

IN THE MATTER OF
GENERAL MOTORS CORPORATION AND AC SPARK PLUG
COMPANY

FINDINGS AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SUBSECS.
(a) AND (d) OF SECS. 2 (a) AND 2 (d) AND SEC. 3 OF THE CLAYTON ACT, AS
AMENDED, AND OF THE FEDERAL TRADE COMMISSION ACT

Docket 5620. Complaint, Nov. 17, 1948—Decision, July 10, 1953

Where a corporation engaged since December 29, 1950, among other things, in the distribution and sale of automobile, truck, tractor, and engine accessories, parts, and supplies, including AC spark plugs, cables, fuel pumps, fuel pump parts, oil filters, oil filter cartridges, and oil filter elements—dealt in by its wholly owned subsidiary prior to the latter's dissolution on said date—which (1) sold said AC products throughout the United States in substantial competition with others, to customers engaged, as were many of their customers, in the resale of said products at wholesale and retail; (2) supplied annually more spark plugs, oil filters, fuel pumps and speedometer cables to the original equipment field than any other manufacturer; and (3) along with Champion Spark Plug Co. and the Electric Auto-Lite Co., made and sold about 90 percent of all spark plugs sold in the United States, and itself accounted for a substantial part of all such plugs there sold for both original equipment and replacement; and (4) sold said AC products at prices which varied as between purchasers buying for original equipment; as between purchasers buying for original equipment and purchasers for resale or replacement; and as between purchasers, both direct and indirect, buying for resale or replacement;

In selling to (1) its various direct purchasers including distributors which handled all AC products and were given a special price for handling AC spark plugs and oil filter cartridges on an exclusive basis; direct jobber accounts who stocked and sold such AC products as they found demand for; and contract accounts, in which were included automobile manufacturers, chain stores, national oil and tire companies and others, whose principal business was other than the wholesaling of automotive supplies, and who were sold on said basis because of their volume of purchases; and (2) its indirect purchasers in which were included indirect jobber accounts, fleet accounts and other dealers who were required to purchase from its distributors or wholesalers, but at prices and on terms and conditions fixed and controlled by it, so that sales thereto were essentially sales by respondent—

(a) Discriminated in price during 1940 in favor of direct distributor purchaser accounts and against direct jobber and indirect accounts through schedules of prices on its spark plugs, oil filters and air cleaners which, as illustrative, ranged, in the case of the plugs, from 27½ cents and 29 cents to its "D" and "DA" accounts, to 31 cents to its direct jobber accounts, and to 32½ cents to 37 cents to its indirect accounts; and from 1936 to 1941 discriminated against its direct jobber accounts through the payment to the distributors, on sales of plugs by it to a jobber at 31 cents per plug, of 10 percent or 3.1 cents per plug;

54

Syllabus

- (b) Discriminated, from 1941 until Nov. 1, 1946, in favor of its "warehouse distributors" and against its direct jobber accounts through selling the former at 28 cents per plug while selling the latter at 30 cents per plug, and through payment to said distributors, on their sales to such jobbers, of an additional 10 percent; through payment to said distributors on their sales to certain contract dealers, of additional compensation of 10 percent and 5 percent respectively; and through payment to them also of additional compensation of 10 percent on their sales of other AC products to such dealers, with no provision for additional compensation to jobbers on sales by them to such contract dealer accounts;
- (c) Discriminated in favor of its warehouse distributors, from 1942 to Nov. 1, 1946, and against indirect jobber purchasers who bought from said distributors at 31.5 cents per plug instead of the 30 cents paid by its direct jobber purchasers, through paying said distributors 10 percent on the selling price to them of 28 cents per plug on their sales to such indirect jobbers at 31.5 cents per plug, and thus in effect accorded said distributors a price of 24.85 cents per plug as compared with said indirect jobbers net purchasing price of 31.5 cents, with contract dealers paying higher prices for AC products than the jobbers, and noncontract dealers paying higher prices than contract dealers;
- (d) Discriminated in price under a new distribution program inaugurated Nov. 1, 1946, in favor of its "warehouse distributors" and against its direct and indirect jobbers through a schedule of prices and arrangements under which, as illustrative, price of spark plugs to said distributors was 8 percent less than the jobber price of 27 cents, or 24.8 cents, plus an additional allowance of 12 percent on sales by said distributors to jobbers approved by respondent, or net, 21.6 cents, and under which "warehouse distributors" were also eligible for a compensation of 12 percent on their sales at jobber prices to large "jobber fleet owner" accounts, after approval of contracts therewith by respondent;
- (e) Discriminated in favor of certain direct purchaser accounts such as oil and tire companies, distributor manufacturers, jobber chains, and large retail outlets such as Sears, Roebuck, Western Auto Supply, and Montgomery Ward, which sold on a national basis, at jobber prices less 8 percent for warehouse compensation and 5 percent as a distributional discount, through according them, in addition to the prices made available by respondent to warehouse distributors (namely, jobber price less 8 percent, and an additional 12 percent compensation on their sales to jobbers) an additional 7 percent discount, and thus made its net prices to said national distributors 5 percent less than its prices to warehouse distributors on all sales except where the national distributor or warehouse distributor resold to jobbers;
- (f) Discriminated further, in addition to the varying prices to different customer classifications, through selling certain large purchasers of AC products for resale for replacement at prices which were substantially less than those charged other large purchasers, including, in 1940 and 1941, International Harvester, sold at 22.3 cents per plug, and Allis-Chalmers, at 27.5 cents;
- (g) Discriminated in price between certain large retail outlets in that in January 1947 it discontinued selling direct to J. T. R. Motors and Montgomery Ward—therefore sold plugs for resale at 27 cents less 8 percent and 5 percent, or 23.6 cents per plug—and required said concerns thereafter to purchase AC products indirect at dealer prices, while permitting Sears, Roebuck

