

Syllabus

IN THE MATTER OF
STANDARD OIL COMPANY

COMPLAINT, MODIFIED FINDINGS AND ORDER, AND DISSENTING OPINIONS
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 AP-
PROVED JUNE 19, 1936

Docket 4389. Complaint, Apr. 23, 1941¹—Decision, Jan. 16, 1953²

In dealing with the question as to whether or not the granting or continuing of certain alleged discriminatory prices, done pursuant to and in accordance with the seller's general policy, was in good faith to meet the equally low price of a competitor within the meaning of Sec. 2 (b) of the Clayton Act as amended: the Commission believes that consideration cannot be confined to such specific offers as may have been made by competitors, but must also include the setting and general conditions under which such offers were made.

In the aforesaid connection it was noted that the particular seller—which had had long experience in the sale and distribution of the product involved; was thoroughly familiar with the costs of operating retail service stations and bulk plants and the margins of gross profits available, and with the competitive results which might be expected when some retailers received lower prices than competing retailers; and which knew or had the means of knowing and should have known that the manner in which it priced and sold its products continually created the possibility of injury to competition between retailers who bought the product at different prices and resold it in competition with one another; that the price differences it granted could not be justified on the basis of differences in the cost of manufacture, sale and delivery resulting from differing methods or quantities in which its product was sold or delivered—took no action at the time the Robinson-Patman amendment to the Clayton Act became law, to review its pricing policy and bring it into conformity with the new statute, in accordance with the duty and obligation thereby imposed upon it, and made no bona fide attempt to do so.

Section 2 (b) of the statute, in the Commission's view, does not contemplate justifications being made for a method of pricing as exemplified by individual instances of price discrimination made pursuant to such pricing method which were not the result of departures from a nondiscriminatory price scale made to meet lower prices of competitors but represented only the continued application of the pricing standard previously adopted by the seller

¹ Amended.

² Findings and order are published as modified following the decree of the Court of Appeals for the Seventh Circuit on February 14, 1951, vacating and setting aside its former judgment and remanding the case to the Commission to make findings in conformity with the opinion of the Supreme Court on January 8, 1951, in *Standard Oil Co. v. Federal Trade Commission*, 340 U. S. 231. The original findings and order are reported in 41 F. T. C. 263 and the order as modified by the Commission on August 9, 1946, is reported in 43 F. T. C. 56.

and followed by it since long before 1936 when the Robinson-Patman amendment was enacted, namely, as respects the granting of respondent's tank-car, or so-called "jobber" price, in the instant proceeding, that a purchaser—irrespective of his status as retailer or wholesaler—must make annual purchases of not less than from one to two million gallons of gasoline, have storage facilities sufficient to accept delivery in tank-car quantities, and have a credit standing assuring payment for large volume purchases.

In a situation where, as in the present case, the seller necessarily knew at the time of the passage of the Robinson-Patman Act, and at all times thereafter, that its standard for granting the challenged prices was in all substantial respects the same as the standards used by its major competitors, and evidently relied upon the position that so long as the pricing method in existence prior to the passage of the Act remained unchanged, it could defend its price discriminations on the ground that its lower prices were granted in good faith to meet equally low prices of its competitors—a defense, if valid, equally available to competitors involved: the Commission does not construe the words "in good faith" in the section as permitting such a result, and does not believe that the statute provides a means of effectively insulating any particular pricing pattern from attack, or guarantees that so long as a pricing pattern in effect prior to 1936 remains undisturbed, price discriminations made pursuant to that pattern may be lawfully continued.

As respects the sale of a branded product, such as gasoline, it is necessary for a dealer to have a product his customers are willing to buy, public acceptance is determined in large measure by factors other than actual grade and quality, and a dealer cannot readily shift from one brand to another without running the risk of losing many of his customers whom he may not be able to replace. And in the case of off-brand or local-brand gasoline, distributors in metropolitan areas find it necessary to undersell major brands in order to secure some share of the market.

In a proceeding brought under Sec. 2 (a), offers received by customers, to whom the seller extended the alleged unlawfully discriminating prices from its competitors, before the date of the Robinson-Patman Act, would not be relevant—except possibly for certain limited purposes, and except insofar as they might be continuing offers—to show that said specific discriminations in price made subsequent to said date were made in good faith to meet equally low prices of competitors.

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 15 states principally located in the middle west; (2) during the years from 1936 to 1940, inclusive, supplied from 16.2 to 17.4 percent 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 large commercial users in said areas, usually sold on contracts made by its general office in Chicago, with gas 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 was resold at retail to consumers in competition with other retailers who purchased gas 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 Red Crown gasoline, its 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, while 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 (C-K, W, and 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 1 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, nor as made in good faith to meet the equally low price of a competitor within the meaning of Sec. 2 (b)—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.

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 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 $\frac{1}{2}$ 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) Noninclusion 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 (C-K, S, W, and N), 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 allowance 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 1½ cent differential 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 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 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;

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(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 the fact that 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 billboard advertising, to the tank-wagon channel alone, with no part charged to the jobber channel, notwithstanding the fact that 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.

As respects the offers to N, one of the favored customers involved in the instant proceeding, by a competitor of respondent seller, to supply it with an off-brand gasoline—generally sold at less than major brands and with no public acceptance comparable to that enjoyed by respondent's well-known brand—at the prevailing tank-car price, and the subsequent reduction by respondent to said customer of $\frac{1}{2}$ cent per gallon from respondent's tank-wagon price: respondent could not, in view of its familiarity with competitive conditions and irrespective of the fact as to whether or not said off-brand gas was of comparable grade or quality with its own product, have regarded the offer

of said competitor to sell its off-brand gasoline at a 1½ cent per gallon lower price, as a serious competitive threat.

With regard to the tentative arrangement made between the Texas Co. and C-K in August 1936 for a five-year contract under which C-K was to be allowed 2 cents per gallon off the tank-wagon price and certain other advantages—which respondent refused to meet and which was never put into effect—and to the 1939 offer of Argo to sell a certain gasoline to C-K at 2 cents a gallon less than the prevailing tank-wagon price:

Such offers could not have been relevant to the lower price already granted to C-K in 1928 or 1929 and continually in effect since that time, and were presumably intended to show that continuance of the lower price to C-K was necessary to prevent respondent's competitors from securing the patronage of that customer.

As regards the aforesaid assumption and the fact that respondent had substantial reasons for believing that if it ceased granting tank-car prices to C-K, W, and S, and continued to refuse the tank-car price to N—which it accorded in March 1938 when N became entitled thereto under respondent's standards as hereinbefore set out—it would lose the accounts, since the first three had already been recognized as entitled to a tank-car price under said commonly accepted standards of the industry, and N had achieved a volume of distribution which brought it within the range where it was likely to be so recognized by a major oil company at any time:

The Commission was of the view, for the reasons hereinbefore set forth, that the actions of respondent in granting or continuing, to the said four dealers, the tank-car price made pursuant to and in accordance with its aforesaid general policy, and the criterion applied by its major competitors, were not done in good faith to meet equally low prices of competitors; such discriminations, with the exception of the ½ cent per gallon discrimination in favor of N, representing only the continued application of the pricing standard previously adopted by respondent and followed by it since long before 1936, and not the result of departures from a nondiscriminatory price scale made to meet lower prices of competitors.

Before *Mr. Webster Ballinger*, hearing examiner.

Mr. L. E. Creel, Jr. and *Mr. J. Wallace Adair* for the Commission.

MacMahon, Abbott & Roberts, of Detroit, Mich., and *Mr. Thomas E. Sunderland*, *Mr. Gordon E. Tappan*, *Mr. Albert L. Green*, *Mr. Buell F. Jones* and *Kirkland, Fleming, Green, Martin & Ellis*, of Chicago, Ill., for respondent.

Appell, Austin & Gay, of New York City, for Retail Gasoline Dealers Association of Michigan, Inc. and National Congress of Petroleum Retailers, Inc., intervenors.

Miller, Gorham, Wescott & Adams, of Chicago, Ill., for Empire State Petroleum Association, Inc., intervenor.

Adamowski & Sallemi, of Chicago, Ill., for Great American Oil Co., intervenor.

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:

¹The complaint is published as amended by the 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 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 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.

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.

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 principal office and place of business located at 910 South Michigan Avenue, Chicago, Illinois. Respondent is engaged in the business, among other things, of distributing and selling gasoline to and in the city of Detroit, Michigan, 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, Indiana, to its terminal at River Rouge, Michigan, 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, Indiana, and said retail dealers purchasing the same in Detroit, Michigan. 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 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

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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, MODIFIED 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 (the Clayton Act), as amended by an Act of Congress approved June 19, 1936 (The 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 said respondent with having violated the provisions of subsection (a) of Section 2 of the said Clayton Act, as amended. After the issuance of said complaint, the filing of the respondent's answer thereto, and the taking of part of the 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 theretofore 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 to the original complaint be adopted as the respondent's answer to the complaint, as amended. Thereafter, further testimony and other evidence in support of and in opposition to the allegations of said complaint, as amended, were introduced before a hearing examiner of the Commission theretofore duly designated by it, and such testimony and other evidence were duly recorded and filed in the office of the Commission. This proceeding then regularly came on for final hearing before the Commission upon the complaint, as amended, the respondent's answer thereto, the testimony and other evidence, the report of the hearing examiner upon the evidence and exceptions thereto, briefs

in support of and in opposition to the complaint, as amended, and oral argument of counsel; and the Commission, having duly considered the same, on October 9, 1945, made its findings as to the facts and its conclusion drawn therefrom and issued its order to cease and desist (which order to cease and desist was, on August 9, 1946, modified in certain respects).

On October 4, 1946, the respondent filed with the United States Circuit Court of Appeals for the Seventh Circuit its petition for review of the Commission's modified order to cease and desist, and after hearing the cause on briefs and oral argument, said court, on April 29, 1949, issued its decree modifying Paragraph 6 of said order and affirming the order as so modified. The judgment of the Court of Appeals having been reversed by the Supreme Court, said Court of Appeals, on February 14, 1951, issued its decree vacating and setting aside its former judgment and remanding the case to the Commission "to make findings in conformity with the opinion of the Supreme Court of the United States filed on January 8, 1951."

