

Syllabus

IN THE MATTER OF
STANDARD OIL COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF
SUBSEC. (a) OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED
BY AN ACT APPROVED JUNE 19 1936

Docket 4389. Complaint, Apr. 23, 1941¹—Decision, Oct. 9, 1945

As respects the proviso in Section 2 of the Clayton Act, prior to its amendment by the Robinson-Patman Act, which permitted discriminations in price "in the same or different communities made in good faith to meet competition," Congress, in framing the latter act, discarded said proviso as an indefinite and weakening factor and made price differences due to differences in cost, market changes and marketability of the goods the only absolute justifications now available to a respondent charged with unlawful price discrimination thereunder.

A *prima facie* case of a violation of Section 2(a) of the Clayton Act, as amended, may be established by proving (1) jurisdiction, (2) goods of like grade and quality, and (3) discrimination in prices. Based upon such a case the Commission may draw a rebuttable presumption that the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly or to injure, destroy or prevent competition, in which event the burden of proof shifts to the respondent, who, in rebuttal of such a *prima facie* case, may show, under Section 2 (b), that the respondent's lower price was made in good faith to meet an equally low price of a competitor, following which the Commission could no longer rely upon its *prima facie* case, but would need to show by additional and affirmative evidence that the effect of the discrimination might be to substantially lessen competition or tend to create a monopoly or to injure, destroy or prevent competition between respondent and its competitors or between customers of the respondent or with the customers of such customers

A showing, under Sec. 2 (b) of the Clayton Act, that respondent's lower price was made in good faith to meet an equally low price of a competitor, is not an absolute defense to a charge of unlawful discrimination and can be availed of only to the extent it may rebut a *prima facie* case under Sec. 2 (a) as above set out. The meeting of an equally low price of a competitor in good faith is not a defense to a charge of price discrimination where competitive injury is affirmatively shown and so replaces the rebuttable presumption of the *prima facie* case. This results from the difference between such a case and the *prima facie* case referred to in Section 2 (b). Section 2 (b) defines a *prima facie* case as " * * * proof * * * that there has been discrimination in price . . ." which must be compared with the prohibitions of Section 2 (a) which make such a discrimination unlawful only in the event it injuriously affects competition.

To hold that the provision for showing of good faith to meet an equally low price of a competitor can be construed as a *carte blanche* exemption to a respondent to engage in discriminations in price which have the adverse effects on competition proscribed under Section 2 (a), would constitute recognition of the soundness of the principle that one competitor's violation of law justifies its violation by another; would also justify discrimination by a chain organization to meet the equally low

¹ Amended.

price of a single unit competitor who had not discriminated at all as well as discrimination to meet the price of any competitor whose discrimination is lawful because justified by cost differences; and would defeat the substantive purposes and requirements of Section 2 (a) in such situations as well as in cases where discrimination to meet the equally low prices of a competitor has produced the adverse effects on competition which it was the main purpose of the section and of the Act to prevent.

Aside from a showing under Sec. 2 (b) that respondent's lower price was made in good faith to meet an equally low price of a competitor, as a means of rebutting a *prima facie* case where affirmative evidence of competitive effects proscribed by the statute has not been introduced, a respondent may also introduce evidence in support of its affirmative defense tending to establish that the effect of the differential in price is not to substantially lessen competition or tend to create a monopoly or to injure, destroy or prevent competition with customers of the person granting the discrimination or competition with persons knowingly receiving the benefit thereof, and may also show in support of its justifications (1) that the differential proved makes only due allowances for differences in cost resulting from the differing methods or quantities sold or delivered; or (2) that the differentials were the result of price changes in response to changing conditions affecting the market for or the marketability of the goods concerned, establishment of any of which contentions would preclude any conclusion that the law had been violated.

Where a corporation which (1) was engaged in the refining and interstate sale and distribution of gasoline and other petroleum products throughout a territory consisting of 14 states principally located in the middle west; (2) during the years from 1936 to 1940, inclusive, supplied from 16.2 to 17.4% of all the branded and unbranded gasoline sold in the Detroit metropolitan area; (3) leased or subleased after Sept. 10, 1936 to independent operators all retail service stations owned or leased by it in said area and thereafter (a) regularly supplied gas delivered in its tank wagons from its four bulk stations in said city at its posted tank wagon prices to about 200 retail stations owned by it and to eight which it leased; and to 150 or more contract service stations owned or operated by independent operators with whom it had entered into agreement to supply for the period specified all their requirements of its three brands, namely, Solite with Ethyl, Standard Red Crown, and Stanolind gasoline; (b) supplied gas delivered during period involved, first in its tank wagons and later by tank car and transport truck (of equivalent capacity), owned by others, direct from its marine terminal, to the C-K; S; W; and N companies; the first three of which companies, classified by it as jobbers, supplied its gas to from 94 to 106 retail service stations, and also sold a substantial portion of gas purchased from it direct to the public through retail stations owned and operated by them; and last of which jobbers was engaged entirely in retail sale of gas to public through its own service stations; and, (c) also supplied gas in said area to large commercial users, usually sold on contracts made by its general office in Chicago, with gas therefor usually delivered either direct from its Whiting Refinery or aforesaid River Rouge Terminal by tank car or transport truck—

- (a) Discriminated in price by selling its gas for resale direct to the purchasing public to said four jobbers, which it did not limit to sales at wholesale only and which owned or operated in said area one or more gasoline stations where its gas, so purchased, was resold at retail to consumers in competition with other retailers of gas, who purchased the same from it or other manufacturers, at prices which were substantially lower than the prices charged by it to its other retailer purchasers in said area for gas of the same grade and quality, and by selling as aforesaid its Red Crown gasoline, or largest selling brand, to them at its tank car price or at $1\frac{1}{2}$ cents per

gallon less than the prices charged by it for the same gas to its other dealers in said area; and,

- (b) Discriminated during the period from September 1, 1936, to March 7, 1938, when it classified said N Company as a jobber, by selling its gas to said N at one half cent per gallon less than the price it was charging for the same gas to its other retail dealers in said Detroit metropolitan area, which continuing to sell its gas to it as theretofore, on the regular tank-wagon basis, and to make deliveries from its bulk plants direct to the retail service stations of said N:

With the result that —

Price discriminations granted by it both prior to and subsequent to March 7, 1938, to said N — which cut prices directly; cut them through varying commercial classifications depending upon the competitive situation; and cut them through under-cover discounts and premiums, and was responsible for starting most of the retail price-cutting in major brand gasoline in Detroit over a period of several years — and price discriminations granted by it to said other arbitrarily classified jobbers, to-wit, said C-K, said W, and said S, on gas sold by them at retail, gave such favored dealers a substantial competitive advantage in their retail operations over other retailers of gas, including its own retail customers with their 3.3 cents per gallon profit margin;

Said advantage was capable of being used, and was used, by said N, and, to some extent, by said C-K, to divert large amounts of business from other retailers of gas, including said refiner seller's own customers, with resulting injury to them and their business and to their ability to continue in business and successfully compete with said dealers in the retailing of gas; and said C-K was enabled to sell a million gallons of gasoline annually over a period of two years to one retailer customer at a delivered price of one cent per gallon less than posted tank wagon price, and to sell another at a discount of $\frac{1}{2}$ cent per gallon, thereby enabling the former to sell said gas to the consuming public at discounts of as much as 2 cents per gallon and thus reap a competitive advantage over other retailers, including said seller's own retailer customers, and divert business from such retailers to said favored customer and substantially lessen competition and injure, destroy and prevent competition between said favored customer and other retailers of gas, including its own retailer customer:

Effect of which discriminations in price, allowed by it to the aforesaid four dealers, as above set forth, and which, as respects price differentials involved, were not shown as making only due allowance for differences in its costs of sale and delivery resulting from the differing methods and quantities in which it sold its gasoline to dealers concerned, had been and might be, substantially to lessen competition and to injure, destroy and prevent competition with each of said four dealers and with their respective customers in the resale of gasoline:

Held, That aforesaid discriminations in price by said corporation, under the circumstances set forth, constituted violations of Subsection (a) of Section 2 of the (Clayton Act), as amended by the Robinson-Patman Act