Syllabus

50 F. T. C.

to continue to purchase at the favored price; and discriminated further in favor of Sears in that its retail stores were allowed to purchase AC plugs from local warehouse distributors at 31.5 cents per plug in lots of not less than 10, while other dealers paid 41.1 cents per plug in lots of ten;

- (h) Discriminated in favor of certain large rubber and oil companies and against competing distributors, jobbers, and retail outlets at various competitive levels, in that it—

(1) Sold from 1941 to 1946, AC plugs to the Goodrich Rubber Co. at a flat price of 24 cents per plug for resale through its retail outlets direct to consumers, while competing jobbers and dealers were required to pay higher prices;

(2) Discriminated from beginning 1947 to Nov. 1948, in that AC products were billed and shipped to the Pure Oil Co.'s field warehouses at national distributors' prices and to its company-owned service stations, which sold them at retail in competition with other dealers who purchased from jobbers at higher prices; and in that it granted said company a special price on oil filters 3 percent less than that paid by other national distributors; and

(3) Discriminated through its cash discount practice in favor of the Goodyear Tire & Rubber Company, which resold plugs through its own retail outlets to consumers, and also had an arrangement with four oil companies whereby it paid them a commission of 10 percent on sales by Goodyear to service stations which handled their petroleum products and a commission of 7½ percent on sales to their jobber companies, and also gave its customers a rebate based on the dollar volume of purchases during a year, including AC spark plugs, and thus passed on to certain of its customers a portion of the preferential price it received;

With result that—

(1) Its discriminations in price in favor of said warehouse distributors and national distributors and against direct and indirect jobbers, who resold their products to dealers, fleet owners, and consumers in direct competition therewith, resulted in lower profits to such jobbers, loss of customers, and a lessening of their ability to compete with said favored distributors;

(2) Its discriminations in price in favor of national distributors gave their warehouse branches and plants a substantial competitive advantage in enabling them to purchase said AC products at prices substantially lower than those paid by competing warehouse distributors, jobbers and dealers; and

(3) Its discriminations in price between its national distributor accounts gave the favored accounts a substantial competitive advantage over others;

Effect of which various price discriminations had been and might be to substantially lessen, injure, destroy, and prevent competition between and among respondent's favored customers and others:

Held, That such acts and practices, under the circumstances set forth, were in violation of subsec. (a) of Sec. 2 of the Clayton Act as amended: and

Where said corporation, engaged as aforesaid in the sale and distribution of its AC products—

- (a) Entered into and had in effect, in and prior to 1939, more than 750 contracts with its "D" and "DA" distributor accounts which contained a provision that the distributor would handle said products on an exclusive basis and, following the elimination of the exclusive dealing clause from its 1940 distributor contracts, continued its policy, though not uniformly, of requiring its distributors to handle said products exclusively; and

- (b) In conformity with its aforesaid policy, following the World War II period and beginning in 1946 when supply and demand for automotive parts began to equalize, gave preferential prices to some of its distributors on the condition or understanding that they would not deal in spark plugs, oil filters, oil filter elements, oil filter cartridges or fuel pumps sold by its competitors, threatened distributors with cancellation of their contracts if they failed to give up competing lines, and cancelled its contracts with a number of its warehouse distributors because they failed to comply;

Effects of which exclusive dealing contracts and policy were to unreasonably restrain and substantially lessen competition between it and its competitors in the sale and distribution of the products concerned, and to substantially lessen competition in the sale thereof by the elimination of distributors who refused to deal in its products exclusively and who were the source of its supplies to many dealers:

Held, That such acts and practices, under the circumstances set forth, were in violation of Sec. 3 of the Clayton Act.

Before *Mr. Webster Ballinger*, hearing examiner.

Mr. L. E. Creel, Jr. for the Commission.

Mr. Henry M. Hogan, of Detroit, Mich., and *Miller, Gorham, Westcott & Adams*, of Chicago, Ill., for respondents.

Willkie, Owen, Farr, Gallagher & Walton, of New York City, for Kaiser-Frazer Corp., amicus curiae.

Mr. L. Arthur Greenstein and *Mr. Daniel S. Greenstein*, of Philadelphia, Pa., for Berlin Auto Supply Co., amicus curiae.

Beaumont, Smith & Harris, of Detroit, Mich., for Hudson Motor Car Co., amicus curiae.

Cook, Beake, Miller, Wrock & Cross, of Detroit, Mich., for Nash-Kelvinator Corp., amicus curiae.

Bodman, Longley, Bogle, Armstrong & Dahling, of Detroit, Mich., for Packard Motor Car Co., amicus curiae.

Ritter & Boesel, of Toledo, Ohio, for Willys-Overland Motors, Inc., amicus curiae.

REPORT, FINDINGS AS TO THE FACTS, AN ORDER

Pursuant to the provisions of the Federal Trade Commission Act and to 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 17, 1948, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them in Count I thereof with violation of subsection (a) of Section 2 of the Clayton Act, as amended; in Count II thereof with violation of subsection (d) of Section 2 of the Clayton Act, as amended; in Count III thereof with

Findings

50 F. T. C.

violation of Section 3 of the Clayton Act; and in Count IV thereof with violation of Section 5 of the Federal Trade Commission Act.