Thereafter, the Commission, having further considered the matter, on March 24, 1952, issued, and on March 26, 1952, served upon the respondent, an order granting the respondent leave to present to the Commission any objections it might have to the issuance of a document attached thereto as the Commission's modified findings as to the facts and conclusion in compliance with the aforesaid decree; and the Commission, having received and considered the respondent's objections and briefs on behalf of Retail Gasoline Dealers Association of Michigan, Inc., National Congress of Petroleum Retailers, Inc., Empire State Petroleum Association, Inc., Great American Oil Company, and counsel in support of the complaint, and having heard and considered oral argument of counsel in opposition to and in support of the proposed modified findings as to the facts and conclusion, now makes this its modified findings as to the facts and its conclusion drawn therefrom in this proceeding:

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, Illinois.

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 accounts for approximately 90 percent of respondent's sales in the Detroit metropolitan area, while Solite with Ethyl accounts for 7 to 10 percent and Stanolind, 3 or 4 percent. Respondent has several refineries, one of which is located in Whiting, Indiana. 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 Route 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, Indiana, 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 pur-

chased 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, the 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 purchasing 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 prices, which was 1½ 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 dealers hereinbefore named, the respondent required only that said dealers 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 dealers 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 time 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 was operating 5 retail service stations at the time this case was submitted for decision. 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 was operating 2 stations at the time this case was submitted for decision. During this period its annual purchases of gasoline from respondent 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 0.5 cent 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 0.5 cent 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. During all of the time covered by these findings Citrin-Kolb Oil Company, Wayne Oil Company, and Stikeman Oil Company, Inc., sold 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 variations 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. This is illustrated by the fact that between November 19, 1939, and March 1, 1941, the retailer's margin between respondent's posted tank-wagon price and prevailing retail selling price on its Red Crown gasoline was only 3.3 cents a gallon in the metropolitan area of Detroit. 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

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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 of commercial customers 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. During the time covered by these findings price cutting at Ned's Auto Supply Company's stations was almost continuous, and this company was responsible for 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.

During the years 1936 to 1940 the Citrin-Kolb Oil Company annually sold at retail from 6.5 to 29.4 percent of the gasoline purchased from respondent through service stations operated by it. 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 0.5 cents per gallon during the period from September 1, 1936, to March 7, 1938, made only due allowance for differences in respondent's costs 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

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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-dump 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 salesmen 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 0.213 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 of 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 the 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 the 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 did 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 most 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 explanations as to methods used, which was introduced as Respondent's Exhibits 99 and 100.

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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 of $1\frac{1}{2}$ cents per gallon off tank-wagon price allowed by respondent to the above-named dealers made only 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 dealers. 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 differentials 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 dealers 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 expense 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. In further defense of the discriminations in price challenged in this proceeding the respondent contends that the lower prices allowed Ned's Auto Supply Company from and after September 1, 1936, and the lower prices allowed Citrin-Kolb Oil Company, Wayne Oil Company, and Stikeman Oil Company, Inc., from and after June 19, 1936, were all made in good faith to meet equally low or lower prices of competitors within the meaning of subsection (b) of Section 2 of the Clayton Act, as amended. The respondent argues that this is established: (1) By the showing made respecting several offers to these dealers by some of respondent's competitors, which, it

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contends, demonstrates that the granting of the lower prices to these dealers was necessary to prevent the loss of their business by respondents; and (2) by evidence that during all of the time the lower prices were allowed by respondent the general competitive condition in Detroit was such that any of these dealers could have purchased from some of respondent's competitors gasoline of a grade and quality comparable with respondent's gasoline at prices equally low or lower than the prices charged by respondent. Although finding against the respondent on other grounds, the hearing examiner nevertheless expressed the opinion (not necessary to the decision which he recommended) that the lower prices allowed these four customers by respondent were in fact granted to meet equally low prices of competitors. Whether deliberately or inadvertently, the hearing examiner did not find that these lower prices were allowed "in good faith." In any event, for reasons hereinafter stated, the Commission is convinced that these lower prices were not made in good faith to meet equally low prices of competitors within the meaning of Section 2 (b) of the amended Clayton Act.

PAR. 13. As hereinabove indicated, the respondent's method of pricing its gasoline in the Detroit metropolitan area is to sell to its customers generally at what is designated in the oil industry as the "tank-wagon price" and to sell to a much more limited number of purchasers at a "tank-car price," the latter being $1\frac{1}{2}$ cents per gallon lower than the former (on the respondent's Red Crown gasoline). The "tank-car price" is also frequently referred to as the "jobber" price, although the granting of such price is not based upon any consideration of the method of resale by the purchaser. The respondent's standard for granting the tank-car price is that a purchaser make annual purchases of from one to two million gallons of gasoline, have storage facilities sufficient to accept delivery of a tank-car quantity of gasoline at one time, and have a credit rating satisfactory to assure payment for the gasoline purchased in the larger quantities.

The facts with respect to offers made by respondent's competitors to these four customers appear in detail in the record. In brief, these facts are as follows:

Ned's Auto Supply Company

The lower prices granted Ned's Auto Supply Company were $\frac{1}{2}$ cent less than the tank-wagon price from September 1, 1936, to March 7, 1938, and $1\frac{1}{2}$ cents less than the tank-wagon price from and after March 7, 1938, this purchaser having acquired tank-car storage facilities on or about March 1, 1938. The offers made to this customer

were from the Argo Oil Company, the Texas Company, Shell Oil Company, and Red Indian Oil Company.

In 1930 a vice-president of Argo Oil Company offered to sell Ned's Auto Supply Company its requirements of gasoline by tank-wagon delivery at a price 1 cent per gallon less than the tank-wagon price then paid by Ned's for respondent's gasoline. The brand of gasoline offered by Argo Oil Company was "Dixie" gasoline, not a major brand. The offer was declined and the matter ended.

In 1933 Charles H. Gershenson, President, Ned's Auto Supply Company, went to Akron, Ohio, and discussed with a Mr. Dodge of the Texas Company the possibility of Ned's Auto Supply Company buying gasoline from that company at the price at which that company then sold its gasoline to Firestone Tire & Rubber Company, which purportedly was 4 cents per gallon less than the tank-wagon price on regular gasoline and $4\frac{1}{2}$ or 5 cents per gallon less than the tank-wagon price on premium or Ethyl gasoline. There is no evidence that the Texas Company or any of its representatives ever agreed to the proposal made by Gershenson or of any further discussions of the matter subsequent to 1933.

In 1933 or 1934 a representative of Shell Oil Company informed Gershenson that it was seeking a single "jobber" in Detroit and that if Ned's Auto Supply Company would arrange to handle tank-car deliveries Shell Oil Company would sell gasoline to it at about 2 cents per gallon less than the prevailing tank-wagon price. Ned's Auto Supply Company did not accept the offer, and Shell Oil Company selected another dealer in Detroit.

Between 1930 and March 7, 1938, Red Indian Oil Company made repeated offers to sell gasoline to Ned's Auto Supply Company at prices varying from 1 cent to $1\frac{1}{2}$ cents less than respondent's prices to that customer. In 1930 Red Indian Oil Company was selling Phillips 66 gasoline, which it offered to deliver to Ned's stations at 1 cent per gallon less than respondent's price or to sell to Ned's at $1\frac{1}{2}$ cents less than respondent's price if Ned's took delivery at Red Indian's bulk plant. In 1934 or 1935 Red Indian Oil Company ceased selling Phillips 66 gasoline, and since that time has sold Fleet Wing gasoline, which it offered to Ned's at the prevailing tank-car price. Fleet Wing gasoline is not a major brand gasoline and did not have public acceptance comparable to that enjoyed by respondent's Red Crown gasoline.

As each of the above negotiations occurred, Ned's Auto Supply Company notified the respondent of it, and on August 27, 1936, Ned's advised respondent by letter that a competitive major oil company had offered it a gasoline contract carrying a substantially larger margin of profit than it was able to realize under its arrangement with

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respondent and that it was the present intention of Ned's to accept that offer. Mr. Gershenson testified that the offer he had in mind was that made by the Red Indian Oil Company on Fleet Wing gasoline. After further negotiation between respondent and Ned's Auto Supply Company, a reduction of one-half cent per gallon off the tank-wagon price was allowed Ned's, with delivery as theretofore by tank wagon. This lower price to Ned's was made effective September 1, 1936, and continued to March 7, 1938, when Ned's was allowed the tank-car price of $1\frac{1}{2}$ cents per gallon less than the tank-wagon price.

Citrin-Kolb Oil Company

The Citrin-Kolb Oil Company was first granted the tank-car price by respondent in 1928 or 1929 at a time when that company was engaged exclusively in the retail sale of gasoline through its own filling stations, and this price of $1\frac{1}{2}$ cents less than the tank-wagon price has been continued by respondent to the present time.

Beginning about 1930 Citrin-Kolb received offers from three different suppliers to furnish gasoline at net prices lower than the tank-car prices it was paying respondent. Hickok Oil Company of Toledo, Ohio, proposed an arrangement under which Citrin-Kolb, then a partnership, would incorporate and assign to Hickok 51 percent of the common stock of the new corporation. This offer related to a brand of gasoline known as Hi-Speed gasoline. Shell Oil Company made a joint offer to Citrin-Kolb and another dealer, Middleton Oil Company, involving a brand of gasoline not then sold in Detroit and known as Silver Flash gasoline. Gulf Refining Company offered its gasoline to Citrin-Kolb at the same price as respondent was then selling it, but in addition offered to waive any requirement that Citrin-Kolb supply its own bulk storage and agreed to allow Citrin-Kolb to take its requirements from Gulf's bulk storage plant, and in addition offered to furnish filling station pumps and other service station equipment without cost to Citrin-Kolb.

In August 1936 Citrin-Kolb Oil Company worked out a tentative arrangement with the Texas Company for a five-year contract under which Citrin-Kolb was to be allowed 2 cents per gallon off the tank-wagon price and certain other advantages. This proposed agreement was exhibited to respondent's Detroit manager, Mr. Raupaugh, presumably to afford respondent an opportunity to meet its terms, but this the respondent refused to do and the contract was never put into effect.

In 1939 a representative of Argo Oil Company, a gasoline jobber in the Detroit area, offered Citrin-Kolb Oil Company gasoline (either

Marathon or Linco gasoline, the witness was not certain which) at 2 cents a gallon less than the prevailing tank-wagon price. Although this offer was mentioned to respondent's Detroit sales manager, apparently it was never seriously considered by Citrin-Kolb.