As respects refiner seller's challenged discrimination in favor of the N company, which operated a number of retail gasoline stations in the Detroit Metropolitan area in competition with other retail customers of said seller, and with those of other sellers, and to which N company said seller, after said discriminatory allowance, continued, as, before, to make customary deliveries in its tank wagons and from its bulk plants in the area involved, seller's exhibits, with supporting testimony, failed to show cost justification for challenged price differential of one half cent, as making only due allowance for differences in its costs of sale and delivery resulting from the differing methods and quantities in which it sold its gas to said N during the period involved; due, among other things, to —

(1) The invalidity of attempted comparison between its cost of doing business with said N and that of doing business with all its other retail customers, with their varying group costs;

(2) Non-inclusion of comparable costs of other independents; and to —
Fallacies involved in —

(3) Assumptions underlying attempted comparison of single-dump and multiple-dump deliveries:

(4) Segregation of certain items of sales expenses and allocation thereof among all its other reseller customers, but not to N, as being an established account which required no further promotional sales work, such as driveway training and promotional advertising;

(5) Segregation of certain items of expense of an overhead nature on the theory — equally applicable to the business of any other single retail service station — that such expenses would not be appreciably influenced by the acquisition or loss of a single account, such as that of N;

(6) Apportionment among its retail customers of certain items of cost, assertedly not susceptible of exact allocation, among its retail customers, instead of allocating the same on the basis of gallonage;

(7) Inclusion of certain costs in connection with stations leased or sublet by it, which pertained to its landlord activities and were not properly cost of sale or delivery;

(8) Allocation of sales expenses of certain salesmen who called on N and other retail service stations, on the basis of erroneous cost comparisons and analyses; and

(9) Failure to allocate to N and other customers on a gallonage basis advertising costs (other than those for point of sale advertising) such as newspaper, printed and direct mail, motion pictures, and outdoor signs, which were intended to increase sales at all its stations, including those of N.

As respects refiner seller's challenged discrimination in favor of four companies, namely the C-K; the S; the W; and the N; companies, the first three of which, classified by it as jobbers, supplied its gas to from 94 to 106 retail service stations, and also sold a substantial portion thereof directly to the public through retail stations owned and operated by them, and last of which was engaged in retail sale of gas to public through its own retail service stations, and to which said seller supplied gas first, by its tank wagons, and later by tank cars and transport trucks of others, seller's contention that the differential between the price of 1½ cents off tank-wagon price charged said companies and the tank wagon price charged its other retail dealers made only due allowances for differences in its costs of sale and delivery resulting from differing methods and quantities in which gasoline was sold and delivered to said jobbers was not well founded in that said differential of 1½¢ per gallon between tank car and tank wagon price was not justified by —

(1) Comparison of cost of selling jobbers, based on survey made in the Kansas-Oklahoma field, with cost of sale and delivery by tank wagon in the entire Detroit *division or field* (in which was included Detroit *area*) in that —

(a) Evidence indicated the two were not comparable by reason of volume sold in the two areas, absence of consumer acceptance advertising expense in case of former, and inclusion or exclusion, as case might be, of accounting and credit costs, and supervising and selling costs of two jobbers who handled nearly one-half of refiner's total gallonage therein; and

(b) Attempted comparison between cost of Jobber's operations in said K-O field with cost of sale and delivery to dealers in the Detroit *field* had no probative value in determining cost differential between tank-car sales to jobbers and tank-wagon sales to dealers in the Detroit *metropolitan area* due to the accounting practice employed by it in allocating or failing to allocate certain expenses or costs in its

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preparation, from time to time, in its regular course of business, of its "Comparative Statement of Expense" or "Form 189" as an expense record for the Detroit field; and,

(2) Was not justified by said refiner's attempted segregation of cost items appearing in said "Statement" (so as to reallocate cost items appearing thereon to the reseller and jobber channels, including tank-wagon resellers), as making due allowances for differences in its costs of sale and delivery resulting from differing methods and quantities in which it sold its gasoline to said jobbers; by reason, among other things of—

(a) Failure to limit its survey to cost differences which resulted from differing methods or quantities in which gasoline was sold or delivered to the two classes of customers, and to determining savings, if any, which accrued by reason of tank-car or transport-truck delivery as compared with tank-wagon delivery, instead of attempting to compare the cost of doing business with the one class as compared with the other through arbitrary allocation of all of its costs of every nature which could be charged to the expense of doing business in the Detroit field, including Chicago general office costs allocated to that field;

(b) Improper comparison of cost of marketing to the four jobbers concerned, located in the Detroit *metropolitan area*, whose business was confined thereto, with the cost of marketing gasoline to all its other dealers in the Detroit *field*, included wherein is rural section supplied by small bulk plants operated by commission agents and known as "B" stations, as distinguished from the large bulk plants used to serve the Detroit *metropolitan area* operated by salaried employees and known as "A" stations, and as to which substantial evidence indicated that its cost of marketing gasoline to service stations in latter through commission agents was higher than its cost of marketing through its large bulk plants to service stations in the former;

(c) The charging, in the allocation of cost items to the tank-wagon reseller channel and the jobber channel, to the tank-wagon reseller channel of a number of items which should not have been charged thereto, and the failure to charge to the jobber channel cost items properly chargeable thereto;

(d) Determination of expense on leased service stations which involve landlord operations only, and inclusion of such expense, after deduction of income from rentals, in the general tank-wagon delivery expense allocated to the tank-wagon reseller channel, notwithstanding fact the landlord expense incident to the operation of its leased service stations, carried separately in its regular accounting procedure, had no bearing on the cost of marketing gasoline through the regular reseller channel but represented cost of maintenance, taxes, etc., on company-owned or leased service stations less revenue received, without consideration of the sale of gasoline or the expenses incident thereto;

(e) Allocation of direct-shipment expense for the most part on the basis of effort, while inconsistently making allocation to the tank-wagon reseller channel for the most part on the basis of gallonage — except in accounts where allocation was made on the basis of effort in its regular accounting procedure — as a result of which comparative results obtained did not properly reflect the difference in cost of sale and delivery between the tank-wagon and jobber channel;

(f) Allocation of point of sale advertising which constitutes small proportion only of advertising expense—the largest single item of expense—between tank-wagon and jobber channels, and improper allocation of "consumer advertising" such as newspaper and bill-board advertising, to the tank-wagon channel alone, with no part charged to the jobber channel, notwithstanding fact consumer advertising costs cannot properly be separated between gasoline resold through jobber-operated retail stations and gasoline sold through other retail stations except upon the basis of gallonage, which, if used, would afford no cost differential.

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As respects differential of $1\frac{1}{2}$ cents off tank-wagon price allowed four concerns in the Detroit metropolitan area by respondent refiner, challenged as in violation of Sec. 2 (a) of the Clayton Act as amended, and introduction by said refiner of evidence of competitive offers from distributors of both major and minor brands of gasoline, and contention and defense in said connection that the lower prices allowed the four dealers were made in good faith to meet an equally low price of a competitor for the reason that said four dealers could at any time herein involved have purchased gasoline of grade and quality comparable to that sold by respondent refiner at equally low or lower prices from other suppliers in Detroit: Where there was affirmative proof that the effect of the discrimination was to injure, destroy and prevent competition with the retail stations operated by the said named dealers and with stations operated by their retailer-customers, the Commission concluded as a matter of law that it was not material whether the discriminations in price granted by respondent refiner to the said four dealers were made to meet equally low prices of competitors, and also as a matter of law, that it was unnecessary for it to determine whether the alleged competitive prices were in fact available or involved gasoline of like grade or quality or of equal public acceptance, and accordingly did not attempt to find the facts regarding said matters because, even though the lower prices in question might have been made by said respondent refiner in good faith to meet the lower prices of competitors, such did not constitute a defense in the face of said affirmative proof.

Before *Mr. Webster Ballinger*, trial examiner.

Mr. Cyrus B. Austin for the Commission.

MacMahon, Abbott & Roberts, of Detroit, Mich., and *Mr. Albert L. Green* and *Mr. Buell F. Jones*, of Chicago, Ill., for respondent.