After the issuance of said complaint and the filing of respondents' answers thereto, testimony and other evidence in support of and in opposition to the allegations of the complaint 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. Thereafter, this proceeding regularly came on for final consideration by the Commission upon the complaint, answers thereto, testimony and other evidence, recommended decision of the hearing examiner and exceptions thereto, written briefs of counsel supporting the complaint, counsel for respondents, and counsel for Kaiser-Frazer Corporation, Hudson Motor Car Company, Nash-Kelvinator Corporation, Packard Motor Car Company, and Willys-Overland Motors, Inc., as amici curiae, and oral argument of opposing counsel; and the Commission, having duly considered the matter and having entered its order disposing of the exceptions to the recommended decision of the hearing examiner, and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent General Motors Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located in Detroit, Michigan. Said respondent is now, and for many years past has been, engaged in the manufacture, distribution, and sale of, among other things, internal combustion engines; trucks; automobiles; and automobile, truck, tractor, and engine accessories, parts, and supplies, including spark plugs, cables, fuel pump parts, oil filters, oil filter cartridges, and oil filter elements.

Respondent AC Spark Plug Company was, until December 29, 1950, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Michigan, with its principal office and place of business located in Flint, Michigan. Said respondent was engaged in the distribution and sale of automobile, truck, tractor, and engine accessories, parts, and supplies, including spark plugs, cables, fuel pumps, fuel pump parts, oil filters, oil filter cartridges, and oil filter elements, such products being hereinafter collectively referred to as "AC products." Said respondent was a wholly owned subsidiary of respondent General Motors Corporation, and said AC products were manufactured by General Motors Corporation. Under

date of December 29, 1950, respondent AC Spark Plug Company was dissolved in accordance with the laws of the State of Michigan. Respondent General Motors Corporation, as successor to respondent AC Spark Plug Company, was responsible for the acts, practices, and policies shown by the record to have been engaged in by the now dissolved AC Spark Plug Company, and said respondent General Motors Corporation has conceded that any order which the Commission could lawfully enter against respondent AC Spark Plug Company on the record herein may be lawfully entered against respondent General Motors Corporation (AC Spark Plug Division). The complaint herein will, therefore, be dismissed as to respondent AC Spark Plug Company, and as hereinafter used the term "respondent" does not include said AC Spark Plug Company.

PAR. 2. Respondent General Motors Corporation transports said AC products, or causes same to be transported, for sale and distribution from the places where said products are manufactured or stored to its customers and purchasers thereof located in other and different States of the United States and in the District of Columbia; and there is, and has been at all times mentioned herein, a continuous current of trade and commerce in said products between the States where respondent's factories and warehouses are located and the various other States of the United States. Said AC products are sold by respondent General Motors Corporation for use, consumption, and resale within the United States and the District of Columbia.

PAR. 3. Respondent General Motors Corporation distributes and sells said AC products throughout the United States in the same territories and places as, and in substantial competition with, other persons and corporations engaged in the manufacture, distribution, and sale of similar products. Customers of respondent purchasing AC products for resale, and many of their customers, are competitively engaged in the resale of such products at wholesale and retail in the various territories and places where said customers, respectively, carry on their businesses. For the past several years, respondent General Motors Corporation has annually supplied more spark plugs, oil filters, fuel pumps, and speedometer cables to the original equipment field (that is, for use by manufacturers of engines and vehicles as original equipment) than any other manufacturer of these products. Respondent, Champion Spark Plug Company, and The Electric Auto-Lite Company are the three largest manufacturers of spark plugs in the United States, and although there are approximately 40 manufacturers or assemblers of spark plugs in the United States, these three companies manufacture and sell approximately 90 percent of all the spark plugs sold in the United States. Respondent manufactures

Findings

50 F. T. C.

and sells a substantial portion of all the spark plugs sold in the United States for both original equipment and replacement. In recent years approximately 98 percent of all automobiles manufactured in the United States have been equipped with respondent's AC fuel pumps.

PAR. 4. Respondent General Motors Corporation has sold its said AC products to vehicle and engine manufacturers for use by such manufacturers as original equipment in vehicles and engines manufactured by them. Respondent has also sold said AC products to such manufacturers and others for resale for replacement of original equipment. The prices at which respondent has sold its said AC products of like grade and quality have varied as between (1) purchasers buying such products for original equipment; (2) purchasers buying such products for original equipment and purchasers buying such products for resale or replacement; and (3) purchasers, both direct and indirect, buying such products for resale or replacement.

PAR. 5. In the sale of AC products for original equipment on engines and vehicles, respondent has charged varying prices for products of like grade and quality. For example, respondent has sold spark plugs to automobile and other manufacturers for original equipment at prices ranging from 6 cents per plug to 15 cents per plug or more. As of February 1, 1949, after the issuance of the complaint herein, respondent's 6-cent price on spark plugs was increased to 10 cents, and respondent's customers who had been purchasing at the 6-cent price discontinued purchasing such plugs from respondent.

The hearing examiner in his recommended decision found that respondent's price differentials between customers purchasing for original equipment resulted in injury to those customers who paid the higher prices. The hearing examiner did not state what evidence in the record he relied upon in making this finding. However, in a footnote to said finding, he stated that "While the difference in the cost of plugs in a single engine amounted to but a few cents, the profits accruing from yearly volume purchases were substantial."

The Commission, upon consideration of the entire record, is of the opinion that the allegations in the complaint as to the results of respondent's price differentials between customers purchasing AC products for original equipment are not sustained by the evidence, and that, therefore, such allegations should be dismissed.

PAR. 6. From 1936 to 1949 respondent sold spark plugs to automobile and other manufacturers for original equipment at prices substantially less than those charged for spark plugs of like grade and quality sold said automobile and other manufacturers and others for resale for replacement of original equipment. For example, during this period respondent's prices on spark plugs sold to automobile and

other manufacturers for original equipment ranged from 6 cents per plug, which price was below respondent's cost of manufacture, to 15 cents per plug, while respondent's prices on spark plugs sold to said automobile and other manufacturers and to certain other direct purchasers for resale for replacement was 24 cents per plug or more.