In December 1940 Citrin-Kolb was informed by a representative of Aurora Gasoline Company, a Detroit company, that its refinery was to be enlarged and that it would be in a position to furnish Citrin-Kolb with gasoline at 2 cents a gallon less than the prevailing tank-wagon price. Citrin-Kolb informed respondent's Detroit manager, who declined to meet the offer, and nothing further was done.

Wayne Oil Company

In 1935 respondent granted Wayne Oil Company the tank-car price on gasoline, and since that time has continued to sell to it at such price. There was some evidence that the Aurora Gasoline Company solicited the business of Wayne Oil Company, but there is no showing of any definite offers made at prices as low as or lower than the price allowed Wayne by respondent until after the complaint in this proceeding was issued.

In December 1940 a representative of Aurora Gasoline Company discussed with Wayne a proposal similar to that made to Citrin-Kolb Oil Company, and there is also testimony relating to a tentative proposal made in December 1940 by National Refining Company of Cleveland to Wayne Oil Company and Stikeman Oil Company, Inc., jointly, upon a gasoline known as White Rose gasoline, which was not then sold in Detroit.

Stikeman Oil Company, Inc.

Respondent granted the tank-car price on gasoline to Stikeman Oil Company, Inc., in 1932, and has subsequently sold to it at that price. There is no evidence of any offers made to Stikeman by any of respondent's competitors at any time prior to the issuance of complaint in this proceeding.

PAR. 14. This proceeding was brought under Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936. Proof of discriminations in price by the respondent prior to June 19, 1936, could not be used to establish the violations of law alleged to have occurred. Except for the limited purposes hereafter considered, offers received by the four customers of respondent as heretofore recited, prior to June 19, 1936, and which were not continuing offers, are not relevant to show that the specific discriminations in price made by respondent subsequent to June 19, 1936, were

made in good faith to meet equally low prices of competitors. This leaves for immediate consideration the continuing offer of the Red Indian Oil Company to Ned's Auto Supply Company and the two offers made to Citrin-Kolb Oil Company. The offer of Red Indian Oil Company was on Fleet Wing gasoline which, as has been previously found, was not a major brand of gasoline. In the trade sense, it was an off brand and generally sold at prices lower than major brands of gasoline.

There was no evidence as to whether or not Fleet Wing gasoline was of comparable grade or quality with respondent's gasoline. Regardless of this, in the retail distribution of gasoline public acceptance rather than chemical analysis of the product is the important competitive factor. Certain widely distributed and well advertised brands of gasoline have come to be known as major brands, and other brands are known as off brands. In the Detroit metropolitan area, as elsewhere, off-brand or local-brand gasoline sells at lower prices than major brands, and distributors of off-brand gasoline find it necessary to undersell major brands in order to secure some share of the market.

A dealer's purpose in purchasing gasoline is to resell it to his customers, and it is necessary, therefore, for him to have a product his customers are willing to buy. The dealer's overall success or failure may be governed largely by the extent to which his merchandise is acceptable to the public, and in the case of gasoline public acceptance is determined in large measure by factors other than actual grade and quality. A dealer cannot readily shift from one brand of gasoline to another without running the risk of losing many of his customers whom he may or may not be able to replace. Respondent has at all times been familiar with these competitive factors in the distribution of gasoline and could not have regarded the offer of Red Indian Oil Company to sell its Fleet Wing gasoline at a 1½ cents per gallon lower price as a serious competitive threat.

The offer of the Texas Company to Citrin-Kolb Oil Company in August 1936, and the offer of Argo Oil Company in 1939, could not have been relevant to the lower price respondent originally granted to Citrin-Kolb, for that lower price was first allowed in 1928 or 1929 and has continued since that time. Presumably, these offers were intended to show that continuance of the lower price to Citrin-Kolb was necessary to prevent respondent's competitors from securing the patronage of that customer.

It may well be that respondent was convinced that if it ceased granting tank-car prices to Citrin-Kolb, Wayne, and Stikeman and continued to refuse the tank-car price to Ned's Auto Supply Company

it would lose these accounts. It had substantial reasons for believing this to be the case, for all of these concerns, except Ned's Auto Supply Company, had already been recognized as entitled to the tank-car price under the commonly accepted standards of the industry, and Ned's had achieved a volume of distribution which brought it within the range where it was likely to be so recognized by a major oil company at any time. Thus, the real question is whether or not the actions of the respondent in granting or continuing to these four dealers the tank-car price pursuant to and in accordance with its general policy can be said to have been made in good faith within the meaning of Section 2 (b).

In dealing with this question, the Commission believes that consideration cannot be confined to such specific offers as may have been made by competitors, but also must include the setting and general conditions under which such offers were made. In selecting the customers or prospective customers to whom it will grant the tank-car price on gasoline, the respondent's criterion is now, and for many years has been, that the customer or prospective customer make annual purchases of not less than from one to two million gallons of gasoline, have storage facilities sufficient to accept delivery in tank-car quantities, and have a credit standing assuring payment for large volume purchases. This is the same criterion which for many years has also been applied by the respondent's major competitors, and under it any question of the distributive function performed by the purchaser, that is, whether the purchaser is a retail dealer selling to the public or a wholesaler selling to retail dealers, is wholly immaterial.

Respondent has had long experience in the sale and distribution of gasoline, both through service stations which it owned or leased and operated and through its bulk plants to service station operators. It follows that respondent is thoroughly familiar with the costs of operating retail service stations and bulk plants, with the margins of gross profits available to retail service stations and to operators of bulk plants, and with the competitive results which may be expected when some retailers receive lower prices than competing retailers. At all relevant times, respondent knew or had the means of knowing and should have known that the manner in which it priced and sold its gasoline continually created the probability of injury to competition between retail dealers who bought such gasoline at different prices and resold it in competition with one another. It also knew or should have known that the price differences which it granted could not be justified on the basis of differences in the cost of manufacture, sale and delivery resulting from differing methods or quantities in which its gasoline was sold or delivered. These circumstances existed at the

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time the Robinson-Patman Amendment to the Clayton Act became law, and their existence imposed upon respondent the duty and obligation of reviewing its pricing policy and taking such action as might be necessary to bring that policy into conformity with the new statute. Respondent neither did this nor made any bona fide attempt so to do.

With the exception of the $\frac{1}{2}$ cent per gallon discrimination in favor of Ned's Auto Supply Company preceding the granting of the tank-car discount of $1\frac{1}{2}$ cents per gallon to that purchaser, all of the discriminations in price involved in this proceeding were made pursuant to respondent's established method of pricing. They were not the result of departures from a nondiscriminatory price scale which were made to meet lower prices of competitors, but represented only the continued application of the pricing standard previously adopted by respondent and followed by it since long before 1936. In the Commission's view, Section 2 (b) of the statute does not contemplate justification being made for a method of pricing as exemplified by individual instances of price discrimination made pursuant to such pricing method.

It is also important that the respondent necessarily knew at the time of the passage of the Robinson-Patman Act, and at all times thereafter, that its standard for granting tank-car prices on its gasoline was in all substantial respects the same as the standards used by its major competitors. It was evidently then relying, as it is now relying, upon the position that so long as the pricing method in existence prior to the passage of the Robinson-Patman Act remains unchanged it can defend its price discriminations on the ground that its lower prices were granted in good faith to meet equally low prices of its competitors. Upon this same theory, respondent's competitors, including the three against whom similar charges of price discriminations are pending, might also defend their similar price differences on the ground of meeting respondent's equally low prices or the equally low prices of other competitors. The Commission does not construe the words "in good faith" in Section 2 (b) as permitting that result. In the circumstances shown to exist, the Commission does not believe that the statute provides a means of effectively insulating any particular pricing pattern from attack or that it guarantees that so long as a pricing pattern in effect prior to 1936 remains undisturbed price discriminations made pursuant to that pattern may be lawfully continued.

PAR. 15. For the reasons stated, the Commission is of the opinion that the respondent has not shown that the discriminatory prices allowed Ned's Auto Supply Company, Citrin-Kolb Oil Company, Wayne Oil Company, and Stikeman Oil Company, Inc., were lower prices

granted in good faith to meet equally low prices of competitors. The Commission, therefore, finds that the burden imposed upon the respondent by Section 2 (b) of the Clayton Act, as amended by the Robinson-Patman Act, has not been sustained and that the price discriminations referred to in these findings have not been justified.

CONCLUSION

The aforesaid discriminations in price by the respondent, as herein found, constituted violations 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 (the Clayton Act), as amended by an Act of Congress approved June 19, 1936 (the Robinson-Patman Act).

MODIFIED ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, as amended, the respondent's answer thereto, testimony and other evidence in support of the allegations of said complaint, as amended, and in opposition thereto, taken before a hearing examiner of the Commission theretofore duly designated by it, report of the hearing examiner upon the evidence and exceptions filed thereto, briefs in support of and in opposition to the complaint, as amended, and oral argument of counsel, and the Commission, having considered the matter, on October 9, 1945, made its findings as to the facts and its conclusion drawn therefrom and issued its order to cease and desist (which said order to cease and desist was, on August 9, 1946, modified in certain respects).

Said modified order to cease and desist having been further modified by the United States Court of Appeals for the Seventh Circuit in the manner and to the extent set forth in the judgment of said Court issued April 29, 1949, which judgment was subsequently reversed by the United States Supreme Court, and the case having been remanded to the Commission on February 14, 1951, by the Court of Appeals with instructions "to make findings in conformity with the opinion of the Supreme Court of the United States filed on January 8, 1951"; and the Commission having made its modified findings as to the facts and its conclusion that the 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 (the Clayton Act), as amended by an Act of Congress approved June 19, 1936 (the Robinson-Patman Act), and having afforded the respondent opportunity

to show cause why the modified order to cease and desist issued in this proceeding on August 9, 1946, should not be further modified in the manner shown in its order issued March 24, 1952, and having considered the objections to such modification made by the respondent and briefs filed on behalf of Retail Gasoline Dealers Association of Michigan, National Congress of Petroleum Retailers, Inc., Empire State Petroleum Association, Inc., Great American Oil Company, and counsel in support of the complaint, and oral argument of counsel:

It is ordered, That the respondent, Standard Oil Company (Indiana), a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale or distribution 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 gasoline of like grade and quality:

1. By selling such gasoline to any retailer thereof at a lower price than to any other retailer who in fact competes with the favored purchaser in the resale of such gasoline to the public ("Retailer" as here used applies to that portion of the business of any purchaser which consists of the retail sale of gasoline to the public).