COMPLAINT¹

The Federal Trade Commission, having reason to believe that Standard Oil Company, a corporation, has violated and is violating the provisions of Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act (U. S. C., Title 15, Sec. 13), hereby issues its complaint, charging as follows:

PARAGRAPH 1. The respondent, Standard Oil Company, is a corporation organized, existing, and doing business under and by virtue of the laws of

The complaint is published as amended by following order dated April 23, 1941

This matter coming on to be heard by the Commission upon the motion of counsel for the Commission for an order amending the complaint in the above-entitled proceeding to conform to the evidence adduced in the record of said proceeding and adopting the testimony heretofore taken in support of the allegations of said complaint as testimony in support of the complaint as so amended, and upon the testimony and other evidence heretofore taken in said proceeding before Webster Ballinger, an Examiner of the Commission duly designated by it, and upon hearing Cyrus B. Austin, Esq., counsel for the Commission, in support of said motion, and counsel for the respondent having notified the Commission, by letter of April 14, 1941, that he does not oppose said motion and that, if said motion is granted the answer filed by respondent to the original complaint herein may be received and adopted as respondent's answer to the complaint as so amended, and the Commission having duly considered said motion and being now fully advised in the premises:

It is ordered. That the complaint herein be and the same hereby is, amended.

1. By striking out all of Paragraph Three of said complaint, and inserting in place thereof the following paragraph:

PAR. 3. Since June 19, 1936, in the course and conduct of its business above described, respondent has sold, and now sells, its gasoline to our Detroit dealers engaged in reselling said gasoline at retail at prices substantially lower than the prices charged by respondent to its other Detroit retailer purchasers or gasoline of the same grade and quality. Said four dealers are: Citrin-Kolb Oil Company; Stikeman Oil Company, Inc.; Wayne Oil Company; and Ned's Auto Supply Company. Each of said dealers has since said date, owned or operated in the Detroit area one or more gasoline stations where

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the State of Indiana, with principal office and place of business located at 910 South Michigan Avenue, Chicago, Ill. Respondent is engaged in the business, among other things, of distributing and selling gasoline to and in the city of Detroit, Mich., and adjacent territory.

PAR. 2. Respondent sells its gasoline to about 450 retailers thereof in the Detroit area, with a large proportion of whom respondent has entered into contracts, now in force, obligating respondent to sell and deliver to such retailers all of their respective requirements of respondent's brands of gasoline during the terms of such contracts. For the purpose of supplying said customers and of making deliveries pursuant to said contracts, respondent ships its gasoline from its refinery at Whiting, Ind., to its terminal at River Rouge, Mich., from which point respondent transports and delivers said gasoline to said customers in tank cars or tank wagons; and there is and has been at all times herein mentioned a continuous stream of trade and commerce in said gasoline between respondent's refinery at Whiting, Ind., and said retail dealers purchasing the same in Detroit, Mich. All of such purchases by said retail dealers are and have been in the course of such commerce. Said gasoline is sold by respondent for resale in the Detroit area.

PAR. 3. Since June 19, 1936, in the course and conduct of its business above described, respondent has sold, and now sells, its gasoline to four Detroit dealers engaged in reselling said gasoline at retail, at prices substantially lower than the prices charged by respondent to its other Detroit retailer purchasers for gasoline of the same grade and quality. Said four dealers are: Citrin-Kolb Oil Company; Stikeman Oil Company, Inc.; Wayne Oil Company; and Ned's Auto Supply Company. Each of said dealers has, since said date, owned or operated in the Detroit area one or more gasoline stations where said gasoline so purchased has been resold (and, except as to Stikeman Oil Company, Inc. is now resold) at retail to consumers thereof, in competition with other retailers of gasoline purchasing the same from respondent or from other manufacturers. Citrin-Kolb Oil Company, Stikeman Oil Company, Inc., and Wayne Oil

said gasoline so purchased has been resold (and except as to Stikeman Oil Company Inc. is now resold) at retail to consumers thereof, in competition with other retailers of gasoline purchasing the same from respondent or from other manufacturers. Citrin-Kolb Oil Company, Stikeman Oil Company, Inc. and Wayne Oil Company, respectively, are also engaged in the business of reselling a wholesale, a large part of the gasoline so purchased by them from respondent, to other gasoline dealer in the Detroit area who are likewise competitively engaged in the resale thereof at retail. Said three named wholesalers have knowingly received the benefit of said lower prices. The prices at which respondent has sold its gasoline to the four dealers above named, from time to time since June 19, 1936 have ranged from one-half cent to one and three-quarters cents per gallon lower than the prices charged by it to other Detroit retailers for the same gasoline. Under normal merchandising conditions, during the greater part of that period, respondent's price to said four dealers for its "Red Crown" gasoline (its largest selling brand) has been one and one-half cents below its price therefor to other retailers.

2. By inserting in Paragraph Four of said complaint, after the comma in the third line of said paragraph the words "and with their respective customers," so that said paragraph will read as follows:

PAR. 4 The effect of the discrimination in price described in the preceding paragraph hereof has been and may be to injure, destroy and prevent competition with each of the four dealers named in said Paragraph, and with their respective customers, in the resale of gasoline

It is further ordered, That the testimony and other evidence hereinbefore taken before Webster Ballinger an Examiner of the Commission duly designated by it, in support of the allegations of the complaint as originally drawn and in opposition thereto be, and the same hereby is, adopted and considered as having been taken in support of the allegations of the complaint as hereby amended: and

It is further ordered, That the answer to the original complaint herein, heretofore filed by the respondent be, and the same hereby is, received and adopted as respondent's answer to the complaint as hereby amended.

Company, respectively, are also engaged in the business of reselling at wholesale, a large part of the gasoline so purchased by them from respondent, to other gasoline dealers in the Detroit area who are likewise competitively engaged in the resale thereof at retail. Said three named wholesalers have knowingly received the benefit of said lower prices. The prices at which respondent has sold its gasoline to the four dealers above named, from time to time since June 19, 1936, have ranged from one-half cent to one and three-quarters cents per gallon lower than the prices charged by it to other Detroit retailers for the same gasoline. Under normal merchandising conditions, during the greater part of that period, respondent's price to said four dealers for its "Red Crown" gasoline (its largest selling brand) has been one and one-half cents below its price therefor to other retailers.

PAR. 4. The effect of the discrimination in price described in the preceding paragraph hereof has been and may be to injure, destroy and prevent competition with each of the four dealers named in said paragraph, and with their respective customers, in the resale of gasoline.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an act of Congress entitled, "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (Clayton Act), as amended by an Act of Congress approved June 19, 1936 (Robinson-Patman Act), the Federal Trade Commission on November 29, 1940, issued and subsequently served its complaint in this proceeding upon the respondent. Standard Oil Company, a corporation, charging it with violation of the provisions of subsection (a) of Section 2 of the said Clayton Act as amended. After the issuance of said complaint, the filing of respondent's answer thereto, and the taking of partial testimony and other evidence in support of the complaint, the Commission, on April 23, 1941, issued and subsequently served upon the respondent an order amending said complaint, which order further provided that the testimony and other evidence heretofore taken be adopted and considered as having been taken in support of the allegations of the complaint as amended and that the answer of the respondent filed to the original complaint be adopted as respondent's answer to the complaint as amended. Thereafter, testimony and other evidence in support of and in opposition to the allegations of said complaint as amended were introduced before a trial examiner of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission upon said complaint as amended, answer thereto, testimony and other evidence, report of the trial examiner upon the evidence and exceptions filed thereto, briefs filed in support of and in opposition to the complaint, and oral argument of counsel; and the Commission, having duly considered the matter and being now fully advised in the premises, makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, Standard Oil Company, is a corporation organized, existing, and doing business under and by virtue of the

laws of the State of Indiana, with its principal office and place of business located at 910 South Michigan Avenue, Chicago, Ill.

PAR. 2. The respondent is engaged in the business of refining and distributing gasoline and other petroleum products among and between the various States of the United States. Respondent sells three brands of gasoline—"Solite with Ethyl," "Red Crown," and "Stanolind." Red Crown is respondent's regular house-brand gasoline and constitutes approximately 90 percent of its sales in the Detroit metropolitan area, while Solite with Ethyl constitutes 7 to 10 percent and Stanolind, 3 or 4 percent. Respondent has several refineries, one of which is located in Whiting, Ind. Crude oil to supply its refineries is derived from various sources but principally from the so-called mid-continent fields in Kansas, Oklahoma, Texas, and Wyoming. Respondent sells its products throughout a territory consisting of 14 States, principally located in the Middle West. This territory is divided into 27 divisions or fields, with a branch office in each field in charge of a manager or superintendent.