It is alleged in Count I of the complaint herein that respondent's practice of selling its spark plugs for original equipment below its cost of manufacture places upon the purchasers of spark plugs for replacement the injurious, unfair, and oppressive burden of paying a higher price than the price paid by others, so as to carry the loss incurred by respondent in the sale of original equipment plugs at 6 cents per plug, and that the effect of price differentials between purchasers buying for original equipment and purchasers buying for resale is and may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which respondent is engaged or to injure, destroy, or prevent competition with respondent in the manufacture, distribution, and sale of spark plugs.

The hearing examiner in his recommended decision found that the aforesaid allegations are sustained by the evidence, and his recommended order would prohibit all such price differences except those which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such products are to such purchasers sold or delivered.

In the opinion of the Commission, the hearing examiner's findings with respect to the competitive injury resulting from respondent's lower (and below cost) price on original equipment spark plugs than on replacement spark plugs is not supported by or in accordance with the greater weight of the reliable, probative, and substantial evidence in the record. The spark plugs purchased by vehicle and engine manufacturers for use as original equipment become an integral part of the engine in which they are used. None of such spark plugs are resold by such manufacturers for replacement purposes. The buyers paying the aforesaid different prices do not compete in the resale of the spark plugs. It is contended that as a result of the below cost price on original equipment spark plugs, it is necessary for the respondent to recoup its losses on original equipment business by charging higher prices for replacement spark plugs. It is also contended that as a result of the lower prices on original equipment spark plugs, smaller manufacturers are not only precluded from selling their spark plugs for original equipment, but are also placed at a substantial disadvantage in competing with respondent in the sale of replacement spark plugs.

Findings

50 F. T. C.

The adoption and use of a particular spark plug by a well-known vehicle manufacturer increases the demand for that particular plug for replacement purposes. However, despite the fact that substantially all the spark plugs used as original equipment are supplied by respondent, Champion Spark Plug Company, and The Electric Auto-Lite Company, the record does not disclose any undue mortality rate on the part of smaller spark plug manufacturers which can be attributed to respondent's lower price on original equipment spark plugs than on replacement plugs.

There is testimony in the record to the effect that some competitors of the respondent have been unable to sell their spark plugs to vehicle manufacturers because such competitors have been either unable or unwilling to sell at the prices charged by respondent and its two principal competitors in the original equipment field. However, the record as a whole does not, in the opinion of the Commission, sustain the allegations of the complaint as to the competitive injury resulting from respondent's lower price on original equipment spark plugs than on replacement spark plugs, and such allegations should, therefore, be dismissed.

PAR. 7. In the course and conduct of its aforesaid business, respondent has, since June 19, 1936, sold AC products for replacement of original equipment at prices which varied substantially as between (1) purchasers buying directly from respondent; (2) purchasers buying indirectly from respondent; and (3) purchasers buying directly and purchasers buying indirectly from respondent.

Prior to 1941, respondent classified certain of the accounts to whom it sold AC products directly as "D," "DA," "J," "A-1," "A-2," and "A-4" accounts. D and DA accounts were distributors handling all AC products and who were given a special price in return for handling AC spark plugs and AC oil filter cartridges on an exclusive basis and performing certain other designated services. J accounts were jobbers who stocked and sold such AC products as they found demand for and in the quantity consistent with the demand. Respondent's contracts with J accounts did not contain a provision requiring that AC spark plugs and AC oil filter cartridges be handled on an exclusive basis. A-1, A-2, and A-4 accounts were those concerns who were also sold on a contract basis (except fleet owners) because of the volume of their purchases, but whose principal business was other than the wholesaling of automotive supplies. These classifications included automobile manufacturers, chain stores, national oil and tire companies, and others. Other dealers in AC products were required to purchase, and did purchase, their requirements from distributors or wholesalers who purchased directly from respondent. However, the

prices and terms and conditions applicable to such indirect purchasers were fixed and controlled by respondent. Representatives of respondent personally solicited the business of such indirect accounts and sales to such accounts were essentially sales by respondent.

The prices at which respondent sold certain of its AC products to purchasers in the different classifications described above during the year 1940 are shown below:

Item	D and A-1 accounts	DA and A-2 accounts	J and A-4 accounts	Indirect accounts
AC Spark Plugs.....	\$0.27½	\$0.29	\$0.31	\$0.32½ to \$0.37.
AC Oil Filters (Type No. S-1).....	3.60	3.78	4.00	\$4.50 to \$5.40.
AC Oil Filter Elements (Type No. S-11).....	.65	.69	.73	\$0.87 to \$1.05.
AC Air Cleansers.....	1.80	1.80	1.94	\$2.22 to \$2.70.

From 1936 to 1941, respondent's distributors (D and DA accounts) guaranteed the accounts of certain of respondent's jobber customers and received from respondent an amount equal to 10 percent of the jobbers' purchasing price. For example, on sales of AC spark plugs by respondent to a jobber at 31 cents per plug, a distributor received 3.1 cents per plug. As a result of such payments, respondent's price discriminations in favor of its distributors and against its other customers were actually greater than is indicated by the prices appearing in the above tabulation.

From 1941 until November 1, 1946, respondent sold AC spark plugs to purchasers classified by it as "Warehouse Distributors" ("WD") at 28 cents per plug. During the same period, respondent sold to purchasers classified by it as "Jobbers" ("LJ") at 30 cents per plug. On sales by Warehouse Distributors to these Jobbers respondent paid the Warehouse Distributors additional compensation of 10 percent of the selling price. On sales of spark plugs by Warehouse Distributors to certain contract dealers (those classified by respondent as "SP-33" and "SP-36") respondent paid the Warehouse Distributors additional compensation of 10 percent and 5 percent, respectively. Warehouse Distributors also received additional compensation of 10 percent on sales by them of other AC products to contract dealers. Jobbers received no additional compensation on their sales to these contract dealer accounts.