2. By selling such gasoline to any retailer at a price known by respondent to be higher than the price at which any wholesaler-purchaser is reselling such gasoline to any retailer who competes with such direct retailer-customer of respondent, where respondent is selling to such wholesaler at a price lower than respondent's price to such direct retailer-customer.

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

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

Commissioners Mason and Carretta dissenting.

DISSENTING OPINION OF COMMISSIONER LOWELL B. MASON

Commissioner Mason joins with Commissioner Carretta in his dissent.

In this connection, reference is made to the following language contained in Commissioner Mason's previous dissent of August 9, 1946, in this same case:¹

"* * * the respondent proved by greater weight of the evidence (in fact, I find the testimony uncontroverted). The respondent

¹ See 43 F. T. C. 56 at 59.

proved that it had granted a lower price in good faith to meet a competitor's price. The trial examiner who heard the case so held, and I as a Commissioner would so find.

"The Commission concludes as a matter of law that it is unnecessary for it to determine this fact. In my opinion, this is not sound. So far as the Federal Trade Commission is concerned, I believe deliberate and intentional matching of a competitor's lower price is legitimate as long as the proviso on Section 2 (b) of the Clayton Act stays on the statute books."¹

"In the instant case, the respondent, having lost two customers because it would not meet the prices of its competitors, made up its corporate mind to hang on to what business it had left, and in good faith, and what appears to me only ordinary common sense, lowered its price to that of its competitors.

"In my opinion, the rejection of this defense by the Commission is fatal to the validity of the order."²

DISSENTING OPINION OF COMMISSIONER ALBERT A. CARRETTA

I. HISTORY OF CASE.

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, an Indiana 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 also provided that the testimony and other evidence theretofore 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. The complaint, as amended, alleges that the respondent, since June 19, 1936, sold "its gasoline to four Detroit dealers engaged in reselling said gasoline at retail, at prices substantially lower than the prices charged by respondent-

¹ The Supreme Court sustained this view. *Standard Oil Company v. Federal Trade Commission*, October Term, 1950.

² The Supreme Court agreed with this interpretation.

ent 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 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."

The complaint, as amended, further alleges that "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."

Between March 1941 and August 1942, approximately 8000 pages of 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.

In the "Trial Examiner's Report Upon the Evidence" in this case, filed on July 1, 1943, the Trial Examiner posed the following question:

"Were the differentials in price accorded the four dealers, recognized by respondent as jobbers, made in good faith to meet equally low prices of competitors, or the services or facilities furnished by competitors?"

After reviewing the evidence in the record, the Trial Examiner further stated in this Report:

"CONCLUSION OF FACT:

The differentials on its branded gasolines respondent granted Ned's Auto Supply Company, at all times subsequent to March 7, 1938, and Stikeman Oil Company, Citrin-Kolb Oil Company, and the Wayne Company, at all times subsequent to June 19, 1936, were granted to meet equally low prices offered by competitors on branded gasolines of comparable grade and quality."

On October 9, 1945, the Commission published both its "Findings as to the Facts and Conclusion" in this matter, as well as its "Order" which requires the respondent to cease and desist from discriminating in the price of gasoline of the same grade and quality among its customers in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

Under dates of January 21, 1946 and February 15, 1946, counsel for the Commission filed motions seeking to modify the order to cease and desist entered herein by the Commission on October 9, 1945. Under date of January 28, 1946, respondent filed a motion seeking a rehearing and reconsideration of the order to cease and desist. Under date of August 9, 1946, the Commission ordered that the motions of counsel for the Commission be granted, and that said order to cease and desist be modified substantially in the manner and to the extent as set out in the supplemental motion of counsel for the Commission dated February 15, 1946. Under date of August 9, 1946, the Commission ordered that the motion of respondent for rehearing and reconsideration of the order to cease and desist be denied. Under date of August 9, 1946, the Commission published its modified order to cease and desist.

On October 4, 1946, respondent filed its petition in the United States Court of Appeals for the Seventh Circuit seeking a review of the aforementioned modified cease and desist order. In this proceeding, the Commission asked enforcement of its order. In its petition, the respondent contended that the modified cease and desist order should not be enforced because:

1. The Commission failed to find and could not have found under the undisputed evidence in this case, that either or any of the purchases involved in such discrimination was in commerce.
2. The Commission treated as immaterial the respondent's conclusive showing that the discrimination made in price was in good faith to meet an equally low price of a competitor, which showing the respondent asserted as a complete defense.
3. "Paragraph 6 of the modified order directs Standard at its peril to prevent jobbers to whom it sells gasoline and who are in competition with Standard in the resale thereof from reselling to their retail dealers at prices less than Standard's price to its own retail dealers; requires Standard to police, maintain and regulate such competitor's prices on gasoline, title to which passed to the jobber on delivery by Standard; and subjects Standard retroactively to punishment for contempt should a jobber-competitor fail to maintain such resale prices."

Under date of March 11, 1949, the United States Court of Appeals for the Seventh Circuit published its opinion which stated, among other things, that:

1. The respondent's operations are in commerce from the refinery to its customers.
2. The showing of the respondent that it made the discriminatory price in good faith to meet competition is not controlling in view of

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the very substantial evidence that its discrimination was used to affect and lessen competition at the retail level.

(In this connection, the following language is quoted from the opinion of the United States Court of Appeals for the Seventh Circuit:

"There is substantial evidence in the record, and we think it may be assumed to be conclusive, to the effect that the petitioner made its low price to Ned's, Citrin, Wayne, and Stikeman in good faith to meet the lower price of a competitor."

* * * * *

"Now as to the contention that the discriminatory prices here complained of were made in good faith to meet a lower price of a competitor. While the Commission made no finding on this point, it assumed its existence but held, contrary to the petitioner's contention, that this was not a defense."

* * * * *

"The showing made here by the petitioner that it made the lower price in good faith to meet competition, we assume, as the Commission apparently did, was made out.")

3. "We would modify Paragraph 6 to read as follows: 'By selling such gasoline to any 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 jobbers or wholesalers, where such jobber or wholesaler, to the knowledge of the respondent or under such circumstances as are reasonably calculated to impute knowledge to the respondent, resells such gasoline or intends to resell the same to any of its said retailer-customers at less than respondent's posted tank-wagon price or directly or indirectly grants to any such retailer-customer any discounts, rebates, allowances, services or facilities having the net effect of a reduction in price to the retailer.'"

The United States Court of Appeals for the Seventh Circuit concluded its opinion by stating:

"The order as modified will be enforced, and judgment thereon will be entered accordingly."

Subsequently, respondent filed a petition with the Supreme Court of the United States for a Writ of Certiorari, which was granted on November 7, 1949. Under date of January 8, 1951, the Supreme Court of the United States reversed the judgment of the United States Court of Appeals for the Seventh Circuit in this case, and remanded the case to that court with instructions to remand it to the Federal Trade

Commission to make findings in conformity with the opinion of the Supreme Court.

With respect to the contention of respondent that the subject sales were not in "commerce," the Supreme Court stated in its opinion:

"Such sales are well within the jurisdictional requirements of the Act."

With respect to the respondent's contention that its price discriminations were made in good faith to meet an equally low price of a competitor, the Supreme Court states:

"In addition there has been widespread understanding that, under the Robinson-Patman Act, it is a complete defense to a charge of price discrimination for the seller to show that its price differential has been made in good faith to meet a lawful and equally low price of a competitor. This understanding is reflected in actions and statements of members and counsel of the Federal Trade Commission. Representatives of the Department of Justice have testified to the effectiveness and value of the defense under the Robinson-Patman Act. We see no reason to depart now from that interpretation."

The opinion of the Supreme Court, therefore, stated that there should be a finding by the Commission as to whether or not petitioner's price reduction was made in good faith to meet a lawful equally low price of a competitor. It was for this purpose that the United States Court of Appeals for the Seventh Circuit was ordered to remand this case to the Federal Trade Commission. This was done on February 14, 1951.

II. FINDING REQUIRED BY THE SUPREME COURT OF THE UNITED STATES

The Supreme Court, in its opinion of January 8, 1951, stated:

"THERE SHOULD BE A FINDING AS TO WHETHER OR NOT PETITIONER'S PRICE REDUCTION WAS MADE IN GOOD FAITH TO MEET A LAWFUL EQUALLY LOW PRICE OF A COMPETITOR."

From a reading of the entire opinion, it appears that the one and only purpose for which this case was remanded to the Commission was to direct the Commission to make a finding on the subject matter indicated in the above quotation. All other questions previously presented in this case were disposed of.

The Supreme Court discussed the "*good faith defense*" contained in Section 2 of the original Clayton Act, and in so doing compared it with the language now contained in Section 2 (a) and 2 (b) of the Clayton Act, as amended by the Robinson-Patman Act. The Court decided that the changes made in this section did not "cut into the actual core of the defense" ("good faith" defense). The Court fur-

ther stated that such defense "still consists of the provision that whenever a *lawful lower price* of a competitor tends to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower price. Actual competition, at least in this elemental form, is thus preserved." (Italics supplied.)

Section 2 (b) of the Clayton Act, as amended by the Robinson-Patman Act, reads as follows:

"Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown the Commission is authorized to issue an order terminating the discrimination: *Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.*" (Italics supplied.)

The question which immediately suggests itself upon reading this language of the statute concerns the intended meaning of the word "lawful," which was apparently added by the Supreme Court to the wording of the statute. Since January 1951, when the decision of the Court herein was published, many articles have been written and many speeches have been made questioning, first, the authority of the Supreme Court to add this word "lawful" to the words of the statute, and second, the meaning which the Court sought to convey by its use. Be that as it may, however, it is not within the province of the Federal Trade Commission to question a decision of the Supreme Court of the United States. Until such time as the Supreme Court should rule otherwise, or until such time as Congress might legislate upon this subject, the Commission is bound to read the proviso in Section 2 (b) as though it contains the word "lawful." To do otherwise would be to flout the decision of the Supreme Court.

Speaking as only one of the Commissioner of the Federal Trade Commission, I can honestly say that I am not in disagreement with the majority of the Court when it ruled that there should be a finding as to whether or not petitioner's price reduction was made in good faith to meet a *lawful* equally low price of a competitor. The question of importance concerns the extent to which, if any, the respondent is to assume the burden of proving that the competitor's price which was being met was a *lawful price*.

The Supreme Court could have meant that the respondent must assume the burden of affirmatively proving that the competitor's lower price which was being met was a lawful price. If such were the case, the respondent would have the burden of proving to the satisfaction of the Commission that the lower price of a competitor which was being met was one which would be found by the Commission as being non-violative of Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act. To do this, it would be necessary for the respondent to have access to facts and figures which ordinarily are in the possession of only the competitor. For example, if a competitor's lower price were one based on "cost justification," the respondent would have to have the figures which would justify the granting of such lower price by the competitor to its customer. It is hardly reasonable to assume that any respondent could voluntarily obtain such information from a competitor. This would also mean that the respondent would have to have such information in his possession before he could meet the lower price. Otherwise, he would proceed at his peril. This interpretation is illogical in that it would place upon the party who was required to meet the lower price of his competitor an unreasonable burden. It would bundle him in an economic straight jacket and leave him incapable of exercising that flexibility of movement which is so necessary to compete successfully in the market place. While he was checking to determine whether the price he was required to meet was a *lawful* price, he would be losing his customer to his competitor.

Further, it must be remembered that it sometimes takes the Federal Trade Commission—even with its extensive investigative and subpoena powers—several years to establish that prices charged by certain respondents are "unlawful" as being in violation of Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act. Conversely, it may be stated that the respondents in such cases also spend several years in attempting to establish that *their own* prices are "lawful" and not in violation of the aforementioned section. How much more difficult, therefore, would it be for a seller to establish that the *prices of a competitor* are "lawful" prices?

In connection with this matter, it would be well to quote from the "Final Report of the Select Committee on Small Business" of the House of Representatives, dated December 31, 1952.

"A persistent problem faced by the Federal Trade Commission for many years has been the inordinate amount of time needed to complete its actions." (Report, p. 285)

"A total of 64, about three-fourths of all pending antimonopoly cases, on June 30, 1952, had been active—if active is the word—for

more than 3 years. *The average period as represented by the median was 61 months.*" (Italics added) (Report, p. 287)

In consideration of the insurmountable problems which would confront a respondent if it were assigned the above-described unreasonable burden of affirmatively proving that the lower price of its competitor which was being met was lawful, it must be concluded that the Supreme Court could not have meant, and in fact, did not mean, that any such burden was to be assumed by the respondent. What, then, could the Court have meant?

The presumption of validity of prices is one which should be given consideration by the Commission in its determinations, and is not one to be lightly dismissed under our system of jurisprudence in the absence of evidence to the contrary.

If a seller *knows* that a competitor is offering a customer of the seller an unlawful price, can it ever be said that the seller—in meeting such price—is meeting a lawful price? Obviously not. Further, if a seller has reason to believe that the price which a competitor is offering a customer of the seller is an unlawful price, can it ever be said that the seller—in meeting such price—is meeting a lawful price? Here, if the seller ignores the danger signals of which he is cognizant and makes no attempt to dispel his doubts as to the "unlawfulness" of his competitor's price, then the answer must also be in the negative. If the seller meets the lower price of the competitor under such conditions without dispelling the doubts from his mind, he does so at his peril. On the other hand, if the seller *does not know*, or if the seller *does not have reason to believe* that the competitor's price to a seller's customer is or may be unlawful, may he, *acting as a reasonable prudent man would act under the circumstances*, meet such competitor's lower price? Here, I believe the answer is "yes." To require more of the seller would be to deprive him of the right to compete for the business of his customer.

Consequently, when a respondent seeks to avail itself of the defense provided in Section 2 (b) of the Clayton Act, as amended by the Robinson-Patman Act, such respondent must assume the burden of affirmatively proving to the satisfaction of the Commission that his lower price was made in good faith to meet an equally low price of a competitor (note the omission of the word "lawful" herein). As one of the tests in determining whether respondent lowered its price *in good faith* to meet the equally low price of a competitor, the Commission must be satisfied that the respondent did not know, or did not have reason to believe, that the competitor's lower price which he was meeting was or might have been unlawful, and that he acted as a reasonable prudent man would have acted under the circumstances.

III. EVIDENCE OF RECORD

It must be remembered in reading this section that although the present tense is used in many instances, all statements refer to the testimony of witnesses given more than ten years ago.

Before proceeding to a consideration of the evidence relative to the competition which had to be met by the respondent in selling gasoline in the Detroit, Michigan, area, it would be well to cite from the record the uncontroverted testimony concerning the nature of the gasoline market in the city of Detroit and in the State of Michigan during the period covered in the complaint.

Mr. Raupagh, Manager of the Detroit Division of the respondent, testified that Detroit is generally considered to be one of the most, if not the most, highly competitive areas insofar as the gasoline industry is concerned. This applies both to the competition among the suppliers of gasoline to resellers, and to the competition among resellers. Mr. Raupagh gave as some of the reasons for this condition that Detroit, being a large industrial city, has a large potential market for gasoline; it is so located that its distributors have both good water and rail transportation. He stated that some years ago, Detroit was considered as a sort of a dumping ground for gasoline because refineries from the mid-continent and other fields would dump their surplus in the Detroit market because transportation facilities were good—even though normally, such refineries did not enter the Detroit market (R. 3256-57). Mr. Raupagh stated that there has been a surplus of gasoline in the Detroit area during all the time he has been there—which has been since 1930 (R. 3259, R. 3431). The witness further testified that Michigan is a crude oil producing State and that there are approximately 30 refineries therein refining Michigan-produced gasoline, the greater part of which is sold in the Detroit area. Thirty percent of the gasoline consumed in Michigan is produced within the State. There was also a surplus of Michigan gasoline which Michigan refineries were offering to Michigan dealers at 3¢ below the prevailing tank-wagon price (R. 3269).

There are a number of marine terminals located in the Detroit area operated by such companies as Shell, Cities Service, Ohio Oil, Texas, Mid-Continent, Chas.-Austin, Inc., Puritan Stations, Inc., Keystone Oil & Refining, Globe Oil & Refining, and Brownley, as well as by respondent. In addition, gasoline is brought into the city of Detroit by pipe line from Toledo. The witness further testified that Detroit is not too far distant from northern Indiana and northern Illinois, where numerous refineries, pipe line terminals and oil depots are located.

Dissenting Opinion

49 F. T. C.

Prior to the date on which the complaint herein was issued (November 29, 1940), respondent sold its gasoline to seven jobbers in the Detroit, Michigan, area on a "tank-car" basis. These jobbers were:

Ned's Auto Supply Company
Citrin-Kolb Oil Company
Stikeman Oil Company
Wayne Oil Company
Carnick Oil Company
Middleton Oil Company
Dick Lock.

Mr. Raupagh, Manager of the Detroit Division of the respondent, testified that in 1933 or 1934 respondent lost the Carnick Oil Company account to Gulf Oil Corporation. This latter company permitted Carnick Oil Company to purchase at "tank-car" prices from Gulf Oil's bulk plant, thus enabling Carnick Oil to do away with the necessity of owning and operating a bulk plant (R. 3277-78).

Mr. Raupagh further testified that in 1933 respondent lost the Middleton Oil Company account to Shell Oil Company. At that time, Shell Oil made a lower offer to Middleton Oil, which respondent declined to meet (R. 3279-3282).

In 1933 or the early part of 1934, according to testimony of Mr. Raupagh, respondent lost the Dick Lock account to the Gulf Oil Company. At that time, Dick Lock informed Mr. Raupagh that Gulf Oil had made a better offer to him and that he had accepted such offer (Re. 3282-84).

As of the date on which the complaint herein was issued, respondent was selling its gasoline to the remaining four jobbers on a "tank-car" basis. Respondent was also selling its gasoline on a "tank-wagon" basis to retail service stations owned by it, and to retail service stations independently owned, in the Detroit area.

The basic, customary and prevailing standards for qualification as a "jobber" in the gasoline industry are that the applicant for this status must possess a bulk storage plant, must possess a good credit rating, and must have some established business enabling it to purchase from one million to two million gallons per year (R. 40; R. 1485-86).

Because the alleged price discriminations of which the respondent is charged pertain to respondent's dealings with the four jobbers not lost to competitors by the respondent prior to the date on which the complaint herein was issued, it will be necessary to review the record for the history of such dealings.

Ned's Auto Supply Company

Ned's Auto Supply Company (hereinafter sometimes referred to as "Ned's") began operations in 1918 through the establishment of a single service station. The second service station was acquired in 1928, the third in 1933 or 1934, and the fourth in 1935. Between 1936 and 1940 two other stations were acquired, making a total of six in all, plus a service station known as "Charley's" which was owned by Ned's but which was operated by an individual on a salary and commission basis. During all these years Ned's purchased its requirements from the respondent, and by 1936 was purchasing approximately 2,400,000 gallons of gasoline a year from the respondent at "tank-wagon" prices.

Ned's was classified by the respondent as a "jobber" on March 7, 1938 (approximately two years after the enactment of the Robinson-Patman Act) and since that date has been purchasing its gasoline requirements from the respondent at "tank-car" prices. Ned's did not sell to other resellers of gasoline, but did at all times sell the gasoline purchased from the respondent to the public through its above-mentioned service stations.

Charles Gershenson and William Gershenson at the time this proceeding began, were President and Vice President, respectively, of Ned's Auto Supply Company. At the hearing Charles Gershenson testified that prior to 1936, his company had received offers for the sale of gasoline to his company from various suppliers. In approximately 1930 a representative of the Argo Oil Company inquired whether Ned's would be interested in buying gasoline at a price 1¢ a gallon lower than the "tank-wagon" price Ned's was then paying the respondent. The brand name of the gasoline offered was either "Dixie" or "Shell" (R. 3088-89).