One of such divisions or fields is known as the "Detroit Field," which embraces all or part of thirteen counties in southern Michigan, including the cities of Detroit, Lansing, Pontiac, Jackson, and Ann Arbor. The "Detroit Area," as distinguished from the "Detroit Field," includes only the city of Detroit and its suburbs, Hamtramck, Dearborn, and Highland Park in Wayne County, which is also referred to as the "Detroit Metropolitan Area."

The respondent has no refinery in the State of Michigan. Gasoline and other petroleum products sold and distributed by the respondent in the Detroit Field are transported from its refinery at Whiting, Indiana, by tankers through the Great Lakes to respondent's marine terminal at River Rouge in the outskirts of Detroit. This marine terminal has a storage capacity of about 1,500,000 barrels of 42 gallons each. During the summer months, deliveries are made from the Whiting refinery every week and sometimes twice a week. In the fall sufficient gasoline is delivered and stored to take care of estimated requirements during the winter months when navigation through the Great Lakes is closed.

During the years from 1936 to and including 1940 respondent supplied from 16.2 percent to 17.4 percent of all the branded and unbranded gasoline sold in the Detroit Metropolitan Area. The total sales made by respondent in said area during that period amounted to 62,198,750 gallons in 1936, 70,015,200 gallons in 1937, 60,448,200 gallons in 1938, 70,279,818 gallons in 1939, and 74,627,712 gallons in 1940.

During the periods of time herein mentioned respondent operated six bulk plants in the Detroit Metropolitan Area. Delivery of gasoline to these bulk plants was made from the River Rouge marine terminal by tank car or transport truck. Tank-car delivery by railroad was for the most part discontinued about February 1, 1940. Transportation of gasoline by transport truck was accomplished by transportation companies employed by the respondent. The capacity of a transport truck is approximately the same as a tank car. In some instances the respondent has shipped gasoline and other petroleum products from its refinery at Whiting, Ind., directly to purchasers thereof located in the Detroit Metropolitan Area. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said products in commerce among and between the various States of the United States.

PAR. 3. Prior to September 10, 1936, respondent operated all retail

service stations owned or leased by it in the Detroit metropolitan area, but on that date it discontinued all retail operations and leased or sublet all stations owned or leased by it to independent operators.

In the course and conduct of its business in the Detroit metropolitan area, the respondent, since September 10, 1936, has regularly supplied gasoline to approximately 358 retail service stations. Respondent owned approximately 200 and leased 8 of these stations. The remaining 150 stations which were supplied directly by the respondent were owned or operated by independent operators, with whom the respondent entered into written agreements known as "Dealer's Agreement, Form 461," by which agreements respondent agreed to sell, and the dealers agreed to purchase, all of their requirements of Solite with Ethyl, Standard Red Crown, and Stanolind gasoline for the period of time specified in said agreements. These latter stations were known as contract service stations as distinguished from the leased service stations hereinabove described.

Deliveries of gasoline to the leased and contract service stations in the Detroit metropolitan area were made from respondent's bulk plants by tank trucks owned by respondent and operated by its salaried employees. This method of delivery is known as "tank-wagon" delivery. The price at which respondent sold its gasoline to said leased and contract service stations was its "posted tank-wagon price," which was fixed from time to time by the general office of the respondent in Chicago.

In addition, the respondent also supplied gasoline to four dealers in the Detroit metropolitan area—Citrin-Kolb Oil Company, Stikeman Oil Company, Inc., Wayne Oil Company, and Ned's Auto Supply Company, which were classified by respondent as jobbers and which, with the exception of Ned's Auto Supply Company, supplied respondent's gasoline to from 94 to 106 retail service stations. Deliveries to these dealers were generally made by tank car, and after February 1, 1940, by transport truck, direct from respondent's River Rouge terminal. During the periods of time hereinafter described, the Citrin-Kolb Oil Company, Stikeman Oil Company, Inc., and Wayne Oil Company sold a substantial portion of the gasoline purchased by them from the respondent direct to the public through retail service stations owned and operated by them. Ned's Auto Supply Company was engaged entirely in the retail sale of gasoline to the public through its own stations.

A third class of customer in the Detroit metropolitan area to whom the respondent supplied gasoline was large commercial users of gasoline, who were usually sold on contracts made by the general office of the respondent in Chicago. The gasoline so purchased was usually delivered either direct from the Whiting refinery or the River Rouge terminal by tank car or transport truck.

PAR. 4. In the course and conduct of its business, since June 19, 1936, respondent has discriminated in price by selling its gasoline for resale direct to the purchasing public to Citrin-Kolb Oil Company, Stikeman Oil Company, Inc., and Wayne Oil Company, and subsequent to March 7, 1938, to Ned's Auto Supply Company, at prices which were substantially lower than the prices charged by respondent to its other retailer-purchasers in the Detroit metropolitan area for gasoline of the same grade and quality. Each of the aforesaid purchasers has, since said date, owned or operated in the Detroit metropolitan area one or more gasoline stations where said respondent's gasoline so purchased has been resold at retail to consumers thereof in competition with other retailers of gasoline pur-

chasing the same from the respondent or from other manufacturers. The respondent sold its largest selling brand, Red Crown gasoline, to said four jobbers at its tank-car price, which was $1\frac{1}{2}$ cents per gallon lower than the prices charged by it for the same gasoline to its other retail dealers in the Detroit metropolitan area.

PAR. 5. In allowing jobber classification in the Detroit metropolitan area to the four jobbers hereinbefore named, the respondent required only that said jobbers purchase substantial quantities of gasoline, own or control bulk plants where gasoline in large quantities could be delivered, and have sufficient financial standing or credit rating to warrant the extension of credit. There was no requirement that said jobbers should sell only at wholesale.

The Citrin-Kolb Oil Company, although selling the respondent's gasoline direct to the consuming public, was nevertheless classified by the respondent as a jobber in 1928 or 1929 and since that it has been allowed the tank-car price on gasoline purchased from respondent. It operated from 1 to 5 retail stations from 1936 to 1939, from 5 to 8 stations in 1940 and 1941, and is operating 5 retail service stations at the present time. During this time it purchased from the respondent in excess of 5,000,000 gallons of gasoline annually. The percentage of gasoline so purchased which was sold at retail by Citrin-Kolb Oil Company through its retail service stations was 29.4 percent in 1936, 15.4 percent in 1937, 7.3 percent in 1938, 10.1 percent in 1939, and 6.5 percent in 1940. During the period from January 1, 1938, to December 31, 1940, Citrin-Kolb Oil Company sold a million gallons of gasoline annually to Langer and Cohn, retail service station operators, at 1 cent per gallon off tank-wagon price and in addition sold another retail service station operator at $\frac{1}{2}$ cent per gallon off tank-wagon price. For a short period of time Citrin-Kolb Oil Company issued "special Savings Cards," which entitled the holders to a 2-cents-per-gallon discount on the purchase of gasoline from one of the retail service stations operated by it.

The Wayne Oil Company, although selling the respondent's gasoline direct to the consuming public, was nevertheless classified by respondent as a jobber in 1935 and since that time it has been allowed the tank-car price on all gasoline purchased from respondent. Prior to September 8, 1939, the Wayne Oil Company operated no retail service stations but subsequent thereto has operated from 2 to 6 stations and is operating 2 stations at the present time. During this period its annual purchases of gasoline from respondent have ranged from 1,348,348 gallons in 1936, to 2,341,394 gallons in 1940. The percentage of gasoline so purchased which was sold at retail by the Wayne Oil Company through its retail service stations was 7.6 percent in 1939 and 14.2 percent in 1940. There is no evidence that the Wayne Oil Company ever sold gasoline to resellers at a price lower than the posted tank-wagon price charged by respondent to its dealers or that any discount was allowed to purchasers by any retail service station operated by it.

The Stikeman Oil Company, Inc., although selling the respondent's gasoline direct to the consuming public was nevertheless classified by respondent as a jobber in 1932 and since that time it has been allowed the tank-car price on all gasoline purchased from respondent. In 1938 the Stikeman Oil Company, Inc., discontinued the operation of retail service stations. Since 1936 its annual purchases of gasoline from the respondent have ranged from 2,255,000 gallons in 1936 to 1,772,911 gallons in 1940

The percentage of gasoline so purchased which was sold at retail by the Stikeman Oil Company, Inc., through retail service stations operated by it was 27.8 percent in 1936, 9.1 percent in 1937, and 0.3 percent in 1938. There is no evidence that this company ever sold gasoline to resellers at a price lower than posted tank-wagon price charged by respondent to its dealers or that any discount was allowed to purchasers by any retail service station operated by it.

