sold to the public, said tires not being for resale or renewal purposes are not taken into consideration in this case.

SEC. 6.—Respondent's sales policy with its dealers.

Respondent maintains a sales department under the supervision of a vice president who also has the title of sales manager. This vice president has an assistant sales manager and several managers or superintendents of the different products being sold. Respondent maintains, through its sales subsidiary, Goodyear Tire & Rubber Company, Inc., a number of distributing branches in charge of managers and assistant managers, which branches employ a large force of salesmen who call upon the retail tire dealers in their respective territories. In 1926, there were 114 such branches, which employed in 1927, 448 general line salesmen.

Prior to 1914 respondent sold its rubber tires and tubes through dealers and direct to consumers. Beginning in 1914 it adopted a policy of making all its renewal sales of tires through dealers only, and this policy has been followed since that time with exceptions which will be hereinafter noted.

In conducting its business respondent entered into contracts with its service station dealers to engage actively in the sale and distribution of Goodyear merchandise and to render Goodyear tire service to the consumer. Service station dealers were required by their contracts with respondent to carry Goodyear automobile casings, tubes and accessories in stock in sufficient quantities to insure prompt service, and not to substitute or attempt to substitute any other merchandise when the consumer requested Goodyear products. Under these contracts the Goodyear service station dealers were allowed to purchase Goodyear automobile casings, tubes and accessories at prices specified in lists designated as Goodyear price lists.

From October 1924 until October 1929 the prices listed in the Goodyear price lists were dealer prices, that is, prices paid by deal-

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ers. In connection with these prices, respondent issued sheets indicating the prices at which the service station dealers and others should sell tires and tubes to consumers in order to realize a margin of 20% or 25% on the selling price. Subsequent to October 1929 the Goodyear price lists contained recommended consumer prices, the dealers being allowed to purchase at fixed trade discounts from these suggested consumer prices. The regular trade discounts allowed varied with the grade or type of tire sold—for instance on Goodyear "All Weather" brand, a standard first line tire, a trade discount of 25% was allowed all service station dealers, and a trade discount of 22½% was allowed on the Goodyear "Pathfinder" brand, a standard second line tire. In addition to the consumer price lists, respondent issued net billing prices to all service station dealers from time to time reflecting the market billing changes and containing respondent's net prices to said dealers.

The president of respondent, in February 1930, in his report to stockholders for the year 1929, said:

The great body of Goodyear dealers, through which Goodyear tires are marketed, constitutes unquestionably, we think, the most efficient medium of distribution and service available to the tire consuming public the world over.

During the years indicated below respondent had the following number of sales contracts with service station dealers who were furnished tires by the various factories of respondent:

1927-----	26,071 contracts.
1928-----	28,161 contracts.
1929-----	27,166 contracts.
1930-----	24,946 contracts.
1931-----	25,621 contracts.
1932-----	24,644 contracts.
1933-----	25,000 contracts (approximately).

The exact total number of service station dealers in the entire United States in 1926 is not known, but the most reliable estimate is 100,000.

When respondent sells tires to its service station dealers as hereinbefore described, it ships the tires by freight, express and truck from the respective factories located at Akron, Ohio, Los Angeles, Calif., and since 1929 at Gadsden, Ala., either direct to the customer or to branch warehouses located in the principal distributing centers of the United States from which said tires are distributed to the respective customers located in the territory contiguous to these branch warehouses, and there has been and now is a continuous course of interstate commerce in tires flowing from the factories of respondent.

ent to respondent's customers located throughout the several States of the United States.

Respondent's competitors, hereinbefore named, in 1926, and prior thereto, followed generally the same system of sale and distribution as followed by the respondent as described herein, recognizing the independent retail tire dealer as the most efficient medium of distribution and service available for the tire consuming public, although respondent and some of its competing manufacturers had at that time made a few sales to wholesalers and jobbers under private brands.

SEC. 7.—Respondent's dealer quantity bonuses.

Respondent, in addition to the regular trade discounts hereinbefore described, also allowed its service station dealers so-called bonuses, which were paid to the dealers after settlement at the end of the year in consideration of the entire volume of purchases of respondent's products. These bonuses were on a sliding scale and were changed from year to year due to changes in competitive conditions. For instance, in 1926 there were seven grades of bonuses sent out by the respondent in its printed circulars to service station dealers. These bonuses were open to all of respondent's dealers and varied from 1 to 7%, depending upon the annual volume of purchases. The minimum bonus was for purchases of \$1,000 to \$2,500 and the maximum for purchases of \$25,000 to \$50,000. It was indicated on the printed circular that a further bonus might be allowed the dealer if his annual purchases were in excess of \$50,000.

During 1927 and 1928, respondent increased its bonus grades to ten, the minimum bonus remaining the same but the maximum bonus being changed to 10% which was allowed on a \$75,000 volume of annual purchases. During 1928, extra bonuses were also allowed for truck and bus tire business.

During 1929, respondent allowed the maximum bonus of 10% on an annual purchase of \$50,000 and over. Respondent made very few changes in the amount of bonuses granted during the succeeding years until 1933 when the maximum bonus of 10% was allowed on annual purchases of \$25,000 or over until September 30, 1933, when a maximum bonus of 15% was allowed on an annual volume of \$15,000 and over for the remainder of that year.

In November 1933, respondent designated certain of its service station dealers as key dealers who were entitled to receive a guaranteed 10% bonus regardless of the quantity of their purchases for certain distributing services rendered. They were also entitled to earn an additional bonus of 5% on a quantity basis. These key

dealers, as a matter of course, were allowed to sell to sub-dealers or any tire dealers within a certain designated area and usually no other Goodyear service station dealer was allowed to sell respondent's products in such territory.

SEC. 8.—*Sears, Roebuck & Co.'s business.*

Sears, Roebuck & Co., in favor of whom respondent discriminated in price in the sale of tires, is a corporation organized under the laws of the State of New York on June 16, 1906, to succeed an Illinois corporation which had been in business since 1895. It is a merchant corporation selling, through mail order, and since 1926, through chain store channels, a complete general line of merchandise, including automobile and truck tires and tubes. Its mail order sales are said to be the largest in the United States. Its principal office and store are located at Chicago, Ill. It has branches in Seattle, Wash.; Dallas, Tex.; Kansas City, Mo.; Philadelphia, Pa.; Los Angeles, Calif.; Memphis, Tenn.; Boston, Mass.; and Atlanta, Ga.

Its total retail sales, through mail order and chain store channels, during the years 1925 to 1933, were as follows:

1925-----	\$253, 342, 000
1926-----	272, 699, 000
1927-----	282, 927, 000
1928-----	346, 974, 000
1929-----	443, 453, 000
1930-----	390, 282, 000
1931-----	347, 209, 000
1932-----	295, 723, 000
1933-----	289, 290, 000

During the year 1925 Sears, Roebuck & Co. began to sell merchandise, including tires, at retail through three of its Chicago retail stores. Beginning in the year 1926, Sears, Roebuck & Co. began to open in other cities retail stores through which it sold a general line of merchandise, including tires, which were designated as "A" stores. Beginning in 1928, Sears, Roebuck & Co. also began to establish a number of retail stores in various cities of the United States known as "B" stores handling only hardware, including tires and accessories; and in 1929 began to establish in various cities of the United States a number of stores handling only tires and automobile accessories, known as "C" stores.

Prior to the year 1928, 18 "A" stores had been established and 4 "B" stores. During 1928, 9 more "A" stores were opened and 104 "B" stores were opened. Sears, Roebuck & Co. increased its retail establishments in 1929 by 23 "A", 79 "B" and 21 "C" stores; in 1930, by 29

"C" stores; so that by 1933 there were in operation 375 retail stores where tires were sold, comprising 61 of the "A" type, 233 of the "B" type, and 81 of the "C" type. The "B" and "C" stores were opened in locations where they would attract the attention of motorists.

Before 1926 Sears, Roebuck & Co. sold tires to the public under the brand or trade name of "Justice". These were of a quality inferior to the brands of tires then on the market, known as "standard" brands, manufactured by the respondent and other leading manufacturers for sale to the consumer by independent retail tire dealers. At the beginning of 1926 Sears, Roebuck & Co. was purchasing most of its tires from Murray Tire & Rubber Company, of Trenton, N. J., under a contract, although it had also been buying some tires from other small manufacturers. In the year 1925 Sears, Roebuck & Co. had sold approximately 700,000 tires and its principal mail order competitor, Montgomery Ward & Co., sold approximately 2,000,000 tires. Sears, Roebuck & Co. officials for some time had been dissatisfied with the financial condition of its principal supplier of tires, as well as the quality of the product, and early in 1926 sought a more satisfactory and dependable source of supply. As far back as 1922 or 1923, respondent had sold Sears, Roebuck & Co. two orders of Ford size tires. Subsequently, respondent was offered one or two other small orders by Sears, Roebuck & Co., but the president of respondent refused to accept such orders for the reason that it appeared that the only time respondent could get any business from Sears, Roebuck & Co. was when there was an emergency, and respondent did not want such business because it always came at a time when respondent was at its peak of production.

SEC. 9.—*Respondent's tire contracts with Sears, Roebuck & Co.*

In January 1926 representatives of Sears, Roebuck & Co.'s tire department called upon the tire sales manager of respondent and stated that they would like to make arrangements to buy a portion (50%) of Sears, Roebuck & Co.'s requirements of tires from respondent. Thereafter negotiations took place between officials of Sears, Roebuck & Co. and respondent which culminated in the execution of the first cost plus contract between a major manufacturer of nationally advertised tires and a mass distributor.

On March 8, 1926, a contract was entered into between the Goodyear Tire & Rubber Co., Inc., a Delaware corporation, the selling subsidiary of respondent, and Sears, Roebuck & Co., in the form of a letter or memorandum addressed to the Goodyear Tire & Rubber Co., Inc., by Sears, Roebuck & Co., signed by Max Adler, vice president, and accepted by the Goodyear Tire & Rubber Co., Inc., signed by

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P. W. Litchfield, vice president (later president), and attested by F. R. Wahl, assistant secretary. This contract reads as follows:

COMMISSION'S EXHIBIT 9

MARCH 8, 1926.

THE GOODYEAR TIRE & RUBBER COMPANY, INC.,

Akron, Ohio.

GENTLEMEN: Confirming our verbal understanding, it is agreed that we are to purchase from you and your California Company for a period of three (3) years, beginning May 1st, 1926, our entire requirements of casings and tubes, with the exception of such casings and tubes as we are committed for under existing contracts, which will be terminated at the earliest possible date and not later than January 1st, 1927.

It is our understanding that you will provide us with our entire requirements of casings and tubes during the life of this agreement at cost of manufacture, which shall include all costs of shipping and handling and a profit of Six (6%) Percent net, but no selling or advertising expense.

We are to supply you with estimates of our requirements from time to time and at proper periods to enable you to furnish the required casings and tubes, same to be of such types, qualities and sizes as set forth in the specifications hereto attached and such other types, qualities and sizes as may be agreed upon in the future.

You are to provide us a schedule setting forth the present prices of all the casings and tubes that you are to supply at the outset, and it is understood that the prices of the respective sizes and types of casings and tubes shall be your cost of the product loaded on cars plus a profit sufficient to assure you Six (6%) Percent net of the price.

You shall on January 1st, April 1st, July 1st, and October 1st in each calendar year calculate all prices to as nearly as possible to approximate the cost including Six (6%) Percent profit and the price then set shall be the maximum price we shall pay for all casings and tubes delivered to us during the ensuing three (3) months.

Within thirty (30) days after the end of each calendar year and also as soon as practical after the conclusion of this contract, there shall be a recalculation and re-determination of the price upon the then actually determined factors and bases, and an adjustment by way of payment either from us to you or from you to us as such re-determination shows that we may have under or over paid.

Within thirty (30) days after the submission to us of such re-determined prices if for any reason we question the correctness thereof, then such re-determined prices shall be submitted to Messrs. Price, Waterhouse & Company of New York City, certified public accountants, who shall determine the prices which shall prevail for the purpose of such adjustment.

In determining the cost of casings and tubes, it is understood that all elements that enter into the cost shall be the same as prevail in your own product, providing that the prices shall not include any rubber on hand and in your factory, purchased or contracted for by you prior to March 15th, 1926.

At the close of your books each year, you are to determine the cost of all products supplied us and in no case shall the maximum amount that we pay

you exceed the maximum price set up for each period and return to you a greater net profit than Six (6%) percent.

Payment for all shipments of casings and tubes and any other commodities that we may in the future purchase from you shall be made on the 15th day of the calendar month following date of invoice.

This agreement carries with it an initial order on our part of a minimum of 1800 casings per day and 1800 tubes per day, which you agree to provide in accordance with the terms of our understanding, and such additional quantities as may be ordered in writing by us from time to time. (Sundays and legal holidays excluded.) It being understood that you are to be allowed at least thirty (30) days' time in which to increase the daily requirements by One Thousand (1000) casings and One Thousand (1000) tubes, and thereafter thirty (30) day period for each additional Six Hundred (600) casings and Six Hundred (600) tubes per day. Provided further that we shall maintain with you a reserve mold equipment in sizes and types which will enable you to produce our requirements of casings and tubes to the extent increased.

We are likewise to have the right to reduce our requirements in the same ratio and in the same manner.

There shall be no more than one such increase or decrease in any thirty (30) day period and any decrease shall not go below the minimum of Eighteen hundred (1800) casings and Eighteen Hundred (1800) tubes per day.

You are at all times to maintain a minimum stock on hand for our requirements equal to at least one (1) month's production at the rate per day then required by us, to the extent that the then existing mold capacity permits.

You are to make delivery of said casings and tubes in accordance with our shipping instructions daily or weekly f. o. b. point of manufacture; the casings to be wrapped and tubes to be boxed and placed in packing cases in accordance with your general practice in making shipments.

It being understood also at such times as we may ask you to arrange for local shipments direct to our customers, that you will be prepared to handle such part of our business in that manner, providing however that we are to defray all expenses incurred by you in connection therewith.

It is understood that you shall be relieved of performance under this agreement in event of fire, flood or other acts of God, war, riot, embargo, strikes or any unavoidable casualty beyond your control.

It is also understood that we will hold you harmless from damages or loss which may arise out of the use of any name, brand, design, trademark or other mark furnished by us and used in connection with the manufacture and sale of casings and tubes.

You are at no time to manufacture for or sell to any other person or company any casings or tubes having the same name or tread design as those you manufacture for us.

It is understood that our duly authorized representative shall at any and all reasonable times be given access to the factory or factories where such casings and tubes are being produced for us, for the purpose of inspecting the character of raw materials purchased and used in the manufacture thereof.

It is agreed by you that all casings and tubes manufactured and sold to us under this agreement shall be free from defects in workmanship and material. Any defective casing or tube furnished us or any casing or tube not manufactured in accordance with specifications in effect by virtue hereof at the time of its manufacture, may within nine (9) months from date of shipment thereof

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be returned to you, and if such casing or tube has not been used on any motor vehicle and is undamaged, you are to credit us with a sum equal to the amount for which we were charged for same, plus an amount equal to the transportation charges and the delivery thereof to us and its return to you.

In all cases where we shall make an adjustment on, or shall replace any casing or tube supplied by you in accordance with our agreement after the same has been put into use on a motor vehicle, we may return such casing or tube to you and shall mark the same so as to show the defect claimed and the basis on which such adjustment was made. If such adjustment was made by us on a basis of defective workmanship or material, you are to make an adjustment with us with respect to such defective casing or tube on the same basis as we made to our customer.

It is understood that an amount not to exceed One and One-half (1½%) percent shall be considered a part of the cost of production to be applied on all such adjustments, but in no event shall any profit be computed on this item.

It is further understood that you are not to be held liable for any adjustment made by us for any reason other than defects in workmanship or material.

It is distinctly understood and agreed that all casings and tubes which may be classified as "seconds", hence not of the quality contemplated to be purchased by us, may be disposed of by you, provided that before selling or disposing of same you shall buff off or otherwise obliterate any name, brand, design, trademark other than the tread placed upon the casing.

We agree not to make any reference either written or printed to your Company or to any of your affiliated companies in connection with our sale of casings and tubes.

Any failure on our part to make payment in accordance with the agreement herein set forth, entitles you to adopt whatever measures you may see fit on future shipments.

This agreement shall be effective from May 1st, 1926, to May 1st, 1929; it being provided that on or about May 1st, 1928, a further understanding shall be arrived at as to the continuance of the contract beyond May 1st, 1929; and that in event of the contract being terminated May 1st, 1929, we shall not be required to purchase from you, nor will you be obliged to supply more than Fifty (50%) percent of our normal requirements for the last six months' period of this agreement or approximately two-thirds (⅔) of our requirements for the third quarter and one-third (⅓) of our requirements for the last quarter of the period.

Upon the termination of this agreement, it is understood that we shall purchase from you all casings and tubes manufactured in accordance herewith at the prices then fixed under the terms of this agreement.

It is understood that this agreement cannot be assigned by either of us without the written consent of the other.

SEARS, ROEBUCK AND CO.,
By MAX ADLER, *Vice President.*

Accepted:

THE GOODYEAR TIRE & RUBBER COMPANY, INC.,

By P. W. LITCHFIELD, *Vice President.*

Attest:

F. R. WAHL, *Asst. Secy.*

Pursuant to the provisions of this contract, respondent began to manufacture and sell tires and tubes to Sears, Roebuck & Co. on or

about May 1, 1926. These tires and tubes were manufactured by respondent from its own materials and by its own workmen in its own factories, from its own formulae of rubber compound and fabric specifications prepared by its own engineers on estimates made from year to year, quarter to quarter and month to month by Sears, Roebuck & Co. as to its requirements, Sears Roebuck & Co. specifying the sizes and types of tires, including the tread design, and also in a general way, the type and quality of materials to be used in the manufacture of the tires so as to obtain a tire of uniform and high quality. Respondent wrapped and prepared the tires for shipment, and on Sears, Roebuck & Co.'s order from time to time shipped the tires to the various warehouses and retail stores of Sears, Roebuck & Co. located throughout the several States of the United States. Respondent at all times kept in its factory warehouses an adequate inventory of Sears, Roebuck & Co.'s brands of tires to supply Sears, Roebuck & Co.'s requirements for 30 days at the current rate of demand. One exception to this practice was in June 1932, when an agreement was made between respondent and Sears, Roebuck & Co., hereinafter set forth in more detail (p. 273), and which was brought about on account of the excise tax being placed on the tires. Sears, Roebuck & Co. bought a large number in advance of the time when the tax went into effect to avoid the payment of the tax.

Sears, Roebuck & Co. ordinarily paid respondent for the tires purchased by it on the 10th of the month, in the month following the shipment and billing of the tires to Sears, Roebuck & Co. The tires and tubes were billed to Sears, Roebuck & Co. at estimated prices usually approximately 5-10% higher than estimated costs, and final settlement making all adjustment for the year's business was made thirty days after the end of each year (45 days in later contracts). In this settlement the matter of adjustments upon defective goods where the defects had not developed, or had not been developed at the time of the final settlement, were not included. In such settlement Goodyear always rebated to Sears, Roebuck & Co. the difference between the billing price and cost plus 6% profit on the price, pursuant to the terms of the contract.

SEC. 10.—*Respondent's second tire contract with Sears, Roebuck & Co.*

The first or original contract hereinbefore described dated March 8, 1926, was superseded by a second contract dated May 17, 1928, between respondent herein and Sears, Roebuck & Co., signed by P. W. Litchfield, as president of respondent, attested by W. D. Shilts, and also by R. E. Wood, president, and John Higgins, secretary of

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Sears, Roebuck & Co. This said second contract was authorized by the directors of respondent on May 21, 1928, but was not signed by General Wood until on or about June 20, 1928. General Wood declined to sign it until he had been given definite assurance by Mr. Litchfield as to the erection of a new plant by respondent in the southeastern part of the United States to take care of Sears, Roebuck & Co.'s requirements in that territory, and permission to secure a supply of 200,000 tires a year or more from an outside source in the Middle West.

The aforesaid second tire contract between respondent and Sears, Roebuck & Co. reads as follows:

COMMISSION'S EXHIBIT 10

THIS AGREEMENT, made and entered into this 17th day of May, A. D. 1928, by and between the GOODYEAR TIRE & RUBBER COMPANY, a corporation organized and existing under and by virtue of the laws of the State of Ohio, hereinafter for convenience called "GOODYEAR," party of the first part, and SEARS, ROEBUCK AND CO., a corporation organized and existing under and by virtue of the laws of the State of New York, hereinafter for convenience called "BUYER," party of the second part,

WITNESSETH:

QUANTITY

FIRST: Goodyear hereby agrees to manufacture and sell to the Buyer, and the Buyer hereby agrees to buy from Goodyear, for and during the term of this agreement, and on the terms and conditions hereinafter set forth, the Buyer's requirements of pneumatic automobile, truck and motorcycle tires and tubes hereafter collectively referred to as "Product," up to the amount that Goodyear is hereinafter obligated to sell to the Buyer.

Goodyear shall in each calendar year of this contract, be obligated to sell to the Buyer such part of Buyer's requirements of the "product" as is equivalent to 25%, but not more than 25%, of the productive capacity for said year (less any reduction in such productive capacity because of any of the contingencies referred to in Paragraph Seventh of this contract), of the plants of Goodyear and its subsidiaries in the United States; provided, however, that Goodyear may by written notice to Buyer prior to any such calendar year, obligate itself to sell to Buyer for said year, more of Buyer's requirements, and in said written notice Goodyear shall state the amount of Buyer's requirements in excess of 25% of the productive capacity of the plants of Goodyear and its subsidiaries in the United States that it so elects to obligate itself to sell to Buyer in said year. The Buyer, except as otherwise herein provided, shall not in any year of this agreement, order less than sixty-six and two-thirds per cent (66⅔%) of the Buyer's purchases from Goodyear during the preceding year of this agreement.

In the event the Buyer's requirements in any year shall exceed the maximum quantity which Goodyear is obligated or has elected to become obligated

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as aforesaid to sell to Buyer hereunder, the Buyer shall have the right to purchase such excess of its requirements for said year from sources other than Goodyear (which said purchases are herein also referred to as "outside purchases"); and if in the succeeding year Goodyear is obligated or has elected to become obligated to sell Buyer the latter's requirements or more of the "product" than in the prior year, nevertheless the Buyer shall have the right during the eighteen months next ensuing, beginning with the first of such succeeding year, to make "outside purchases" in the following proportions, to-wit: during the first six months of said eighteen month period, one-third, during the next six months one-fourth, and during the next and last six months one-sixth, of the "outside purchases" made by the Buyer during the preceding year; and the amount of "product" Buyer shall be required to purchase from Goodyear during said eighteen months' period shall be reduced by the amount of such "outside purchases" during that period; provided that anything herein to the contrary notwithstanding, the "outside purchases" in such succeeding year shall not exceed the "outside purchases" of the preceding year or the excess of the Buyer's requirements for such year as aforesaid, whichever shall be greater.

QUALITY, SIZE, AND TYPE

SECOND: The "product" to be sold to the Buyer herein shall be manufactured by Goodyear in accordance with the specifications hereto attached, made a part hereof, and initialed by the parties hereto, and shall be of the sizes, types and grades selected from such specifications by the Buyer as hereinafter provided. Said specifications may be modified and changed by mutual agreement from time to time to meet the changing requirements of the Buyer, and by like mutual agreement the specifications for other types and sizes of "product" required by Buyer shall be attached hereto from time to time.

PRICE

THIRD: The price to be paid by Buyer for the "product" bought hereunder shall be Goodyear's cost of such "product," an allowance for adjustments on such "product" as hereinafter provided, and a profit to Goodyear as hereinafter set forth.

Goodyear's cost of said "product" shall be determined as nearly as circumstances will permit, according to methods usually employed by Goodyear, unless such methods are inconsistent with sound accounting principles, in which event such sound accounting principles shall be used in determining cost; said cost shall include all proper items of cost (including shipping, warehousing and packing expense), but shall not include selling, advertising expense, interest on borrowed moneys or loss due to manufacturing of "product", which in the course of manufacture are classified as "seconds", which loss due to seconds shall be in excess of one-half of one percent of selling price.

The allowance for adjustments shall be one and one-half per cent ($1\frac{1}{2}\%$) of the selling price of said "product" except on pneumatic truck tires of six inches in diameter and over, and as to such tires, such allowance for adjustments shall be four per cent (4%) of Goodyear's price to Buyer, plus any actual loss on adjustments thereof up to an additional four per cent (4%) of Goodyear's price to Buyer, which said actual loss on adjustments thereof up to an additional four percent (4%) of Goodyear's price to Buyer, shall be paid to Goodyear when and as determined after the end of each year, whether or not this contract may then be in effect.

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The profit to Goodyear shall be a percentage of the price of said "product" to the Buyer (excluding, however, from such price for the purpose of figuring said profit, the allowance for adjustments), and such percentage shall be six percent (6%) whenever the price of crude rubber included in the cost of said "product" averages twenty-five cents or more per pound for the then current quarter, and shall be six and one-half per cent when such price of crude rubber averages less than twenty-five cents per pound for said current quarter; and if at any time it shall be proposed by either Goodyear or the Buyer that Goodyear make changes in methods and/or types of equipment used in the manufacture of "product" for the Buyer hereunder which would involve greater investment on the part of Goodyear than the methods and/or types of equipment employed by it hereunder as at the commencement of the term hereof, and which would reduce the ratio (as at the commencement of the term hereof) of Goodyear's profit hereunder to its investment by ten or more percent of such ratio, then such changes shall not be made unless Goodyear and the Buyer agree that such changes are mutually advantageous and unless the parties hereto agree that the profit provided herein be revised (Goodyear giving the Buyer access to its books of account before such revision of prices is made) so as to yield Goodyear not more than substantially the same ratio of return on such greater investment as the profit provided herein represented on the investment employed by Goodyear hereunder at the commencement of the term hereof.