Mr. Charles Gershenson also testified that another offer was received at about the same time from the Red Indian Oil Company, and he stated that he remembered this offer very clearly because such offer had been continued to the date of the hearing in this matter. Red Indian Oil Company was then selling "Phillips 66," a brand of well-advertised gasoline. The representative of Red Indian, a Mr. McLean, told Mr. Charles Gershenson that his company would supply Ned's with gasoline—delivered to Ned's place—at 1¢ a gallon lower than the "tank-wagon" price paid by Ned's to respondent, or, if the gasoline was picked up by Ned's at the bulk plant of Red Indian Oil Company and hauled by Ned's, Red Indian Oil Company would sell it to Ned's at approximately 1½¢ lower than the "tank-wagon" price paid by Ned's to respondent (R. 3089-91). Another offer was made to Ned's by Red Indian Oil Company in 1936. At that time, Mr. Dworman, President

of Red Indian Oil Company, offered to deliver gasoline to Ned's at a price $1\frac{1}{2}\text{¢}$ lower than the "tank-wagon" price paid by Ned's to respondent, or at a price 1.7¢ lower than the aforementioned "tank-wagon" price if the gasoline was picked up by Ned's at the bulk plant of Red Indian Oil Company (R. 3415, et seq.).

Mr. Charles Gershenson testified that either in 1933 or 1934, he had attended a "dealer jamboree" conducted by the Shell Oil Company in the Book-Cadillac Hotel in Detroit. There he met a Mr. Jack Read, a representative of Shell Oil Company, who advised him that Shell was looking for a distributor in Detroit, and that if Ned could set itself up to handle "tank-car" deliveries, Shell Oil Company would sell to Ned's on a "tank-car" jobber basis. Subsequently, several meetings were held between Mr. Charles Gershenson and Mr. Read. The Shell Oil Company subsequently took on another company as its Detroit jobber (R. 3100-01).

Mr. Charles Gershenson testified that in May or June of 1933, he went to Akron, Ohio, where, at the Firestone Clubhouse he met a Mr. Dodge, who was then Vice President and Sales Manager of The Texas Company. Mr. Gershenson informed Mr. Dodge that Ned's was then purchasing its gasoline requirements from respondent on a "tank-wagon" basis but that he wasn't satisfied with the price, and knowing of the contract Firestone Tire and Rubber Company had with The Texas Company, inquired whether Ned's could obtain a similar contract. Mr. Dodge asked whether Ned's had facilities for handling gasoline on a "tank-car" basis. Ned's did not have such facilities at that time. Terms of the Firestone Tire & Rubber Company contract were then discussed, and Mr. Charles Gershenson testified that to the best of his recollection, Firestone's differential was 4¢ lower than respondent's "tank-wagon" price on the house brand gasoline, and either $4\frac{1}{2}\text{¢}$ or 5¢ a gallon lower than the respondent's "tank-wagon" price on premium gasoline. Mr. Charles Gershenson informed Mr. Dodge that he would communicate with him as soon as Ned's had facilities to avail itself of "tank-car" deliveries. This offer by The Texas Company to Ned's was subsequently communicated to Mr. Raupagh by telephone (R. 3092-96).

Under date of August 27, 1936, a letter was addressed to respondent by William Gershenson in which it was stated:

"This is to advise you that a competitive major oil company recently submitted to us a gasoline contract carrying a substantially larger margin of profit than we now enjoy from your company.

"It is our present intention to act upon this offer and accept same."
(Attention is invited to the fact that the above letter was addressed

to the respondent subsequent to the passage of the Robinson-Patman Act.)

Relative to this letter, Mr. Charles Gershenson testified that the offer of The Texas Company was in the nature of a continuing offer, and that it was the offer referred to in the above-quoted letter. The record indicates that although the letter was signed by William Gershenson, it was actually dictated by the witness, Charles Gershenson (R. 3054). As a result of this communication, and subsequent meetings between respondent and Ned's, in approximately September 1936 the respondent began selling gasoline to Ned's at a price $\frac{1}{2}\text{¢}$ below respondent's prevailing "tank-wagon" price (R. 3415-16). This arrangement continued until some time in March, 1938, when, as a result of a letter addressed to the respondent by Ned's, under date of February 14, 1938 (Resp. Ex. No. 46), respondent began selling to Ned's on a "tank-car" basis at $1\frac{1}{2}\text{¢}$ lower than respondent's prevailing "tank-wagon" price. At this time, Ned's had acquired bulk plant facilities, enabling it to purchase in larger quantities and to store such gasoline in its own facilities. Prior to Ned's having received the "tank-car" price, Charles Gershenson testified that he had had a number of conversations with Mr. Raupagh subsequent to the writing of the letter referred to as respondent's exhibit No. 46. At such meetings he mentioned to Raupagh the fact that his company could obtain gasoline from Shell, Red Indian, or Texas, at a lower price, and that this letter, respondent's exhibit No. 46, was in the nature of an ultimatum. Mr. Raupagh was advised that Ned's would take advantage of one of these other three offers if respondent did not start selling Ned's on a "tank-car" basis (R. 3113).

Mr. Raupagh, Detroit Division Manager of respondent company, also testified at some length relative to negotiations between respondent and Ned's Auto Supply Company. Mr. Raupagh testified that in 1936 the relationship between Ned's and respondent was so delicate as to raise a doubt as to whether respondent could retain Ned's business. In that year Charles and William Gershenson suggested to him that they go to Chicago to talk to respondent's officials. Mr. Raupagh made arrangements for this trip, and testified that the meeting in Chicago lasted several days (R. 3410). Mr. Raupagh further testified that at this Chicago conference the Gershensons advised respondent's officials that unless respondent agreed to sell to Ned's at a price lower than the prevailing "tank-wagon" price, Ned's would discontinue doing business with respondent. The Gershensons stated to respondent's officials that they no longer could afford to pay the prevailing price in view of offers Ned's had received from other suppliers. At that time Ned's argued very strongly in favor of being placed on

a "tank-car" basis (R. 3411). Mr. Raupagh testified that as a result of these Chicago meetings, he came to the conclusion that respondent would lose Ned's as a customer unless some price reduction was made (R. 2412-14), and that he was specifically told so by the Gershensons (R. 3414). Mr. Raupagh stated that some time later he informed Ned's of respondent's willingness to sell gasoline to Ned's at a price $\frac{1}{2}$ ¢ lower than the prevailing "tank-wagon" price. There were extensive discussions with respect to this offer of respondent, and although Ned's was not completely satisfied, Ned's decided to accept it for the time being (R. 3415). This testimony of Mr. Raupagh corroborated the testimony of Mr. Charles Gershenson.

Continuing his testimony, Mr. Raupagh testified that some time during the early part of 1938, respondent received a letter from Ned's containing a demand that they be put on a "tank-car" price basis. This is in evidence as respondent's exhibit 46 (R. 3419). At meetings held between Ned's and the respondent, Ned's referred to offers made to it by other suppliers of gasoline (R. 3114, 3420, 3425).

Pursuing this line of questioning, Mr. Raupagh was asked by counsel for respondent to relate as many instances as he could where some offer was referred to him by Ned's as having been made to Ned's by other suppliers of gasoline. In this connection Mr. Raupagh testified in detail concerning the circumstances surrounding the offer received by Ned's from The Texas Company. Mr. Raupagh also testified that he had known of the offer made to Ned's by Red Indian Oil Company (R. 3422-25). Continuing, Mr. Raupagh stated that Ned's had informed him of an offer received by Ned's from the Gulf Refining Company in 1940 (quite some time after the enactment of the Robinson-Patman Act) through their manager, a Mr. Crawford. At that time, Gulf offered to sell Ned's the regular quality of gasoline at the same price being paid by Ned's to respondent. Respondent introduced in evidence Exhibit 48, which was a letter dated December 23, 1940, addressed to the respondent by Charles Gershenson, confirming the aforementioned offer made to Ned's by Gulf Refining Company (R. 3425-27).

Citrin-Kolb Oil Company

Citrin-Kolb Oil Company was organized in 1923 as a partnership comprising Jacob A. Citrin, Nathan Kolb and Barney Citrin. At that time they were buying "Lincoln" gasoline. Some time prior to 1926 they began buying gasoline from respondent. Between 1926 and 1928, they acquired a bulk storage plant. In 1929 respondent granted "jobber" classification to this company, and since that time has been selling to it on a "tank-car" basis.

Citrin-Kolb operated from one to five retail stations from 1936 to 1939; from five to eight stations in 1940-1941, and at the time this case was submitted to the Commission for decision, it was operating five retail service stations. During the latter period, Citrin-Kolb Oil Company purchased approximately 5,000,000 gallons of gasoline per year from respondent. Part of the gasoline so purchased was resold at its own retail stations, and part of it was sold to other distributors.

Jacob A. Citrin testified at the hearing that when his company was accorded "jobber" status by respondent in 1929 and purchased gasoline at "tank-car" prices, other jobbers at that time were paying less for gasoline from other suppliers. Notwithstanding this, the company continued to purchase gasoline from respondent (R. 2085-86). Mr. Citrin further testified that in 1930 Hickok Oil Company had offered to sell gasoline to his company at a price which would have netted Citrin-Kolb Oil Company 1¢ more than his company was netting on their purchases of gasoline from respondent. Mr. Citrin testified that under the terms of this offer, his company would have had to incorporate and among other things, assign to the Hickok Oil Company 51% of the corporate stock (R. 2088-89).

Mr. Citrin further testified that in the early part of 1936, an offer was received by his company from a Mr. Chandler, of Gulf Refining Company, under the terms of which Citrin-Kolb Oil Company would not be required to buy and store large quantities of gasoline because they could use Gulf's storage facilities. This would not necessitate as much of an investment for Citrin-Kolb Oil Company, and would eliminate shrinkage (R. 2118-20). The price offered by Gulf Refining Company was comparable to the price Citrin-Kolb Oil Company was getting from respondent, with the exception that Gulf Refining Company would furnish pumps, paint for oil stations, and equipment. Mr. Citrin testified that this offer of Gulf Refining Company was communicated to Mr. Raupagh, who refused to meet it (R. 2142-44). Mr. Citrin also testified that in August 1936 (subsequent to the enactment of the Robinson-Patman Act), an offer was received by his company from The Texas Company (R. 2126). This offer would have permitted his company to purchase gasoline from The Texas Company at a price approximately $\frac{1}{2}$ ¢ less per gallon than respondent was charging his company. However, The Texas Company would also furnish advertising, paint, and globes. This offer was communicated by Mr. Citrin to Mr. Raupagh, but Mr. Raupagh advised him that respondent could not meet it (R. 2126-41).