From 1942 to November 1, 1946, some of respondent's jobbers purchased AC spark plugs out of Warehouse distributors' stocks at 31.5 cents per plug (5 percent increase over the 30 cents per plug paid by jobbers purchasing direct). On sales to these indirect jobbers, Warehouse Distributors received a compensation of 10 percent of the selling price, and their net purchase price was, therefore, 28 cents less 3.15

Findings

50 F. T. C.

cents, or 24.85 cents per plug, as compared with the indirect jobbers' net purchasing price of 31.5 cents per plug, a difference of 6.5 cents per plug. Contract dealers purchased AC products at prices higher than those paid by jobbers, and noncontract dealers purchased AC products at prices higher than those paid by contract dealers.

As of November 1, 1946, respondent inaugurated a new distribution program under which Warehouse Distributors could purchase AC products at jobbers' prices less 8 percent. On sales to jobbers approved by respondent, Warehouse Distributors received an additional compensation of 12 percent of the jobber price. Respondent's prices to Warehouse Distributors and jobbers during a major portion of the year 1947 on a number of different AC products are shown in the tabulation following:

Item	Jobber's price	WD invoice price (jobber's price less 8 percent)	WD price on sales to jobbers (jobber's price less 8 percent and 12 percent)
AC Spark Plugs.....	\$0. 27	\$0. 248	\$0. 216
AC Oil Filters (Type No. S-1C).....	4. 16	3. 83	3. 33
AC Oil Filter Elements (Type C-10).....	. 68	. 63	. 54
AC Fuel Pumps (Type No. 403).....	4. 00	3. 68	3. 20
AC Fuel Pump Repair Kits (Type No. R-1).....	. 90	. 83	. 72
AC Speedometer Cables (Type No. 601).....	. 315	. 29	. 25
AC Air Cleansers (Type No. 907).....	2. 26	2. 08	1. 81

From 1938 until November 1, 1946, respondent had an arrangement whereby owners or operators of fleets of vehicles or engines could purchase AC spark plugs, oil filters, fuel pumps, and other AC products at varying prices depending upon the number of vehicles or engines operated. For example, operators of from 10 to 49 vehicles or engines could purchase AC spark plugs from distributors or jobbers at 41 cents per plug. Operators of from 50 to 199 vehicles or engines could purchase from distributors or jobbers at 37 cents per plug, and operators of 200 or more vehicles or engines could purchase from distributors or jobbers at 34 cents per plug. Fleet owners entitled to the 37-cent or 34-cent price were required to enter into a contract with respondent before they could purchase at those prices.

After November 1, 1946, large fleet accounts were designated by respondent as "Jobber Fleet Owner" accounts and were permitted to purchase AC products from Warehouse Distributors at jobber prices. Like jobber accounts, contracts with large fleet owners were subject to the approval of respondent before Warehouse Distributors were eligible for a compensation of 12 percent on their sales to Jobber Fleet Owner accounts.

At the same time that respondent was selling AC products to Warehouse Distributors at jobber prices less 8 percent, with an additional 12 percent compensation to the Warehouse Distributors on their sales to Jobbers, respondent sold AC products of like grade and quality direct to certain accounts, such as oil and tire companies, distributor-manufacturers, and jobber chains, which sell on a national basis, at jobber prices less 8 percent for warehouse compensation and 5 percent as a distributional discount. On sales to jobbers, these national distributors received an additional 7 percent discount. After July 16, 1947, the aforesaid discounts of 8 percent and 5 percent were deducted from the amount of each billing at the time the billing was made. Respondent's net prices to national distributors were, therefore, 5 percent less than its net prices to Warehouse Distributors on all sales except where the national distributor or Warehouse Distributor resold to jobbers.

In addition to the varying prices at which respondent has sold AC products for resale or replacement of purchasers in the different customer classifications as described hereinabove, respondent has also sold AC products for resale or replacement to certain large purchasers at prices substantially less than those charged other large purchasers. For example, respondent sold AC spark plugs to International Harvester Company and to Allis-Chalmers Company for resale for replacement. In 1940 and 1941, respondent's price to International Harvester Company was 22.3 cents per plug, while at the same time respondent's price to Allis-Chalmers Company was 27.5 cents per plug.

Certain large retail outlets, such as Sears, Roebuck & Company, Western Auto Supply Company, Marshall's U. S. Auto Supply, Montgomery Ward, J. & R. Motors, and others, were classified by respondent as Warehouse Distributors until August 25, 1946; as Direct Jobbers until November 1, 1946; and as Jobber Chains after the latter date. Respondent's price after November 1, 1946, to accounts classified by it as Jobber Chains was the jobber price less 8 percent and 5 percent. AC spark plugs, for example, were sold to such concerns for resale through their own retail outlets at 27 cents less 8 percent and 5 percent, or 23.6 cents per plug. In January 1947 respondent discontinued selling direct to J. & R. Motors and Montgomery Ward, and thereafter those concerns were required to purchase AC products indirect at dealer prices. Sears, Roebuck & Company was permitted to continue to purchase at the favored price. Also, Sears' retail stores were allowed to purchase AC spark plugs from local Warehouse Distributors at the local jobber's price of 31.5 cents per plug in lots of not less than 10 plugs. Other dealers in AC spark plugs paid 41 cents per plug in lots of ten.