Ned's Auto Supply Company was classified by respondent as a jobber on March 7, 1938, and since that time it has been allowed the tank-car price on all gasoline purchased from the respondent. Ned's Auto Supply Company does not sell other resellers of gasoline but has at all times sold the gasoline purchased from the respondent to the public through its own service stations. In 1938 Ned's Auto Supply Company operated 5 retail service stations, which was increased to 6 in 1940. In addition, Ned's Auto Supply Company, operates a station known as "Charley's Service Station," which is owned by Ned's Auto Supply Company and operated by an individual on a salary-and-commission basis. At all times since March 7, 1938, it has been the practice of Ned's Auto Supply Company to sell its gasoline below the prevailing retail service-station price or to give premiums and discounts from its posted price.

PAR. 6. In addition to the discriminations in price hereinabove described, the respondent, in the course and conduct of its business during the period from September 1, 1936, to March 7, 1938, sold its gasoline to Ned's Auto Supply Company at .5 cents per gallon less than the price that it was charging for the same gasoline to its other retail dealers in the Detroit metropolitan area.

Since 1918 Ned's Auto Supply Company has been a customer of respondent and until March 7, 1938, received its gasoline from respondent by regular tank-wagon delivery. In 1936 Ned's Auto Supply Company purchased 2,401,600 gallons of gasoline from the respondent, which it resold to the public through its four retail outlets or service stations. On September 1, 1936, respondent allowed Ned's Auto Supply Company a price of .5 cents off regular tank-wagon price, which was allowed on all gasoline purchased from September 1, 1936, until March 7, 1938. When respondent allowed this price differential, it made no change in its form of delivery of gasoline to Ned's Auto Supply Company but continued to sell it on the regular tank-wagon basis, making delivery from respondent's bulk plants direct to Ned's Auto Supply Company service stations.

PAR. 7. Citrin-Kolb Oil Company, Wayne Oil Company and Stikeman Oil Company, Inc., sell the respondent's gasoline at both wholesale and retail. Citrin-Kolb Oil Company, Wayne Oil Company and Stikeman Oil Company, Inc., although selling a substantial portion of respondent's gasoline direct to the consuming public were nevertheless arbitrarily classified by the respondent as jobbers and as such received from the respondent a lower price on gasoline than the respondent charged its other retail customers in the metropolitan Detroit area who purchased gasoline of like grade and quality direct from the respondent.

Ned's Auto Supply Company, although selling all of its gasoline purchased from the respondent at retail direct to the consuming public was nevertheless arbitrarily classified by the respondent as a jobber and as such received from the respondent a lower price on gasoline than the respondent charged its other retail customers in the metropolitan Detroit area who purchased gasoline of like grade and quality direct from the respondent.

PAR. 8. The volume of gasoline sold in the Detroit metropolitan area through retail gasoline stations is more or less constant, and fluctuations that occur are chiefly due to variation in the number of cars in use from year to year. A lower price at one service station than at another is an important factor in the purchasing public's mind, particularly when the difference in price occurs in the major brands of gasoline. Any difference in price between two stations selling the same gasoline or major brands of gasoline is very important in influencing the flow of business.

The margin of profit of the retail service-station operator between the tank-wagon price which he pays and the prevailing retail service-station price on the regular brand of gasoline of major companies is small. The retailer's margin between respondent's posted tank-wagon price and prevailing retail selling price on its Red Crown gasoline has been only 3.3 cents a gallon in the metropolitan area of Detroit since November 19, 1939. Consequently, any reduction allowed to a retail service-station operator below the regular tank-wagon price gives such operator a material advantage over other retail operators who pay the full tank-wagon price.

In 1936 Ned's Auto Supply Company had four retail stations and its gasoline volume was 2,401,000 gallons. On September 1, 1936, respondent began to sell gasoline to Ned's Auto Supply Company at .5 cents per gallon below posted tank-wagon price by tank-wagon delivery. In 1937 Ned's Auto Supply Company was openly advertising cut prices, and its volume increased to 4,240,500 gallons.

On March 7, 1938, Ned's Auto Supply Company began to purchase from respondent in tank-car quantities at tank-car prices. Although the total volume of gasoline sold in the Detroit metropolitan area during the year 1938 was 10 percent less than the volume sold in 1937, the volume of gasoline sold by Ned's Auto Supply Company increased from 4,240,500 gallons in 1937 to 4,880,500 gallons in 1938.

In 1937 Ned's Auto Supply Company was selling respondent's Red Crown gasoline to the public at approximately 2 cents per gallon below the prevailing retail service-station price, which continued, with variations, until the latter part of 1939. In 1939 and 1940, when Ned's Auto Supply Company's posted price was approximately the same as the prevailing retail price, it gave various undercover discounts and premiums. It has from time to time given commercial discounts varying from 1 to 2 cents per gallon off the posted price. The classification as to who was regarded a commercial customer varied from time to time, depending upon the competitive situation. During August to November 1939 Ned's Auto Supply Company issued trading stamps of a value of 2 cents for each gallon purchased, which were redeemable in merchandise or in gasoline at Ned's Auto Supply Company's stores. Price cutting at Ned's Auto Supply Company's stations has been almost continuous, and this company has been responsible in starting most of the retail price cutting in major-brand gasoline in Detroit over a period of several years. This practice on the part of Ned's Auto Supply Company has caused substantial damage to other retail service-station operators selling respondent's Red Crown gasoline and also to retail service-station operators selling other brands of gasoline, and the ability of Ned's Auto Supply Company to continue the price-cutting practice was greatly enhanced through the discriminations in price allowed it by the respondent while at the same time limiting other retailer-customers to a margin of profit of approximately 3.3 cents per gallon.

The Citrin-Kolb Oil Company annually sold at retail from 6.5 percent

to 29.4 percent of the gasoline purchased from respondent through service stations operated by it during the years 1936 to 1940. In 1938 or 1939 the Citrin-Kolb Oil Company gave discount cards to purchasers of gasoline at one of the stations operated by it entitling the holder to a discount of 2 cents a gallon on respondent's Red Crown gasoline.

The Commission finds that the price discriminations granted by the respondent to Ned's Auto Supply Company, both prior to March 7, 1938, and subsequent thereto, and the price discriminations granted to Citrin-Kolb Oil Company, Wayne Oil Company, and Stikeman Oil Company, Inc., on gasoline sold by them at retail have given a substantial competitive advantage to these favored dealers in their retail operations over other retailers of gasoline, including retailer-customers of the respondent. This competitive advantage is capable of being used, and by Ned's Auto Supply Company and to some extent by Citrin-Kolb Oil Company has been used, to divert large amounts of business from other retailers of gasoline, including customers of the respondent, with resultant injury to them and to their ability to continue in business and successfully compete with said dealers in the retailing of gasoline.

The Commission further finds that the discriminations in price allowed to Citrin-Kolb Oil Company permitted this dealer to sell a million gallons of gasoline annually to one retailer-customer—Langer and Cohn—from January 1, 1938, to December 31, 1940, at a delivered price of one cent per gallon less than posted tank-wagon price and to sell another customer at a discount of one-half cent per gallon. The Citrin-Kolb Oil Company, by passing on in part to Langer and Cohn the benefits of the discriminatory prices allowed by respondent, enabled said Langer and Cohn to sell said gasoline to the consuming public at discounts of as much as two cents per gallon, which not only gave said Langer and Cohn a competitive advantage over other retailers of gasoline, including retailer-customers of the respondent, but also had the effect of diverting business from such retailers to said Langer and Cohn and of substantially lessening competition and injuring, destroying and preventing competition between said Langer and Cohn and other retailers of gasoline, including retailer-customers of the respondent.

The Commission further finds that the effect of the discriminations in price allowed by the respondent to the four dealers as herein described has been, and may be, substantially to lessen competition and to injure, destroy, and prevent competition with each of said four dealers and with their respective customers in the resale of gasoline.