Mr. Citrin testified that in 1939 (subsequent to the enactment of the Robinson-Patman Act), he received an offer from the Argo Oil Corporation, dealing in "Marathon" gasoline. This offer came from

a Mr. Roy Fisher, who offered to sell this gasoline at a price $\frac{1}{2}\text{¢}$ lower than the Citrin-Kolb Oil Company was then paying respondent (R. 2145-56). This offer was communicated by Mr. Citrin to Mr. Love, Sales Manager of respondent's Detroit Division, who in turn advised Mr. Raupagh.

Mr. Citrin testified that on December 10, 1940 (more than four years after the enactment of the Robinson-Patman Act), he received an offer from a Mr. McCready of the Aurora Oil Company (R. 2163-64). This offer was $\frac{1}{2}\text{¢}$ lower than the price Citrin-Kolb Oil Company was paying respondent (R. 2172). The record indicates that Mr. Raupagh, who was Detroit Division Manager of respondent, testified that the gasoline offered by Aurora Oil Company to Citrin-Kolb Oil Company was better gasoline than was being supplied by respondent to Citrin-Kolb Oil Company (R. 3447). This offer of Aurora Gasoline Company was communicated to Mr. Raupagh by Mr. Citrin, who advised Mr. Raupagh that the partners of his company had decided to accept such offer unless respondent agreed to meet it (R. 2174-75). Mr. Raupagh advised Mr. Citrin that he could not do anything about it (R. 2176), and as of the date of the hearings held in this matter, the offer of Aurora Gasoline Company was still being considered by Citrin-Kolb Oil Company (R. 2177).

With regard to the negotiations between Citrin-Kolb Oil Company and the respondent, Mr. Raupagh later was called as a witness by respondent and corroborated all of the testimony given by Mr. Citrin with regard to negotiations between Citrin-Kolb Oil Company and the respondent, as well as in connection with offers received by Citrin-Kolb Oil Company from other suppliers of gasoline, of which Mr. Raupagh had knowledge.

Stikeman Oil Company

Stikeman Oil Company (hereinafter sometimes referred to as "Stikeman") was organized in 1931. It acquired bulk storage facilities and was recognized by respondent as a "jobber" in 1932. In 1935 the company decided to discontinue retail operations and did completely withdraw from that market on February 15, 1938. Since this later date, it has purchased approximately 2,000,000 gallons annually of respondent's branded gasolines, all of which it has sold at wholesale.

Mr. Raupagh, the Detroit Division Manager of respondent, testified that some time prior to 1936 respondent lost this account to the White Star Refining Company (which is now Socony-Vacuum Oil Company). Mr. Raupagh further testified that the reason for losing this account was that Stikeman was offered a better price by White Star Refining Company than the price offered by respondent. He did

not recall how much lower the White Star Refining Company price was, but stated that he believed it to have been from $\frac{1}{2}\text{¢}$ to 1¢ per gallon lower than respondent's price (R. 3452). The record is not clear as to the date on which Stikeman Oil Company again began purchasing gasoline from respondent. However, Mr. Raupagh testified that subsequent to 1936, he learned that Phillips Petroleum Company was attempting to sell "Phillips 66" gasoline to Stikeman Oil Company. The Phillips Petroleum Company offer to Stikeman was along the lines of a contract offer, that is, Phillips desired to tie up the Stikeman Oil Company account for a number of years. Mr. Stikeman discussed this offer with Mr. Raupagh, who testified that the Phillips Petroleum Company offer would have allowed Stikeman a larger margin of profit than was possible under the price being paid to respondent (R. 3452).

Mr. Raupagh also testified that the next offer of which he had knowledge as having been made to Stikeman was made in December 1940, when the National Refining Company made a joint offer to sell gasoline to Stikeman Oil Company and to the Wayne Oil Company on a contract basis, by the terms of which each company would realize a greater margin of profit than would be possible under its purchases from respondent (R. 1998 and R. 3450). The testimony of Mr. Raupagh with respect to the offer from National Refining Company is corroborated by Mr. Ledbetter, President of Wayne Oil Company, who was present in the office of the Stikeman Oil Company at the time the offer was made by Mr. Rickley, who represented the National Refining Company, to both Stikeman Oil Company and to Wayne Oil Company (R. 1888-89).

Wayne Oil Company

The Wayne Oil Company is a family corporation which, in 1931, began operating a retail service station, buying its requirements therefor from the respondent at "tank-wagon" prices. In the same year, it acquired two additional service stations. In 1933 it leased its stations to the then operators, who continued to purchase their requirements from respondent.

By July 1935, Wayne Oil Company was operating twelve service stations, and its requirements increased to approximately one million gallons of gasoline per year. Prior to 1935, the Wayne Oil Company acquired bulk storage facilities. In 1935 the Wayne Oil Company began selling at wholesale, and also supplied gasoline, which it purchased from respondent, to the lessees of its service stations. Since 1935, when this company was recognized as a jobber by respondent, it has been purchasing from the respondent its gasoline requirements on a "tank-car" basis.

From August 1935 to September 1939, the Wayne Oil Company operated no retail service stations, but subsequent to the latter date, this company took over and operated from two to six of its service stations, and was operating two of such stations at the time this case was submitted to the Commission for decision. During this period, the annual purchases of gasoline by the Wayne Oil Company from respondent ranged from approximately 1,350,000 gallons in 1936 to approximately 2,240,000 gallons in 1940.

Mr. Ledbetter, President of Wayne Oil Company, testified as a witness in this proceeding. He stated that for three or four years prior to 1940, the Aurora Gasoline Company had, on different occasions, solicited his gasoline business (R. 1908). The Aurora Gasoline Company is a local Detroit Company, operating refineries at Detroit and at Elsie, Michigan (R. 1886). Although a local Detroit company, in 1940 Aurora Gasoline Company had bulk storage facilities capable of storing from forty to fifty million gallons of gasoline (R. 3450). Mr. Ledbetter further testified that on December 10, 1940 (12 days after the complaint herein was issued and more than four years after the enactment of the Robinson-Patman Act), Wayne Oil Company received another offer from the Aurora Gasoline Company to supply his company with 80-octane gasoline at a price $\frac{1}{2}\text{¢}$ per gallon below the price which his company was paying respondent for "Red Crown" gasoline (R. 1878-84). Relative to the quality of the gasoline being offered by the Aurora Gasoline Company, Mr. Ledbetter testified that such gasoline is recognized as being comparable, if not superior, to respondent's "Red Crown" gasoline (R. 1883). This latter offer was communicated by letter from Wayne Oil Company to respondent, which fact was confirmed by Mr. Raupagh when he testified concerning this same matter (R. 1885, R. 3450).

Continuing his testimony, Mr. Ledbetter testified that on December 13, 1940, his company received an offer from the National Refining Company, which company operates in a large part of the United States and in Canada (R. 1888-90). He stated that for several months prior thereto, the National Refining Company had been attempting to supply his company with its gasoline requirements (R. 1910). In Mr. Ledbetter's opinion, the National Refining Company furnishes a considerable quantity of the total gasoline sold in the Detroit area (R. 1891). He stated that under the terms of this offer, which was made jointly to Wayne Oil Company and to the Stikeman Oil Company, the National Refining Company would furnish them with "White Rose" gasoline, which is represented as being of better quality than respondent's "Red Crown" gasoline at a price which would net each company a greater margin of profit than each would

realize under its purchases from the respondent (R. 1892, R. 1905, R. 1907, R. 1998).

During Mr. Raupagh's testimony, he stated that the first conversation he had had with Mr. Ledbetter relative to offers from competing gasoline companies was in 1935, prior to the time Wayne Oil Company began purchasing gasoline on a "tank-car" price basis. At that time, one of Wayne's service stations was being supplied by the Highland Oil Corporation at a price which was 1¢ per gallon lower than the prevailing "tank-wagon" price. Wayne's other several stations were supplied by respondent, by Sun Oil Company, and by Gulf Refining Company at prevailing "tank-wagon" prices (R. 1914). Mr. Raupagh also testified that no other definite offers from competing gasoline companies were reported to him by the Wayne Oil Company until the summer of 1940 (Mr. Ledbetter, during his testimony, had fixed this date as being December of 1940) when the Aurora Gasoline Company and the National Refining Company both solicited the gasoline business of the Wayne Oil Company (R. 3447). The details of these offers have already been set forth above in connection with Mr. Ledbetter's testimony.

IV. COMMENTS UPON THE EVIDENCE

Let us now appraise the evidence in connection with respondent's sales to Ned's Auto Supply Company; to Citrin-Kolb Company; to Stikeman Oil Company; and to Wayne Oil Company, and determine whether the prices charged to these companies were made in good faith to meet lawful equally low prices of a competitor or competitors of respondent.

First, it must be noted that respondent began selling to each of these four companies some time prior to the enactment of the Robinson-Patman amendment (June 19, 1936) to the Clayton Act. Regardless of this fact, if its pricing policies were not illegal prior to that date but became illegal by virtue of the provisions of the aforementioned Robinson-Patman amendment, the respondent was bound to revise such pricing policies. It is no defense for any respondent to defend on the grounds that it has continued doing business in exactly the same manner as it did prior to the effective date of the Robinson-Patman Act. In the subject case, the record discloses lower offers being made to each of these four companies *after* June 19, 1936. It was to compete with such other offerors that the respondent conducted its business as it did.

Consideration must be given to the setting and general conditions under which such offers were made and such competition was met. The record is replete with uncontroverted testimony that the Detroit gasoline market during the years covered in the complaint was of the

"dog eat dog" variety. Detroit was described as the "dumping ground" for gasoline from the mid-continent and other fields. It was not a market of scarcity—rather, it was a market of abundance. Against this background we must appraise the practices of respondent and their effect upon competition. The record discloses that the respondent lost three of its seven jobbers in the years preceding the issuance of the complaint herein. (It also lost a fourth jobber—Stike-man Oil Company—but later succeeded in recovering this customer from its competitors.) It is clear that these accounts were lost because the respondent refused to meet the lower prices offered to such customers by respondent's competitors.

We might well examine the evidence to determine whether the respondent arbitrarily granted "jobber" status to the four jobbers hereinbefore referred to. The record shows that it was not an arbitrary classification by respondent in order to favor these four jobbers with lower prices, inasmuch as the companies were qualified for such status according to the commonly accepted standard in the industry.

Ned's Auto Supply Company

Turning now to Ned's Auto Supply Company—which was at all times a retailer of gasoline—we learn from the record that respondent began selling gasoline to this company as far back as 1918. Until September 1936, respondent sold gasoline to Ned's at regular "tank-wagon" prices. Lower price offers were made to Ned's by respondent's competitors from time to time, and in August of 1936—after the Robinson-Patman amendment—Ned's wrote a letter to respondent in which it was stated that a "competitive major oil company" was offering a gasoline contract carrying a substantially larger margin of profit. To meet this competition, respondent lowered its price $\frac{1}{2}$ ¢ per gallon. Respondent's witness testified that he had come to the conclusion that respondent would have lost this account unless some price reduction was made.

Early in 1938, Ned's acquired bulk plant facilities and received offers from Shell, Red Indian, and Texas to sell its gasoline at "tank-car" prices. Ned's wrote another letter to respondent demanding to be placed on a "tank-car" basis. After some negotiation, respondent met the competition. There is no doubt, after a review of the record, that respondent would have lost Ned's as a customer if it had not met its competitors' offers.

Because of the higgling between respondent and Ned's, which is evident in the record, and because of the slowness and reluctance with which respondent reduced its gasoline price to Ned's, I am convinced that the respondent acted in good faith in meeting such competition.

Citrin-Kolb Oil Company

This company began buying gasoline from the respondent in about 1926. In 1929, after acquiring a bulk storage plant, it was recognized as a "jobber" by respondent and purchased gasoline on a "tank-car" basis. Some of this gasoline was resold at its own retail service stations and some was sold to other distributors.

One of the partners of this company testified that in 1930, the Hickok Oil Company offered gasoline to his company at a lower price; in 1936, the Gulf Refining Company offered a more attractive contract to his company; in August 1936 (after the enactment of the Robinson-Patman Act) The Texas Company offered it gasoline at a lower price; in 1939 (again after the enactment of the Robinson Patman Act) the Argo Oil Corporation solicited his company's business with an attractive offer; and in 1940 (more than four years after enactment of the Robinson-Patman Act) the Aurora Gasoline Company sought his company's business with a lower price. At the time of the hearings in this matter, Citrin-Kolb Oil Company had this last offer under consideration.

Here, respondent had begun selling Citrin-Kolb Oil Company on a "tank-car" basis long before the enactment of the Robinson-Patman Act, and such policy had continued to the date of the hearings herein. Should respondent have ceased this practice in 1936 when the Robinson-Patman Act became effective? For many years after 1936, Citrin-Kolb Oil Company was being pressed by respondent's competitors with attractive offers. Although no new pricing policy was here engaged in after 1936 in order to meet competition, it is clear that a retention of the existing pricing policy was necessary and imperative to meet the competitive offers being made by respondent's competitors to this company.

The evidence is clear that respondent here retained its pricing policy in good faith to meet competition.

Stikeman Oil Company

This company began buying gasoline from the respondent in about 1932 as a "jobber," paying "tank-car" prices. At that time, this company was engaged in retail operations but by February 15, 1938, it had withdrawn completely from such market. Because of competition, this account was lost by respondent some time prior to 1936. The account was lost to the White Star Refining Company (which is now Socony-Vacuum Oil Company) because such company offered Stikeman Oil Company a better price than respondent was willing to offer to Stikeman Oil Company.

The record discloses that subsequent to 1936 (after the enactment of the Robinson-Patman Act) the Phillips Petroleum Company was attempting to sell Stikeman Oil Company its "Phillips 66" gasoline. The offer of Phillips Petroleum Company would have allowed Stikeman Oil Company a larger margin of profit than was possible under the price being paid to respondent.

There is also evidence in the record that in December 1940 (more than four years after the enactment of the Robinson-Patman Act) a joint offer was made by the National Refining Company to sell gasoline to Stikeman Oil Company and to the Wayne Oil Company on a contract basis, by the terms of which each company would realize a greater margin of profit than would be possible under its purchases from respondent.

Here, as in the case of Citrin-Kolb Oil Company, the practice complained of by the Commission was one instituted by the respondent prior to the enactment of the Robinson-Patman Act. However, subsequently to the passage of that Act, respondent's competitors were making strenuous efforts to take this customer away from respondent.

It appears that the decision of the respondent to retain its existing pricing policy was necessary to meet the competition of respondent's competitors and to prevent the loss of its customer. Consequently, it is my belief that respondent retained its pricing policy in good faith to meet the competition of its competitors.

Wayne Oil Company

This company began buying its requirements from respondent in 1931 on a "tank-wagon" basis. In about 1935 it acquired bulk storage facilities and began buying from respondent on a "tank-car" basis. It sold most of the gasoline at wholesale and sold some gasoline to the lessees of its service stations.

After the enactment of the Robinson-Patman Act and for about three or four years, the Aurora Gasoline Company, on different occasions, solicited the business of this company and offered to sell gasoline to it at lower prices than charged by respondent.

In December 1940 (also after the enactment of the Robinson-Patman Act) a joint offer was made by the National Refining Company to sell gasoline to Wayne Oil Company and to the Stikeman Oil Company on a contract basis, by the terms of which each company would realize a greater margin of profit than would be possible under its purchases from respondent.

Here, as in the case of Citrin-Kolb Oil Company and the Stikeman Oil Company, the practice complained of by the Commission began before the enactment of the Robinson-Patman Act, but it is evident

that for many years thereafter competitors of the respondent had been seeking to take this customer from respondent by offering a lower price to such company.

The retention of its pricing policy was undoubtedly necessary to prevent the Wayne Oil Company from buying its requirements from some other supplier, and I am convinced that the respondent acted in good faith in so doing.

* * * * *

In reaching my conclusion in connection with respondent's treatment of each of the above four customers, I am satisfied that there is nothing in the 8000 pages of evidence in this record which might cause me to suspect that the respondent knew, or that it had reason to believe, that the competitor's lower price which it was meeting was or might have been unlawful. With regard to Citrin-Kolb Oil Company, Stikeman Oil Company and Wayne Oil Company, wherein all that the respondent did was to retain its pricing policy which was in effect prior to the enactment of the Robinson-Patman Act, I am satisfied that there, too, the respondent did not know, or did not have reason to believe, that it was retaining its pricing policy against a price or practice which was or might have been unlawful. All in all, the record convinces me that the respondent—in meeting some competitor's prices—and in refusing to meet the prices of others—acted as a reasonable prudent person would have acted under the circumstances.

I cannot leave this subject without emphasizing the fact that—independently—both the Commission's Trial Examiner and the United States Court of Appeals for the Seventh Circuit found that the respondent's lower prices were made in good faith to meet competition.

1. The Trial Examiner who presided at all of the hearings in this matter and who—first hand—heard all of the evidence and observed all of the witnesses, asked the following question in 1943 in his Report to the Commission:

“Were the differentials in price accorded the four dealers, recognized by respondent as jobbers, made in good faith to meet equally low prices of competitors, or the services or facilities furnished by competitors?”

and answered it in the same Report as follows:

“Conclusion of Fact:

The differentials on its branded gasolines respondent granted Ned's Auto Supply Company, at all times subsequent to March 7, 1938, and Stikeman Oil Company, Citrin-Kolb Oil Company, and the Wayne Company, at all times subsequent to June 19, 1936, were granted to

meet equally low prices offered by competitors on branded gasolines of comparable grade and quality."

2. The United States Court of Appeals for the Seventh Circuit—in spite of the fact that it ordered enforcement of the modified order of the Commission against the respondent, stated in its opinion in 1949 as follows:

"There is substantial evidence in the record, and we think it may be assumed to be conclusive, to the effect that the petitioners made its low price to Ned's, Citrin, Wayne, and Stikeman in good faith to meet the lower price of a competitor."

* * * * *

"Now as to the contention that the discriminatory prices here complained of were made in good faith to meet a lower price of a competitor. While the Commission made no finding on this point, it assumed its existence but held, contrary to the petitioner's contention, that this was not a defense."

* * * * *

"The showing made here by the petitioner that it made the lower price in good faith to meet competition, we assume, as the Commission apparently did, was made out."

V. CONCLUSION

Contrary to the conclusion of the majority of the Commission, the finding in this matter should be:

"The respondent's price reduction was made in good faith to meet a lawful equally low price of a competitor."

Relying upon such a finding, the complaint herein against the respondent should be dismissed.

Order

IN THE MATTER OF

LEO LICHTENSTEIN ET AL. TRADING AS HARLICH
MANUFACTURING COMPANY AND LOOMIS MANUFACTURING
COMPANY

MODIFIED CEASE AND DESIST ORDER

Docket 4879. Modified order, Jan. 16, 1953

Modified order eliminating the words "or may be used" from the Commission's original order, issued on June 30, 1950, 46 F. T. C. 984, in accordance with the decision and decree of the Court of Appeals, Ninth Circuit, February 5, 1952, in *Leo Lichtenstein et al. v. Federal Trade Commission*, 194 F. (2d) 607; and in other respects affirming the Commission's order—

Requiring respondents to cease and desist from selling or distributing in commerce, punchboards, etc., and in connection with the offer, etc., of cigarette chests or other articles of merchandise; and to cease and desist from supplying to others, punchboards, etc., for use in the sale, etc., of merchandise to the public, as in said order in detail below set out.

Before *Mr. John W. Addison* and *Mr. James A. Purcell*, hearing examiners.

Mr. J. W. Brookfield, Jr. for the Commission.

Mr. George M. Glassgold and *Mr. James A. Murray, Jr.*, of Washington, D. C., for respondents.

MODIFIED ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission, the respondents' answer thereto, testimony and other evidence in support of and in opposition to the allegations of the amended complaint introduced before a hearing examiner of the Commission theretofore duly designated by it, the hearing examiner's recommended decision, and briefs and oral argument of counsel, and the Commission having made its findings as to the facts and its conclusion that the respondents have violated the provisions of the Federal Trade Commission Act and having issued its order to cease and desist on June 30, 1950; and

Respondents having filed in the United States Court of Appeals for the Ninth Circuit their petition to review and set aside the order to cease and desist issued herein, and that Court having heard the matter on briefs and oral argument and fully considered the matter, and having, thereafter, on February 5, 1952, entered its final decree modifying and affirming, as modified, the aforesaid order to cease and desist pursuant to its opinion announced on that same date; and