Findings

50 F. T. C.

The B. F. Goodrich Rubber Company purchased AC spark plugs from respondent at a flat price of 24 cents per plug from 1941 to 1946 and resold such plugs through its own retail outlets direct to consumers. At the same time, competitors of Goodrich, jobbers and dealers, were required to pay higher prices for the AC spark plugs they purchased.

The Pure Oil Company purchased AC spark plugs from respondent on a national distributor's basis from the beginning of 1947 until November 1948. AC products were billed and shipped to Pure Oil Company's field warehouses at national distributor's prices and the Pure Oil Company operated company-owned service stations which sold these AC products at retail in competition with other dealers who purchased from jobbers at higher prices. Respondent granted the Pure Oil Company a special price on oil filters, which price was 3 percent less than the price paid by other national distributors.

The Goodyear Tire & Rubber Company purchased AC spark plugs from respondent on a national distributor's basis less 2 percent cash discount at the time of billing. Competitors of Goodyear who purchased on the same basis were allowed a discount of 2 percent for cash payment within the discount period, the discount being deducted from the remittance instead of from the face of the invoice. Goodyear Tire & Rubber Company resold some of the AC spark plugs so purchased through its own retail outlets to consumers. Goodyear had an arrangement with Shell Oil Company, Sinclair Refining Company, Richfield Oil Company, and Sherwood Brothers whereby Goodyear paid these companies a commission of 10 percent on sales by Goodyear to service stations which handled the petroleum products of those oil companies, and a commission of 7½ percent on sales to jobber customers of those oil companies. Goodyear also had a bonus plan under which it gave its customers a rebate based on the dollar volume of purchases during a year. AC spark plugs were included in determining the volume of purchases. A portion of the preferential price received by Goodyear on its purchases of AC spark plugs was thus passed on to certain of its customers.

PAR. 8. Direct jobbers who purchased AC products directly from respondent, as well as jobbers who purchased such products indirectly, resold such products to dealers, fleet owners, and consumers in direct competition with Warehouse Distributors and national distributors who purchased AC products directly from respondent at prices less than those paid by said jobbers. The record clearly establishes that respondent's price differentials to competing customers were substantial.

Respondent's discrimination in price in favor of Warehouse Distributors and national distributors and against jobbers, both direct

54

Findings

and indirect, have resulted in lower profits to the jobbers, loss of customers, and a lessening of their ability to compete with Warehouse Distributors and national distributors in the resale of respondent's AC products.

Respondent's discriminations in price in favor of national distributors have given the national distributors a substantial competitive advantage over Warehouse Distributors, jobbers, and dealers in the resale of AC products. Warehouses, branches, and plants of national distributors have been able to purchase AC products at prices substantially less than those paid by their competitors, namely, Warehouse Distributors, jobbers, and dealers. For example, in November 1947 the national distributor's profit on sales of fuel pumps to jobbers was 19.6 percent and on sales to one of the dealer classifications the profit was 38.8 percent. At the same time, the profit to jobbers on sales of fuel pumps to the same dealer classification was 30 percent. Similarly, on AC oil filters the national distributor's profit was 19.6 percent on sales to jobbers and 43.2 percent on sales to dealers. At the same time the profit to jobbers on sales of AC oil filters to dealers was 35 percent.

Respondent's discriminations in price as between its national distributor accounts have given the accounts receiving the lower prices a substantial competitive advantage over the accounts paying the higher prices.

The effect of the price discriminations described in Paragraph 7 has been and may be to substantially lessen, injure, destroy, and prevent competition between and among respondent's customers receiving the benefits of said discriminations and respondent's customers who do not receive the benefits of such discriminations.

PAR. 9. Respondent alleges in its answer to the complaint that any differences in prices to different accounts which it may have allowed were not discriminatory but were established in good faith to meet the equally low prices of competitors and/or the services and facilities furnished by competitors, as well as to make allowances for differences in the cost of manufacture, sale, or delivery resulting from the different methods or quantities in which AC products were sold and delivered to such different accounts.

The Commission's determination that the allegations of the complaint with respect to the injury to competition resulting from respondent's price differences between (1) customers purchasing AC spark plugs for original equipment and (2) customers purchasing AC spark plugs for original equipment and customers purchasing such spark plugs for resale or replacement are not sustained makes it unnecessary to determine whether respondent's aforesaid defenses to these price differentials are sustained by the record.

Findings

50 F. T. C.

The evidence in the record does not establish that respondent's price differentials as between customers purchasing AC products for resale for replacement as described in Paragraph 7 hereof were made in good faith to meet equally low prices of competitors or the services and facilities furnished by competitors, or that such price differentials were justified by differences in the cost of manufacture, sale, or delivery resulting from the different methods or quantities in which AC products were sold and delivered to such customers.

PAR. 10. In and prior to 1939 respondent entered into and had in effect more than 750 contracts with distributors who were classified by respondent as "D" and "DA" accounts, which contained a provision that the distributors would handle designated AC products on an exclusive basis. Agreements entered into by respondent with such distributors in 1939 contained the following provision:

It is understood and agreed that this agreement is entered into by the AC Spark Plug Company in consideration of the Distributor handling AC Plugs, AC Oil Filter Renewal Cartridges, and AC Oil Filters on an exclusive basis * * *.
(Comm. Ex. 169, p. 22)

The exclusive dealing clause was eliminated from respondent's 1940 distributor's contracts. However, respondent's policy of requiring its distributors to handle AC products exclusively was continued, although such policy has not been uniformly adhered to. In 1940, respondent announced in a "Statement of Policy" to all its distributors that "These distributors [D and DA accounts], therefore, do not carry competitive products either for wholesale or retail distribution * * *" and "Should an AC Distributor at any time feel it to their best interest to handle a competing product, this decision is accepted by the AC Spark Plug Company; and another concern will be sought to act as an AC Distributor * * *."

From 1941 until the end of World War II the demand for AC products greatly exceeded production and respondent was unable to meet the demands of its customers. During that period respondent made little or no attempt to enforce its policy of exclusive dealing. In 1946, when the supply and demand for automotive parts began to equalize, respondent in conformity with its aforesaid policy gave preferential prices to some of its distributors on the condition or understanding that said purchasers would not deal in spark plugs, oil filters, oil filter elements, oil filter cartridges, or fuel pumps sold by competitors of respondent. Some of respondent's distributors who desired to stock competing lines of products were threatened with cancellation of their contracts if they failed to give up competing lines or products, and some distributors ceased handling competitive lines, although they carried out all the functions of the distributors and purchased in the quantities entitling them to respondent's Ware-

house Distributor's contract. For example, one witness testified that respondent's regional manager "would call my attention to the fact that we could not carry a Champion line if we were an AC distributor." Another witness testified that he was told by respondent's assistant regional manager "that they would not tolerate me to sell another spark plug alongside of AC, that if I did, they would cancel my contract." This same witness also testified that he was told by respondent's agent that "We don't allow anyone that sells AC spark plugs on a WD to carry another line of merchandise with us, and we will give you just so long to get rid of the merchandise." A regional manager for respondent testified that he had an "understanding" with this Warehouse Distributor and that he had occasion to remind this Warehouse Distributor of the "nice gentlemen's agreement" which the Warehouse Distributor had with the respondent regarding exclusive dealing. Another witness testified that he was told by one of respondent's salesmen in 1948, in reference to the handling of a competitor's plug, "in no uncertain terms that that was very much against the regulations and that we had better dispose of them, which we did."

Respondent canceled its contracts with a number of its Warehouse Distributors because such Warehouse Distributors failed to comply with respondent's request to cease handling competing products.

The evidence in the record clearly establishes that respondent's distributors, except those who were exempted from respondent's exclusive dealing policy, generally understood that they were prohibited from dealing in or handling competing products.

The complaint herein does not allege, and the record does not show that respondent has enforced its aforesaid exclusive dealing policy against all its distributors. It appears that respondent permitted a number of its distributors to deal in competitive products because (1) the distributor's volume of business was so large that respondent could not enforce its policy, (2) the distributor was located in a strategic territory, or (3) respondent was unable to furnish a complete line. It also appears that some of respondent's distributors did not deal in competing products because of their own preference, rather than because of any understanding with, or coercion by, respondent. The fact remains, however, that respondent has made contracts for sale and has sold AC products to distributors on the condition, agreement, or understanding that said distributors shall not deal in products manufactured or sold by a competitor of respondent.

The effects of respondent's exclusive dealing contracts and policy have been to unreasonably restrain and substantially lessen competition between respondent and its competitors in the sale and distribution of spark plugs, oil filters, fuel pumps, speedometer cables, and

Findings

50 F. T. C.

related items, and to substantially lessen competition in the sale of respondent's products by the elimination of some of respondent's distributors who refused to deal in respondent's products exclusively and who were the source of supply of respondent's products to many dealers.

PAR. 11. Count II of the complaint herein charges respondent with violation of subsection (d) of Section 2 of the Clayton Act, as amended. With respect to such charge the hearing examiner found in substance that from June 19, 1936, to 1941 respondent's distributors guaranteed the accounts of certain of respondent's jobber customers, and that for such service respondent paid its distributors an amount equal to 10 percent of the dollar value of the purchases of AC products by the guaranteed account. The distributors and the jobbers whose accounts were guaranteed by the distributors were in competition in the resale of AC products. This practice was discontinued at the end of 1940.

The Commission is of the opinion that the aforesaid payments by respondent to its distributors were in fact reductions in the prices paid respondent by such distributors as hereinabove found. Under the circumstances, Count II of the complaint should be dismissed.

In Count IV of the complaint herein respondent is charged with having violated Section 5 of the Federal Trade Commission Act by agreeing with and compelling distributors of and dealers in AC products to maintain the various prices fixed by respondent for the resale of AC products.

Subsequent to the completion of the hearings herein the Federal Trade Commission Act was amended with respect to certain contracts and agreements which establish minimum or stipulated resale prices (Public Law No. 542, approved July 14, 1952—the McGuire Act). This amendment had the effect of making legal certain of the acts and practices which it is contended the respondent has engaged in, in connection with the fixing and maintaining of resale prices. For example, it is contended that respondent's agreements with its distributors which fixed the exact prices at which the distributors were to resell spark plugs were illegal because the Miller-Tydings Act, which permits the fixing of minimum resale prices under certain circumstances, does not permit the fixing of exact resale prices. The aforesaid McGuire Act has the effect of permitting, under certain circumstances, contracts or agreements which prescribed stipulated, or exact, prices, as well as minimum prices. Certain of the respondent's acts and practices which may have been illegal at the time they were committed may not, therefore, be illegal under the existing law. Under these circumstances, an order to cease and desist such practices would be inappropriate. Furthermore, the complaint herein, having been issued

54

Order

prior to the enactment of the aforesaid McGuire Act, may not have sufficiently informed the respondent as to its acts and practices in connection with the fixing and maintaining of resale prices challenged therein.

Upon consideration of all the foregoing and the further fact that the order to cease and desist which is being entered herewith pursuant to the charge in Count I of the complaint will be effective in preventing respondent from fixing and maintaining discriminatory prices as between its direct and indirect customers who compete with each other in the resale of respondent's AC products, the Commission is of the opinion that Count IV of the complaint should be dismissed.

CONCLUSION

The acts and practices of the respondent as hereinabove found in Paragraphs 7, 8, and 9 are in violation of subsection (a) of Section 2 of the Clayton Act, as amended, and the acts and practices of the respondent as hereinabove found in Paragraph 10 are in violation of Section 3 of the Clayton Act.

Commissioners Howrey and Carretta not participating for the reason that oral argument on the merits was heard prior to their appointment to the Commission.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, answers of the respondents, testimony and other evidence in support of and in opposition to the allegations of said complaint taken before a hearing examiner of the Commission theretofore duly designated by it, recommended decision of the hearing examiner and exceptions thereto, briefs of counsel supporting the complaint, counsel for respondents, and counsel for Kaiser-Frazer Corporation, Hudson Motor Car Company, Nash-Kelvinator Corporation, Packard Motor Car Company, and Willys-Overland Motors, Inc., as amici curiae, and oral argument of opposing counsel; and the Commission having issued its order disposing of the exceptions to the recommended decision of the hearing examiner and having made its findings as to the facts and its conclusion that respondent General Motors Corporation has violated the provisions of subsection (a) of Section 2 of the Clayton Act, as amended, and Section 3 of said Clayton Act:

It is ordered, That respondent General Motors Corporation, a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device, in or in connection with the sale, for replacement purposes, of spark plugs, oil filters, oil

Order

50 F. T. C.

filter cartridges, oil filter elements, fuel pumps, fuel pump part kits, speedometer cables, and related automotive parts and accessories in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

(a) Discriminating, directly or indirectly, in the price of said products of like grade and quality:

1. By selling to any direct purchaser at net prices higher than the net prices charged any other direct purchaser who in fact competes in the resale and distribution of said products with the purchaser paying the higher price.

2. By selling to any indirect purchaser at net prices higher than the net prices charged any other direct or indirect purchaser who in fact competes in the resale and distribution of said products with the purchaser paying the higher price.

(b) Selling or making any contract or agreement for sale of said products on the condition, agreement, or understanding that the purchaser shall not use or deal in or sell the products of a competitor or competitors of the respondent.

(c) Enforcing in any manner or continuing in operation or effect any condition, agreement, or understanding, in or in connection with any existing contract or agreement for sale of said products, which condition, agreement, or understanding is to the effect that the purchaser shall not use or deal in or sell the products of a competitor or competitors of the respondent.

(d) Granting any rebate or fixing any price to any purchaser of said products on the condition, agreement, or understanding that such purchaser shall not use or deal in the products of a competitor or competitors of the respondent.

It is further ordered, That the allegations in Count I of the complaint relating to respondent's price differences between (1) purchasers buying for original equipment and (2) purchasers buying for original equipment and purchasers buying for resale for replacement, and the allegations in Counts II and IV of the complaint, be, and they hereby are, dismissed.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondent AC Spark Plug Company.

It is further ordered, That the respondent General Motors Corporation 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 Howrey and Carretta not participating for the reason that oral argument on the merits was heard prior to their appointment to the Commission.

Syllabus

IN THE MATTER OF
THE ELECTRIC AUTO-LITE COMPANY

FINDINGS AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (a)
OF THE CLAYTON ACT, AS AMENDED, AND OF THE FEDERAL TRADE
COMMISSION ACT

Docket 5624. Complaint, Nov. 29, 1948—Decision, July 10, 1953

Where a corporation which was engaged in the manufacture and competitive interstate sale of certain engine and vehicle parts and accessories, including, since 1936, spark plugs; numbered among its customers, to whom it sold spark plugs at varying prices, certain purchasers competitively engaged, as were some of their customers, in the resale of spark plugs at wholesale or retail; since 1936, together with Champion Spark Plug Co. and General Motors Corporation, AC Spark Plug Division, produced and sold about 90 percent of all spark plugs produced and sold in the United States; and, in 1947, made 17.17 percent of all spark plugs—15.77 percent of all replacement plugs, and 26.5 percent of all original equipment plugs—manufactured and used in the United States—

In selling spark plugs for replacement to various customer classifications, embracing, after August 9, 1948, (1) direct accounts including Warehouse Distributors and Direct Jobbers which competed with each other in the sale to certain indirect accounts and to dealers and consumers, competed with vehicle and engine manufacturers who were sold directly, and competed with respondent's indirect accounts in sales to dealers and consumers; and (2) indirect accounts, namely, Registered Jobbers, Contract Jobbers, and Service Jobbers, sales to which, by virtue of the control exercised by respondent, were essentially sales by respondent, and which were in competition with each other in the resale to retail dealers and consumers—

(a) Discriminated between direct purchasers in that as of Nov. 29, 1948, it sold spark plugs for replacement use to various vehicle and engine manufacturers at 24 cents per plug, while invoicing plugs to its Warehouse Distributors and Direct Jobbers at 29 cents, or to Warehouse Distributors at a net price of 24.94 cents, and 27.35 cents, for resale to Registered Jobbers and to Contract Jobbers, respectively;

With the result that such vehicle and engine manufacturers were enabled by their lower purchasing price to effectively promote the sale of replacement spark plugs to their own distribution outlets, and thus deprive Warehouse Distributors and Direct Jobbers of the opportunity of selling to such accounts; and

(b) Further discriminated in the prices at which it sold spark plugs for replacement as between (1) direct purchasers, (2) direct purchasers and indirect purchasers, and (3) indirect purchasers, through their price schedules under which, after Aug. 9, 1948, invoice price to Warehouse Distributors was 29 cents and their net prices on sales to Registered Jobbers and Contract Jobbers, as noted above, were 24.94 and 27.35 cents, respectively; price to Direct Jobbers and to Registered Jobbers was 29 cents, and to Contract Jobbers and Service Jobbers was 3 cents;