PAR. 9. As a defense to this proceeding the respondent introduced a series of exhibits (Respondent's Exhibits 31-A to Q), with supporting testimony, to show cost justification for the price differentials allowed Ned's Auto Supply Company for the period from September 1, 1936, to March 7, 1938.

The Commission finds that the evidence submitted by the respondent fails to establish that the price differential allowed by respondent to Ned's Auto Supply Company of .5 cents per gallon during the period from September 1, 1936, to March 7, 1938, made only due allowance for differences in respondent's cost of sale and delivery resulting from the differing methods and quantities in which it sold its gasoline to Ned's Auto Supply Company during the period involved. The following are a few of the features of respondent's cost justification which warrant its complete rejection as a defense in this proceeding:

a. Respondent has attempted to make a comparison between the cost of doing business with Ned's Auto Supply Company and the cost of doing business with all of its other reseller-customers as a group. This fails to take into consideration the fact that the respondent's reseller-customers fall into several groups, such as service stations owned by respondent and leased to operators, stations leased by respondent and sublet to operators, and independently owned stations to which respondent supplied gasoline. The costs of doing business would vary between these various groups. Furthermore, there were independent stations, transactions of which with respondent were comparable to those of Ned's Auto Supply Company, and comparison of the costs of these stations and Ned's Auto Supply Company would necessarily show a different result than that shown through respondent's having combined all kinds and types of its reseller stations.

b. Respondent has attempted to make a comparison between the costs of single-dump and multiple-dump deliveries. This is based upon the assumption that all deliveries made to Ned's Auto Supply Company were by single-dump delivery and all deliveries to respondent's other reseller-customers by multiple-dump delivery. However, the respondent did not make full-load or single-dump deliveries in all cases to Ned's Auto Supply Company during the period involved but, instead, made both single- and multiple-dump deliveries. There were also a substantial number of retail service stations located in the Detroit metropolitan area with tank capacity sufficient to take single-load deliveries, and a substantial number of single-load deliveries were made to such stations at respondent's regular tank-wagon price during the period involved.

c. Respondent attempted to segregate certain items of sales expense as not being influenced by Ned's Auto Supply Company and allocated them among all of respondent's other reseller-customers, with no charge being made against Ned's Auto Supply Company; for example, it was contended that when an account, such as Ned's Auto Supply Company, has been established, no further promotional sales work is necessary and should not be charged to such account. Among such items which respondent did not charge to Ned's Auto Supply Company were certain sales promotional services, such as driveway training, which it furnished to reseller-customers but which was not desired by, or furnished to, Ned's Auto Supply Company. In addition to the fact that certain promotional advertising should be charged to Ned's Auto Supply Company, it further appears from the evidence that there are other reseller-customers of the respondent whose accounts have been established and who do not require driveway training.

d. Respondent attempted to segregate certain items of expense of an overhead nature as not being influenced by Ned's Auto Supply Company, on the theory that such expenses would not be appreciably influenced by the acquisition or loss of a single account, such as Ned's Auto Supply Company, and, consequently, that it is proper to charge no part of these expenses to the business of Ned's Auto Supply Company. The reason for not charging any of such items to the business of Ned's Auto Supply Company would apply equally to the business of any other single retail service station.

e. There were certain other items of cost on which it was claimed by respondent that no exact allocation could be made, and, as to such items, the respondent apportioned them among its retail customers, exclusive of Ned's Auto Supply Company, instead of allocating these costs on the basis of gallonage, which would have afforded no cost differential

f. Respondent has included in its cost items certain items of expense in connection with stations owned or leased by the respondent which were leased or sublet to the station operator. Many of these costs apply directly to the landlord activities of the respondent and are not properly chargeable to, or considered as, costs of sale or delivery.

g. In allocating the sales expense of certain salesmen who called on Ned's Auto Supply Company and other retail service stations, respondent attempted to estimate the time spent at Ned's Auto Supply Company and compare the costs so determined as against all salesmen's costs, including salesmen who did not confine their activities solely to the Detroit metropolitan area. Furthermore, in estimating the time of the particular salesman who called on Ned's Auto Supply Company, no consideration was given to the time which such salesman spent in calling on service stations which were not customers of the respondent.

h. The respondent allocated advertising expense in such a manner as to show an alleged savings of .213 cents per gallon, or better than 40 percent of the price differential. In doing this, the respondent allocated the items of point-of-sale advertising which were supplied to Ned's Auto Supply Company, such as service signs, globes, banners, games, and displays, by charging the cost of some directly and assigning others on the basis of outlets and arrived at the cost per gallon of these particular items by relating it to gallonage sold by Ned's Auto Supply Company. All other advertising costs were allocated to the gallonage of all reseller-customers, exclusive of Ned's Auto Supply Company. The advertising so charged consisted principally of advertising issued by the respondent for the purpose of creating consumer acceptance and increasing the sale of gasoline at all Standard stations, such as newspaper advertising, printed and direct-mail advertising, motion pictures, and outdoor signs. Such advertising was for the benefit of Ned's Auto Supply Company, as well as all other customers, and should accordingly have been allocated to Ned's Auto Supply Company, as well as to other customers, on a gallonage basis, in which event there would have been no cost differential as to such items.

PAR. 10. As a further defense to this proceeding, respondent contended that the differential between the price of $1\frac{1}{2}$ cents per gallon off tank-wagon price charged Citrin-Kolb Oil Company, Stikeman Oil Company, Inc., Wayne Oil Company, and Ned's Auto Supply Company and the tank-wagon price charged respondent's other retail dealers made only due allowances for differences in respondent's costs of sale and delivery resulting from the differing methods and quantities in which gasoline was sold and delivered to said jobbers.

Respondent first attempted to show justification of differential of $1\frac{1}{2}$ cents per gallon between the tank-car and tank-wagon price by introducing evidence as to a survey made in the Kansas-Oklahoma field to show cost of selling jobbers, the results of which were compared with the cost of sale and delivery of gasoline by tank-wagon in the entire Detroit division. There is no evidence that the costs of sale and delivery by tank car to jobbers in the Kansas-Oklahoma field were the same or were substantially the same as, or have any relation to, the costs of sale and delivery of gasoline by tank car to jobbers in the Detroit metropolitan area. In fact, the evidence indicates that the costs of the jobber operations in the Kansas-Oklahoma field were not comparable with the jobber operations in the Detroit field. The volume sold was not comparable with the Detroit

sales and the total annual sales to jobbers in the Kansas-Oklahoma field were less than the annual sale to one jobber, Citrin-Kolb Company, in Detroit, and several of these jobbers purchased less gasoline annually than is sold at an average service station in Detroit. The tabulation of jobber expense in the Kansas-Oklahoma field includes no items of consumer acceptance advertising expense charged to such jobber operations, which is substantial in the Detroit metropolitan area. Furthermore, the cost computations for the Kansas-Oklahoma field do not reflect the true conditions or give a factual result since the gallonage sold to two jobbers, Gibson Oil Company and Kramer Oil Company, that handled nearly one half the gallonage sold in that field, was excluded in computing accounting and credit costs and included in computing supervision and selling costs.

In determining the costs of tank-wagon deliveries in the Detroit metropolitan area for the purpose of comparison with jobber costs in Kansas and Oklahoma, respondent used the total marketing costs for the entire Detroit field which were allocated to the reseller channel and leased service stations in its "Comparative Statement of Expense," known as "Form 189." Respondent divided the total marketing costs so allocated by the total reseller gallonage to arrive at the cost per gallon of sale and delivery in tank-wagon deliveries. This comparative statement of expense is an expense record for the Detroit field prepared from time to time in respondent's regular course of business. Said form represents a breakdown of marketing expense between the channels of distribution, which are reseller channel, consumer channel, leased service stations, and other methods. The consumer channel is also known as the "direct-shipment channel" and includes deliveries to large industrial users of gasoline made either direct from the Whiting refinery or the River Rouge terminal. Such shipments usually originate with sales contracts made by the general office of the respondent on a bid basis. Shipments to jobbers were included in the consumer or direct-shipment channel in respondent's usual accounting procedure. The respondent did not consider it necessary for its purpose to isolate the cost of the direct-shipment channel, which included sales to jobbers. Consequently, none of the expense allocations made on Form 189 are charged to either the direct-shipment channel or to the business done with jobbers, but, instead, such expense is distributed or scattered over the various channels appearing on said form. While this comparative statement of expense may be considered by the respondent as sufficient to reflect company operations, the figures taken therefrom cannot properly reflect the cost of tank-wagon sales as compared with jobber sales. There are numerous items of cost which have been allocated to the reseller channel, a substantial portion of which should have been charged to jobber gallonage and, if so charged, would have substantially reduced the cost of reseller operation and in turn reduced the differential in cost between tank-wagon and jobber costs.