REDETERMINATION OF PRICES

FOURTH: For the purpose of this agreement, the word "quarters" shall be deemed to mean the quarter yearly periods beginning the first day of January, April, July, and October, respectively, of each year of this agreement.

Ten days before the first of each quarter, Goodyear shall furnish the Buyer an estimate of prices for the purpose of billing said "product" to the Buyer during the ensuing quarter. Within forty-five days after the end of each calendar year, and also as soon as practicable after the termination of this agreement, there shall be a recalculation and redetermination of the prices, giving effect to factors and bases entering into said prices then actually determined; and in the event the payments made by or due from Buyer to Goodyear on account of "product" delivered during the periods with respect to which such redetermination of prices is made, exceeds the aggregate amount to which Goodyear would be entitled on the basis of said redetermined prices, then Goodyear shall pay to Buyer such excess.

As soon as practicable after June 30th of each year of this agreement, Goodyear will make a provisional recalculation and redetermination of the prices of said "product" sold to the Buyer during the preceding six months, and to the extent warranted by said provisional recalculation and redetermination, Goodyear shall make a provisional payment to the Buyer against any moneys that may be estimated to become due Buyer at the time of the final redetermination of prices at the end of the year as hereinbefore provided. If on such final redetermination at the end of the year, the provisional payment made by Goodyear to the Buyer in such provisional recalculation and redetermination of prices shall be in excess of the amount due the Buyer from Goodyear as found in said final redetermination of said prices, then the Buyer shall repay to Goodyear such part thereof, if any, as is shown in the said final redetermination to be due Goodyear.

In the event the Buyer shall question Goodyear's said redetermination of prices, it shall on notice to Goodyear have the right within thirty days after the submission to it of such redetermined prices, to refer them to Messrs. Price, Waterhouse & Company of New York City, certified public accountants, whose determination of the prices which should prevail hereunder shall be final. For the purpose of any such determination Goodyear agrees to make available all pertinent books, papers and records to the accountants. In the event Price, Waterhouse & Company are unable to act in the capacity above set forth, then the parties hereto shall select some other certified public accountants for said purpose, and if they fail to agree upon such selection, then the Auditor of the State of Illinois shall designate such accountant to act in the place of said Price, Waterhouse & Company.

TERMS

FIFTH: All "product" sold hereunder shall be F. O. B. the plant where such "product" has been manufactured. The Buyer shall on the tenth day of each calendar month during this agreement, pay to Goodyear for all "product" delivered by Goodyear to the Buyer hereunder during the preceding calendar month.

ESTIMATES AND QUANTITY OF PRODUCTION

SIXTH: The Buyer shall annually, within ninety (90) days before the first day of each calendar year, and also before that part of the year of 1929 beginning May 1st and ending December 31st, furnish Goodyear an estimate of the quantity of "product" it will require hereunder during the ensuing calendar year, and in the case of the year 1929, for that part thereof beginning May 1st and ending December 31st. The Buyer shall also furnish Goodyear at least thirty (30) days prior to the first day of each calendar month during this agreement, a statement of the quantities of "product" which Goodyear is to manufacture during each of the ensuing three calendar months, which statement shall be in detail as to items, sizes and types of said "product" for the first ensuing calendar month. Such statements shall be subject, however, to revision from time to time, and the statement for each succeeding month shall be deemed to automatically revise the statement of the preceding month as to the quantities of "product" which Goodyear is to manufacture during the period set forth in the said statement of said preceding month. Based upon such statements, Goodyear shall manufacture approximately the quantities therein set forth, subject, however, to the following conditions:

(a) Goodyear may, but shall in no event be required to, manufacture in any one month of any year more than eleven per cent (11%) (with reasonable division among the various types and sizes) of the quantities of said "product" which are to be furnished hereunder by Goodyear during such year, according to the Buyer's annual estimate revised with reference to the actual sales up to such time and the sales outlook for the remainder of said year.

(b) Goodyear shall not be required to manufacture for the Buyer in any one day more than twenty-five thousand (25,000) tires and tubes, unless Goodyear shall from time to time because of increased capacity or other changed conditions of its plants, agree to a specification by Buyer of a larger maximum daily quantity.

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(c) Increases and decreases in the daily rate of production shall be arranged from time to time by mutual agreement by the parties hereto with a view to efficient and economical manufacturing operations.

(d) Goodyear will at all times endeavor to maintain at its plant at least one month's inventory of "product" for the Buyer, based on the then current rate of shipments to the Buyer.

EXCEPTIONS

SEVENTH: Neither party to this contract shall be held liable or deemed in default hereunder if prevented from performing the obligations of this agreement by reason of fire, flood, drought, acts of God, war, riot, strikes, lockouts, embargo, unavoidable causes or circumstances beyond its control, failure of transportation, or inability to secure raw material, supplies or equipment.

MARKINGS, TRADE-MARKS, AND TRADE NAMES

EIGHTH: It is understood that trade names, trade marks, tread designs and other markings and embellishments appearing exclusively on "product" furnished hereunder are the property of the Buyer. The Buyer agrees to save and hold Goodyear harmless from any liability, suit or damages for infringement or alleged infringement arising out of Goodyear's manufacture or use hereunder of any such name, brand, design, tread, trade mark or other embellishment. Goodyear agrees not to sell any "product" bearing the name, brand, trade marks, trade names or tread designs belonging to the Buyer to anyone other than the buyer, except that as to "products" which in the course of manufacture are classified as "seconds", Goodyear shall have the right after buffing off or otherwise removing the Buyer's name and trade marks, to sell "products" so classified as "seconds."

The Buyer agrees not to make any reference to Goodyear and/or the subject matter of this contract either orally or in writing, except in communication to or with Goodyear and to this end specifically covenants that it will exert its utmost efforts to prevent its employees from in any wise referring to or disclosing the fact that "product" sold to the Buyer hereunder is manufactured by Goodyear.

SHIPMENTS

NINTH: Shipment of all "product" hereunder shall be to the Buyer as the Buyer may direct, and the "product" sold hereunder shall be packed in such manner as the Buyer may request.

INSPECTION

TENTH: The Buyer, by its duly authorized representatives, shall at any and all reasonable times have access to the factory or factories in which "product" is being manufactured hereunder for the Buyer, for the purpose of inspecting the manufacture thereof.

WARRANTIES AND ADJUSTMENTS

ELEVENTH: "Product" sold to the Buyer hereunder, is warranted by Goodyear to be free from defects in workmanship and material.

Any "product" furnished hereunder which shall be defective in workmanship or material or not in accordance with the specifications in effect by virtue hereof at the time of manufacture, may, within eighteen months from the date of manufacture thereof, be returned to Goodyear and if such "product" shall not have been used or damaged the Buyer shall be credited therefor at the current price charged hereunder for "product" of the same grade, type and size, plus an amount equal to the charges for transportation of the "product" from the plant where purchased to the Buyer and from the Buyer back to Goodyear. Goodyear may thereafter dispose of such "product" as "seconds."

Whenever any "product" sold hereunder, which has been put into use, shall prove defective in either workmanship or material, the Buyer may return such "product" to Goodyear at Goodyear's expense, and in that case shall furnish such information in respect thereof as Goodyear may reasonably require and thereupon Goodyear shall make a reasonable adjustment by way of credit to the Buyer. Such adjustment shall be on the basis of the then current (or the last, as the case may be) price charged by Goodyear to the Buyer for "product" of the same grade, size and type, and in respect of service rendered by the defective "product" shall be based upon the warranties in respect thereof made by the Buyer to its customer. Such warranties shall, however, be no more favorable to the consumer than those which the Buyer has in effect at the date of execution hereof. Goodyear shall in no wise be liable in respect of any adjustment made by the Buyer with its customers except it shall be on account of a defect in workmanship and material herein warranted against.

DURATION AND TERMINATION

TWELFTH: This contract shall begin May 1, 1929, and shall continue thereafter until terminated, as hereinafter provided. Either party may elect to terminate this contract by giving notice in writing to the other party during December of any year beginning with the year 1931, that it desires to terminate this contract as of the 31st day of December of the year following. Such notice of termination if given by Goodyear hereunder shall be addressed to the Buyer at its place of business at Homan Avenue and Arthington Street, Chicago, Illinois, Attention Manager of Tire Department, and if given by the Buyer to Goodyear, at Goodyear's place of business at Akron, Ohio. Upon the giving of said notice by either party hereto, this contract shall terminate on the 31st day of December of the year following the year in which said notice is given.

During the last year of this agreement, the Buyer shall not be obligated to purchase or Goodyear to furnish, more than 56¼% of the total quantity of "product" as estimated by the Buyer in its annual estimate which would have been bought and sold under this agreement during such year but for the impending termination of this agreement, as follows: 37½% of such total quantity during the first six months of such year and 12½% of such total quantity during the third quarter of such year, and 6¼% of such total quantity during the fourth quarter of such year.

On termination of this agreement, if Goodyear shall have any investment in molds or other equipment, purchased at the order of the Buyer and relating especially to operations under this contract and not required for its operations irrespective of this contract, and if said investment shall not have been amortized over and recovered through manufacture and sale of "product" hereunder, then the Buyer shall pay to Goodyear the amount of such unrecovered capital

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expenditures, and thereafter such molds and other equipment shall belong to the Buyer.

On termination of this agreement the Buyer shall forthwith purchase and accept delivery of any "product" theretofore specified by Buyer for manufacture under this contract, which Goodyear may then have on hand, or which may then be in process at prices hereinbefore provided.

THIRTEENTH: Any waiver by either party of any condition of this agreement or obligation incumbent upon the other party in any particular instance shall not be deemed a waiver of such condition in any succeeding instance or instances.

FOURTEENTH: This contract contains the entire agreement between the parties and shall not be modified or enlarged by any understandings, customs or practices whatsoever. This agreement can be modified or enlarged only by agreements supplemental hereto executed by the parties in like manner to the execution hereof.

FIFTEENTH: This contract shall be binding upon and inure to the successors and assigns of the respective parties hereto. Neither party, however, shall have the right to assign this contract without the consent of the other.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed in quadruplicate at Chicago, Illinois, by their respective officers duly authorized so to do, and their respective corporate seals to be hereunto affixed the day and year first above written.

THE GOODYEAR TIRE & RUBBER COMPANY,
By P. W. LITCHFIELD, *President*.

Attest:

W. D. SHILTS, *Secretary*.
SEARS, ROEBUCK AND CO.,
By R. E. WOOD, *President*.

Attest:

JNO. HIGGINS, *Secretary*.

SEC. 11.—*Respondent's third or current tire contract with Sears, Roebuck & Co.*

Respondent continued to sell and ship tires and tubes to Sears, Roebuck & Co. during 1929, 1930, and 1931, pursuant to the conditions and terms of said second tire contract, until it was cancelled and superseded by the third and current tire contract executed by the same parties on October 5, 1931.

In July 1931, Gen. R. E. Wood, President of Sears, Roebuck & Co., verbally notified P. W. Litchfield, President of the respondent, that Sears, Roebuck & Co. expected to give Goodyear written notice sometime during December 1931, of its intention to terminate the aforesaid second contract as of December 31, 1932.

Pursuant to further negotiations hereinafter described, the third and current tire contract between respondent and Sears, Roebuck & Co. was entered into on October 5, 1931, being signed by P. W. Litchfield as president of respondent, and by R. E. Wood, as president of Sears, Roebuck & Co. This contract reads as follows:

COMMISSION'S EXHIBIT 11

THIS AGREEMENT, made and entered into this 5th day of October, A. D. 1931, by and between the GOODYEAR TIRE & RUBBER COMPANY, a corporation organized and existing under and by virtue of the laws of the State of Ohio, hereinafter for convenience called "GOODYEAR", party of the first part, and SEARS, ROEBUCK AND CO., a corporation organized and existing under and by virtue of the laws of the State of New York, hereinafter for convenience called "BUYER", party of the second part;

WITNESSETH:

QUANTITY

FIRST: GOODYEAR hereby agrees to manufacture and sell to BUYER, and BUYER hereby agrees to buy from GOODYEAR for and during the term of this agreement and on the terms and conditions hereinafter set forth, BUYER'S requirements of pneumatic automobile truck and motorcycle tires and tubes (except a quantity not in excess of two hundred thousand (200,000) of said tires and tubes annually to and including December 31, 1934), and also BUYER'S requirements of bicycle tires and tubes from January 1, 1932, during the remainder of the term of this contract, all hereinafter collectively referred to as "product", up to the amount that GOODYEAR is hereinafter obligated to sell to BUYER. From December 31, 1934, GOODYEAR may, at its option, include said quantity not in excess of two hundred thousand (200,000) of said pneumatic automobile truck and motorcycle tires and tubes annually in this contract during the remainder of the term thereafter.

GOODYEAR shall in each calendar year of this contract, be obligated to sell to the BUYER such part of BUYER'S requirements of the "product" as is equivalent to 25%, but not more than 25%, of the productive capacity for said year (less any reduction in such productive capacity because of any of the contingencies referred to in Paragraph Seventh of this contract), of the plants of GOODYEAR and its subsidiaries in the United States; provided, however, that GOODYEAR may by written notice to BUYER prior to any such calendar year, obligate itself to sell to BUYER for said year, more of BUYER'S requirements, and in said written notice GOODYEAR shall state the amount of BUYER'S requirements in excess of 25% of the productive capacity of the plants of GOODYEAR and its subsidiaries in the United States that it so elects to obligate itself to sell to BUYER in said year. The BUYER, except as otherwise herein provided, shall not in any year of this agreement, order less than sixty-six and two-thirds per cent (66⅔%) of the BUYER'S tonnage purchases from GOODYEAR during the preceding year of this agreement.

In the event the BUYER'S requirements in any year shall exceed the maximum quantity which GOODYEAR is obligated or has elected to become obligated as aforesaid to sell to BUYER hereunder, the BUYER shall have the right to purchase such excess of its requirements for said year from sources other than GOODYEAR (which said purchases are herein also referred to as "outside purchases"); and if in the succeeding year GOODYEAR is obligated or has elected to become obligated to sell BUYER the latter's requirements or more of the "product" than in the prior year, nevertheless the BUYER shall have the right during the eighteen months next ensuing, beginning with the

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first of such succeeding year, to make "outside purchases" in the following proportions, to-wit: during the first six months of said eighteen month period, one-third, during the next six months one-fourth, and during the next and last six months one-sixth, of the "outside purchases" made by the BUYER during the preceding year; and the amount of "product" BUYER shall be required to purchase from GOODYEAR during said eighteen months' period shall be reduced by the amount of such "outside purchases" during that period; provided that anything herein to the contrary notwithstanding, the "outside purchases" in such succeeding year shall not exceed the "outside purchases" of the preceding year or the excess of the BUYER'S requirements for such year as aforesaid, whichever shall be greater.

QUALITY, SIZE AND TYPE

SECOND: The "product" to be sold to the BUYER herein shall be manufactured by GOODYEAR in accordance with the specifications hereto attached, made a part hereof, and initialed by the parties hereto, and shall be of the sizes, types and grades selected from such specifications by the BUYER as hereinafter provided. Said specifications may be modified and changed by mutual agreement from time to time to meet the changing requirements of the BUYER, and by like mutual agreement the specifications for other types and sizes of "product" required by BUYER shall be attached hereto from time to time.

PRICE

THIRD: The price to be paid by BUYER for the "product" bought hereunder shall be GOODYEAR'S cost of such "product", an allowance for adjustments on such "product" as hereinafter provided, and a profit to GOODYEAR as hereinafter set forth.

GOODYEAR'S cost of said "product" shall be determined as nearly as circumstances will permit, according to methods usually employed by GOODYEAR, unless such methods are inconsistent with sound accounting principles, in which event such sound accounting principles shall be used in determining cost; said cost shall include all proper items of cost (including shipping, warehousing and packing expense), but shall not include selling, advertising expense, interest on borrowed moneys, or loss in excess of one-half of one per cent of selling price due to manufacturing of product which in the course of manufacture is classified as "seconds." Determination as to what is a first or second of said "product" shall be in accordance with the standard classification of GOODYEAR and as applied by GOODYEAR to its own tires. If a classification other than the above standard is in writing ordered or specified by BUYER, any loss above one-half of one per cent of the selling price occasioned solely by BUYER'S said order or specification for such modification of said standard shall be borne by BUYER.

BUYER will pay GOODYEAR as allowance for adjustments a sum equal to three-fourths of one percent of the basic selling price of GOODYEAR to BUYER of said "product" plus any actual loss on adjustment thereof up to but not in excess of an additional one-fourth of one per cent of said basic selling price of GOODYEAR to BUYER, provided, however, that on pneumatic truck tires of six inches in diameter and over, allowance for adjustments shall be four per cent of the basic selling price of GOODYEAR to BUYER

plus any actual loss on adjustment thereof up to but not exceeding an additional four percent of GOODYEAR'S basic price to BUYER, said three-fourths of one per cent and four per cent, respectively, to be included in estimated prices as hereinafter provided, any additional allowances for actual loss on adjustment to be paid to GOODYEAR when and as determined after the end of each year whether or not this contract may then be in effect. In the event actual losses on adjustments are determined after the termination of this contract, the relation thereof to selling price for the determination of BUYER'S liability to pay said allowance for adjustment shall be based upon the aggregate selling prices and the aggregate actual losses on adjustment over the term of this contract as hereby provided or the last five years of its effectiveness, whichever shall be shorter.

The profit to GOODYEAR shall be a percentage of the price of said "product" to the BUYER (excluding, however, from such price for the purpose of figuring said profit, the allowance for adjustments), and such percentage shall be six percent of the selling price to BUYER of said "product" (excluding, however, from such selling price for the purpose of figuring said profit the allowance for adjustments) whenever the price of crude rubber included in the cost to BUYER of said "product" averages twenty-five cents (25¢) or more per pound for the then current quarter, and shall be six and one-half per cent when the price of said crude rubber averages less than twenty-five cents per pound for said current quarter; and if at any time it shall be proposed by either GOODYEAR or the BUYER that GOODYEAR make changes in methods and/or types of equipment used in the manufacture of "product" for the BUYER hereunder which would involve greater investment on the part of GOODYEAR than the methods and/or types of equipment employed by it hereunder as at the commencement of the term hereof, and which would reduce the ratio (as at the commencement of the term hereof) of GOODYEAR'S profit hereunder to its investment by ten or more percent of such ratio, then such changes shall not be made unless GOODYEAR and the BUYER agree that such changes are mutually advantageous and unless the parties hereto agree that the profit provided herein be revised (GOODYEAR giving the BUYER access to its books of account before such revision of prices is made) so as to yield GOODYEAR not more than substantially the same ratio of return on such greater investment as the profit provided herein represented on the investment employed by GOODYEAR hereunder at the commencement of the term hereof.

REDETERMINATION OF PRICES

FOURTH: For the purpose of this agreement, the word "quarters" shall be deemed to mean the quarter yearly periods beginning the first day of January, April, July and October, respectively, of each year of this agreement.

Ten days before the first of each quarter, GOODYEAR shall furnish the BUYER an estimate of prices for the purpose of billing said "product" to the BUYER during the ensuing quarter. Within forty-five days after the end of each calendar year, and also as soon as practicable after the termination of this agreement, there shall be a recalculation and redetermination of the prices, giving effect to factors and bases entering into said prices then actually determined; and in the event the payments made by or due from BUYER to

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GOODYEAR on account of "product" delivered during the periods with respect to which such redetermination of prices is made, exceeds the aggregate amount to which GOODYEAR would be entitled on the basis of said redetermined prices, then GOODYEAR shall pay to BUYER such excess.

As soon as practicable after June 30th of each year of this agreement, GOODYEAR will make a provisional recalculation and redetermination of the prices of said "product" sold to the BUYER during the preceding six months, and to the extent warranted by said provisional recalculation and redetermination, GOODYEAR shall make a provisional payment to the BUYER against any moneys that may be estimated to become due BUYER at the time of the final redetermination of prices at the end of the year as hereinbefore provided. If on such final redetermination at the end of the year, the provisional payment made by GOODYEAR to the BUYER in such provisional recalculation and redetermination of prices shall be in excess of the amount due the BUYER from GOODYEAR as found in said final redetermination of said prices, then the BUYER shall repay to GOODYEAR such part thereof, if any, as is shown in the said final redetermination to be due GOODYEAR.

In the event the BUYER shall question GOODYEAR'S said redetermination of prices, it shall on notice to GOODYEAR have the right within thirty days after the submission to it of such redetermined prices, to refer them to Messrs. Price, Waterhouse & Company of New York City, certified public accountants, whose determination of the prices which should prevail hereunder shall be final. For the purpose of any such determination GOODYEAR agrees to make available all pertinent books, papers and records to the accountants. In the event Price, Waterhouse & Company are unable to act in the capacity above set forth, then the parties hereto shall select some other certified public accountants for said purpose, and if they fail to agree upon such selection, then the Auditor of the State of Illinois shall designate such accountant to act in the place of said Price, Waterhouse & Company.

TERMS

FIFTH: All "product" sold hereunder shall be F. O. B. the plant where such product has been manufactured. The BUYER shall on the tenth day of each calendar month during this agreement, pay to GOODYEAR for all "product" delivered by GOODYEAR to the BUYER hereunder during the preceding calendar month.

ESTIMATES AND QUANTITY OF PRODUCTION

SIXTH: The BUYER shall annually, within ninety (90) days before the first day of each calendar year, furnish GOODYEAR an estimate of the quantity of "product" it will require hereunder during the ensuing calendar year. The BUYER shall also furnish GOODYEAR at least thirty (30) days prior to the first day of each calendar month during this agreement, a statement of the quantities of "product" which GOODYEAR is to manufacture during each of the ensuing three calendar months, which statement shall be in detail as to items, sizes and types of said "product" for the first ensuing calendar month. Such statements shall be subject, however, to revision from time to time, and the statement for each succeeding month shall be deemed to automatically

revise the statement of the preceding month as to the quantities of "product" which GOODYEAR is to manufacture during the period set forth in the said statement of said preceding month. Based upon such statements, GOODYEAR shall manufacture approximately the quantities therein set forth, subject, however, to the following conditions:

(a) GOODYEAR may, but shall in no event be required to, manufacture in any one month of any year more than eleven percent (11%) (with reasonable division among the various types and sizes) of the quantities of said "product" which are to be furnished hereunder by GOODYEAR during such year, according to the BUYER'S annual estimate revised with reference to the actual sales up to such time and the sales outlook for the remainder of said year.

(b) GOODYEAR shall not be required to manufacture for the BUYER in any one day more than twenty-five thousand (25,000) tires and tubes, unless GOODYEAR shall from time to time because of increased capacity or other changed conditions of its plants, agree to a specification by BUYER of a larger maximum daily quantity.

(c) Increases and decreases in the daily rate of production shall be arranged from time to time by mutual agreement by the parties hereto with a view to efficient and economical manufacturing operations.

(d) GOODYEAR will at all times endeavor to maintain at its plant at least one month's inventory of "product" for the BUYER, based on the then current rate of shipments to the BUYER.

EXCEPTIONS

SEVENTH: Neither party to this contract shall be held liable or deemed in default hereunder if prevented from performing the obligations of this agreement by reason of fire, flood, drought, acts of God, war, riot, strikes, lockouts, embargo, unavoidable causes or circumstances beyond its control, failure of transportation, or inability to secure raw material, supplies or equipment.

MARKINGS, TRADE-MARKING, AND TRADE NAMES

EIGHTH: It is understood that trade names, trade marks, tread designs and other markings and embellishments appearing exclusively on "product" furnished hereunder are the property of the BUYER. The BUYER agrees to save and hold GOODYEAR harmless from any liability, suit or damages for infringement or alleged infringement arising out of GOODYEAR'S manufacture or use hereunder of any such name, brand, design, tread, trade mark or other embellishment. GOODYEAR agrees not to sell any "product" bearing the name, brand, trade marks, trade names or tread designs belonging to the BUYER to any one other than the BUYER, except that as to "products" which in the course of manufacture are classified as "seconds", GOODYEAR shall have the right after buffing off or otherwise removing the BUYER'S name and trade marks, to sell "products" so classified as "seconds".

The BUYER agrees not to make any reference to GOODYEAR and/or the subject matter of this contract either orally or in writing, except in communication to or with GOODYEAR and to this end specifically covenants that it will exert its utmost efforts to prevent the employes from in any wise referring to or disclosing the fact that "product" sold to the BUYER hereunder is manufactured by GOODYEAR.

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SHIPMENTS

NINTH: Shipment of all "product" hereunder shall be to the BUYER as the BUYER may direct, and the "product" sold hereunder shall be packed in such manner as the BUYER may request.

INSPECTION

TENTH: The BUYER, by its duly authorized representatives, shall at any and all reasonable times have access to the factory or factories in which "product" is being manufactured hereunder for the BUYER, for the purpose of inspecting the manufacture thereof.