The Commission finds that the attempted comparison between cost of jobber operations in the Kansas-Oklahoma field with cost of sale and delivery to dealers in the Detroit field taken from its Comparative Statement of Expense has no probative value in determining the cost differential between tank-car sales to jobbers and tank-wagon sales to dealers in the Detroit metropolitan area.

PAR. 11. In a further effort to show cost justification for the price differential of 1½ cents off tank-wagon price allowed to Citrin-Kolb Oil Company, Stikeman Oil Company, Inc., Wayne Oil Company, and Ned's Auto

Supply Company, the respondent attempted to segregate the cost items appearing on its comparative statement of expense and to reallocate such costs to the reseller and jobber channels. For this purpose respondent prepared a modified form of its regular comparative statement of expense showing costs allocated to jobbers, as well as to tank-wagon resellers, which was introduced into evidence as Respondent's Exhibit 101, together with explanation as to methods used, which was introduced as Respondent's Exhibits 99 and 100.

After consideration of the modified form of respondent's comparative statement of expense and other exhibits and testimony submitted in connection therewith, the Commission finds that the evidence submitted by the respondent fails to establish that the price differential allowed by respondent to the above-named jobbers of 1½ cents per gallon off tank-wagon price made due allowance for differences in respondent's costs of sale and delivery resulting from differing methods and quantities in which it sold its gasoline to said jobbers. The following are a few of the features of respondent's cost justification which warrant its complete rejection as a defense in this proceeding:

a. In making this cost study the respondent did not limit its survey to cost differences which resulted from differing methods or quantities in which gasoline was sold or delivered to the two classes of customers nor was it limited to determining savings, if any, which accrued by reason of tank-car or transport-truck delivery as compared with tank-wagon delivery, but, instead, the respondent attempted to compare the cost of doing business with the one class as compared with the other by arbitrarily allocating all of respondent's costs of every nature which could be charged to the expense of doing business in the Detroit field, including Chicago general office costs allocated to that field.

b. Respondent has compared the cost of marketing to the four jobbers located in the Detroit metropolitan area, whose business was confined to that area, with the cost of marketing gasoline to all its other dealers in the Detroit field. The Detroit metropolitan area includes the city of Detroit and the suburbs of Dearborn, Hamtramck, and Highland Park. The Detroit field includes the rural section located outside the Detroit metropolitan area, including Lansing, Pontiac, and Ann Arbor, where different methods of delivery are involved since the rural section is supplied by small bulk plants operated by commission agents known as "B" stations as distinguished from the large bulk plants used to serve the Detroit metropolitan area operated by salaried employees and known as "A" stations. No factual cost study or investigation was made to determine the relation of sale and delivery costs in the entire Detroit metropolitan field to those in the restricted Detroit metropolitan area. In fact, there is substantial evidence indicating that respondent's cost of marketing gasoline to service stations in the rural areas of the Detroit field through commission agents is higher than its cost of marketing through its large bulk plants to service stations in the Detroit metropolitan area.

c. In allocating cost items to the tank-wagon reseller channel and the jobber channel, the respondent charged to the tank-wagon reseller channel a number of items which should not have been charged to that particular channel and failed to charge to the jobber channel cost items properly chargeable to that channel.

d. For the purpose of this cost study, respondent has determined the expense on leased service stations which involve landlord operations only

and has carried such expense, after deducting income from rentals, into the general tank-wagon delivery expense allocated to the tank-wagon reseller channel. In fact, the landlord expense incident to the operation of respondent's leased service stations was carried separately in respondent's regular accounting procedure, as this expense has no bearing on the cost of marketing gasoline through the regular reseller channel but represented cost of maintenance, taxes, etc., on company-owned or leased service stations less revenue received, without consideration of the sale of gasoline or the expenses incident thereto.

e. It further appears from respondent's cost study that direct-shipment expense has been allocated for the most part on the basis of effort, while the allocation to the tank-wagon reseller channel has been made for the most part on the basis of gallonage except in accounts where allocation was made on the basis of effort in respondent's regular accounting procedure. The use of these two methods of allocation appears to be inconsistent, and the comparative results obtained do not properly reflect the difference in cost of sale and delivery between the tank-wagon and jobber channel.

f. While advertising comprises the largest single item of expense, only a small proportion, consisting of point-of-sale advertising, has been allocated between the tank-wagon and jobber channel. The remaining advertising expense, commonly known as "consumer advertising," such as newspaper and billboard advertising, was improperly allocated to the tank-wagon channel alone and no part charged to the jobber channel. Consumer advertising costs cannot properly be separated between gasoline resold through jobber-operated retail stations and gasoline sold through other retail stations except upon the basis of gallonage, which, if used, would afford no cost differential.

PAR. 12. As a further defense the respondent contends that the differential of $\frac{1}{2}\text{¢}$ off tank-wagon price allowed Ned's Auto Supply Company from September 1, 1936, to March 7, 1938, and the differential of $1\frac{1}{2}\text{¢}$ off tank-wagon price allowed Citrin-Kolb Oil Company, Wayne Oil Company and Stikeman Oil Company since June 19, 1936, and the differential of $1\frac{1}{2}\text{¢}$ off tank-wagon price allowed Ned's Auto Supply Company from March 7, 1938, were all made in good faith to meet equally low or lower prices of competitors.

In support of this defense the respondent introduced evidence of competitive offers received by the four dealers from distributors of both major and minor brands of gasoline. Some of these offers were made prior to June 19, 1936, and some were made subsequent to June 19, 1936. Of those offers made subsequent to June 19, 1936, some were made after the filing of the complaint herein. In further support of this defense the respondent contended that the lower prices allowed the four dealers were made in good faith to meet an equally low price of a competitor for the reason that said four dealers could at any time herein involved have purchased gasoline of grade and quality comparable to that sold by the respondent at equally low or lower prices from other suppliers in Detroit.

Based on the record in this case the Commission concludes as a matter of law that it is not material whether the discriminations in price granted by the respondent to the said four dealers were made to meet equally low prices of competitors. The Commission further concludes as a matter of law that it is unnecessary for the Commission to determine whether the alleged competitive prices were in fact available or involved gasoline of like grade or quality or of equal public acceptance. Accordingly the

Commission does not attempt to find the facts regarding those matters because, even though the lower prices in question may have been made by respondent in good faith to meet the lower prices of competitors, this does not constitute a defense in the face of affirmative proof that the effect of the discrimination was to injure, destroy and prevent competition with the retail stations operated by the said named dealers and with stations operated by their retailer-customers.

Prior to June 19, 1936, the effective date of the Robinson-Patman amendment, Section 2 of the Clayton Act declared discriminations in price to be unlawful when the effect of such discriminations may be substantially to lessen competition or create a monopoly, with provisos permitting, among other things, discriminations in price "in the same or different communities made in good faith to meet competition." Under that proviso a discrimination in price made in good faith to meet competition might under proper circumstances have been a complete defense to a charge of unlawful price discrimination.

In framing the Robinson-Patman Act Congress recognized that the provision in Section 2 of the Clayton Act permitting discriminations in good faith to meet competition was indefinite and uncertain and had the effect of weakening Section 2. Consequently Congress discarded the proviso in Section 2 which made the meeting of competition in good faith a complete or absolute justification and made price differences due to differences in cost, market changes and marketability of the goods the only absolute justifications now available to a respondent charged with unlawful price discrimination. Section 2 (a) of the Clayton Act as amended by the Robinson-Patman Act contains no reference to lower prices made in good faith to meet competition. That matter was covered by Congress through a proviso in Section 2 (b), and such proviso was "intended to operate only as a rule of evidence in a proceeding before the Federal Trade Commission."

A *prima facie* case of violation of Section 2 (a) may be established by proving (1) jurisdiction, (2) goods of like grade and quality, and (3) discrimination in price. Discrimination in price here was shown by proving a difference in the prices charged competing customers. Based upon the *prima facie* case thus shown the Commission may draw from such *prima facie* case a rebuttable presumption that the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly or to injure, destroy or prevent competition. The burden then shifts to the respondent.