WARRANTIES AND ADJUSTMENTS

ELEVENTH: "Product" sold to the BUYER hereunder, is warranted by GOODYEAR to be free from defects in workmanship and material.

Any "product" furnished hereunder which shall be defective in workmanship or material or not in accordance with the specifications in effect by virtue hereof at the time of manufacture, may, within eighteen months from the date of manufacture thereof, be returned to GOODYEAR and if such "product" shall not have been used or damaged the BUYER shall be credited therefor at the current price charged hereunder for "product" of the same grade, type and size, plus an amount equal to the charges for transportation of the "product" from the plant where purchased to the BUYER and from the BUYER back to GOODYEAR. GOODYEAR may thereafter dispose of such "product" as "seconds".

Whenever any "product" sold hereunder, which has been put into use, shall prove defective in either workmanship or material, the BUYER may return such "product" to GOODYEAR at GOODYEAR'S expense, and in that case shall furnish such information in respect thereof as GOODYEAR may reasonably require and thereupon GOODYEAR shall make a reasonable adjustment by way of credit to the BUYER. Such adjustment shall be on the basis of the then current (or the last, as the case may be) price charged by GOODYEAR to the BUYER for "product" of the same grade, size and type, and in respect of service rendered by the defective "product" shall be based upon the warranties in respect thereof made by the BUYER to its customer. Such warranties shall, however, be no more favorable to the consumer than those which the BUYER has in effect at the date of execution hereof. GOODYEAR shall in no wise be liable in respect of any adjustment made by the BUYER with its customers except it shall be on account of a defect in workmanship and material herein warranted against.

DURATION AND TERMINATION

TWELFTH: This contract shall begin from the date hereof, and shall continue thereafter until terminated, as hereinafter provided. Either party may elect to terminate this contract by giving notice in writing to the other party during the month of December of any year beginning with the year 1941 that it desires to terminate this contract as of the 31st day of December of the year following. Such notice of termination, if given by GOODYEAR hereunder shall be addressed to the BUYER at its place of business at Homan Avenue and Arthington Street, Chicago, Illinois, attention Manager of Tire Depart-

ment, until another address is in writing designated by BUYER by its President or Vice-President for such notice, and then to such other address, and if given by BUYER to GOODYEAR at GOODYEAR'S place of business at Akron, Ohio. Upon the giving of said notice by either party hereto, this contract shall terminate on the 31st day of December of the year following the year in which said notice is given.

During the last year of this agreement, the BUYER shall not be obligated to purchase or GOODYEAR to furnish, more than $56\frac{1}{4}\%$ of the total quantity of "product" as estimated by the BUYER in its annual estimate which would have been bought and sold under this agreement during such year but for the impending termination of this agreement, as follows: $37\frac{1}{2}\%$ of such total quantity during the first six months of such year and $12\frac{1}{2}\%$ of such total quantity during the third quarter of such year, and $6\frac{1}{4}\%$ of such total quantity during the fourth quarter of such year.

On termination of this agreement, if GOODYEAR shall have any investment in molds or other equipment, purchased at the order of the BUYER and relating especially to operations under this contract and not required for its operations irrespective of this contract, and if said investment shall not have been amortized over and recovered through manufacture and sale of "product" hereunder, then the BUYER shall pay to GOODYEAR the amount of such unrecovered capital expenditures, and thereafter such molds and other equipment shall belong to the BUYER.

On termination of this agreement the BUYER shall forthwith purchase and accept delivery of any "product" theretofore specified by BUYER for manufacture under this contract, which GOODYEAR may then have on hand, or which may then be in process at prices hereinbefore provided.

THIRTEENTH: Any waiver by either party of any condition of this agreement or obligation incumbent upon the other party in any particular instance shall not be deemed a waiver of such condition in any succeeding instance or instances.

FOURTEENTH: This contract contains the entire agreement between the parties and shall not be modified or enlarged by any understandings, customs or practices whatsoever. This agreement can be modified or enlarged only by agreements supplemental hereto executed by the parties in like manner to the execution hereof.

FIFTEENTH: The BUYER agrees that in the event of its consolidation or merger with any other corporation or corporations or the transfer by it of its business of selling "product", the BUYER will by appropriate legal action make provision so that the corporation resulting from such consolidation or merger or the transferee of such business (herein called "Successor") shall succeed to this agreement and all of the rights and obligations of the BUYER hereunder, except that the said Successor's requirements of "product" to be purchased from GOODYEAR hereunder in addition to the requirements of the BUYER hereinbefore set forth shall be deemed to be the aggregate of the following during the remainder of this agreement:

(a) All of the Successor's additional actual requirements of "product", the sale of which to the Successor is not covered by a binding contract with some party other than GOODYEAR at the time of said consolidation, merger or transfer, and except as provided in Article First hereof the Successor shall make no further contract for the purchase of "product" from any party other than GOODYEAR during the term of this agreement;

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(b) All of the Successor's additional actual requirements of "product", the sale of which to the Successor is covered by a binding contract or contracts with some party or parties other than GOODYEAR at the time of said consolidation, merger or transfer, after said contract or contracts shall terminate, expire or be cancelled, and the Successor shall not by its act or failure to give notice extend any such contract for the purchase by it of "product" and at the earliest date permitted thereby shall cancel all of said contracts which are legally subject to termination or cancellation.

Any such Successor and each successive Successor thereto shall be in all respects substituted for the BUYER as the party of the second part to this agreement and shall succeed to all of the rights and, except as above limited, to all of the obligations of the BUYER hereunder.

This contract shall be binding upon and inure to the successors and assigns of the respective parties hereto; neither party, however, shall have the right to assign this contract nor shall it inure to any successor of either of the parties hereto without, in either such case, the prior written consent of the other.

SIXTEENTH: By mutual agreement the contract between the parties hereto dated May 17, 1928, is hereby cancelled and annulled, and this agreement is hereby substituted in lieu thereof.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed in quadruplicate at Chicago, Illinois, by their respective officers duly authorized so to do, and their respective corporate seals to be hereunto affixed the day and year first above written.

THE GOODYEAR TIRE & RUBBER COMPANY,
By P. W. LITCHFIELD, *President*.

Attest:

W. D SHILTS, *Secretary*.
SEARS, ROEBUCK AND CO.,
By R. E. WOOD, *President*.

Attest:

E. H. POWELL, *Secretary*.

SEARS, ROEBUCK AND CO.

EXECUTIVE OFFICES

CHICAGO

October 7, 1931

THE GOODYEAR TIRE AND RUBBER Co.,
Akron, Ohio.

GENTLEMEN: With reference to the agreement for product entered into between us as of the 5th of October, 1931, and referring particularly to article third thereof, this letter will evidence our understanding that the allowance for adjustments on bicycle tires and tubes will be a sum equal to 1% of the basic selling price of Goodyear to us as buyer of such bicycle tires and tubes. And the said contract may be deemed by you to be amended in this respect.

Very truly yours,

SEARS, ROEBUCK AND CO.,
(Signed) R. E. WOOD, *President*.

The said third tire contract is now in operation and being carried out by the parties thereto. Respondent is now manufacturing the

entire tire requirements of Sears, Roebuck & Co. at its factories, and is selling and shipping said tires to Sears, Roebuck & Co. conformably with the said contract at prices as provided for therein.

SEC. 12.—*Secret consideration or bonus agreement.*

On the same day the third tire contract was entered into between respondent and Sears, Roebuck & Co., viz, October 5, 1931, a secret agreement was entered into by and between the same parties, which reads as follows:

THIS AGREEMENT, made this 5th day of October, 1931, between THE GOODYEAR TIRE & RUBBER COMPANY, an Ohio corporation, hereinafter called "GOODYEAR", party of the first part, and SEARS, ROEBUCK AND CO., a New York corporation, hereinafter called "SEARS", party of the second part;

WITNESSETH:

WHEREAS, the parties hereto on the 17th day of May, 1928, entered into a written contract for the manufacture and sale by GOODYEAR and the purchase by SEARS from GOODYEAR of SEARS' requirements of pneumatic automobile, truck and motorcycle tires and tubes; and

WHEREAS, the Twelfth paragraph of said contract provided that either party may elect to terminate said contract by giving notice in writing to the other party during December of any year, beginning with the year 1931, that it desires to terminate said contract as of the 31st day of December of the year following; and

WHEREAS, SEARS has signified its intention to terminate said contract as of December 31, 1932, by giving notice in writing to GOODYEAR during December, 1931, that it desires to terminate said contract, as aforesaid; and

WHEREAS, GOODYEAR has requested SEARS to enter into a new contract in lieu of the above contract of May 17, 1928, which said new contract will not be terminable until December 31, 1942;

NOW, THEREFORE, in consideration of the execution simultaneously herewith by SEARS of said new contract, and for other good and valuable considerations from SEARS, the receipt and sufficiency of which is hereby acknowledged by GOODYEAR, IT IS AGREED AS FOLLOWS:

FIRST: GOODYEAR hereby covenants and agrees that it will issue, assign, transfer and/or deliver to SEARS simultaneously with the execution of this contract eighteen thousand (18,000) shares of common capital no par value stock of GOODYEAR fully paid, non-assessable and to be the sole property of SEARS, and at said time also to pay to SEARS in cash the sum of Eight hundred thousand dollars (\$800,000.00) to be used by SEARS to purchase a minimum of thirty-two thousand (32,000) additional shares of the common capital no par value stock of GOODYEAR, all to be the sole property of SEARS, and SEARS agrees to acquire a minimum of thirty-two thousand (32,000) shares by purchase in the market not later than December 15, 1931.

SECOND: SEARS in consideration of the aforesaid covenants and agreements of GOODYEAR and the delivery of the shares of stock and the payment to be made by GOODYEAR, as aforesaid, agrees to execute simultaneously herewith said new contract for the manufacture and sale by GOODYEAR and the purchase by SEARS from GOODYEAR of SEARS' requirements of pneumatic

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automobile, truck and motorcycle tires and tubes (except two hundred thousand (200,000) thereof annually to and including December 31, 1934), and also SEARS' requirements from January 1, 1932, of bicycle tires and tubes during the remainder of the term of said contract, to-wit, until the same is terminated as set forth in said contract after December 31, 1941. SEARS further agrees that it will not, except to a successor of SEARS under paragraph "Fifteenth" of said contract of October 5, 1931, sell, transfer or otherwise dispose of any of said 18,000 shares nor of said 32,000 additional shares of common capital stock of GOODYEAR provided for in this contract during the period of ten (10) years from the date hereof, except with the prior consent of GOODYEAR.

This contract shall be binding upon and inure to the successors and assigns of the respective parties hereto, neither party, however, shall have the right to assign this contract without the prior written consent of the other.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed in duplicate at Chicago, Illinois, by their respective officers duly authorized so to do and their respective corporate seals to be hereunto affixed the day and year first above written, in accordance with resolution of their respective Board of Directors and/or Executive Committee.

THE GOODYEAR TIRE & RUBBER COMPANY,
By P. W. LITCHFIELD, *President*.

Attest:

W. D. SHILTS, *Secretary*.

SEARS, ROEBUCK AND CO.,
By R. E. WOOD, *President*.

Attest:

E. H. POWELL, *Secretary*.

The said secret consideration or bonus agreement was ratified by the board of directors of the respondent at a special meeting held on October 6, 1931, but no action with respect thereto was ever taken by the stockholders of said respondent and no notice was ever given to said stockholders of its existence. The said agreement was duly performed by the assignment from respondent to Sears, Roebuck & Co., between the dates of October 5, 1931, and January 1, 1932, of 18,000 shares of Goodyear Treasury stock of the stated valuation of \$450,000 (previously bought in by respondent at a cost of approximately \$1,000,000), and by respondent's payment to Sears, Roebuck & Co. of \$800,000 in cash on or about October 5, 1931. This money was used by Sears, Roebuck & Co. to purchase 32,000 additional shares of Goodyear common stock, which stock Sears, Roebuck & Co. now owns.

SEC. 13.—*Immediate delivery contract.*

On June 16, 1932, respondent and Sears, Roebuck & Co. entered into a further agreement respecting immediate transfer of title and constructive possession of all tires manufactured and on hand prior to June 21, 1932, the effective date of the "Manufacturer's Sales" tax, which agreement reads as follows:

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MEMORANDUM OF AGREEMENT, made and entered into this 16th day of June, A. D. 1932, by and between THE GOODYEAR TIRE & RUBBER COMPANY, a corporation organized and existing under and by virtue of the laws of the State of Ohio, hereinafter for convenience called "Goodyear", Party of the First Part, and SEARS, ROEBUCK & CO., a corporation organized and existing under and by virtue of the laws of the State of New York, hereinafter for convenience called "the Buyer", Party of the Second Part.

WITNESSETH

The parties hereto are parties to a certain agreement dated the 5th day of October, 1931, and having to do with the purchase and sale of certain "product" (pneumatic automobile, truck, and motorcycle tires and tubes and bicycle tires and tubes). All said product now in Goodyear's possession or which is hereafter manufactured prior to June 21, 1932, by or for Goodyear for the Buyer shall be delivered to the Buyer at warehouses located at the point of manufacture at Akron, Ohio, Gadsden, Alabama, or Los Angeles, California, as the case may be, and on and after such delivery such product shall be at the sole risk of the Buyer, Title thereto, as well as possession thereof, passing to the Buyer immediately upon such delivery.

Goodyear will, immediately upon such delivery, bill the Buyer for such product and the Buyer shall promptly pay therefor.

Goodyear agrees when, as and if requested by the Buyer to store said product and to pack, load and ship the product from said warehouses to such other destinations as the Buyer may select, on the same basis as if done prior to delivery of the product to the Buyer. Such packing, shipping and loading shall, however, be at the sole risk and under the sole direction and control of the Buyer.

Except to the extent that this agreement may be inconsistent with any of the terms and provisions of said agreement of October 5, 1931 (in the event of such inconsistency this agreement controlling), said agreement of October 5, 1931, shall remain in full force and effect according to its terms.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed in their respective corporate names by their officers duly authorized thereto the day and year first above written.

THE GOODYEAR TIRE & RUBBER COMPANY,
By R. S. WILSON, *Vice President*.

Attest:

W. M. METTLER, *Ast. Secretary*.

SEARS, ROEBUCK AND COMPANY,
By D. M. NELSON, *Vice President*.

Attest:

E. H. POWELL, *Secretary*.

SEC. 14.—Price comparisons.

During the period from April 1, 1926, through December, 1933, respondent sold Sears, Roebuck & Co. under said contracts 19,239,194 tire casings, 17,388,806 tubes, 508,073 bicycle tire casings and 42,867 bicycle tubes at a total billing price of \$129,252,984.69. After annual settlement was made each year and respondent rebated to Sears, Roebuck & Co. the difference between billing price and final settlement price, amounting to approximately \$9,000,000, to make the

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transaction come within the terms of the contracts, and after deducting excise tax, losses on replacements and adjustments, the net amount received by respondent as a result of its sales of tires to Sears, Roebuck & Co. was \$116,359,367.85.

Respondent received from its service station dealers on a corresponding volume of business, in gross sales \$182,598,399.59, and in net sales \$157,576,156.33, the net sales figure being obtained by deducting from the gross sales price figure allowances for factory shipments, dealers' quantity discounts, discounts on special price sales, cash discounts on sales, freight on sales, excise tax, commissions, allowances, trade-in allowances, extra discounts and commissions and losses on replacements amounting to \$25,022,243.26 in the aggregate. The difference between these two net sales items, \$157,576,156.33 net amount of dealer sales and \$116,359,367.85 net amount of Sears, Roebuck & Co. sales, is \$41,216,788.48, which is the aggregate amount of discrimination in net sales price in favor of Sears, Roebuck & Co. and against the Goodyear service station dealers, and which is 26.15% of the total dollar net sales to the service station dealers over the 7½-year period.

As the foregoing aggregate discrimination in net sales takes into account transportation cost differences, it is apparent that such aggregate amount of discrimination in total net sales made due allowance for differences in the cost of transportation. The question of due allowance for differences in the cost of selling will be taken up later herein under an appropriate heading (p. 279).

The aforesaid percentage of aggregate discrimination in net sales price (26.15%) is recognized as a weighted average percentage of discrimination over the 7½-year period which cannot be and is not representative of the price discrimination existing in actual individual sales of tires to Sears, Roebuck & Co. on the one hand and to the independent retail dealers on the other, with respect to which price discrimination the retail dealer customers of respondent are most concerned. Therefore, consideration must be given to the documentary evidence in the record dealing specifically with selected representative sizes of tire casings sold respectively to Sears, Roebuck & Co. and to dealers, and to a comparison of the net billing prices of respondent to its service station dealers and to Sears, Roebuck & Co. for tire casings of comparable size, grade and quality. The record contains two sources for such comparison: (1) so-called margin sheets (Com. Exh. 230 and 617) prepared by respondent's accountants and (2) net sales price tabulations prepared by the Commission's accountants from the sales records of respondent (Com. Exh. 693 to 705).

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The so-called margin sheets are statements showing a comparison of margins on sales prices of four representative and popular sizes of tire casings sold through both channels of distribution. These were (1) for Fords and Chevrolets, size 4.50-21; (2) for Plymouths and Whippets, size 4.75-19; (3) for Dodges and Nashes, size 5.25-21; and (4) for Buicks and Hudsons, size 6.00-21. The following chart sets forth in detail the net billing prices to Sears, Roebuck & Co. on its "All State" brand and to the independent service station dealers on the Goodyear "All Weather" brand, both being "first line" tire casings, comparable in grade and quality. The said prices are listed quarterly from the first quarter in 1927 through 1933 and show that the net billing price to Sears, Roebuck & Co. on these sizes ranged from 31.4% to 55.9% per quarter, lower than the net billing prices to the dealers, such percentages being based on the dealer prices.

Chart comparing billing prices of Goodyear All Weather brand and Sears, Roebuck & Co. All State brand

Date	Size	Net billing price to dealers "Goodyear All Weather"	Net billing price to Sears, Roebuck & Co. "All State"	Difference between Goodyear price to dealers and to Sears, Roebuck & Co.	Sears, Roebuck & Co. price under dealers price
1927					<i>Percent</i>
First quarter.....	5.25-21 4-ply.....	\$16.45	\$9.81	\$6.64	40.4
Do.....	6.00-21 4-ply.....	19.90	11.73	8.12	40.9
Second quarter.....	4.75-19 4-ply.....	11.60	7.60	4.00	34.5
Do.....	5.25-21 4-ply.....	16.45	9.66	6.79	41.4
Do.....	6.00-21 4-ply.....	19.90	11.89	8.01	40.8
Third quarter.....	4.75-19 4-ply.....	11.60	7.80	3.80	32.8
Do.....	5.25-21 4-ply.....	16.45	9.96	6.49	39.5
Do.....	6.00-21 4-ply.....	19.90	12.26	7.64	38.4
Fourth quarter.....	4.75-19 4-ply.....	10.45	7.29	3.16	30.3
Do.....	5.25-21 4-ply.....	14.87	10.05	4.82	32.6
Do.....	6.00-21 4-ply.....	17.96	12.14	5.82	32.4
1928					
First quarter.....	4.50-21 4-ply.....	9.64	5.81	3.83	39.8
Do.....	4.75-19 4-ply.....	10.45	6.09	4.36	41.7
Do.....	5.25-21 4-ply.....	14.87	9.58	5.29	35.6
Second quarter.....	4.50-24 4-ply.....	9.64	5.73	3.91	40.6
Do.....	4.75-19 4-ply.....	10.45	5.85	4.60	55.9
Do.....	5.25-21 4-ply.....	14.87	9.06	5.81	39.1
Do.....	6.00-21 6-ply.....	20.71	12.45	8.26	39.9
Third quarter.....	4.50-21 4-ply.....	8.46	5.26	3.20	37.9
Do.....	4.75-19 4-ply.....	9.17	5.31	3.86	42.1
Do.....	5.25-21 4-ply.....	12.26	8.42	3.84	31.4
Do.....	6.00-21 6-ply.....	17.10	10.73	6.37	37.3
Fourth quarter.....	4.50-21 4-ply.....	8.03	5.11	2.92	36.4
Do.....	4.75-19 4-ply.....	8.69	5.21	3.48	40.1
Do.....	5.25-21 4-ply.....	11.64	7.26	4.38	37.7
Do.....	6.00-21 6-ply.....	16.25	10.81	5.44	33.5
1929					
First quarter.....	4.50-21 4-ply.....	7.63	4.67	2.96	38.8
Do.....	4.75-19 4-ply.....	8.46	4.66	3.80	45.0
Do.....	5.25-21 4-ply.....	11.33	6.72	4.61	40.7
Do.....	6.00-21 6-ply.....	16.23	9.77	6.46	39.9
Second quarter.....	4.50-21 4-ply.....	7.43	4.52	2.91	39.2
Do.....	4.75-19 4-ply.....	8.24	4.63	3.61	43.9
Do.....	5.25-21 4-ply.....	11.03	6.54	4.49	40.7
Do.....	6.00-21 6-ply.....	15.80	9.68	6.12	38.8

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Chart comparing billing prices of Goodyear All Weather brand and Sears, Roebuck & Co. All State brand—Continued

Date	Size	Net billing price to dealers "Goodyear All Weather"	Net billing price to Sears, Roebuck & Co. "All State"	Difference between Goodyear price to dealers and to Sears, Roebuck & Co.	Sears, Roebuck & Co. price under dealers price
<i>1929</i>					
Third quarter.....	4.50-21 4-ply.....	\$7.43	\$4.73	\$2.70	Percent 36.4
Do.....	4.75-19 4-ply.....	8.24	4.90	3.34	40.6
Do.....	5.25-21 4-ply.....	11.03	6.84	4.19	38.0
Do.....	6.00-21 6-ply.....	15.80	10.24	5.56	35.3
Fourth quarter.....	4.50-21 4-ply.....	7.25	4.70	2.55	35.2
Do.....	4.75-19 4-ply.....	8.03	4.96	3.07	38.3
Do.....	5.25-21 4-ply.....	10.75	6.64	4.11	38.3
Do.....	6.00-21 4-ply.....	15.36	9.50	5.86	37.7
<i>1930</i>					
First quarter.....	4.50-21 4-ply.....	7.25	4.25	3.00	41.4
Do.....	4.75-19 4-ply.....	8.03	4.66	3.37	42.0
Do.....	5.25-21 4-ply.....	10.75	6.20	4.55	42.4
Do.....	6.00-21 6-ply.....	15.36	8.67	6.69	43.6
Second quarter.....	4.50-21 4-ply.....	6.89	3.86	3.03	43.9
Do.....	4.75-19 4-ply.....	7.64	4.15	3.49	45.7
Do.....	5.25-21 4-ply.....	10.20	5.93	4.27	41.9
Do.....	6.00-21 6-ply.....	14.96	7.99	6.97	46.6
Third quarter.....	4.50-21 4-ply.....	6.89	3.89	3.00	43.6
Do.....	4.75-19 4-ply.....	7.64	4.37	3.27	42.9
Do.....	5.25-21 4-ply.....	10.20	5.77	4.43	43.5
Do.....	6.00-21 6-ply.....	14.25	7.70	6.55	46.0
Fourth quarter.....	4.50-21 4-ply.....	6.89	4.05	2.84	41.3
Do.....	4.75-19 4-ply.....	7.64	4.58	3.06	40.1
Do.....	5.25-21 4-ply.....	10.20	6.45	3.75	36.8
Do.....	6.00-21 6-ply.....	14.25	8.59	5.66	39.7
<i>1931</i>					
First quarter.....	4.50-21 4-ply.....	5.89	3.31	2.58	43.5
Do.....	4.75-19 4-ply.....	6.41	3.52	2.89	45.2
Do.....	5.25-21 4-ply.....	8.55	4.91	3.64	42.6
Do.....	6.00-21 6-ply.....	12.76	7.01	5.75	45.06
Second quarter.....	4.50-21 4-ply.....	5.89	3.24	2.65	45.0
Do.....	4.75-19 4-ply.....	6.41	3.34	3.07	49.5
Do.....	5.25-21 4-ply.....	8.55	4.57	3.98	46.5
Do.....	6.00-21 6-ply.....	12.76	6.27	6.49	50.9
Third quarter.....	4.50-21 4-ply.....	5.89	3.50	2.39	40.6
Do.....	4.75-19 4-ply.....	6.41	3.58	2.83	44.2
Do.....	5.25-21 4-ply.....	8.55	4.94	3.61	42.3
Do.....	6.00-21 6-ply.....	12.76	6.62	6.14	48.2
Fourth quarter.....	4.50-21 4-ply.....	5.29	3.62	1.67	31.6
Do.....	4.75-19 4-ply.....	5.78	3.74	2.04	35.3
Do.....	5.25-21 4-ply.....	7.69	4.95	2.74	35.7
<i>1932</i>					
First quarter.....	4.50-21 4-ply.....	5.29	3.15	2.14	40.5
Do.....	4.75-19 4-ply.....	5.78	3.23	2.55	44.1
Do.....	5.25-21 4-ply.....	7.69	4.47	3.22	41.9
Do.....	6.00-21 6-ply.....	11.49	5.97	5.52	48.1
Second quarter.....	4.50-21 4-ply.....	5.29	3.26	2.03	38.4
Do.....	4.75-19 4-ply.....	5.78	3.41	2.37	41.1
Do.....	5.25-21 4-ply.....	7.69	4.33	3.36	43.7
Do.....	6.00-21 6-ply.....	11.49	3.44	8.05	35.0
Third quarter.....	4.50-21 4-ply.....	5.29	3.44	1.85	35.0
Do.....	4.75-19 4-ply.....	5.78	3.57	2.21	38.3
Do.....	5.25-21 4-ply.....	7.69	4.51	3.18	41.4
Do.....	6.00-21 6-ply.....	11.49	3.39	8.10	40.5
Fourth quarter.....	4.50-21 4-ply.....	5.69	3.39	2.30	40.5
Do.....	4.75-19 4-ply.....	6.20	3.57	2.63	42.5
Do.....	5.25-21 4-ply.....	8.27	4.77	3.50	42.4
<i>1933</i>					
First quarter.....	4.50-21 4-ply.....	5.12	3.49	1.63	31.9
Do.....	4.75-19 4-ply.....	5.58	3.63	1.95	35.0
Second quarter.....	4.50-21 4-ply.....	4.88	3.00	1.88	38.6
Do.....	4.75-19 4-ply.....	5.25	3.13	2.12	40.4
Do.....	5.25-21 4-ply.....	6.98	3.82	3.16	45.1
Do.....	6.00-21 6-ply.....	10.28	5.58	4.70	45.8
Third quarter.....	4.50-21 4-ply.....	5.63	2.97	2.66	50.2
Do.....	4.75-19 4-ply.....	6.30	3.14	3.16	53.3
Do.....	5.25-21 4-ply.....	8.25	3.85	4.40	52.3
Do.....	6.00-21 6-ply.....	12.23	5.84	6.39	52.3
Fourth quarter.....	4.75-19 4-ply.....	6.30	4.02	2.28	36.2

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The arithmetical average percentages of gross discrimination for the entire period of time on the respective sizes of tire casings included in the foregoing chart are as follows:

Size 4.50-21	39.33%
4.75-19	40.33%
5.20-21	38.76%
6.00-21	38.2%

The gross price discrimination percentages disclosed in the foregoing tabulation (representing a comparison of net billing prices before deductions have been made on account of discounts, allowances and for all other considerations), indicate the disadvantage under which the independent service station dealers were basing their prices to consumers and are important in considering the effect upon the competition between these dealers and Sears, Roebuck & Co., the favored customer.

The figures contained in the net sales price tabulations (Com. Exh. 693 to 705) are summarized in the following Table I which contains a comparison of the discrimination in billing and net sales prices on similar sizes and grades of tire casings in favor of Sears, Roebuck & Co. as against service station dealers, in annual weighted average percentages for the entire period from April 1, 1926, through December 31, 1933, and a comparison of the discrimination found in net sales prices after all deductions have been made from dealer prices for such items as cash discounts, dealer bonuses, trade-in allowances, freight on sales and replacement losses, on eight popular sizes of tires of the two leading brands sold, viz, Goodyear All Weather brand to service station dealers and Sears, Roebuck & Co. All State brand to Sears Roebuck.

The difference, between the amount of gross discrimination found in the foregoing chart and in the following table on the same sizes, is accounted for by the difference in method of calculation and the periods covered, the foregoing chart representing arithmetical averages on a quarterly basis whereas the following table represents weighted averages on an annual basis for the same period of time.

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GOODYEAR BRANDS VERSUS SEARS, ROEBUCK & CO. BRANDS

TABLE I.—Table showing gross and net discrimination on eight popular sizes of tires during the period from April 1, 1926, to December 31, 1933

Sizes	Unit gross sales basis		Difference in unit price, "gross sale"	Ratio of difference in price to A. W. price	Unit net sales basis		Difference in unit price, "net sale"	Ratio of difference in price to A. W. price
1	2	3	4	5	6	7	8	9
	A. W.	A. S.	(Col. 2—Col. 3)	(Col. 4 + Col. 2)	A. W.	A. S.	(Col. 6—Col. 7)	(Col. 8 + Col. 6)
				Percent				Percent
4.40 by 21.....	\$8.34	\$5.10	\$3.24	38.85	\$7.37	\$4.87	\$2.50	33.92
4.50 by 21.....	6.99	4.16	2.83	40.49	5.99	3.83	2.16	36.06
4.75 by 19.....	6.31	4.06	2.25	35.66	5.34	3.71	1.63	30.52
5.25 by 17.....	5.84	3.58	2.26	38.70	4.77	3.13	1.64	34.38
2.25 by 21.....	12.86	7.54	5.32	41.37	11.81	6.88	4.93	39.17
5.50 by 18.....	8.31	5.22	3.09	37.18	7.02	4.78	2.24	31.92
6.00 by 21.....	18.87	9.56	7.11	42.65	14.75	8.76	5.99	40.61
6.50 by 17.....	10.24	6.81	3.43	33.50	8.80	6.28	2.52	28.64

NOTE.—"A. W." signifies "All Weather" brand of Goodyear. "A. S." signifies "All State" brand of Sears, Roebuck & Co.

In the first column of the foregoing table, appears a description of the sizes of the tire casings considered, the same being the popular sizes hereinbefore described. In the second column, are the average prices received for Goodyear All Weather brand casings actually sold by Goodyear, to service station dealers. In the third column, appear the average prices received by Goodyear on All State tires actually sold to Sears, Roebuck & Co. In the fourth column, appear the differences between the average prices received on Goodyear All Weather brand casings, as set forth in column No. 2, and the average prices received on Sears, Roebuck & Co. All State brand casings, as set forth in column No. 3. In the fifth column, appear the ratios or percentages that the differences in the unit price, as disclosed in column No. 4, bear to the Goodyear All Weather brand price, as set forth in column No. 2. In column No. 6, appear the average net prices received by Goodyear for each respective size of tire after deductions have been made as hereinbefore described. In column No. 7, appears the net price received for each size of Sears, Roebuck & Co. All State brand casings after deductions have been made as hereinbefore described. In column No. 8, appear the differences between the net prices received, as indicated in column No. 6 on Goodyear All Weather brand casings, and the net prices received for Sears, Roebuck & Co. All State brand casings as indicated in column No. 7. In column No. 9, appear the ratios or percentages that the amount of the differences between the unit prices on a net sales basis, as set forth in column No. 7, are to the unit net sales prices received by Goodyear on its All Weather brand casings, as indicated in column No. 6.

The net sales figures, taken from respondent's books, which served as the basis for the foregoing Table I (p. 278), were attacked by respondent as inexact because they omitted certain sales made from the Los Angeles plant of the respondent; "were not representative"; and because they failed to give proper weight to certain items of cost and expense. It is determined, however, that the eight samples used are representative and the figures shown in the Commission's exhibits, which served as a basis for the foregoing table, are sufficiently comprehensive to make the exhibits informative upon the point of gross and net discrimination as practiced by respondent in its sales to Sears, Roebuck & Co. on the one hand and the independent retail dealers on the other. The Los Angeles volume does not constitute more than 10% of the total volume of sales of these sizes of tires. The eight sizes used are reasonably representative, being approximately 37% of the total volume of sales of all sizes of Goodyear's All Weather brand and 35% of the total volume of sales of all sizes of Sears, Roebuck & Co. All State brand.

The percentage figures themselves are even more convincing in showing the average discrimination from year to year than those in the margin sheets and are equally as important, as they reflect the percentage of discrimination on independent dealer prices compared with the Sears, Roebuck & Co. prices, after all discounts and allowances have been made.

It is, therefore, apparent from the foregoing table that the respondent in the sale of these popular sizes and leading brands of tire casings to Sears, Roebuck & Co. and independent service station dealers, has discriminated in price on the average over the period covered, from approximately 33% to approximately 42%, when comparison is made between invoice prices to Sears, Roebuck & Co. and independent dealers; and that after all allowances have been made for dealers' bonus, cash discounts, other special discounts, commissions, trade-in allowances and freight on sales (transportation), from the amount of dealer sales and the rebates allowed Sears, Roebuck & Co., as calculated, at the end of the year, from the amount of Sears, Roebuck & Co.'s sales, the net average discrimination still remaining varies from approximately 29% to approximately 40%, depending upon the size of tire casing being compared.

SEC. 15.—Due allowance for differences in cost of selling.

As hereinbefore indicated, the foregoing table, showing the difference in price at which respondent sold tire casings to Goodyear service station dealers and to Sears, Roebuck & Co., makes due allowance for differences in cost of transportation but does not make due

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allowances for differences in cost of selling or distribution, although some of the deductions from the selling price represent items which might be termed distribution expenses such as trade-in allowances, special discounts and quantity discounts.

The following table contains a comparison of the average net billing prices on four popular sizes in equal grades of tire casings during the entire period from 1927 to 1933 inclusive, also a comparison of the average factory costs, distribution and selling expenses and the net operating profit realized by the respondent, in the sale of these tire casings as roughly allocated on the books of the respondent as between Sears, Roebuck & Co. and service station dealer customers, during the same period of time on the same grades and sizes of tire casings, all as set forth in margin sheets prepared by respondent's accountants:

TABLE II.—*Margin sheet comparison of net billing prices, factory costs, and distribution expenses, Goodyear All Weather brand versus Sears, Roebuck & Co. All State brand*

ALL WEATHER

	4.50 by 21	4.75 by 19	5.25 by 21	6.00 by 21
Net billing price.....	\$6.66	\$7.71	\$10.68	\$14.75
Factory cost.....	3.39	3.89	5.57	7.55
Distribution expense.....	2.29	2.53	3.38	4.91
Total cost.....	5.68	6.42	8.95	12.46
Net operating profit.....	.98	1.29	1.73	2.29

ALL STATE

	4.50 by 21	4.75 by 19	5.25 by 21	6.00 by 21
Net billing price.....	\$4.04	\$4.60	\$6.54	\$9.11
Factory cost.....	3.51	4.01	5.76	8.06
Distribution expense.....	.28	.30	.37	.48
Total cost.....	3.79	4.31	6.13	8.54
Net operating profit.....	.25	.29	.41	.57

In the foregoing table, the net billing price items represent the prices at which respondent billed the respective sizes of tire casings to its service station dealers on the Goodyear All Weather brand and the prices at which respondent billed All State tire casings to Sears, Roebuck & Co.; the factory cost item represents the cost of said tire casings through the factory; the distribution expense item in the case of the Goodyear All Weather brand tire casing includes all distribution expenses, including advertising, selling expenses and administrative overhead expenses, also trade-in allowances, dealer

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bonuses, cash discounts and freight on sales, extra allowances and commissions, replacement losses and warehousing and shipping. As to the Sears, Roebuck & Co. All State brand, the only items included under the caption "Distribution Expenses" are warehousing and shipping, replacement losses and administrative overhead expense.

The following table, entitled "Table of Discrimination on Samples", contains a comparison of the selling prices to Sears, Roebuck & Co. and service station dealers on comparable tire casings as set forth in the foregoing table and also a comparison of the differences in distribution and selling expenses as well as transportation and finally the differences not accounted for by differences in distribution and selling expenses. Said table represents a comparison of the average of discrimination on the respective sizes of tire casings and the average distribution expenses for the same period of time.

TABLE III.—Table of discrimination on samples

Size	All Weather net billing price	All State net billing price	Differences in net billing price	Differences in distribution and selling expenses	Differences not accounted for by differ- ences in distribution expenses
4.50 by 21.....	\$6.66	\$4.04	\$2.62	\$2.01	\$0.61
4.75 by 19.....	7.71	4.60	3.11	2.23	.88
5.25 by 21.....	10.68	6.54	4.14	3.01	1.13
6.00 by 21.....	14.75	9.11	5.64	4.43	1.21

The exhibits (margin sheets) which served as the basis for the foregoing tabulations were prepared by the officials of the respondent and respondent's own accountants, and represented by respondent to the Commission as presenting a reasonably accurate comparative picture of the situation. They show the existence of discrimination on the respective sizes of tire casings included in those exhibits, after taking into consideration all of the various items which would be listed as items of selling expense from the books of the respondent corporation where sales were made pursuant to the provisions of the foregoing contracts between respondent and Sears, Roebuck & Co.

Respondent later objected to the use of its own margin sheets to show the amount of dollar and cent discrimination or percentages, it being urged that the samples shown on the margin sheets were too meager to be representative and the sizes used were not popular sizes and had no specially large sales; that respondent made 190 sizes and grades for Sears, Roebuck & Co. and about 500 sizes and

grades for Goodyear dealers. The sizes included in the margin sheets which served as a basis for the foregoing tables were 16.13% of the Goodyear brand of tires made by respondent and 12.33% of the tires made for Sears, Roebuck & Co.

Respondent further urged that the margin sheets were not accurate as to cost and expense; that the costs were estimated costs and the net billing prices were somewhat above the prices realized by respondent on the Sears, Roebuck & Co., business after adjustments had been made at the end of the year; that the prices by Goodyear to the dealer were not accurate in that they were net billing prices and failed to reflect cash discounts, bonuses and allowances of similar character made dealers in settlement of their accounts or at the end of the year.

These objections to the aforesaid margin sheets are for the most part valid if the figures in the foregoing Tables II and III were to be used to determine the *exact amount* of the discrimination on each size of tire. However, since the figures are not considered for that purpose but only to determine the *existence* of price discrimination on the four sizes, compared after due allowance has been made for selling and distribution expenses, the objections do not apply.

There is a more informative comparison of net sales price figures and differences in distribution expenses set forth in the following Table IV on page 283 herein, which is a continuation of Table I, page 278 *supra*, and contains not only a summary of discrimination in net sales prices on eight popular sizes and grades of tire casings sold to service-station dealers and Sears, Roebuck & Co., but also a summary of the differences in distribution expenses, including advertising and selling, and the amount of the average net discrimination per tire casing on eight popular sizes, remaining after due allowance has been made for said differences in distribution costs, together with the ratio that said net discrimination per tire casing bears to the average net dealers sales price on each size.

The item "Difference in Expenses 'Dealers minus Sears'", in column 6 in the following table, is a computation of the differences in distribution expenses incurred by Goodyear on the two classes of business, as shown by a profit and loss statement submitted by the respondent, which does not allocate to Sears, Roebuck & Co. any part of Goodyear's advertising and selling expenses on Goodyear brands of tires but which does charge Sears, Roebuck & Co. with its proportionate share on a cost-of-sales basis of administrative and other overhead expenses, in accordance with the Commission's finding in respect thereto.

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TABLE IV.—Table showing net discrimination on eight sizes of tire casings during the period from April 1, 1926, to December 31, 1933, resulting from deduction of the amount of difference between the selling expense from the difference between the net sales figures

Tire	Unit net sale basis per Commission's exhibits 698 to 705		Difference in unit price, "net sale"	Ratio of difference in price to A. W. price	Difference in expenses "Dealers" minus "Sears"	Net discrimination	Percent of "net sales price" of All Weather
	A. W.	A. S.	Col. 2—col. 3	Col. 4—col. 2		Col. 4—col. 6	Percent col. 7 of col. 2
1	2	3	4	5	6	7	8
No. 1—	\$7.37	\$4.87	\$2.50	<i>Percent</i> 33.92	\$1.30	\$1.20	16.28
No. 2—	5.99	3.83	2.16	36.06	1.06	1.10	18.36
No. 3—	5.34	3.71	1.63	30.52	.94	.69	12.92
No. 4—	4.77	3.13	1.64	34.38	.84	.80	16.77
No. 5—	11.31	6.88	4.43	39.17	2.01	2.42	21.40
No. 6—	7.02	4.78	2.24	31.91	1.23	1.01	14.39
No. 7—	14.75	8.76	5.99	40.62	2.62	3.37	22.85
No. 8—	8.80	6.28	2.52	29.20	1.54	.98	11.14

NOTE.—No. 1—4.40 by 21 size.
 No. 2—4.50 by 21 size.
 No. 3—4.75 by 19 size.
 No. 4—5.25 by 17 size.
 No. 5—5.25 by 21 size.
 No. 6—5.50 by 18 size.
 No. 7—6.00 by 21 size.
 No. 8—6.50 by 17 size.

The items in column 7 entitled "Net Discrimination", represent the difference between the amount of sales price discrimination found in column 4 and the items just described in column 6 and thus represent the amount of net discrimination on each size of tire casing remaining after due allowance has been made for differences in the cost of selling and transportation. In column 8, appear the percentages that the amounts set forth in column 7, for each size of tire casing, are of the net sales figure in column 2 (Goodyear All Weather brand net sales price) and represent the net percentage of discrimination on each size of tire casing, after due allowance has been made for differences in the cost of selling and transportation. The percentages in this column, while not absolutely accurate, fairly approximate the percentage of discrimination in each instance as the figures in the table are based upon actual transactions and are the result of computation made from figures set forth in respondent's books of account and as set forth in exhibits in the record.

Respondent contended the apparent price differences were justified by differences in costs of selling and offered in evidence profit and loss statements which were to take the place of the aforesaid margin sheets and were to serve as a basis for a comparison between the two classes of business to determine the aggregate amount of discrimination in price. Counsel for respondent stated with respect thereto:

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One profit and loss statement in respect of the renewal of Good-year brand business. Another profit and loss statement will be offered covering Goodyear's activities in connection with Sears Roebuck.

Such profit and loss statements will in effect be a universal margin sheet reflecting the weighted averages and giving effect to all items of expense of exact results of the two classes of business.

* * * * *

It is our contention that the profit and loss statements which we propose to introduce in evidence will serve as universal margin sheets covering all of the tires, and in addition covering the appropriate weight of the averages and the appropriate adjustment to meet expenses which could not be shown in the so-called margin sheets.

Upon the basis of respondent's contention that comparative profit and loss statements would best serve as universal margin sheets to show the net aggregate dollar discrimination over the period, it is necessary, in order to determine from a comparison of profit and loss statements whether price discrimination still exists after making due allowances for differences in cost of selling, to consider the factors or elements that go to make up prices at which respondent sells tires to Sears, Roebuck & Co. These elements are costs and profit. As hereinbefore set forth (p. 274), when a comparison is made between the net sales prices of the total volume of tires sold to Sears, Roebuck & Co. and a corresponding volume sold to Goodyear service station dealers, the aggregate amount of net discrimination amounts to \$41,216,788.48. Inasmuch as Goodyear has charged Sears, Roebuck & Co. with the actual factory costs (which were the same or higher than manufacturing costs of the comparable service station dealer tire), the price discrimination lies in the allocation of distributing costs and the amount of net profit received from sales to Sears, Roebuck & Co. Under the contracts between respondent and Sears, Roebuck & Co. the latter is not charged with any advertising or selling expenses or interest on borrowed money. A profit and loss statement as prepared by respondent carrying out the terms of these contracts and restricted to a comparison of Sears, Roebuck & Co.'s business and a corresponding volume of dealer business and restricted to expenses actually incurred in connection with the dealer business and not including expenses incurred in connection with respondent's company-owned stores and bus and taxi business, shows that Goodyear realized on its sale of tires to Sears, Roebuck & Co. during the entire period of time from April 1, 1926, through December 31, 1933, a total net profit of \$7,715,794.56 and from the sale of an equal volume of tires to service station dealers a net profit of

\$20,425,807.21, or a difference of \$12,710,012.65, which difference in net profits would be an aggregate net price discrimination not accounted for by differences in costs of transportation and selling, computed according to respondent's own calculations and based upon the method which it itself suggested.

Respondent's aforesaid profit and loss statements fail to show that the price discrimination in favor of Sears, Roebuck & Co. and against independent service station dealers, as hereinbefore set forth, was justified by differences in costs of transportation or selling.

SEC. 16.—*Secrecy as to prices and terms and secret rebate of \$1,250,000.*

Respondent concealed the prices and terms at which it was selling tires to Sears, Roebuck & Co. from its own sales organization and from the trade generally, and at no time did the sales officials or representatives of respondent offer or give to any dealer or group of dealers prices on Goodyear brands or tires which were comparable with prices at which respondent was selling tires of equal or comparable quality to Sears, Roebuck & Co.

The series of contracts hereinbefore described between respondent and Sears, Roebuck & Co., under which respondent manufactured and sold tires to Sears, Roebuck & Co., were carefully guarded in the files of respondent and only a few officials were permitted to inspect them.

The respondent also carefully concealed the existence of, as well as the terms and conditions set forth in, the consideration or bonus agreement hereinbefore described, which was executed by officials of the respondent at the same time as the third tire contract was executed, viz, October 5, 1931, not only from the trade, but also from investigators of the Federal Trade Commission at the time the Commission's preliminary investigation was made. The existence and terms of said consideration or bonus agreement were also concealed from the stockholders and sales officials of the respondent. No reference to the payment of this bonus is contained in any annual or semi-annual report to stockholders of respondent. Said contract was kept among respondent's confidential records and access to it was strictly limited to certain executive officers of the respondent corporation.

The assignment by respondent of 18,000 shares of its common treasury stock and the payment by respondent of \$800,000 in cash to Sears, Roebuck & Co. on October 5, 1931, at the time it entered into the said third sales contract, as hereinbefore described, without making similar assignments of stock or payment of cash to its regular customers, service station dealers, is a discrimination in price; also since said amount is not included or computed as a cost in the prices

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at which respondent sold tires to Sears, Roebuck & Co., a further discrimination in price is indicated. Said amount is not included in the foregoing margin sheet statements or tables based on net sales prices on eight sizes of tires which are based on respondent's records.

The assignment by respondent of 18,000 shares of its common treasury stock and the payment of \$800,000 in cash to Sears, Roebuck & Co. on October 5, 1931, as hereinbefore described, and the concealment of said assignment and said payment from the trade generally, from the employees of respondent, other than those officials who took part in the negotiations, and the representatives of the Federal Trade Commission, as hereinbefore set forth, constituted a secret rebate or discount from respondent's regular prices to Sears, Roebuck & Co. in the form of cash and valuable stock bonuses in the amount of at least \$1,250,000, which was equal to a reduction in profit to Goodyear of approximately 2% on the aggregate price of the tires sold to Sears, Roebuck & Co. However, the profit and loss statements in the record, upon which the finding of \$12,700,000 aggregate amount of price discrimination is based, contain an allocation of one-tenth of the amount of \$1,250,000, \$125,000 in each of the years 1932 and 1933, as a part of the costs of selling tires to Sears, Roebuck & Co. during those years.

Such allocation and distribution of this item, in a profit and loss statement prepared for the purpose of comparing results of business with Sears, Roebuck & Co. and dealer customers, is approved.

SEC. 17.—*Differences in quantity.*

Respondent claims that the said discrimination in price was on account of differences in the respective quantities sold to Sears, Roebuck & Co. on the one hand and to its several dealers on the other hand, within the proviso of Section 2 of said Clayton Act. The burden of proof is upon the respondent to bring itself within the quantity proviso. The evidence submitted on behalf of respondent tended to show, principally by the testimony of its President, Mr. Litchfield, that Sears, Roebuck & Co. was given the favorable contract and the discriminatory price on account of the volume of business involved, that

Any additional volume always tends to decrease the cost and to distribute the overhead.

Further, respondent's contention is that the testimony tended to show that the Sears, Roebuck & Co. volume was from 13 to 36 times as large as the business of its next largest dealer customer; that the controlling factor motivating the entry by respondent into its contractual relations with Sears, Roebuck & Co. pursuant to which the

tires were sold at said discriminatory prices, was the volume of business thereby to be obtained; that the prognostication by respondent's executives of the size of Sears, Roebuck & Co. purchases was borne out by the facts; that the volume thereby obtained had value to respondent in removing hazards and insuring stability by avoiding the fluctuation of profit inevitable in respondent's other business, and by casting on Sears, Roebuck & Co. the risks which respondent normally bore of raw material price declines and credit losses, which advantages may not be translated into precise terms of dollars and cents benefit; and that quantity discounts in the tire business have been customary since 1924.

Although there was some conflicting testimony by practical and technical economists as to the advantage of dealing with a large customer on the basis of hazard and other factors not translated into any dollar and cents advantage or disadvantage to the respondent, from all of the testimony it is determined, as a matter of fact, that the alleged hazards and other similar factors in this case were too speculative, intangible and remote to justify, or to be reasonably related to, the price discrimination.

It is determined that any and all quantity advantages, as well as other tangible and intangible comparative advantages, to respondent growing out of the Sears, Roebuck & Co. business are necessarily reflected in the comparison of a profit and loss statement showing the results of respondent's business, from a profit and loss standpoint, with Sears, Roebuck & Co., and the results of its business with its dealers. Such a comparison is set forth herein supra, and shows that a very substantial aggregate discrimination remained after making due allowances for differences in quantity sold Sears, Roebuck & Co. and respondent's other customers.

It is further determined that said discrimination was not a quantity discount as customarily understood in the trade; that the quantity discounts usual in the tire industry are relatively small and based upon certain definite and known volumes of purchases with a fixed saturation point at a normal maximum of 10% (abnormal maximum, 15%), and every dealer is in a position to know the price he would have to pay for the tires he purchased on a quantity basis; further that in the case of the usual quantity discount the difference in price bears some approximate and reasonable relation to the difference in quantity, which is not true of the difference in price and the difference in quantity in this case. Individual sales and shipments of tires by respondent to Sears, Roebuck & Co. were often of quantities similar to those shipped to dealers at the higher prices and frequently consisted of only four or five tires; also the quantities of

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tires sold to Sears, Roebuck & Co. varied from month to month and from year to year without any variation in price due to changes in quantity. This price discrimination was not a quantity discount as construed by respondent in handling its dealer business.

In some cases respondent denied to its dealers that it made and sold tires to Sears, Roebuck & Co. at all, and in other cases, after complaint and inquiry by the dealers, it denied to them that Sears, Roebuck & Co. had any more favorable terms than the dealers themselves could obtain and were obtaining. The respondent's dealers asked respondent for means to combat intensive Sears, Roebuck & Co. competition and respondent did not tell the dealers that it was making Sears, Roebuck & Co. a favorable price on account of quantity but told them that Sears, Roebuck & Co.'s competitive advantage was due to Sears, Roebuck & Co.'s economical methods of distribution, and that if the dealers were willing to do business at a like narrow margin their principal difficulty would be solved. In truth and in fact Sears, Roebuck & Co. had a gross margin of 40% to 60% while the dealer in meeting Sears, Roebuck & Co. competition obtained a much less gross margin.

The testimony of the expert economists pro and con has been weighed and it is determined that the aforesaid price discrimination was not in accordance with the ordinary and usual principles recognized in the merchandising field, and that so-called quantity discounts not justified on approximate savings are in that field ordinarily considered as a form of price cutting, and that a comparison of the price advantage given to Sears, Roebuck & Co. with the price advantage given Goodyear's next largest (dealer) customers shows a resulting differential too large to be classified as a quantity discount judged by the standards of ordinary and usual principles in the field of merchandising, and in fact it amounts to an unfair preferential advantage.

It is further determined that the respondent's present contention that said discrimination is justified by the quantity of Sears, Roebuck & Co. purchases is discredited by the fact that the prices at which respondent sold tires to Sears, Roebuck & Co. were treated with great secrecy, while the prices to the respondent's dealers were published and disseminated throughout the trade; that the bonus contract of October 5, 1931, providing for the transfer of \$800,000 in cash and 18,000 shares of stock to Sears, Roebuck & Co. was entered into without the knowledge or consent of the Goodyear stockholders, to whom the officers of the company reported a long-term contract with Sears, Roebuck & Co., saying nothing about the "bonus contract"; that respondent's branch managers, salesmen and

dealers were denied all information concerning the price at which respondent sold Sears, Roebuck & Co.; and that respondent's dealers never knew the Sears, Roebuck & Co. price, and never had an opportunity to buy at that price, although in one instance some tire dealers leagued together and attempted to do so; and that the series of contracts between respondent and Sears, Roebuck & Co. under which respondent manufactured and sold tires to Sears, Roebuck & Co. were carefully guarded in the files of respondent and only a few certain officials having business with them were allowed to inspect them; and that respondent led its dealers to believe that the quality of the tires sold to Sears, Roebuck & Co. was inferior to tires of comparable size, grade and quality sold to dealers, when such was not the fact.

Respondent made no showing by its proof as to the comparative quantities sold under single invoices from day to day or the exact comparative quantities shipped in any one shipment, nor was any testimony adduced by it showing comparative advantage or disadvantage in dollars and cents to respondent of shipping and invoicing in one quantity rather than in another.

With respect to the alleged absorption of Goodyear overhead, it is determined that the proper accounting method is to allocate overhead expenses impartially to all tire units passing through the factory; that the much larger volume of business obtained from Goodyear independent dealers as a group is just as important to the respondent as the volume from Sears, Roebuck & Co. To arbitrarily attribute more importance to one than another customer's contribution to total volume and consequent per unit reduction in overhead is shown by the evidence to constitute one means of creating the unfair preferential advantage given by Goodyear to Sears, Roebuck & Co. As a matter of fact, in the years 1931 and 1932 respondent actually charged Sears, Roebuck & Co. as an additional cost in the manufacture of tires, for losses sustained during certain months because Sears, Roebuck & Co. took proportionately more tires during the high production months when manufacturing costs were high.

Sears, Roebuck & Co. ordered tires in anticipation of sharp rises and declines in production through the entire time so as to take advantage of periods of low cost of production in peak months, usually placing most orders in the summer months when respondent was at the highest point of production on its Goodyear brands, and refrained from ordering tires during the months of November and December, the months of lowest production of Goodyear brands, thus requiring increased capacity in the plants to take care of the peak production for Sears, Roebuck & Co. and the sustaining of losses in manufactur-

ing costs during the months of November and December, the slack months of the year when Goodyear needed increased production to keep down its overhead costs.

Respondent has failed to satisfy its burden of proof to bring it within the excepting proviso as to quantity. The substantial factual evidence that the discriminatory price to Sears, Roebuck & Co. was not on account of quantity far outweighs the statement of Mr. Litchfield that it was on account of quantity, and the testimony of the economists and accountants called by respondent who testified as to the value resulting from the quantity sales in terms of elimination of so-called hazards and the theoretical absorption of overhead. There is not a sufficient factual foundation in the record to bring respondent within the excepting proviso as to quantity. The discrimination found between Sears, Roebuck & Co. on the one hand, and independent dealers on the other, in the sale of its pneumatic tires and tubes by respondent to these respective classes of distributors was not on account of the differences in quantities of the commodity sold.

Savings or economies to the respondent on account of selling large quantities to Sears, Roebuck & Co., as compared to small quantities sold to individual independent tire dealers are allowed and accounted for in the Findings under Section Fifteen entitled "Due Allowances for Differences in Cost of Selling".

SEC. 18.—*Differences on account of quality.*

It has been conceded by the respondent, for the purposes of this case, that corresponding grades of Goodyear and Sears, Roebuck & Co.'s tires, such as the Goodyear "All Weather" brand and the "Companion" and Sears, Roebuck and Co.'s "All State" brand and the "Pathfinder", respectively, may be considered as comparable in quality.

The tires sold by respondent to Sears, Roebuck & Co. on the one hand and to its service station dealers on the other hand were, and are, in fact comparable commodities, grade for grade, and size for size, and that said discrimination set forth herein was not made on account of differences in the grade or quality of the tires sold to Sears, Roebuck & Co.

SEC. 19.—*Discrimination not made in good faith to meet competition.*

At the time and before the first tire contract was entered into between respondent and Sears, Roebuck & Co., March 8, 1926, there was no competition with respect to Sears, Roebuck & Co.'s requirements for respondent to meet. The officials of Sears, Roebuck & Co. had neither solicited nor received bids for their requirements of tires

from any major manufacturer other than respondent. At that time and for some time prior thereto, Sears, Roebuck & Co. had been purchasing tires from a number of small manufacturers and had a contract with the Murray Tire & Rubber Co. of Trenton, N. J., which it was necessary for Sears, Roebuck & Co. to cancel during the year 1926 in order to comply with the terms of its first contract with the respondent.

Officials of Sears, Roebuck & Co. were dissatisfied with the quality of tires that they had been buying and, because of the high quality of Goodyear tires and the financial responsibility of respondent, they approached the sales officials of Goodyear and asked for prices on a tire of the highest quality. The reason that prompted Sears, Roebuck & Co. to seek to purchase tires from respondent, and not approach other major tire manufacturers before doing so, was that from their previous experience with respondent they were satisfied that respondent had the facilities to make tires of satisfactory and uniform quality at a reasonable cost, and also that the financial standing of respondent was such that it could carry out the contract for Sears, Roebuck & Co.'s requirements of tires.

When negotiations were entered into with respect to the renewal of this first tire contract in May, 1928, the officials of both respondent and Sears, Roebuck & Co. were satisfied with the results of the first tire contract, and it was decided to make the second one for five years instead of terminating it in three years. Sears, Roebuck & Co. agreed to allow respondent an extra $\frac{1}{2}\%$ of profit in case rubber went below 25¢ per pound. Other minor changes were made in the terms of the second contract but there was no more genuine competition with respect to the making of the second tire contract than there was with respect to the first. Sears, Roebuck & Co. was satisfied with the quality of the tires it had been getting from respondent and was also satisfied with the margin of profit it was able to get from the sale of the tires. The second tire contract was negotiated by General R. E. Wood, President of Sears, Roebuck & Co., and, before signing it, he insisted upon an assurance that respondent would establish a factory in the southeastern part of the country to take care of Sears, Roebuck & Co.'s tire requirements in that area, and also that respondent would allow Sears, Roebuck & Co. to purchase a limited number of tires (200,000) from a small factory located in Iowa to take care of Sears, Roebuck & Co.'s requirements in that area. There was no intention on the part of Sears, Roebuck & Co.'s officials to consider the Lake Shore Tire & Rubber Co., the small Iowa manufacturer, to replace respondent as to supplier of tires to Sears, Roebuck & Co. There was some vague mention by General Wood to

Mr. Litchfield, the president of respondent, of a group of small manufacturers that might be developed into an adequate source of supply, but no definite steps had been taken by Sears, Roebuck & Co. in this direction, and Sears, Roebuck & Co.'s experience with minor sources of supply was well known to the President of the respondent.

General Wood, President of Sears, Roebuck & Co., and formerly associated with Montgomery Ward & Co., negotiated with the President of respondent for the third, or current, tire contract, which was signed October 5, 1931. During these negotiations, although Sears, Roebuck & Co.'s sale of tires purchased from respondent had been profitable to Sears, Roebuck & Co., General Wood demanded a bonus of fifty thousand shares of respondent's stock as a consideration for signing the new contract without opening it to competition. He had announced, about July 1931, that otherwise he would give notice of termination of the second contract so that it would expire December 31, 1932. At that time General Wood told Mr. Litchfield, President of the respondent, that he "was satisfied" that he could do better than Sears, Roebuck & Co. was doing under the said contract; that better terms might be secured from some of the large companies, or he might get together several small companies as sources of supply.

The basis for General Wood's statement was a conversation that he had with the President of the United States Rubber Company some time in 1930, long prior to the time negotiations were being conducted with respect to the third tire contract. At the time of the negotiations between General Wood and Mr. Litchfield, in the summer of 1931, leading up to the execution of the said third tire contract, it was common knowledge in the tire industry that the United States Rubber Company had a contract with the Montgomery Ward Company to furnish its entire requirements of tires, which had been executed in January of 1931, and was also furnishing half of the requirements of the Atlas Tire & Rubber Co. since late in 1930.

Neither the Firestone Company nor the Goodrich Company, the other two major manufacturers, had solicited or offered bids to Sears, Roebuck & Co. for its tire requirements. In fact no actual tenders or bids were received by Sears, Roebuck & Co. from any reliable source and no names of prospective or available sources were submitted to Mr. Litchfield by General Wood. Mr. Litchfield knew of a rumor that the General Tire & Rubber Co. had offered to buy the Kelly Springfield plant and operate it for Sears, Roebuck & Co., but he had no facts to support the rumor. The President of the General Tire & Rubber Co. testified that he had talked with General Wood but had made it very plain that he could not

produce a low cost tire, and had informed General Wood that the price of tires would be higher than he understood they were then paying respondent.

There is no evidence that any competitor, able to meet the requirements of Sears, Roebuck & Co. as to quantity, quality of tires, and substantial financial responsibility, had ever solicited Sears, Roebuck & Co.'s tire business by offering Sears, Roebuck & Co. tires at prices which were as low as the prices Sears, Roebuck & Co. was then paying respondent for tires; or that officials of Sears, Roebuck & Co. had made known to the officials of the respondent the existence and nature of any competing offers from such competitors; or that the price discriminations then being granted by respondent to Sears, Roebuck & Co. were granted pursuant to any knowledge thus received, and were no more than necessary to meet the threatened competition. Specifically, no competitor ever offered Sears, Roebuck & Co. a cash or stock bonus of more than one million dollars in value for the privilege of selling tires to Sears, Roebuck & Co. on a cost plus 6% profit basis. The secret payment of \$1,250,000 in cash and Goodyear stock to Sears, Roebuck & Co. by respondent on October 5, 1931, was for the purpose, and had the effect of, preventing competition on the Sears, Roebuck & Co.'s tire contract for at least eleven years.

It is quite clear that, when once signed, each of the said tire contracts gave respondent a monopoly on the Sears, Roebuck & Co.'s requirements of tires and all competition was rigidly shut out during the respective periods covered by the said contracts; and that under the contracts themselves there was and could have been no competition for Sears, Roebuck & Co.'s business between respondent and other manufacturers in the actual sale of tires at any time since the execution of the first tire contract in 1926. All Sears, Roebuck & Co.'s purchases of tires from the Lake Shore Co., during 1929 and subsequent years, were with the consent of respondent. This permission is now withdrawn.

Said discrimination in price set forth herein was not made in good faith to meet competition.

SEC. 20.—Effect on competition between Sears, Roebuck & Co., and independent tire dealers.

Prior to May, 1926, the independent tire dealers had not found Sears, Roebuck & Co. a serious competitive factor in the retail tire field and for a short time thereafter they felt no great interest in the developments which followed the making of the first tire contract between respondent and Sears, Roebuck & Co. The independent deal-

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ers, not knowing the price at which respondent was selling tires to Sears, Roebuck & Co., nor the actual quality of the tires, had little to guide them at first in evaluating the effect of this new competitive factor in the retail tire field. Montgomery Ward & Co., principal competitor of Sears, Roebuck & Co., had been more of a factor, although it had not been a menace to any acute degree. Other mass distributors were responsible for some competition, but the effect was not serious upon the independent retail tire dealers. With the exception of the metropolitan area around New York City, the great bulk of independent tire dealers, prior to 1926, had been able to sell tires at the suggested consumers' sales prices of respondent and other leading manufacturers. Most of the independent dealers had margins of from 20% to 25% over net billing prices and found these margins sufficient to enable them to do business on a satisfactory basis. Prices rose and fell gradually. They were usually able to adjust themselves to the declines in the market prices of tires.

Prior to 1926 it had been customary in the retail tire industry for the independent dealer to be able to dispose of the used tires received in trade-in transactions at a profit to himself, or at least at a figure which did not involve any loss in the sale of a new tire, upon which the trade-in was made. Trade-ins became more numerous as types of tires changed, such as the change from the clincher type to the balloon type, but in the bulk of these trade-ins, the value of the old tire taken in was always considered in making the trade-in allowance. This allowance was usually at the value of the old tire or less.

Prior to 1926 it had been customary for the independent dealers, from time to time as the occasion demanded, to give away free merchandise such as free tubes, but it was not a general practice in the industry.

Prior to 1926 there were so-called "gyp" dealers in the retail tire business selling tires usually of unknown quality, manufactured by the smaller independent tire manufacturers, and their activities in the metropolitan area around New York City had made it difficult for dealers in that area to prosper in the tire business, but they were not nearly so important a factor in the rest of the tire distribution territory. These dealers were without great financial responsibility, and their bargains were, for that reason, not attractive to the average customer.

Sears, Roebuck & Co. at the time it made its first tire contract with respondent, because of the low prices at which it bought its tires, adopted a policy of a major effort toward the expansion of its tire business. As hereinbefore stated, during the year 1925, Sears, Roe-

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buck & Co. sold about 700,000 tires in the United States, as against about 2,000,000 tires sold by Montgomery Ward, its principal mail-order rival. As part of its program of tire sales expansion, Sears, Roebuck & Co. adopted a plan of very extensive consumer advertising of its goods, among other things featuring a naming contest to determine the name of the new tire being purchased from respondent (the name "All State" was eventually selected as a result of this contest). Sears, Roebuck & Co., in its advertising campaign, made its tires a leading feature in advertisements in millions of catalogs, national magazines and the leading daily newspapers throughout the United States, featuring the high quality of its new tire and the low price which it maintained systematically at 25% below the lowest price of standard first line tires then on the market.

In addition to these features of its program, Sears, Roebuck & Co. also began, in 1926, to establish retail stores in the principal cities of the United States through which it sold its general merchandise, but always featuring its new brand of tires in its advertising matter. Retail stores handling tires and other automobile accessories exclusively, or hardware and other similar products, were established at an accelerated pace during 1928 and 1929, and by 1933 Sears, Roebuck & Co. had established more than four hundred stores in the principal cities of the several States of the United States, all of which aggressively advertised and sold tires at the opening of the stores and regularly thereafter. In many of these advertisements featuring tires, the source of supply was described as "the leading tire manufacturer", or "the world's foremost tire manufacturer." The high quality and low prices were emphasized. Details of construction were featured paralleling to a considerable extent the construction features advertised by respondent in its general advertising campaign. In many advertisements representations were made that advantageous contracts and mass purchases had put Sears, Roebuck & Co. in a position to make a price about 25% below the price at which tires of comparable quality could be secured from any other source.

Among other representations featured by Sears, Roebuck & Co. in its advertising matter, were extraordinary guarantees backed by the prestige and high standing of Sears, Roebuck & Co. as a merchandiser. In 1926 and 1927, for instance, Sears, Roebuck & Co. was the first to advertise a mileage guarantee of 12,000 miles for its first line, Sears, Roebuck & Co.'s All State brand, and 8,000 miles for its second line tire, Dearborn. Sears, Roebuck & Co.'s All State brand of tires was later guaranteed for 25,000 miles on the heavy

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duty quality. These guarantees were followed by "the strongest tire guarantee ever written", a service guarantee against defects, unlimited as to time or mileage, which guarantee was in force in October, 1931.

As a result of this aggressive advertising due to the low price of tires purchased from respondent, and also the experience on the part of the tire users that Sears, Roebuck & Co. was selling a tire of high quality at a price 25% below prices of standard products, the volume of tire sales by Sears, Roebuck & Co. increased very rapidly. During 1926 Sears, Roebuck & Co.'s unit sales passed the million mark and thereafter grew at a constantly accelerated rate until 1929 when it reached the peak figure of approximately 4,500,000 tires.

By 1927 the competition arising from the combination of high quality and low price, and the aggressive advertising and sales campaign which Sears, Roebuck & Co. was enabled to conduct because of the low buying prices from respondent, began to be felt in the retail tire field. This was especially true in places where Sears, Roebuck & Co. had established retail stores, although Sears, Roebuck & Co. had followed its custom of issuing its regular catalogs twice a year, in the Spring and Fall, and its mid-winter and summer fliers featuring its low prices. By 1928 and certainly in 1929, the independent retail tire dealers were feeling the full force of the Sears, Roebuck & Co. competition with the Goodyear-made tire of high quality combined with a price differential of approximately 25%, in some cases reaching as high as 35% on tires for popular size cars. The strength of the Sears, Roebuck & Co.'s competition is indicated by the statement in its advertising matter, in 1931, that in less than four years its All State brand of tire, its first line product, had risen in volume as compared with other nationally advertised tires, from sixteenth to first place.

Testimony was adduced on behalf of the Commission from 140 tire dealers showing the present and past competitive situation resulting from the Goodyear-Sears, Roebuck & Co. contracts over a territory of 24 States and the District of Columbia, generally, and in 59 cities, particularly. Of these dealer witnesses, 66 either were, or had been, engaged in the sale and distribution of Goodyear brand tires under dealers' franchises for the respondent. Many of them had discontinued handling the Goodyear line by reason of the fact that through the aforesaid contracts Goodyear had placed Sears, Roebuck & Co. in a position to furnish them with their most severe and injurious competition. These dealers represented approximately 42 different brands of tires, including the leading brands of Good-

year, General, Goodrich, United States, Firestone, and Fisk, and some brands which are no longer on the market.

Many independent dealers testified that Sears, Roebuck & Co. was their principal competitor in the retail tire market in their communities. Dealer witnesses, called by counsel for the Commission, attributed Sears, Roebuck & Co.'s ability to compete injuriously with them, to the discriminatory prices made by respondent to Sears, Roebuck & Co. Such dealers testified that soon after the contract had been made between Sears, Roebuck & Co. and respondent, that fact became known to the trade and somewhat later to a large proportion of the purchasing public; and that Sears, Roebuck & Co.'s aggressive advertising campaign featuring a first quality tire at low prices after the middle of 1928 had resulted in largely increased sales of Sears, Roebuck & Co.'s brand of tires in the towns where such advertising was done and had taken much business from retail dealers.

These dealer witnesses also testified that Sears, Roebuck & Co.'s brand of tires were sold at a price approximately 25% under the prices of other brands of competitive tires of comparable grade and quality. Such dealers testified that Sears, Roebuck & Co.'s prices to the consuming public were approximately the same as or below the prices charged by respondent to its service station dealers for tires of the same grade and quality. This the dealers characterized as an impossible competitive situation.

Many dealer witnesses, called by counsel for the Commission, testified that dealers attempted to meet the Sears, Roebuck & Co.'s competition by several expedients. They adopted diversification by adding other lines of merchandise.

Many such dealer witnesses testified that their dollar sales fell off; some dealers went into bankruptcy; many dealers were eliminated entirely.

Dealer witnesses called by counsel for the Commission testified generally that the effect of the depression, which helped to bring down the price of tires, was heightened materially by Sears, Roebuck & Co.'s competition which had demoralized the tire market before the force of the depression was felt. These dealer witnesses complained that where the Sears, Roebuck & Co.'s competition had not actually driven dealers out of business it had reduced their profits so that they had to diversify or go into other lines of business with which they were not familiar in order to survive, with the result that the former independent tire dealers could no longer depend upon the sale of tires for a living. In this statement, these dealer witnesses were supported by many of the respondent's dealer witnesses.

The activities of Sears, Roebuck & Co. which the Commission's dealer witnesses almost uniformly cited as being the principal factors in making it possible to meet Sears, Roebuck & Co.'s competition, were Sears, Roebuck & Co.'s advertising of trade-ins and free merchandise with a quality product; selling its first line tire at dealers' second line tire prices; and the persistent and radical differential in consumer price between the dealer and Sears, Roebuck & Co. caused by respondent's discrimination in price in favor of Sears, Roebuck & Co., and "pair" prices and price wars caused by Sears, Roebuck & Co.

In an effort to meet Sears, Roebuck & Co.'s competition upon the price and quality basis which Sears, Roebuck & Co. was offering, independent retail tire dealers resorted to trade-in allowances which, in some cases, amounted to a price cut of about 10% of the sales price of the tire. Independent dealers also, in some cases, as a sales inducement, offered free merchandise such as tubes at a nominal price in connection with the sale of tires.

Following the policy of keeping its price upon its tires substantially lower than the price offered by any competitor upon similar or comparable products, Sears, Roebuck & Co. met such trade-in allowances by still more liberal trade-in allowances, extensively advertised and nation-wide in scope; Sears, Roebuck & Co. also resorted to the practice of offering tires in pairs at prices substantially lower than the prices at which single tires were sold, and also the offering of free tubes with the purchase of tires. Thus the efforts of independent retail dealers to meet or more nearly approach Sears, Roebuck & Co.'s prices upon comparable quality tires led to still further reductions in Sears, Roebuck & Co.'s prices. Because of its advantageous supply contract and the low prices which it paid for its tires, Sears, Roebuck & Co. was able to conduct its sales of tires even with liberal trade-in allowances, free tubes and pair prices, at a substantial gross profit to itself sometimes as high as 60%, while independent retail dealers in most instances were unable to meet said prices and still have sufficient margin to make their tire business self sustaining.

The increased business thus acquired by Sears, Roebuck & Co. was taken from the independent tire dealer who had been selling tires manufactured by respondent and other tire manufacturers then in business. The potential tire market is limited and cannot be extended by any tire manufacturer or distributor. It depends:

1. Upon the number of motor vehicles from year to year which are equipped with pneumatic rubber tires;
2. Upon the wearing quality of the tires being sold;
3. Upon the volume of spare tires being sold with new cars; and
4. Upon general business conditions.

From September, 1929, until the present time, all these limitations have been operating. The number of car registrations has remained practically stationary, the quality of tires has improved, the persistent depression since 1929 has inclined consumers to be more conservative in their purchases. All these factors must be taken into consideration in evaluating the importance of the Sears, Roebuck & Co.'s competition in its effect upon retail tire dealers. This narrowing of the potential market naturally made the contest among manufacturers and distributors more strenuous for the remaining volume.

The remarkable increase in volume of sales by Sears, Roebuck & Co. from April 1926, to the end of the year 1929, and the going out of business of large numbers of independent dealers upon whom other manufacturers than respondent depended for the sale of their tires, caused said other manufacturers, beginning in the year 1928 and continuing through the succeeding years, to adopt means to meet the Sears, Roebuck & Co.'s competition. Several of the manufacturers including the Firestone Tire & Rubber Co., the nearest in size to respondent, brought out so-called second line tires priced at the same price as Sears, Roebuck & Co.'s first line tire, All State. In addition, Firestone established its own retail store outlets as fast as its independent dealers became crippled or impotent. Such line of action was open only to manufacturers who had extensive financial resources such as respondent and Firestone. Firestone actually spent between 25 and 30 million dollars in the establishment of company-owned stores and in their operation as retail sales agencies has sustained losses of some seven million dollars during the period from 1928 to 1933. Respondent's experience was quite similar. It likewise invested in a string of retail chain stores taking over in the process its larger independent retail dealers in the period between 1927 and 1933, and during that time established more than two hundred retail stores. Respondent suffered a loss of about \$9,500,000 in the operation of its retail stores.

Price wars for commercial business developed seriously after respondent and Firestone began to establish their own retail stores and independent retail dealers who became involved in these price wars had to be protected by the manufacturers. This protection usually came in the form of extended or increased quantity bonuses, although in many instances dealers were reimbursed by manufacturers for the losses sustained on the sales during price wars. The tires sold at cut prices were replaced at such price concessions as to keep the stock intact without financial loss to the dealer. Concessions of this sort can only be made by manufacturers who are strong financially. Some manufacturers required to make these concessions

in 1933 are now in financial difficulties and others have passed out of the picture entirely.

The price wars, which were started upon commercial business periodically by the large manufacturers operating their own retail stores, were the direct result of the demoralization which had come into the price field initially because of the price policy of Sears, Roebuck & Co. in maintaining a very substantial price differential between its sales and the sale by independent retail dealers of comparable commodities, and while said price wars were more or less temporary, lasting but a few days or few weeks at a time, they had very considerable effect upon the fortunes of independent tire dealers.

Sears, Roebuck & Co. with its price advantages in buying, due to the contractual arrangement it had with respondent, was an important initial factor, if not the chief factor, in initiating and perpetuating the price demoralization which characterized the competitive situation from the latter part of 1928 until the close of 1933, and it continued as such up to March, 1934, at the time the testimony was being taken in this case. Its persistent underselling and its initiation of the major chain store developments in the retail tire distribution field were the main tangible instruments which it employed. As a consequence of that competitive situation thus created, numbers of independent retail tire dealers in the several States of the United States were forced out of business. Small manufacturers who had depended on such dealers as channels of distribution for their product were also forced out of business. These two results are inextricably interwoven—each a repercussion from the other. The importance of its activities in evaluating the effect of its discriminatory contract with respondent upon independent retail tire dealer competition was even greater in the competitive force which it brought into the consumer tire market than in its direct effect upon prices. Not only did Sears, Roebuck & Co. initiate a situation which gave the independent dealer, the mail order house and the mail order chain stores to contend with, but it also brought in the company-owned store as an added competitive difficulty.

Beginning in the year 1930, additional private brand tires entered the market through other mass distributors. In January, 1931 (Montgomery Ward & Co., Sears, Roebuck & Co.'s principal mail order and chain store rival), entered into a cost plus contract with the United States Rubber Co. for its supply of tires. The United States Tire & Rubber Co. and the Goodrich Tire & Rubber Co., as a defensive measure, also began to sell tires to a subsidiary of the Standard Oil Co., the tires to be sold through Standard Oil Co. and other gasoline stations under the brand name, Atlas. A few experi-

mental sales had been made in a limited New England territory in 1929 through the Colonial Beacon Co., another subsidiary of the Standard Oil Co. In 1930 there was a further entry made into the New York and Pennsylvania territory, and in 1931 extensive distribution of the Atlas brand through the Standard Oil Co. filling stations, as well as independently owned filling stations, was begun and continued through 1933. The volume of this distribution increased rapidly from a comparatively negligible amount in 1929 to more than 1,600,000 tires in 1931, as the numerous small stations began to take on the distribution of these tires. The volume of Atlas sales declined somewhat in 1932 to about 1,200,000, while in 1933 it increased again to about 1,700,000 tires distributed through about 30,000 stations.

The Standard Oil Co. venture in the retail tire field brought in several other gasoline distributing companies. These oil companies functioned rather by using their chains of filling stations and their filling station connections in distributing several of the standard brands of tires made by leading manufacturers, some of these gasoline distributing companies handling respondent's tires as well as those of Goodrich and Firestone, which tires are sold at the same prices to the consumer as the independent dealers are able to obtain.

Oil company filling stations as a rule do not carry stocks of tires at all comparable with the stocks carried by independent retail tire dealers. The Standard Oil Co. distributing stations depend upon the company's warehouses to supply them from day to day. They may carry a very few of the tires in sizes and brands most generally called for at their stations as a piece of emergency equipment. Other gasoline filling station distributing units depend for their supplies from day to day upon the branch warehouse or the large dealers representing the company whose product they distribute. They carry comparatively meager stocks of tires in immediate demand for emergency equipment, or no stocks at all. While service such as the mounting of tires is given by these gasoline filling stations their leading business is the distribution of gasoline and automobile lubricating oils. Their merchandising of tires is distinctly a side issue and on the whole is of the "pick up" character. Naturally, because they are not dependent upon pneumatic rubber tires for continuing their business, they are able to do business upon a closer margin of profit than is possible for the continued existence of the independent retail tire dealer.

The Atlas tire, the Standard Oil Co. product, was priced about 10% below the price of standard first line tires and about 10% to 15% above Sears, Roebuck & Co.'s "All State", except in the year 1933. As a rule this differential was maintained. The entry into the

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field of gasoline distributing companies and the distribution of tires to their filling stations without doubt added materially to the difficulties of independent retail tire dealers.

The record does not contain satisfactory and definite evidence as to the actual number of independent retail tire dealers in business in 1933, as compared with those in business in 1926, but there was a substantial decline during that period.

The total annual sales of independent retail dealers during the period from 1926 to 1933, inclusive, and the percentages those sales were of the total industry renewal sales are set forth as follows:

Independent dealer sales

	<i>Amount</i>	<i>Percent of total</i>
1926-----	\$36,005,271	89.8
1927-----	41,986,298	89.1
1928-----	42,720,257	84.5
1929-----	34,274,676	74.1
1930-----	26,578,583	69.3
1931-----	25,121,122	66.3
1932-----	21,529,831	64.5
1933-----	21,963,509	63.8

Subsequent to the year 1929, the independent retail tire dealers who went out of business were replaced by approximately an equal number of "outlets", including particularly gasoline stations and small sub-dealers and auto supply chain stores. These, however, cannot be classified as independent retail tire dealers.

In March 1933, Sears, Roebuck & Co.'s prices on its "All State" brand of tires were only 10% below that of the leading manufacturers' first line tire prices, and Sears, Roebuck & Co., from March to September 1933, tried to follow the same trade-in allowances as the independent dealers, and it was principally due to these two facts as well as the increased activity of independent dealers and the increasing competition furnished by the Atlas tire, that the volume of Sears, Roebuck & Co.'s sales declined from 2,525,892 units in 1932 to 1,842,724 units in 1933. In November 1933, Sears, Roebuck & Co. began to take steps to recoup losses sustained in the volume of sales during the year and inaugurated its 25% trade-in allowance plan which it was enabled to put into full effect about January 1, 1934.

Montgomery Ward & Co., Sears, Roebuck & Co.'s principal competitor in the mail-order and chain store field, in the year 1926 sold approximately 1,700,000 units or 4.33% of the total industry renewal sales, which volume declined in 1927 to 1,550,000 units or 3.31% of the total industry renewal sales; while at the same time the total

volume of Sears, Roebuck & Co.'s sales had increased from 1,087,923 units or 2.77% of the total industry renewal sales in 1926 to 1,791,570 units or 3.8% of the total industry renewal sales in 1927. In 1928 Montgomery Ward & Co.'s volume of sales increased to 2,046,000 or 3.91% of the total industry renewal sales; while Sears, Roebuck & Co.'s volume of sales increased to 3,247,463 units or 6.2% of the total industry renewal sales. In 1929 Montgomery Ward & Co. increased its volume of sales to 2,756,000 units, which at that time was approximately 6% of the total industry renewal sales; whereas Sears, Roebuck & Co. increased its volume of sales to 4,379,667 units or 9.6% of the total industry renewal sales.

During the depression years Montgomery Ward & Co.'s volume of tire sales showed a steady decline. Its volume of sales in 1932 was 1,844,000 units or 5.5% of the total industry renewal sales, as compared with 2,525,892 units by Sears, Roebuck & Co., or 7.5% of the total industry renewal sales. In 1933 Montgomery Ward & Co.'s volume of sales amounted to 1,451,000 units or 4.36% of the total industry renewal sales, as against Sears, Roebuck & Co.'s volume of sales of 1,842,724 units, or 5.5% of the total industry renewal sales.

The discrimination in price by respondent in the sales of its pneumatic rubber tires to Sears, Roebuck & Co. on the one hand and in those to independent service station dealers on the other, has been and now is a major causative factor in bringing about a lessening of the number of strictly independent retail tire dealers in competition with one another, with Sears, Roebuck & Co., and with the respondent in the sale of such tires at retail through its own stores, and has lessened this type of competition. Prior to the time of the issuance of the Commission's complaint said discrimination had not lessened, but had rather increased the severity of the price competition in the sales of tires in the retail market, but had shifted and still tends to shift the ruling factor in such competition to Sears, Roebuck & Co. and to other mass distributors such as chain stores and mail order houses. Said discrimination has inaugurated a system of distribution for pneumatic rubber tires from which retail independent tire dealers are being excluded.

Therefore, the execution and carrying out of the contractual relationship between respondent and Sears, Roebuck & Co., hereinbefore described, resulting in the said price discrimination between Sears, Roebuck & Co. and Goodyear independent dealers, was and still is a substantial causative factor in the said competitive situation in the retail tire industry. Such a competitive condition was and is a normal expectation in such an industry where there was a substantial discrimination in price and it is a common experience when a new com-

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petitor begins to gain a position in the market, that those already in the field will adopt some means of overcoming this new competition. The new measures adopted by competitors described herein have had the effect of temporarily checking the growth of Sears, Roebuck & Co. in the industry; but competitive forces take a considerable period of time to work themselves out. Respondent and its mass distributor, Sears, Roebuck & Co., is engaged in a competitive battle with other manufacturers and distributors not so fortunately situated and from which the organization with the lowest costs and the best financial resources will survive. Respondent with its strong financial position, its rubber plantations, cotton factories, favorable rubber position, and its large dealer organization handling its regular Goodyear brands at a profit to itself, with its long term so-called cost plus contract with Sears, Roebuck & Co. with which it may remove small independent dealer competition, has an advantage over all its competitors in the competitive battle now being waged.

The record shows that small independent tire manufacturers which furnish competition to respondent and other large tire manufacturers rely upon independent retail outlets, and any injury to such independent outlets directly affects the distribution of tires in interstate commerce.

Sec. 21.—Effect on Goodyear dealers.

Beginning in 1913 or 1914, respondent definitely selected the retail dealer as its channel of retail tire distribution. It had decided that "public preference" for its tires was its most valuable asset, such public preference depending, from its standpoint, upon wide availability, geographically, by product, by classification; in other words, widely distributed availability to meet needs—leading to large volume of sales. For securing that availability geographically, leading to great volume, respondent developed its widely distributed retail dealer organizations. Its salesmen were instructed to secure Goodyear dealers in each town where ten cars or more were registered. It goes without saying that this meant thousands of necessarily small dealers widely distributed. It was against this class of dealers that respondent with its discriminatory price to Sears, Roebuck & Co. set up competition, first of the mail order variety, then of the chain store brand. Its bonus system which gave some relief to large dealers, helped these small dealers very little—in many cases not at all.

For instance, 61% of Goodyear dealers received a bonus in 1925, while 39% did not. In 1927 the respective figures were 57% for those who received a bonus and 43% for those who received none. In 1928 the bonus participants had dwindled to 54% of the entire

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number of contract dealers, leaving 46% to receive no bonus. For 1929 the figures were 52% for recipients and 48% for non-recipients. For 1930 the figures were 50-50. In 1931, 39% received a bonus, while 61% were without it. In 1933, 38% received a bonus, while 62% had none. Many of the recipients of bonuses indicated in the percentages just given received bonus benefits of very trifling sums. This is indicated by a tabulation of those who received no bonus, plus those who received bonuses of 3% or less in the Goodyear organization. In 1926 the recipients of no bonus or a bonus of not more than 3% were 96% of the total number of Goodyear dealers; in 1927, 92%; in 1928, 83%; in 1929, 82%; in 1930, 83%; in 1931, 89%; in 1932, 93%; in 1933, 79%.

Since the dealers receiving no bonus or receiving a bonus of but 3% or less were small dealers having a limited volume of annual sales, the percentage of respondent's sales volume in dollars and cents which received no bonus was comparatively small as compared with its total volume of sales to dealers, despite the fact that respondent's dealers in overwhelming numbers received no bonus. The percentages of no bonus sales to total sales to dealers by respondent during the period since May 1, 1926, were as follows:

1926.....	17%
1927.....	14%
1928.....	14%
1929.....	13%
1930.....	13%
1931.....	12%
1932.....	19%
1933.....	35%

The percentages of sales receiving no bonus or a bonus of 3% or less during the same period as compared with the total sales of respondent to dealers were as follows:

1926.....	50%
1927.....	47%
1928.....	32%
1929.....	30%
1930.....	29%
1931.....	31%
1932.....	40%
1933.....	53%

Prior to and including 1931 the bonus figures included bonuses paid to respondent's company-owned stores co-mingled with the dealer bonus. In 1932 and 1933 the percentages were for independent retail dealers only, the bonuses paid to company-owned stores of respondent for these years having been excluded. That will explain

the higher percentages in 1932 and 1933 as compared with the period from 1928 to 1931.

The great majority in numbers of respondent's retail independent dealers were subjected to the Sears, Roebuck & Co.'s price competition on the basis of their trade discounts plus anything that they might have had in the way of cash discounts and possible small bonus allowances.

With respect to price discrimination by respondent, as reflected in the consumer or retail prices made respectively by independent retail dealers handling Goodyear brands and by Sears, Roebuck & Co., the consumer prices recommended by the respondent to the retail dealers were the prices usually used by said dealers in selling to the public. The great weight of testimony is to the effect that the prices at which said independent dealers sold their tires to the public during the years 1926 and 1927 were approximately the dealer-consumer recommended prices, but that thereafter, due to the competition of Sears, Roebuck & Co., said dealers were unable to obtain said suggested retail prices from the consuming public.

Respondent's bonus policy as to key dealers, hereinbefore referred to, giving them purchase price concessions beyond the regular trade discounts of 10% later extended to 15% and still later to a maximum of 22½%, indicates the extent of the differential or trade discount which the independent retail tire dealer was finally obliged to meet. A major percentage of respondent's independent retail tire dealer customers did not have such generous concessions made to them to enable them to meet the Sears, Roebuck & Co. and other competition subsequent to 1926.

Respondent had a tire bearing the brand "Pathfinder" which it priced at approximately the Sears, Roebuck & Co.'s "All State" brand price, and in circulars and through its salesmen and branch managers and other selling employees and officers recommended that the dealers use this tire in competition with Sears, Roebuck & Co. and other mail order houses. This tire was distinctly inferior in quality to the Sears, Roebuck & Co.'s "All State" brand tire with which, at the suggestion of respondent, it was placed in competition, and with which it was urged as a competitive tire. The differential in price between the Goodyear "All Weather" brand tire, which was respondent's first line tire comparable with the Sears, Roebuck & Co.'s "All State" brand tire, and its "Pathfinder" tire, which it placed in competition with the Sears, Roebuck & Co.'s "All State" brand, amounted to approximately the dealer trade discount upon "Pathfinder" tires of 22½%.

The record does not contain specific figures with respect to the operating expenses of the average independent retail tire dealer, but it is estimated by respondent's assistant tire sales manager, who testified in the case and qualified as an expert, that the operating cost varied from 20% to 25% in 1926 and 1927; 22% in 1928; 23½% in 1929; 25% in 1930; 29% in 1931; 32% in 1932; and 30% in 1933. Estimates by dealer witnesses vary from 24% to 33%. Said respondent's assistant tire sales manager also testified that he estimated that the average retail tire dealer realized a net profit on sales of tires of 4% in 1928; 4% in 1929; 3% in 1930; 2% in 1931; 1% in 1932; and 2% in 1933.

The gross margin of profit which Sears, Roebuck & Co. enjoyed as a result of the said discriminatory prices it was getting from respondent, varied on the average each year from approximately 40% to 60%. The sales officials of Sears, Roebuck & Co., recognized the advantage Sears, Roebuck & Co. enjoyed in this large margin of profit and during the period of time prior to the year 1932, urged the branch or chain store managers to push the sale of tires. The following quotation taken from a letter written on August 5, 1931, by the tire sales manager of Sears, Roebuck & Co. to the branch store manager at Dallas, Tex., and in evidence as Commission's Exhibit 253, is illustrative:

The tremendous gross profit which is being made by this division under our present cost prices, which cost prices have been reduced 8% for the third quarter, is such that it should be very prominently brought to the attention of each of your Store managers, and in particular your Sales Promotion Manager.

(1) *Large gross profit.*

Gross profit of All State, Super All State and Companion tires (weighted to basis of national sales)

Cost of average tire and tube.....	\$5.30
Selling price of average tire and tube.....	\$8.97
Average gross profit on tires.....	39.71%
Average gross profit on tubes.....	47.43%
Average gross profit on tires and tubes combined.....	40.91%

(These figures include national freight. They are based on national sales by sizes. Your gross profit may be above or below these figures as you sell more or less larger and SUPER tires.)

And besides, these gross profits do not include the tire rebate which comes to your stores as a credit at the end of the year and amounts to approximately 5% of the cost of the merchandise. So actually this additional profit may be added to the above profit, because the anticipated rubber rebate this year should be about what it was last year.

How's that for profit?

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You, as a District Manager, cannot overlook the tremendously high gross profit being made by the Tire Division at the present time, and you certainly cannot overlook the other merchandising advantages which go along with this exceptionally high gross profit.

The differential between the price actually received by Sears, Roebuck & Co. for the tires it purchased from respondent and sold under the Sears, Roebuck & Co.'s "All State" brand and the price received by Goodyear dealers for the standard Goodyear "All Weather" brand tire of comparable quality was approximately 20% to 25% during the years 1926, 1927, 1928, and 1929. Subsequent to that date, and prior to March 1933, during which time Sears, Roebuck & Co. had adopted the trade-in as a means of maintaining its differential and also the pair price and the giving of free tubes in the sale of its product, the differential remained approximately the same. Between the month of March 1933 and late in September of that year, Sears, Roebuck & Co. sold to the public at a price differential below retail dealers amounting to about 10% and observed the trade-in allowances followed by the independent retail dealers. This coincided with Sears, Roebuck & Co.'s heavy loss of volume in its tire sales during that year due, in part, to competition of the independent retail dealer on prices more nearly approximating Sears, Roebuck & Co.'s prices than in previous years. Subsequent to September, in 1933, in sporadic instances, Sears, Roebuck & Co., as hereinbefore stated, to recoup their losses in volume, granted a trade-in allowance of 25%, and beginning on or about January 1, 1934, this trade-in allowance became universal and at times exceeded 35%, which had the effect of restoring the original spread of from 20% to 25% below the prices that were made by the independent retail dealers.

During the period of time Sears, Roebuck & Co. was granting trade-in allowances of 25%, it still had a gross of 35% remaining on its Sears, Roebuck & Co.'s "All State" brand of tires, and as stated by its divisional sales manager in a letter to district and group managers of the tire department, Sears, Roebuck & Co. was

in a position, in all markets, to always beat competition.

In this same letter, the district managers were urged to "cash in on this position." As a result of the increased activities of Sears, Roebuck & Co. in the early months of the year, 1934, pressure was brought to bear upon Sears, Roebuck & Co. by dealers, manufacturers, bankers, and others, not to sell tires at prices which would ruin the tire industry, and the National Recovery Administration found it necessary to declare an emergency and order a truce in the retail tire industry in March 1934, and on May 1, 1934, established a Code of Fair Competition for the Retail Rubber Tire and Battery

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Trade, and on August 22, 1934, established, under said Code, certain restrictive prices to stabilize the retail tire market.

The prices actually received by Sears, Roebuck & Co. on the one hand and by the independent retail tire dealer on the other for respondent's tires throw some light upon the effect upon the dealer of Sears, Roebuck & Co.'s competition, but they do not tell the whole story. There remains the problem of whether the dealer was able to maintain himself as an independent tire dealer upon the narrowed margins which he actually received in the way of trade discounts after meeting Sears, Roebuck & Co.'s systematically low prices on tires. Testimony on this point is conflicting, but not irreconcilably so. Goodyear dealer witnesses called by the Commission testified generally that the Sears, Roebuck & Co. competition had a very severe effect upon their business. Nine had gone out of business as a result of such competition. On the other hand, a substantial number of dealer witnesses called by respondent testified that Sears, Roebuck & Co.'s competition had not been more severe than that of retail dealers who were well financed and aggressive. In this connection, however, it was generally admitted by such witnesses that no other single competitor had been able to get as large a percentage of the retail tire business in the communities where Sears, Roebuck & Co. was located, in the same length of time.

Goodyear dealers called by counsel for the Commission testified to attempting to meet the Sears, Roebuck & Co. competition with the Goodyear brand, "Pathfinder", the second line tire, but they said that the Pathfinder tire, while priced competitively with the Sears, Roebuck & Co.'s "All State" brand was not of the same quality and did not have the same public acceptance or public preference as the Sears, Roebuck & Co.'s "All State" brand which was a first line tire. They testified that consumer purchasers could not be convinced of such equality and saw no reason why they should pay more for the Goodyear "All Weather" brand first line than they paid for the Sears, Roebuck & Co.'s "All State" brand first line tire. Furthermore, the Goodyear "Pathfinder" second line tire had a smaller profit for the dealers than first line tires, which might mean no profit at all on the sale. As a consequence, Goodyear dealers, as well as others who were confronted with entirely similar problems, testified that they lost customers to Sears, Roebuck & Co.

According to the testimony of such dealer witnesses, when appeals were made to the respondent's officials for some sort of protection or device by which they might meet Sears, Roebuck & Co.'s competition, respondent's representatives denied for a time that respondent was making the tire sold by Sears, Roebuck & Co. Later respondent's

representatives assured Goodyear dealers that the Sears, Roebuck & Co. competition would not interfere with them in any way; that their profits would not be interfered with; that the Pathfinder, the Goodyear brand second line tire, was the same or better tire than the Sears, Roebuck & Co.'s All State brand.

Goodyear dealers called by counsel for the Commission also stated that the respondent, in addition to recommending the Goodyear Pathfinder brand as a competitive tire, also recommended increased effort and additional investment, larger filling stations, and diversified merchandising and better service to customers, and in many instances the respondent shared advertising expenses with the dealers. Respondent, however, refused to give the dealers the same price on tires as it was giving to Sears, Roebuck & Co. and these dealers further testified that while they knew that Sears, Roebuck & Co. was selling a Goodyear-made tire of high quality, the exact price differential given Sears, Roebuck & Co. by respondent was kept secret.

As hereinbefore set forth, Goodyear dealers suffered with other dealers in loss of volume and profit and many were forced out of business, and where it was necessary to do so respondent replaced the fallen dealers with company-owned retail stores. Respondent also established many other such stores to maintain its volume and in doing so sustained losses of about \$9,500,000 during the period 1926 to 1933 in operation of its retail stores.

Dealer and other witnesses called by respondent give a somewhat different version of the situation. There is considerable testimony that Sears, Roebuck & Co. was not mainly or materially responsible for the price situation which followed the entrance of Sears, Roebuck & Co. into the retail tire field with the Goodyear-made tire. Respondent contended that Goodyear brand tires had shown larger percentage of total renewal sales in the retail market in 1933 than in 1926. Respondent had also increased its number of company-owned retail outlets from a negligible number in 1925 to 262 at the end of 1933. Since 1926 respondent has sold directly to consumers a substantial volume of its own brands of tires, the volume increasing each year until 1933. Subtracting the total volume of sales by respondent's company stores from the total Goodyear renewal sales, the volume of sales of Goodyear independent dealers in 1933 would be a little less than the volume of sales through the same channels in 1926.

Respondent takes the position that trade-in allowances by dealers competing with Sears, Roebuck & Co. had reduced the differential between Sears, Roebuck & Co. and dealer prices from 25% to about 15% between 1926 and April 1933, and after that date to about 10%; also, that Sears, Roebuck & Co. adhered to its retail store and mail

order list or published prices; and that prior to 1931 it had not used trade-in allowances. After that date respondent contends that dealer trade-in allowances became more frequent and of larger amount. Evidence also was submitted in support of the contention that Sears, Roebuck & Co.'s trade-in allowances had been made to meet this competitive situation. However, Mr. Nelson, Sears, Roebuck & Co.'s merchandise manager, testified that these trade-ins were for the purpose of keeping respondent's prices *below* the market prices of standard first line tires, rather than to *meet* these prices.

Many dealer witnesses called by respondent testified as to several factors which they contended gave them the ability to sell Goodyear brand tires at higher prices than those received for Sears, Roebuck & Co.'s tires offering competition. These reasons may be summarized as follows:

(1) Greater public acceptance or public preference of the Goodyear "All Weather" brand tire.

(2) Sears, Roebuck & Co.'s "All State" brand tire is as distinct from Goodyear brand tires as are the tires of other manufacturers.

(3) Respondent's "All Weather Non-skid Tread" brand was a feature valued above the tread features of Sears, Roebuck & Co.'s "All State" brand.

(4) Respondent sold original equipment to many popular automobile manufacturers and the fact that the cars already were equipped with respondent's "All Weather" brand tires predisposed its owner to use them in replacement for such car. It was stipulated by counsel that respondent's original equipment applied to the Chrysler, Plymouth, Nash, Ford, Cadillac, and LaSalle cars at certain times. Sears, Roebuck & Co.'s "All State" brand is not used as original equipment on any new automobiles.

(5) National advertising by respondent, which had cost it about \$4,500,000 a year and something like \$72,000,000 during its life as a tire manufacturer, was pointed to as giving and maintaining respondent's public acceptance or public preference and its extensive good will.

(6) Practice among automobile manufacturers had changed about 1929 as to their supplying the customer with spare tires at the time that the new car was sold. Prior to that time the tires had been sold to customers separately by automobile local dealers and these dealers had bought their supplies of tires for this purpose from local tire dealers handling the brand of tires used as original equipment. It is not clear whether that custom became universal, although it became very general. Respondent's witnesses estimate the spare tire as about 5% of the renewal market. There is no other estimate upon

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this issue. Respondent's dealer witnesses in considerable numbers testified to this curtailing of their demand for replacement tires as a substantial factor in a reduction of their tire sales.

Without doubt the dealer difficulties in competition were emphasized and added to by several factors other than the injection of Sears, Roebuck & Co.'s consumer prices, which were always below the market prices for comparable standard goods, although the precise extent of the differential at any one time was never certain in advance. Among these factors was the falling demand for pneumatic rubber tires due to some extent to a halt in the increase of automotive vehicles in use in the United States. Another factor in this falling demand was the improvement of the wearing qualities of pneumatic tires up to and including 1930.

The weight of the testimony shows that price and quality are the two factors which control in the capture of a competitive market by a competing brand of goods, and Sears, Roebuck & Co. had both, and supplied both to the fullest extent.

The great mass of tire purchasers, as well as other shoppers, are price-minded, and it was to this mass of purchasers that the Sears, Roebuck & Co.'s price and quality appeal was effectively made. The great majority of respondent's dealers, as well as dealers of other standard manufacturers, found their principal market to be this class of customers.

The conflict at first apparent between the testimony of the Commission's dealer witnesses and the respondent's dealer witnesses in this proceeding is not irreconcilable, because of the considerations hereinabove pointed out as to the part played by public preference and good will carried with the brand of tires such as respondent's and the conservative psychology of a minority of purchasers. It is entirely possible that the dealers called by respondent might have been able to hold a considerable portion of their trade against the price and quality competition of Sears, Roebuck & Co. A majority of the dealers so testifying were comparatively strong dealers, who in fact, received bonus concessions and other extreme quantity discounts, in addition to their trade discount. With large numbers of retail dealers and small manufacturers going out of business on account of the severity of the Sears, Roebuck & Co. competition, the strong dealers among respondent's witnesses had an opportunity to capture some portion of the trade which had theretofore been served by such dealers and had theretofore been supplied by competing manufacturers. Such testimony in no way conflicts with the testimony of smaller and less resourceful independent retail dealers, who were not securing any

sales bonus at all and were obliged, with their mounting costs of doing business, to secure prices from manufacturers which would permit them to apply practically their entire trade discount to try to meet those costs and the competitive buying advantage of Sears, Roebuck & Co. Moreover, such a competitive situation could not be met by thousands of dealers receiving bonus allowances of 3% or less.

The retail tire stores operated by respondent enjoyed the same bonus and quantity discount advantages as the most favored service station dealer. Except in commercial business, which was rather important from the standpoint of volume and profits, the said company-owned retail stores did not follow the Sears, Roebuck & Co. policy of underselling. In that respect, it was not such severe competition to the average retail dealer as was that of Sears, Roebuck & Co.

Therefore, as a result of the unjust discriminatory advantage given Sears, Roebuck & Co. by Goodyear, Sears, Roebuck & Co. has a much larger gross margin for profit upon which to operate in the sale of tires than the ordinary Goodyear service station dealers and subdealers enjoy, and this price discrimination has been and is a direct and substantial causative factor in the competitive situation in the retail tire industry hereinbefore described. Only the Goodyear service station dealers in a strong financial position and those who receive the larger "key dealer" discounts and bonuses have been and are able to successfully withstand the kind of competition Sears, Roebuck & Co. was able to give them by reason of the aforesaid discriminatory buying advantage resulting from this price discrimination. The number of independent Goodyear service station tire dealers is decreasing each year and said dealers are being replaced by subdealers and Goodyear-owned retail tire stores, chain stores of mass distributors and gasoline stations. It is clear that such price discrimination places in Sears, Roebuck & Co.'s hands the power to continue, abate, or resume such destructive control of the tire market at will, subject only to its own discretion.

SEC. 22.—*Effect of the discrimination on competing manufacturers and wholesale distributors of tires.*

As hereinbefore set out, the severe and destructive competition furnished by Sears, Roebuck & Co. resulting from the discriminatory low price at which it bought tires from respondent, was the principal factor in bringing about price declines in the retail tire market and in increasing the severity of the competition between respondent and its smaller competing manufacturers to the point where competition was destroyed, forcing thousands of independent retail dealers

out of the tire business, and in turn forcing out of business a substantial number of small competing manufacturers.

In 1926 there were doing business in the United States 104 pneumatic tire and tube manufacturers who sold their output principally through independent retail tire dealers, although some of them were selling their tires and tubes to mass distributors. The destructive competition furnished by Sears, Roebuck & Co. was an important causative factor in bringing about the reduction of the number of tire and tube manufacturers in the United States from 104 in 1926 to 32 in 1933.

Thirteen representatives and officials of eleven independent manufacturers testified with respect to the effect of the competition furnished by Sears, Roebuck & Co. resulting from the discriminatory prices at which Sears, Roebuck & Co. bought tires from respondent. These representatives of manufacturers were unanimous in their testimony that practically all of the retail price declines in the tire industry were brought about by Sears, Roebuck & Co. While they admitted that the steady decline in rubber prices, the large capacity of the manufacturers and the diminishing quantity of available business had something to do with the decline of the price of tires, they insisted that, without Sears, Roebuck & Co. making nation-wide cuts and initiating price declines followed by the other mail order and mass distributors, conditions would not have been as bad as they were. They were also unanimous in their testimony that beginning in March 1926, when Sears, Roebuck & Co. began to make substantial reductions in the retail prices of its tires to the public, the industry had to follow, and that the price cuts, made particularly in the year 1926, were not justified by changed or lowered costs of raw materials; that Sears, Roebuck & Co. dictates the prices of tires for all markets and that the Sears, Roebuck & Co. price has been the pattern for the industry for many years.

The smaller independent manufacturers were forced to meet the Sears, Roebuck & Co. competition by cutting the price on their best line of tires. Those manufacturers had a natural advantage over large competitors when the price of the raw materials was on a downward trend. But since August 1933, the prices of rubber and cotton have been increasing and the small manufacturers are now at a disadvantage because the large competitors, such as respondent, are able to have and maintain a much larger stock of raw materials that had been purchased at low prices. The average small manufacturer usually has on hand only one or two months' supply of raw materials, due to his financial limitations. On the other hand, respondent, due to its financial position, has been able to maintain a rubber position so

that it keeps an inventory of rubber which, at the time testimony was taken, would last about eighteen months. In December 1932, respondent had on hand or under contract 219,782,340 pounds of rubber, which was inventoried at approximately 3¢ per pound. The current market price of rubber, at the time testimony was taken, was approximately 11¢ per pound.

It is determined that the weight of the testimony in the record is to the effect that competitive price wars in 1929, 1930, 1931 and 1932 were initiated either by Sears, Roebuck & Co. or by competing manufacturers, such as Firestone, through the announcement of low prices on second line tires to enable dealer customers to cope with Sears, Roebuck & Co.'s competition, and that it then became and was often necessary for independent manufacturers to rebate substantial amounts to dealers so that the dealers would not lose money because of Sears, Roebuck & Co.'s price competition. In the latest price war, begun in the fall of 1933 and continued through the early months of 1934, respondent allowed its dealer customers extra allowances as much as 12½% because of Sears, Roebuck & Co.'s competition.

It is also determined from the testimony that many independent manufacturers were forced to bring out unprofitable second and third line tires upon the demands of their dealers for tires which they could sell at a price to meet the low prices of Sears, Roebuck & Co. on their Goodyear-manufactured tires of high quality; that at first the independent manufacturers ignored protests received from their dealer customers against Sears, Roebuck & Co.'s competition, but as time went on, they were forced to recognize the competition and to do something to assist the dealers in meeting that competition and the offering of the second and third line tires was one of the methods used.

Substantial testimony further shows that sales volumes of competing manufacturers declined because substantial numbers of their dealers were forced out of business due to competitive conditions created by Sears, Roebuck & Co.'s destructive prices on high quality tires which they had purchased from respondent at discriminatory prices, particularly during the years 1928 and 1931; that while in the more recent years these independent manufacturers were able in some instances to increase the volume of their business, they suffered financial losses in doing so. Since the year 1926 a substantial number of independent manufacturers in the United States have been forced out of business and the competition furnished by Sears, Roebuck & Co. subsequent to March 1926 was an important causative factor producing that result. The larger competing manufacturers,

such as Firestone, were forced to assist retail dealers financially, and in many instances took over their businesses and established company-owned stores in their stead and conducted the same at a large financial loss in order to meet the competitive situation created by the low prices of Sears, Roebuck & Co. on the high quality Goodyear-manufactured tire. In this respondent was no exception. It was forced to do the same thing and to suffer substantial financial losses for the same reason.

Two of the larger competing manufacturers, U. S. Rubber Co. and the B. F. Goodrich Co., as a defensive measure, began to sell tires to other mass distributors, competitors of Sears, Roebuck & Co., including Montgomery Ward & Co., in January 1931 by U. S. Rubber Co., and the Atlas Tire Co., in October 1930 by both U. S. Rubber Co. and B. F. Goodrich Co.

SEC. 23.—Effect of discrimination on respondent's business.

In April 1926, shortly after respondent entered into its first tire contract with Sears, Roebuck & Co. its sales manager notified branch managers of the fact that respondent was selling tires to Sears, Roebuck & Co. and in defending such course of action pointed out that the transaction was

one more move to definitely clinch for Goodyear the unquestioned leadership in the tire business. * * * While we produce and sell more tires than any other rubber company in the world, we must continue to grow and to develop new business if we are to hold this leadership.

Further evidence of the purpose of the Sears, Roebuck & Co. arrangement is found in the following letter from Mr. Litchfield to Gen. Wood, president of Sears, Roebuck & Co. at the time the second contract was signed in 1928:

I was very pleased to receive the signed contract delivered by Mr. Westrich, also your letter of appreciation on the relations between our two Companies during the past two years.

This is a contract of far-reaching importance to both of us, and I believe has the elements of cooperation and partnership so that our interests are mutual, in trying to build up a large and profitable tire business.

I wish to assure you that I am personally very anxious that the friendly relations and cooperation continue and increase, and I am sure that all of my immediate associates here will do their utmost to make it successful.

In August, 1930, Mr. P. W. Litchfield, president of the respondent, in writing to a Goodyear dealer in Minneapolis, Minn., who had complained of the price cutting activities of Sears, Roebuck & Co.

and the dwindling profits of Goodyear dealers in the face of such competition, pointed out that the Goodyear dealers had not been injured by mail-order competition generally and that Goodyear dealers on Goodyear brands were getting a greater share of the total available business than ever before.

If the mail-order houses have put the old-fashioned gyp dealer out of business, the dealer who in the old days was the worst competition, that is too bad for such dealers.

Mr. Litchfield also pointed out in his letter that Goodyear dealers in Goodyear brands had, during the past three years, gone ahead more rapidly than any other class of dealers and had made more profit than any other class of dealers.

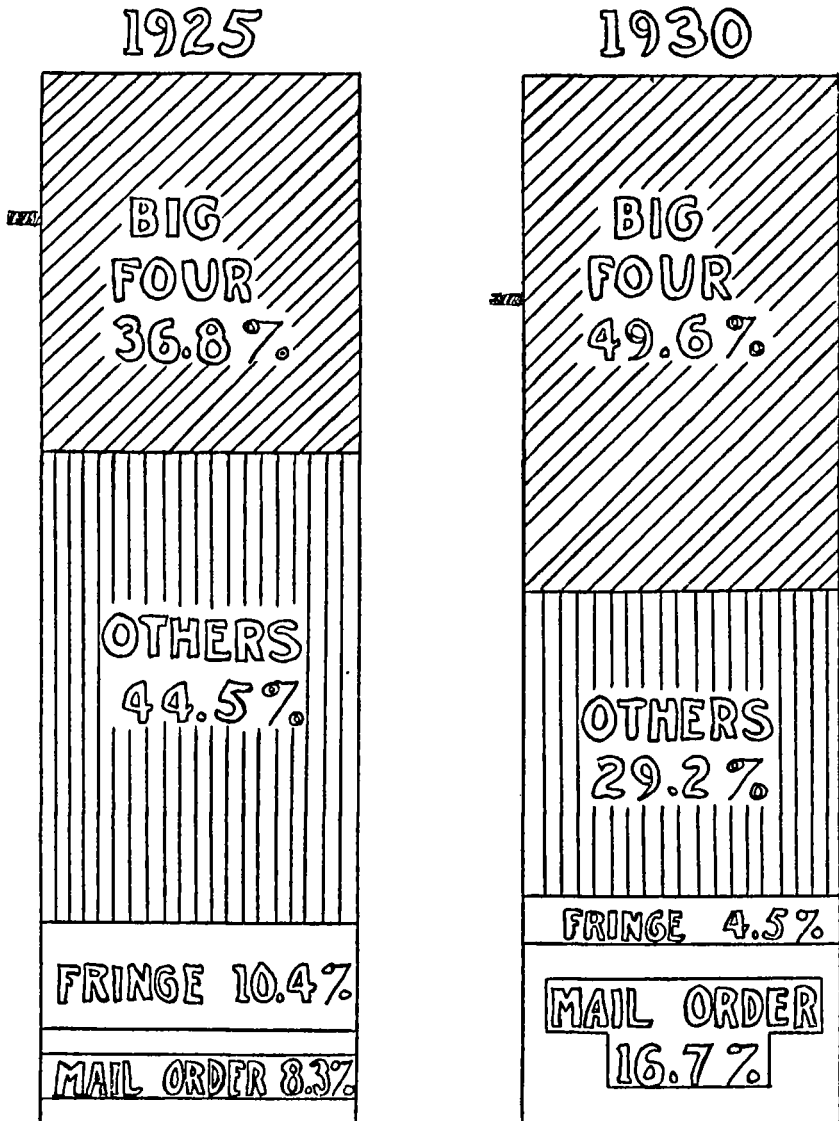
In March, 1931, Mr. R. S. Wilson, vice president and sales manager of the respondent, in a circular letter addressed to all salesmen, in care of branch managers, division managers and sales department managers, summarized at some length trade reasons for respondent's entering into the contract with Sears, Roebuck & Co. and the extent to which those reasons had been justified by the history of the arrangement (Com. Ex. 655). In this letter it was alleged that when respondent went into the Sears, Roebuck & Co. deal it felt that there would be beneficial results to Goodyear dealers because (a) of better quality of Goodyear brand tires than any competitor, and (b) Goodyear tires would thus be easier to sell and hence more profitable to Goodyear dealers.

Mr. Wilson, in this letter, admitted that Sears, Roebuck & Co.'s tire sales had increased rapidly in the past five years, but insisted that the sales of Goodyear brand tires by Goodyear dealers had also increased rapidly in the past five years, and then stated:

From whom did Goodyear dealers and Sears, Roebuck & Co. take this business, I am showing you on next page, in chart form, a division of the renewal tire market in 1925 and again in 1930.

The chart referred to is set forth on the following page.

SHIFT IN RENEWAL TIRE MARKET



It was then explained by Mr. Wilson, in this letter to the salesmen and branch managers, that among other things it could be noted from the foregoing chart that the four largest manufacturers in the industry, including the respondent herein, had increased their percentage of total renewal sales of tires from 36.8% in 1925 to 49.6% in 1930, and that the percentage of renewal sales of tires of the smaller manufacturers had declined from 44.5% in 1925 to

29.2% in 1930, and that the percentage which had been sold by what Mr. Wilson termed the "fringe" or the very small manufacturers who usually sold to the so-called "gyp" dealers, had declined from 10.4% in 1925 to 4.5% in 1930, and that the mail-order sales had increased from 8.3% in 1925 to 15.7% in 1930.

The conclusion drawn by Mr. Wilson from the foregoing chart and figures discloses the real purpose for the transactions involved in this proceeding. Mr. Wilson said:

Note that the group containing the "fringe" manufacturers and their outlet, the gyps, have decreased in size almost exactly in proportion as the mail-order chain store group have increased in size.

Note likewise how the dealers of the "Big-4" group have grown. We state without the slightest fear of contradiction that Goodyear renewal sales on Goodyear brands alone to Goodyear dealers have grown more rapidly in the last five years in dealer sales than in any other of the "Big-4."

It will be noted that on the left edge of that part of each of the foregoing comparative diagrams is a tab or mark. These marks are located to show the relative proportion of the "Big 4" business captured by Goodyear between 1925 and 1930, as shown by the testimony and exhibits in the record, and show that not only has the dominant position of the "Big 4" substantially increased in this period, but that the dominant position of respondent has increased not only with respect to the entire renewal tire market but with respect to its relative position in the "Big 4" itself.

From the foregoing it is determined that one of the effects of the said discrimination hereinbefore described, is a tendency to increase the concentration of a large volume of pneumatic rubber tire business in respondent and to drive from business small competing manufacturers as well as the retail independent dealers and to substitute therefor mass distributors such as mail order houses. At the time of making the tire contracts with Sears, Roebuck & Co., hereinbefore described, the officials of respondent had this effect in mind.

During the period of time from 1926 to 1930, no other tire manufacturer showed as great an increase in volume of sales, in proportion to the total industry renewal sales, as respondent. Respondent's tire sales to dealers alone, in 1926, were 5,166,987 units, or 13.18% of the total industry renewal sales, which amounted to 39,199,527 units. Its sales to special brand customers (except Sears, Roebuck & Co.) during that year, were 422,168 units, and its sales to company-owned stores were 54,498 units, or total renewal sales (except Sears, Roebuck & Co.) of 5,643,653 units, which amount was

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14.40% of the total industry renewal sales of that year. Respondent's sales to Sears, Roebuck & Co. that year were 747,116 units, or 1.91% of the total industry renewal sales. The total Goodyear renewal sales in 1926, including Sears, Roebuck & Co. amounted to 6,390,769 units, which was 16.31% of the total industry renewal sales.

During 1927 respondent's sales to its dealers increased to 6,172,830 units, which was 13.16% of the total industry renewal sales, which amounted to 46,888,211 units. Its sales to private branch customers (except Sears, Roebuck & Co.) amounted to 530,122 units, while its sales to company-owned stores were 92,357 units. Its total renewal sales to all customers, except Sears, Roebuck & Co., amounted to 6,795,309 units, or 14.49% of the total industry renewal sales for that year. Respondent's sales to Sears, Roebuck & Co. during that year increased to 1,635,068 units, or 3.49% of the total industry renewal sales. Respondent's total renewal sales during that year, including sales to Sears, Roebuck & Co., amounted to 8,430,377 units, or 17.98% of the total industry renewal sales.

During 1928 respondent's sales to its dealers increased to 7,519,541 units; or 14.38% of the total industry renewal sales during that year, which amounted to 52,302,912 units (the highest in the history of the industry). Its sales to special brand customers (except Sears, Roebuck & Co.) amounted to 511,814 units, and sales to its company-owned stores, during that year, were 150,844 units. Its total renewal sales (except Sears, Roebuck & Co.) amounted to 8,182,199 units, or 15.64% of the total industry renewal sales. Respondent's sales to Sears, Roebuck & Co. during that year increased to 3,345,492 units, or 6.40% of the total industry renewal sales. Respondent's total renewal sales, including Sears, Roebuck & Co., during that year, amounted to 11,527,691 units, or 22.04% of the total industry renewal sales during that year.

In 1929 respondent's sales to its dealers increased to 7,798,939 units, or 17.15% of the total industry renewal sales, which had declined to 45,471,495 units. Its sales to private brand customers (except Sears, Roebuck & Co.) amounted to 532,779 units and its sales to company-owned stores amounted to 367,800 units. The total renewal sales of respondent during that year to all its customers (except Sears, Roebuck & Co.) amounted to 8,699,518 units, or 19.13% of the total industry renewal sales. Respondent's sales to Sears, Roebuck & Co. during that year increased to 4,225,666 units, or 9.29% of the total industry renewal sales during that year. Respondent's renewal sales to all its renewal customers, including Sears, Roebuck & Co., amounted

to 12,925,184 units, or 28.42% of the total industry renewal sales during that year.

In 1930 respondent's sales to its dealers declined to 7,140,824 units, or 19.18% of the total industry renewal sales, which had that year declined further to 31,482,544 units. Its sales during that year to private brand customers (except Sears, Roebuck & Co.) declined to 308,390 units, and sales to company-owned stores increased to 643,170 units. Respondent's total sales of tires to all of its renewal customers (except Sears, Roebuck & Co.) during that year amounted to 8,092,384 units, or 21.74% of the total industry renewal sales. Respondent's sales to Sears, Roebuck & Co. during that year declined to 3,109,403 units, or 8.35% of the total industry renewal sales. Respondent's total sales of tires to all its renewal customers, including Sears, Roebuck & Co., during that year amounted to 11,201,787 units, or 30.09% of the total industry renewal sales.

The Firestone Tire & Rubber Co. is generally considered the second largest manufacturer in the tire industry and is, therefore, respondent's principal competitor. During the year 1926, Firestone's sales to independent dealers amounted to 4,863,107 units, or 12.14% of the total industry renewal sales. Its only other renewal sales were to company-owned stores, which amounted to 4,467 units, or 0.01% of the total industry renewal sales. Firestone's total renewal sales during that year amounted to 4,867,574 units, or 12.42% of the total industry renewal sales.

During 1927 the Firestone Co. sold to independent dealers, 6,309,194 units, or 13.46% of the total industry renewal sales. Its sales to company-owned stores during that year amounted to 67,698 units, or 0.14% of the total industry renewal sales. Firestone's total renewal sales during that year amounted to 6,376,892 units, or 13.60% of the total industry renewal sales.

During 1928 Firestone's sales to independent dealers showed a slight increase to 6,424,163 units, or 12.28% of the total industry renewal sales. Its sales to company-owned stores during that year increased to 198,502 units, or 0.38% of the total industry renewal sales. Firestone's total renewal tire sales during that year amounted to 6,622,665 units, or 12.66% of the total industry renewal sales.

During 1929 Firestone's sales to independent dealers declined substantially to 4,730,165 units, or 10.40% of the total industry renewal sales. Its sales to company-owned stores increased very substantially to 1,119,104 units, or 2.46% of the total industry renewal sales. Firestone's total renewal tire sales during that year declined to 5,948,269 units, or 12.86% of the total industry renewal sales.

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During 1930 Firestone's sales to independent dealers declined further to 3,828,835 units, or 10.28% of the total industry renewal sales. Its sales to company-owned stores showed a slight increase to 1,347,449 units, or 3.62% of the total industry renewal sales. Firestone's total renewal tire sales during that year amounted to 5,176,284 units, or 13.90% of the total industry renewal sales.

Other leading competitors of the respondent which made up the "Big-4", hereinbefore referred to, were the Goodrich Tire & Rubber Co. and the U. S. Rubber Co. In 1926 the Goodrich total renewal sales to independent dealers amounted to 3,885,631 units, or 9.91% of the total industry renewal sales. The total renewal sales to independent dealers by the U. S. Rubber Co. amounted to 2,735,484 units, or 6.98% of the total industry renewal sales. Its sales to company-owned stores during that year amounted to 42,828 units, or 0.11% of the total industry renewal sales. The total renewal tire sales of the U. S. Rubber Co. during that year amounted to 2,778,312 units, or 7.09% of the total industry renewal sales.

In 1929 the Goodrich renewal tire sales to dealers amounted to 4,585,406 units, or 10.08% of the total industry renewal sales. Its sales to company-owned stores amounted to 299,483 units, or 0.66% of the total industry renewal sales. Its total renewal tire sales during that year amounted to 4,884,889, or 10.74% of the total industry renewal sales. The total renewal tire sales of the U. S. Rubber Co. to its dealers in 1929 amounted to 2,887,749 units, or 6.35% of the total industry renewal sales. Its sales to company-owned stores amounted to 115,000 units, or 0.25% of the total industry renewal sales. Its total renewal tire sales amounted to 3,002,749 units, or 6.60% of the total industry renewal sales.

During 1930, the Goodrich renewal tire sales to independent dealers declined to 4,104,742 units, or 11.02% of the total industry renewal sales. Its sales to company-owned stores amounted to 479,568 units, or 1.29% of the total industry renewal sales. The total renewal tire sales of the Goodrich Co. during that year amounted to 4,584,310 units, or 12.31% of the total industry renewal sales. The U. S. Rubber Co.'s renewal tire sales to its dealers during 1930 declined to 2,498,119 units, or 6.71% of the total industry renewal sales. Its sales to company-owned stores during that year amounted to 140,000 units, or 0.38% of the total industry renewal sales. The total renewal tire sales for the U. S. Rubber Co., during 1930, amounted to 2,638,119 units, or 7.09% of the total industry renewal sales (same as 1926).

During the depression years subsequent to 1930, which was the first full year of the depression, competitors of the respondent, both

the small and large manufacturers, took steps to protect themselves from the competition of Sears, Roebuck & Co., as hereinbefore indicated. In the competitive warfare which followed, and which existed during the period of the depression, the relative proportion of the total industry renewal sales controlled by respondent, declined from a peak of 30.09% in 1930 to 25.56% in 1932, of the total industry renewal sales. The Firestone Company, through the increase in its volume of sales to its company-owned stores, increased its relative position in the industry from 13.90% in 1930 to 15.07% in 1932. The Goodrich Co., on its dealer and company-owned store business showed a decline from 12.31% in 1930 to 9.56% in 1932. During the year 1932, however, it sold 639,323 units to the Standard Oil Co. subsidiary, hereinbefore mentioned, which increased its sales by 1.92% of the total industry renewal sales, or a grand total of 11.48% of the total industry renewal sales.

The renewal sales of the U. S. Rubber Co. to its dealers and company-owned stores, in proportion to the total industry renewal sales, increased from 7.09% in 1930 to 7.33% in 1932. In addition the U. S. Rubber Co. sold tires to Montgomery Ward & Co. and also to the subsidiary of the Standard Oil Co., which increased its relative percentage in the industry during 1932 approximately 7%, so that its total percentage of industry renewal sales during 1932 amounted to about 14%.

During the year 1933, as hereinbefore indicated, Sears, Roebuck & Co., due to pressure brought to bear upon it by the industry, narrowed the margin between the price at which it sold its tires and the industry price on tires of comparable quality, to approximately 10%, instead of 20% to 25% as had been observed in former years. This, together with increased competitive efforts on the part of independent dealers to secure the volume of business previously lost to Sears, Roebuck & Co., resulted in a substantial decline in the total tire sales of Sears, Roebuck & Co. Its total sales during that year amounted to approximately 1,800,000 units, or 5.5% of the total industry renewal sales. Of this amount approximately 1,170,000 units were purchased from respondent, the balance having been bought from a small manufacturer with the permission of the respondent. Respondent's sales to its dealers declined sharply to 4,336,577 units or 13.05% of the total industry renewal sales. Its sales to company-owned stores also declined slightly to 1,063,873 units and its sales to special brand customers, other than Sears, Roebuck & Co., amounted to 357,578 units. Respondent's total renewal sales, including Sears, Roebuck & Co., during that year amounted to 6,928,903 units, or

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20.84% of the total industry renewal sales, or an increase in percentage over 1926 of 6.44%.

During 1933 the renewal tire sales of the Firestone Co. to its dealers declined further to 3,214,995 units, or 9.67% of the total industry renewal sales. Its sales to company-owned stores during that year declined further to 1,140,082 units, or 3.43% of the total industry renewal sales. The total renewal tire sales of the Firestone Co. to all classes of customers in 1933 amounted to 4,355,077 units, or 13.10% of the total industry renewal sales, or a gain of 0.68% over its total renewal sales for 1926.

The Goodrich Tire & Rubber Co.'s sales to dealers in 1933 amounted to 2,826,211 units, or 8.50% of the total industry renewal sales. Its tire sales to company-owned stores declined to 492,494 units, or 1.48% of the total industry renewal sales. Its total sales to dealers and company-owned stores amounted to 3,318,705 units, or 9.98% of the total industry renewal sales, or an increase of 0.07% over 1926. During that year it sold to the subsidiary of the Standard Oil Co. 870,708 units, or 2.62% of the total industry renewal sales. The total renewal tire sales of the Goodrich Company to all classes of customers in 1933 amounted to 4,189,413 units, or 12.60% of the total industry renewal sales, or a gain for the Goodrich Co. of 2.69% of the total industry renewal sales during the entire period from 1926 to 1933.

The renewal tire sales of the U. S. Rubber Co. to its dealers in 1933, amounted to 2,395,650 units, or 7.20% of the total industry renewal sales. Sales to its company-owned stores amounted to 125,000 units or 0.38% of the total industry renewal sales. The total renewal tire sales of the U. S. Rubber Co. to dealers and company-owned stores amounted to 2,520,650 units, or 7.58% of the total industry renewal sales. This company, however, sold approximately 2,200,000 tires to Montgomery Ward & Co. and the said subsidiary of the Standard Oil Co., which increased its percentage of the total industry renewal sales to approximately 14.5%, or an increase of approximately 7% over the year 1926.

The finding is therefore made that in the year 1933, the total renewal sales of the "Big 4" manufacturers was approximately 60% of the total industry renewal sales as compared with approximately 40% percent in 1926 and 50% in 1930; and that respondent, by virtue of the volume of sales of tires to Sears, Roebuck & Co. has increased its percentage of the total industry renewal sales from 13% in 1926 to 20% in 1933 and thus has increased its dominant position in the tire industry, in large part at least due to the sale of tires to Sears, Roebuck & Co. at discriminatory prices.

SEC. 24.—Summary.

The following is a brief summary of the foregoing findings:

1. Respondent, an Ohio corporation with principal office and place of business and principal manufacturing plants at Akron, Ohio, is the largest manufacturer and distributor of pneumatic rubber tires in the United States.

2. Respondent, since about 1914, has distributed the great bulk of its pneumatic rubber tires sold for resale in the several States of the United States through approximately 25,000 local retail dealers.

3. Sears, Roebuck & Co. is a New York corporation with its principal office located in the city of Chicago, State of Illinois, engaged in the distribution of general merchandise products, including pneumatic rubber tires and tubes, by mail order and through chain stores to the consuming public, and is reputed to be the largest mail order house and chain store operator in the United States.

4. On March 8, 1926, respondent and Sears, Roebuck & Co. entered into a contract by which respondent agreed to manufacture and to sell, and Sears, Roebuck & Co. agreed to purchase upon a basis of cost plus 6% (afterward 6½%) the requirements of Sears, Roebuck & Co. for a supply of the pneumatic rubber tires which it sold at retail. This contract with minor modifications was renewed May 17, 1928, and again October 5, 1931, and under the terms of the last renewal will remain in force at least until December 31, 1942.

5. On October 5, 1931, the date that the last tire contract was entered into, a secret agreement was made between respondent and Sears, Roebuck & Co. by which respondent assigned to Sears, Roebuck & Co. 18,000 shares of Goodyear common capital stock and gave to Sears, Roebuck & Co. \$800,000 in cash to be used in the purchase of 32,000 more shares of Goodyear common capital stock as a consideration for the signing of the third tire contract without opening it to competition.

6. Under these several tire contracts, respondent has in fact, with minor exceptions, manufactured and sold to Sears, Roebuck & Co. its requirements of pneumatic rubber tires which it sells at retail.

7. Pursuant to the terms of these several tire contracts between respondent and Sears, Roebuck & Co., respondent has sold tires to Sears, Roebuck & Co. at prices substantially lower than it sold tires of comparable grade and quality to independent retail tire dealers. This difference in sales price has averaged, on four popular sizes of tire casings, from 32 to 40% in 1927; from 33 to 55% in 1928; from 35 to 45% in 1929; from 36 to 46% in 1930; from 35 to 50% in 1931; from 38 to 48% in 1932; from 35 to 53% in 1933. The average gross discrimination on these four sizes for the entire period of time from

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May 1926, to December 1931, was approximately 40%. On other sizes the gross discrimination over the entire period varied from 32% to 42%.

8. The net average sales price discrimination remaining after deductions had been made from the dealer prices for discounts and allowances and transportation, over the entire period, varied from 29% to 40% on eight sizes of tires. The total aggregate net discrimination, after making such allowances, amounted to approximately \$41,000,000, or approximately 26% of the aggregate net sales price to independent dealers on a volume of business comparable to the volume sold to Sears, Roebuck & Co.

9. Such discriminatory prices were not given to Sears, Roebuck & Co. On account of differences in quantity of the commodity sold, nor were they given to make only due allowance for differences in the cost of selling or transportation. Net price discrimination, after making due allowance for selling and transportation costs, ranged from 11% to 22% on eight popular sizes of tires.

10. Such discriminatory prices were not made to Sears, Roebuck & Co. in good faith to meet competition. No competitor of financial responsibility, able to meet Sears, Roebuck & Co.'s requirements as to quantity and quality of the tires, has ever solicited Sears, Roebuck & Co.'s tire business by offering tires of Goodyear quality to Sears, Roebuck & Co. at prices as low as Sears, Roebuck & Co. was paying respondent.

11. Respondent concealed the prices and terms at which it was selling tires to Sears, Roebuck & Co. from its own sales organization and from the trade generally, and at no time did respondent offer to its own dealers prices on Goodyear brands of tires which were comparable to prices at which respondent was selling tires of equal or comparable quality to Sears, Roebuck & Co.

12. None of Sears, Roebuck & Co.'s competitors has the advantages of similar low prices. Sears, Roebuck & Co. was and still is enabled by such discriminatory prices to undersell, at a profit to itself, all retail tire distributors, including retail dealers selling respondent's brands of tires and competing dealers selling tires of other manufacturers.

13. Sears, Roebuck & Co. has in fact, persistently, systematically and substantially, undersold such dealers by pricing for the consumer market the tires which it had so purchased from the respondent at prices ranging from 20 to 25% lower than the prices placed upon tires of comparable grade and quality sold by other retail dealers in the market, except in the year 1933, when due to outside pressure Sears, Roebuck & Co. prices were only approximately 10% lower.

Sears, Roebuck & Co.'s volume of sales of tires increased more rapidly than that of any other retail distributor from 1926 to 1930, and it is still the largest retail distributor of tires in the United States.

14. Sears, Roebuck & Co. usually led in price declines during the period covered by the contracts, that is, from 1926 through 1933, and with the low prices, aggressively pushed the sale of its tires by the use of numerous sales devices, such as excessive guarantees, free tube offers, and trade-in allowances.

15. The competition which Sears, Roebuck & Co. thus brought into the retail tire market in the several States was a major factor in driving out of business a large number of retail tire dealers by reducing their volume of sales of tires or by curtailing of profits derived by such sales, or both.

16. The Sears, Roebuck & Co. competition became destructive and was not such normal competition as would be of benefit to consumers, since Sears, Roebuck & Co. was able, through its discriminatory price advantages to practice such competition and to succeed in engrossing for itself abnormal profits, while curtailing the profits of its competitors.

17. Sears, Roebuck & Co. competition tended to and was in fact a major factor in curtailing the number of competitors who were independent tire dealers, and tended to and was a major factor in substituting for such independent retail tire dealers as were driven out of business, mass distributors and other large volume dealers.

18. Such curtailing of a number of independent retail tire competitors has in turn driven out of business numerous small tire manufacturers and has thus reduced the manufacture and sale of pneumatic rubber tires to a smaller and smaller number of independent manufacturers and dealers.

19. Respondent, as a result of the increased volume of business it has obtained through the sale of tires to Sears, Roebuck & Co. and the reduction in the number of independent manufacturers and dealers, resulting from Sears, Roebuck & Co.'s competition, has substantially increased its percentage of the total industry renewal sales since the year 1926, and has increased its dominant position in the tire industry.

CONCLUSIONS

Said respondent, the largest rubber tire manufacturer in the world, has been and now is engaged in interstate commerce in the sale of tires (casings and tubes) to independent service station dealers and also wholesalers, chain retail stores and mail order houses in compe-

tition with other manufacturers and wholesalers of tires in the United States. Tires are commodities within the meaning of the language of Section 2 of the Clayton Act. In the course and conduct of its said business respondent has unlawfully discriminated in price in the sale of tires between its purchasers thereof, that is to say between Sears, Roebuck & Co., the largest mail order and chain store operator in the United States, and other purchasers of tires, competitors of Sears, Roebuck & Co., by allowing Sears, Roebuck & Co. a lower price than allowed other purchasers competitively engaged in said line of commerce and also by allowing said Sears, Roebuck & Co. secret rebates and discounts in the form of cash and valuable stock bonuses. These said price discriminations were concealed by said respondent from said other purchasers, and the said price discriminations hereinbefore described have the capacity and tendency to, and in fact do, substantially lessen competition in the sale and distribution of rubber tires (casings and tubes) for use on motor trucks and passenger automobiles between respondent and other manufacturers and wholesale distributors of said products and between the said Sears, Roebuck & Co. and other retail tire dealers engaged in the sale and distribution of rubber tires (casings and tubes) in competition with said Sears, Roebuck & Co., including retail tire dealers engaged in the sale and distribution of Goodyear branded tires. Said discriminations also have the tendency and capacity to create a monopoly in said respondent in the sale and distribution of rubber tires (casings and tubes) for use on motor trucks and passenger automobiles to wholesale and retail tire dealers now owned or controlled by said respondent, located throughout the several States of the United States. Said discriminations also tend to create a monopoly in the respondent and said Sears, Roebuck & Co. in the retail distribution and sale to the public of rubber tires (casings and tubes) for use on motor trucks and passenger automobiles throughout the several States of the United States. Said discriminations in price were not made on account of the differences in grade, quality or quantity of the commodity sold, nor did said discriminations make only due allowance for differences in the cost of selling or transportation of said tires, nor were said discriminations made in good faith to meet competition.

The cost of selling large annual quantities to Sears, Roebuck & Co. is less than the cost of selling small individual shipment quantities to independent tire dealers, and a lower price to Sears, Roebuck & Co. is justified, but only to the extent that its large annual purchases are economically justified, that is, to the extent that Goodyear's large

sales to Sears, Roebuck & Co. are less expensive to make than its smaller sales to independent tire dealers.

The Commission does not consider a difference in price to be on account of quantity unless it is based on a difference in cost, and where based on a difference in cost, such difference in price is reasonably related to, and approximately no more than, the difference in cost, otherwise the discrimination will create unjust preference and unfair competitive conditions. The evidence in this case does not show that the amount of the discrimination is made in favor of large sales to Sears, Roebuck & Co. and against small ones to the independent dealer on account of savings or economies to the seller, taking into account all relevant factors going to make up price on account of quantity. The difference in price shown in this case far exceeds any demonstrated difference in savings and bears no reasonable relation to the differences in cost.

The practice of giving large and powerful purchasers a disproportionately large discount is not justified. Such a discrimination, when made merely on account of size, tends toward monopoly and the suppression of competition. If the quantity proviso be interpreted to mean that a manufacturer can discriminate with respect to quantity sales to any extent he desires, the section would be rendered meaningless and ineffective. It is clear that the quantity proviso can only have been intended to preserve to the large buyer the inherent economies of large purchases and does not give a manufacturer a license to grant him a favored price without restraint. Quantity discounts are exempt because such a discount involves some economic utility that should be preserved. The meaning of the quantity exception, therefore, is not that a difference in quantity permits price discrimination without limit or restraint, but merely that a difference in the quantity of the commodity sold must be given reasonable weight in determining whether the discriminatory price is warranted.

In arriving at a price on account of quantity sold, some standard of comparison is necessary. It is the relation between price and quantity. Factors that go to make up price because of quantity are to be taken into account and given reasonable weight in determining whether a price discrimination is legal or illegal. Quantity sales are cheaper than small ones and to this extent they are economically justifiable. A quantity discount based on the amount of annual sales is a price discrimination contrary to Section 2 of the Clayton Act unless it can be shown that it represents and fairly approximates lower costs. On the one hand, remote and unsubstantial differences in cost may be disregarded, and on the other hand, a dis-

count is not to be condemned merely because it does not mathematically accord with cost differences. The problem is a practical one and must depend on the effect and intent of the scheme as a whole. The principle back of Section 2 of the Clayton Act is one of equality to purchasers and in order to maintain this principle of equality it is necessary that the difference in price be reasonably related to the difference in cost and not a covert means of favoritism. If it were left to a manufacturer to make the price solely on account of quantity, he could easily make a discount by reason of quantity so high as to be practically open to the largest dealers only. A manufacturer, if allowed to do so, might in this manner hand over the whole trade in his line of commerce to a few or a single dealer, or he might at will make the discount equal to or greater than the ordinary profit in the trade, and competition by those who could not get the discount would obviously be out of the question.

A manufacturer, under the Clayton Act, is under a duty to comply with the law, and he may not make his bargains according to his own interest by discriminating as he pleases, however honest and however justifiable such course might be from the standpoint of commercial principles. Large industrial companies, through price discrimination, can control competitive business conditions among their customers to the extent of enriching some and ruining others. Under the Clayton Act, a manufacturer has no right to put dealers to any such destructive disadvantage by any unjustified discrimination. While a manufacturer has an interest in making attractive offers, in order to secure as much business as possible, it is, however, an interest which can only be consulted and acted upon in subordination to law. When one discriminates in price between competitors he reduces the price to one or some of them. Competition limits the selling price. When a competitor is given a lower price it follows that his profit has been increased by just the amount of the reduction. It equally follows that every competitor has been put to a disadvantage in just that sum.

It is not contemplated by the statute that a discriminatory price made on account of quantity may be a secret price, but the statute contemplates a price open to all of the seller's customers who may desire to purchase a similar quantity at like prices on like terms.

A lower price to Sears, Roebuck & Co. for large quantities purchased, not justified by differences in cost, cannot be justified on the ground that such lower price was made in good faith to meet competition or because respondent deems such a price necessary to keep the business from going to a manufacturer competitor. The proviso in the act permitting discrimination made in good faith to meet compe-

tition is available to the respondent only if its manufacturer competitors have already made an equally low and discriminating price to Sears, Roebuck & Co.

If a powerful concern starts a campaign of price cutting in a particular community and to particular customers in violation of the Clayton Act, a competitor does not violate the act by meeting this competition by a corresponding discrimination. It is a discrimination in good faith for defensive purposes that is sanctioned, not offensive discrimination.

The Commission considers the correct theory of the law to be that, in addition to the statutory cause of action for treble damages against an offensive price discriminator and in addition to the right to apply to the Federal Trade Commission for a cease and desist order, there is an immediate right of self defense; but that it is available only if the discrimination started with the competitor and it must be exercised in good faith. A manufacturer may justify a discriminatory low price to a large purchaser on the ground of meeting competition only if his competitor has previously made an equally low and discriminating price to that purchaser. Any other interpretation would nullify the effectiveness of the whole section.

In the phrase in the statute, "Where the effect of such discrimination may be to substantially lessen competition", the words "where the effect may be" are obviously used merely to indicate that it is *tendency* and *probable effect* rather than the *actual results* that are important. It follows that the words "substantially lessen competition" are not to be taken in a purely quantitative or arithmetical sense. It is not necessary, nor is it sufficient, to find that difference in price (or any other unfair acts for that matter) will result in, say 5% or 10% less competition than there was before. Such an interpretation would make the law entirely unworkable, for competition is not a thing that can be measured with a yardstick. It would, moreover, be inconsistent with the intent of Congress as expressed in the law, the purpose of which is to insure fair and honest competition based on efficiency. The words "may be" indicate neither bare possibility, nor certainty, but probability, to be deduced from the intent or inherent character of the acts themselves. The words must be construed together with the whole section, and they must be taken, all together, to indicate generically the distinction between fair and unfair competition. The law is designed to prevent lessening of competition by unfair acts. As long as fair methods are followed, competitive conditions will prevail; unfair methods always tend to monopoly.

In this case there is a price discrimination in favor of Sears, Roebuck & Co., which gives it an unfair competitive advantage, thereby

producing an unjust competitive situation as between it and independent tire dealers. The discrimination is not grounded on efficiency and cost. It is the opinion of the Commission that no justification exists for this discrimination or method of competition.

With respect to the qualification that price discrimination is forbidden only insofar as its effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce, the Commission considers this to mean merely that the discrimination must have the effect of imposing an unlawful restraint on competition, as distinguished from normal competitive methods.

In considering the question of price discrimination, it is important to bear in mind the underlying theory of Section 2 of the Clayton Act. That theory is that monopoly on the whole is an unnatural product, the result of unwholesome competitive methods; and that it will not ordinarily result where the methods of competition are fair. Hence, to prohibit price discrimination—unfair methods of competition—is to prohibit the methods which foster monopoly.

Price discriminations are specifically condemned by the act because the Congress deems them to be unfair and injurious. They are condemned, it is true, only "where the effect may be to substantially lessen competition or tend to create a monopoly", but this simply means that the discrimination must be of a type which experience has demonstrated to be unfair. The hypothesis which underlies Section 2 of the Clayton Act is that price discriminations not justified on the basis of cost and efficiency create unfair competitive conditions, and that unfair competitive methods of themselves tend toward monopoly.

The price discrimination to Sears, Roebuck & Co. was not justified on account of differences in the grade, quality or quantity of the commodity sold, or by difference in the cost of selling or transportation, or by good faith to meet competition, and it had the effect of substantially lessening competition and tending to create a monopoly.

The Commission, therefore, finds that the said discriminations were and are in violation of Section 2 of said Clayton Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint and amended complaint of the Commission, the answers of the respondent thereto, testimony and evidence taken before John W. Bennett, examiner of the Commission, theretofore duly designated by it, in support of the charges of said complaints and in opposition thereto, briefs filed herein and oral argument by Everett F. Haycraft and PGad B. Morehouse, counsel for the Com-

mission, and by Edward B. Burling and Grover Higgins, counsel for the respondent, and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions 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" (38 Stat. 730).

It is ordered, That the respondent, The Goodyear Tire & Rubber Co., and its subsidiaries and their officers, agents, representatives, servants and employees, in connection with the sale of automobile and truck tires (casings and tubes) sold in interstate commerce, for resale within the United States or any territory thereof, or the District of Columbia, cease and desist from:

(1) Discriminating in price, either directly or indirectly, between Sears, Roebuck & Co. and respondent's retail dealer customers, or any of them, by selling said tires to said Sears, Roebuck & Co. at net realized prices which are lower than net realized prices at which said respondent or any of its subsidiaries, sells the same sizes of tires of comparable grade and quality to independent tire dealers, or other purchasers. In arriving at said net realized prices, respondent shall take into account and make due allowance and only due allowance for differences in the cost of transportation and selling tires to independent tire dealers on the one hand and Sears, Roebuck & Co. on the other.

(2) Discriminating in price, either directly or indirectly, between Sears, Roebuck & Co. and independent retail dealers, by selling said tires to said Sears, Roebuck & Co. at an aggregate price computed and based upon the cost of said tires plus a fixed ratio of profit, which said price is less, in the aggregate, than a price currently computed or based upon a cost, computed in accordance with the accounting principles and procedures then maintained by respondent, and including all items of costs and expenses then being incurred in the manufacture, sale and distribution of tires to all other purchasers of tires from said respondent engaged in the resale thereof, except advertising and selling expenses incurred in the sale of Goodyear brands, and with a profit factor which would be sufficient to return to said respondent thereon a ratio of net profit to cost of goods sold approximately equivalent to the ratio of net profit to cost of goods sold, realized from the sale of tires to said other purchasers: *Provided, however*, That in complying with this section of this order respondent shall not be prevented from following the method now employed in billing Sears, Roebuck & Co. periodically at estimated prices for all tires shipped to Sears, Roebuck & Co. during such period and collecting the amount of said billing from Sears, Roebuck & Co. at times

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agreed upon between respondent and Sears, Roebuck & Co. and furnishing Sears, Roebuck & Co. at convenient times, agreed upon between respondent and Sears, Roebuck & Co., an estimate of the prices at which said tires will be billed to Sears, Roebuck & Co., and making recalculations or redeterminations of said prices at which said tires have been billed to Sears, Roebuck & Co., giving effect to the factors and bases entering into said prices, and in the event payments made by or due from Sears, Roebuck & Co. to respondent on account of the purchase price of the product delivered during the respective periods, exceeds the aggregate amount to which respondent would be entitled upon the basis of said recalculated or redetermined prices, respondent shall not be prevented from following the present method of paying to Sears, Roebuck & Co. such excess amount; and provided that in the event the payments made by or due from Sears, Roebuck & Co. to respondent on account of the purchase price of the product delivered during the said respective periods were less than the aggregate amount to which respondent would be entitled on the basis of said recalculated or redetermined prices, then respondent shall not be prevented from requiring Sears, Roebuck & Co. to repay to the respondent the amount shown to be due respondent, in order to comply with the provisions of this order.

Provided, further, That nothing herein shall restrict the respondent's liberty to remove the discrimination either by increasing its price to Sears, Roebuck & Co., or by lowering its price to its other customers.

It is further ordered, That said respondent shall, within 30 days from notice hereof, file with this Commission a report in writing stating in detail the manner in which this order will be complied with and conformed to.

Complaint

IN THE MATTER OF

MILTON TOCH TRADING AS UNIVERSAL INK COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 2715. Complaint, Feb. 7, 1936—Decision, Mar. 7, 1936

Where an individual engaged for some two years in the sale of liquid and powdered ink—

Represented through letters, labels, circulars and otherwise that he was established in business in 1895 and was the manufacturer of the ink sold and distributed by him under his trade name, notwithstanding fact his business was not established until 1934 and he did not make said products, or own, operate or control any plant or factory which made the same;

With capacity and tendency to mislead and deceive purchasers of his said product into the belief that in buying from him they were dealing with a manufacturer of established business standing and thereby saving middleman's profit, and to confuse, mislead and deceive a substantial number of the public in respect of his business history and status as aforesaid, and into purchasing his products in such erroneous belief, and with effect of diverting trade to him from competitors who do not thus misrepresent their status or history and with tendency so to do, to their substantial injury and prejudice:

Held, That such practices, under the conditions and circumstances set forth, were to the prejudice of the public and competitors and constituted unfair methods of competition.

Mr. DeWitt T. Puckett for the Commission.

Mr. Charles Howard Levitt, of New York City, for respondent.

COMPLAINT

Pursuant to the provisions 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", the Federal Trade Commission having reason to believe that Milton Toch, an individual, trading as Universal Ink Company, hereafter referred to as respondent, has been and now is using unfair methods of competition in commerce as "commerce" is defined in said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Milton Toch, trading as Universal Ink Company, is an individual whose office and place of business is at 1847 Sixty-eighth Street, Brooklyn, N. Y. He is now, and has been since 1934, engaged in advertising and selling powdered and liquid ink between and among the various States of the United States and