In rebuttal of the *prima facie* case the respondent under Section 2(b) may show that the respondent's lower price was made in good faith to meet an equally low price of a competitor. However, such a showing is not an absolute defense to a charge of unlawful discrimination and proof of meeting a competitor's equally low price can be availed of only to the extent it may rebut the *prima facie* case. The meeting of an equally low price of a competitor in good faith is not a defense to a charge of price discrimination where competitive injury is affirmatively shown and so replaces the rebuttable presumption of the *prima facie* case. This results from the difference between such a case and the *prima facie* case referred to in Section 2(b). Section 2(b) defines a *prima facie* case as "* * * proof * * * that there has been discrimination in price * * *." This definition must

¹ Congressional Record, June 8, 1936, p. 8410.

be compared with the prohibitions of Section 2(a) which makes such a discrimination unlawful only in the event it injuriously affects competition. If proof of good faith in meeting an equally low price of a competitor is made, the Commission could no longer rely upon its *prima facie* case, but must show by additional and affirmative evidence that the effect of the discrimination may be to substantially lessen competition or tend to create a monopoly or to injure, destroy or prevent competition between respondent and its competitors or between customers of the respondent or with the customers of such customers. Where such injurious effect on competition is affirmatively proved, the proof made as to meeting an equally low price of a competitor under the proviso of Section 2(b) does not constitute a substantive justification or defense.

The respondent may also introduce evidence in support of its affirmative defense tending to establish that the effect of the differential in price is not to substantially lessen competition or tend to create a monopoly or to injure, destroy or prevent competition with customers of the person granting the discrimination or competition with persons knowingly receiving the benefit thereof. The respondent may also show in support of its justifications (1) that the differential proved makes only due allowances for differences in cost resulting from the differing methods or quantities sold or delivered; (2) that the differentials were the result of price changes in response to changing conditions affecting the market for or the marketability of the goods concerned. The establishment of any of such contentions would preclude any conclusion that the law had been violated.

The provision for a showing of good faith to meet an equally low price of a competitor cannot be construed as a *carte blanche* exemption to a respondent to engage in discriminations in price which have the adverse effects on competition proscribed under Section 2(a). Such a construction would constitute recognition of the soundness of the principle that one competitor's violation of law justifies its violation by another. It would also justify discrimination by a chain organization to meet the equally low price of a single unit competitor who had not discriminated at all as well as discrimination to meet the price of any competitor whose discrimination is lawful because justified by cost differences. It would defeat the substantive purposes and requirements of Section 2(a) in such situations as well as in the present case, where discrimination to meet the equally low prices of a competitor has produced the adverse effects on competition which it was the main purpose of the section and of the Act to prevent.

PAR. 13. Since the record in this case affirmatively shows that the discriminations in price in favor of the named jobbers and in favor of Ned's Auto Supply Company as a tank-wagon purchaser from September 1, 1936, to March 7, 1938, and as a tank-car purchaser thereafter, have resulted in injuring, destroying, and preventing competition between said favored dealers and retail dealers in respondent's gasoline and other major brands of gasoline, the Commission is of the opinion, and so finds, that the defense of meeting an equally low price of a competitor as provided by subsection (b) of Section 2 of the Clayton Act is not available to the respondent on the basis of the present record.

CONCLUSION

The aforesaid discriminations in price by the respondent, as herein found, constitute violations of subsection (a) of Section 2 of an Act of Con-

gress entitled, "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" approved October 15, 1914 (Clayton Act), as amended by an Act of Congress approved June 19, 1936 (Robinson-Patman Act).

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission as amended, answer of the respondent, testimony and other evidence in support of the allegations of said complaint as amended and in opposition thereto taken before a trial examiner of the Commission theretofore duly designated by it, report of the trial examiner upon the evidence and exceptions filed thereto, briefs in support of the complaint and in opposition thereto, and oral argument of counsel; and the Commission having made its findings as to the facts and its conclusion that respondent has violated the provisions of subsection (a) of Section 2 of an Act of Congress entitled, "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (Clayton Act), as amended by act approved June 19, 1936 (Robinson-Patman Act).

It is ordered, That the respondent, Standard Oil Company, a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device in connection with the sale of gasoline in commerce as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such gasoline of like grade and quality as among purchasers:

1. By selling such gasoline of like grade and quality to competing purchasers at different prices in the manner and under the circumstances found in paragraph 4 of the aforesaid findings as to the facts and conclusion.

2. By continuing or resuming the discriminations in price referred to and described in paragraph 4 of the Commission's findings as to the facts herein.

3. By otherwise discriminating in price between purchasers of gasoline of like grade and quality in a manner and degree substantially similar to the manner and degree of the discriminations referred to in paragraph 4 of the Commission's findings as to the facts herein, and in any other manner resulting in price discriminations substantially equal in amount to such discriminations.

4. By selling such gasoline to some retailers thereof at prices different from the prices charged other retailers who in fact compete in the sale and distribution of such gasoline; provided, however, that this shall not prevent price differences of less than 0.5 cent per gallon which do not tend to lessen, injure, or destroy competition among such retailers.

5. By allowing a lower price to any dealer, jobber, or wholesaler on gasoline sold by such dealer, jobber, or wholesaler at retail, than the price which respondent charges its retailer-customers who in fact compete in the sale and distribution of such gasoline with such dealers, jobbers, or wholesalers in their retailing activity; provided, however, that this shall not prevent price differences of less than 0.5 cent per gallon which do not tend to lessen, injure, or destroy competition with such dealers, jobbers, or wholesalers in the sale of gasoline direct to the consuming public.

6. By selling such gasoline to any dealer, jobber, or wholesaler at a price lower than the price which respondent charges its retailer-customers who in fact compete in the sale and distribution of such gasoline with the retailer-customers of such dealers, jobbers, or wholesalers, where such dealers, jobbers or wholesalers resell such gasoline to any of its said retailer-customers at less than respondent's posted tank-wagon price or who directly or indirectly grant to any such retailer-customer any discounts, rebates, allowances, services or facilities having the net effect of a reduction in price to the retailer.

For the purpose of comparison the term "price" as used in this order takes into account discounts, rebates, allowances, and other terms and conditions of sale.

It is further ordered, That the respondent shall, within 60 days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF
BURTON BROTHERS & COMPANY, INC.

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

Docket 5053. Complaint, Sept. 22, 1943—Decision, Oct. 9, 1945

Where a corporation engaged as a converter in the interstate sale and distribution among other textile products, of its "Burton's Irish Poplin"—made to its specifications by manufacturers in this country of domestic cotton and long sold under said designation both before and after its registration thereof, together with a depiction of a shamrock leaf, as its trade-mark—to garment manufacturers, along with cardboard tags and woven labels, for attachment to finished garments, which featured its said trade-mark together with one of the supplemental phrases "Made in U.S.A. of Fine Cotton" or "Woven of American Cotton in the U.S.A.," and also to retail stores in the form of yard goods in bolts which it wrapped in green paper bearing numerous depictions of a shamrock leaf, in the center of each of which appeared its trade-mark with one of the said supplemental phrases—

Falsely represented, through use of said designation "Burton's Irish Poplin" in extensive advertisements in newspapers and periodicals, and in its aforesaid tags and labels, and in letters and invoices, that said product was made in Ireland or was of Irish origin and imported into this country; and supplemented, supported and emphasized such representations through use of green color and depictions of a shamrock leaf in said trade-mark and advertisements, which representations the aforesaid supplemental phrases did not serve to qualify or explain, but merely contradicted;

With tendency and capacity to confuse, mislead, and deceive a substantial portion of the purchasing public into the erroneous belief that its poplin was of Irish origin and imported into this country; and with result, in the furnishing of tags and labels to garment manufacturers, of placing in the hands of others the means whereby purchasers might be confused, misled, and deceived as to the origin of its fabric used in such garments; whereby members of the public were misled and deceived into the purchase of substantial quantities of its said product or of garments made thereof:

Held, That such acts and practices were all to the prejudice and injury of the public, and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. Arthur F. Thomas*, trial examiner.

Mr. R. P. Bellinger for the Commission.

Greene & Greene, of New York City, for respondent.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said act, the Federal Trade Commission having reason to believe that Burton Brothers & Company, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows: