

Decision

IN THE MATTER OF
OUTBOARD, MARINE & MANUFACTURING COMPANYORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 3
OF THE CLAYTON ACT*Docket 5882. Complaint, May 23, 1951—Decision, June 27, 1956*

Order requiring a manufacturer of outboard motors for boats and parts and accessories therefor, with factories and offices at Milwaukee, Wis., and Galesburg, and Waukegan, Ill., accounting for one-third to one-half of the total sales of outboard motors in the United States, to cease exacting assurances from its distributors and dealers that they would not deal in its competitors' outboard motors or parts.

Mr. Paul R. Dixon for the Commission.

Butzel, Levin, Winston & Quint, of Detroit, Mich., and *Cleary, Gottlieb, Friendly & Ball*, of Washington, D. C., for respondent.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

THE PROCEEDINGS

Complaint herein was issued May 23, 1951 and charged respondent with selling or contracting to sell its outboard motors or fixing the sales price thereof on the condition, agreement, or understanding that the purchasers thereof would not use or deal in the merchandise of competitors of respondent in violation of Section 3 of the Clayton Act (15 U.S.C.A. 14). After service and answer, seven hearings were held resulting in 578 pages of transcript, 79 Exhibits for proponent and 22 Exhibits for respondent. The proceeding was closed by the hearing examiner on December 16, 1952 and initial decision filed by him December 29, 1952. The case was tried and decided on the theory of, and the quantitative tests applied by, the court in the so-called *Standard Stations* case¹ and others of like import; namely, that the statutory requirement of "where the effect of such lease, sale or contract for sale of such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce" is satisfied, if it be shown that respondent's sales accounted for a major or substantial share of the available market for the product involved. This showing was that, in 1949, respondent sold almost as many units as all its competitors combined and did more business dollarwise than the rest of the industry;

¹ *Standard Oil of California v. U. S.*, 337 U. S. 293 (1949). *International Salt Company v. U. S.*, 332 U. S. 392.

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in other words, accounted for more than 50% of all outboard motor sales.

All evidence offered by respondent—tending to show: that respondent spent far more than its competitors on advertising, on service maintenance, on dealer service training, on the number of salesmen and outlets of each competitor, and the latter's individual sales volume; that dealers prefer to handle only one brand of outboard motor and that they handle other non-competitive products such as boats, as well as outboard motors; the experience and training of respondent's dealers prior to becoming such, and since; the number of motors sold by them, why some quit selling respondent's motors, what dealers in other motors than respondent's sell and how, and the importance of service in selling motors; the relationship between consumer price and exclusive dealing; the reasons why respondent discontinued merchandising through distributors and sold direct to dealers; the benefits to the industry and to the public of exclusive dealing, and opinion evidence that respondent's success and pre-eminent position in the market was due to other factors, such as excellence of product, rather than its exclusive dealing policy—was all rejected by the hearing examiner, or, if received, was subsequently stricken from the record by him as immaterial under the Standard Stations case ruling referred to. Similarly, evidence to show actual injury to competitors of respondent was likewise rejected.

Upon appeal by respondent to the Commission from the initial decision, the Commission set the latter aside stating that such rejected evidence was, in its opinion, material and necessary for it to decide the case and remanded the case on February 18, 1954, with instructions to reconsider such rulings.

Since that hearing examiner was then about to be mandatorily retired for age, the proceeding was transferred to the undersigned hearing examiner for completion in conformity to such order, and counsel for respondent having waived any objection to such transfer, the former rulings of rejection or striking were reversed and 13 additional hearings were held resulting in 1,114 additional pages of transcript, 3 additional exhibits for proponent and 17 additional exhibits for respondent. The proceeding was then again closed on July 11, 1955, and the undersigned hearing examiner, having considered the entire record, the proposed findings and conclusions and briefs submitted by all counsel, makes the following:

FINDINGS OF FACT

1. Respondent, Outboard Marine and Manufacturing Company, is a Delaware corporation, with its principal office and place of business

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located at Waukegan, Illinois. It has factories and offices located at Milwaukee, Wisconsin, and Galesburg and Waukegan, Illinois, and since its incorporation on September 30, 1936, has manufactured and sold outboard motors for boats, parts of such motors and other products, through three divisions:

A. Johnson Motors Division (referred to hereinafter as "Johnson"), with office and factory at Waukegan, Illinois, which manufactures and sells "Johnson Sea Horse" outboard motors.

B. Evinrude Motors Division (referred to hereinafter as "Evinrude"), with office and factory at Milwaukee, Wisconsin, which manufactures and sells "Evinrude" outboard motors and which, until 1950, also manufactured and sold "Elto" outboard motors.

C. Gale Products Division (referred to hereinafter as "Gale"), with factory at Galesburg, Illinois, which manufactures outboard motors primarily for special order and specification customers. In addition, Gale manufactures the "Buccaneer" line of outboard motors for sale to hardware jobbers throughout the nation.

2. Respondent's fiscal year runs from October 1st to the succeeding September 30th and all figures and data in these findings, pertaining to a specified year unless otherwise stated, refer to the fiscal year ending on September 30th of the specified year. Thus, 1948 means the twelve month period beginning October 1, 1947, and ending September 30, 1948.

3. In the years 1937 through 1950, respondent's sales through its three divisions were as follows:

	Johnson Motors division		Evinrude Motors division		Gale Products division		Total	
	Number of motors	Total price	Number of motors	Total price	Number of motors	Total price	Number of motors	Total price
1937.....	29,391	\$2,113,912	38,680	\$2,011,256	-----	-----	68,071	\$4,125,168
1938.....	31,075	2,165,086	37,345	1,973,454	-----	-----	68,420	4,138,540
1939.....	40,802	2,865,493	48,967	2,497,666	-----	-----	89,769	5,273,159
1940.....	41,929	3,073,374	46,887	2,741,091	-----	-----	88,816	5,814,465
1941.....	41,964	3,281,504	51,870	3,141,822	5,392	\$283,041	99,226	6,706,367
1942.....	14,428	1,427,826	12,957	1,033,645	936	56,391	28,321	2,517,862
1943.....	6,252	1,321,365	6,772	1,926,900	-----	-----	13,024	3,248,265
1944.....	7,366	1,293,033	6,901	1,762,824	-----	-----	14,267	3,055,857
1945.....	11,578	1,583,462	11,466	2,018,254	7,683	526,463	30,727	4,128,179
1946.....	47,557	4,870,784	41,728	3,808,923	35,775	2,280,220	125,060	10,959,927
1947.....	78,554	8,866,148	89,830	8,323,540	93,707	6,498,493	262,091	23,688,181
1948.....	90,627	10,316,614	76,221	8,018,636	98,865	7,204,131	265,713	25,539,381
1949.....	80,419	11,332,254	37,086	4,790,342	49,576	4,112,166	137,081	20,234,762
1950.....	82,230	10,818,766	56,360	6,846,799	36,659	2,907,490	175,249	20,573,055

4. In the year 1949, the entire outboard motor industry sold 347,159 motors for a total selling price of \$39,094,482, of which approximately \$8,320,651 were private brand sales. In that year, respondent ranked first in dollar volume of sales of outboard motors, equal to the aggregate of the dollar volume of all other outboard motor manufacturers,

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although respondent's unit production was not equal to the total unit production of all other outboard motor manufacturers, being 48.1% for all three divisions, or 33.9% counting only Johnson and Evinrude production. During 1949, the largest of respondent's competitors enjoyed less than one-half of the dollar and unit volume of business secured by respondent. Between 1946 and 1950 the annual dollar sales of Johnson and Evinrude alone, in relation to the total sales of substantially all of the industry, declined 11.9%, although in each year it was never less than twice and usually more than three times the market share of any other manufacturer.² Johnson and Evinrude sales alone since World War II have never been less than 32% and have exceeded 50% of the total market. The finding, accordingly, is that respondent's market share has at times been dominant, and never less than substantial.

5. As of the date of the complaint, and for many years prior thereto, respondent has sold its outboard motors and parts therefor to distributors and dealers located throughout the several States of the United States, the territories thereof, the District of Columbia and foreign countries, for resale in interstate and foreign commerce and regularly caused such products, when sold, to be shipped from their various places of manufacture throughout the nation and abroad in a constant current of trade in such commerce.

6. In the course and conduct of its business, respondent has been for many years last past and is now in substantial competition in the manufacture, sale and distribution of outboard motors in commerce between and among the various States of the United States, the Territories thereof, and in the District of Columbia, with other corporations, persons, firms and partnerships who are likewise so engaged.

In addition to respondent there were, in 1951, ten manufacturers making and selling at least fifteen brands of outboard motors. These are:

- (1) Kiekhaefer Corporation and Kiekhaefer Aeromarine Motors, Inc., manufacturer of Mercury and Wizard brands.
- (2) National Pressure Cooker Co., manufacturer of Martin brand.
- (3) Hart-Carter Co., manufacturer of Lauson brand.
- (4) West Bend Aluminum Company, manufacturer for Sears-Roebuck of the Elgin brand.
- (5) Chris-Craft Outboard Motors Co., manufacturer of Chris-Craft brand.
- (6) Scott-Atwater Mfg. Co., manufacturer of Scott-Atwater, Corsair, and Firestone brands.

² Respondent's Exhibit 22-G, -H, -I and -K.

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(7) Champion Motors Co., manufacturer of Champion, Majestic, and Voyager brands.

(8) H. B. Milburn Co., manufacturer of Milburn Cub brand.

(9) Metal Products Corp., manufacturer of Flambeau brand.

(10) Muncie Gear Works, manufacturer of Neptune brand.

7. At the time of organization of respondent in 1936, there was being manufactured, in addition to its motors, the following:

Name of motor:	Name of manufacturer
Champion	Champion Outboard Motors Company.
Neptune	Muncie Gear Works.
Thor	Cedarburg Manufacturing Co.
Bendix	Bendix Aviation Corporation.
Elgin-Waterwitch	(Sears, Roebuck)—Kissel Company.

As of May 23, 1951, the Neptune motors were still being manufactured and sold by Muncie and the Champion by Champion Motors Company, successor to the old Champion Company. Cedarburg Manufacturing Company was acquired by Kiekhaefer Corporation, and the name of its motor was changed from Thor to Mercury, and this company continued manufacturing and selling Mercury motors as well as private brand motors. Kissel Company sold its business to West Bend Aluminum Company, which continued to manufacture and sell Sears, Roebuck motors at the former Kissel plant. Bendix Aviation Corporation is the only manufacturer to withdraw from the industry in the fifteen years from 1936 to 1951.

After 1936, other manufacturers entered the outboard motor business, some before World War II, and some after the War. These include the following:

National Pressure Cooker Co.....	Martin Motor.
Scott-Atwater Manufacturing Co..	Scott-Atwater Motor, Corsair Motor, and Firestone Motor.
Chris-Craft Outboard Motors Co..	Chris-Craft Motor.
Hart-Carter Co.	Lauson Motor.
Metal Products Corp.....	Flambeau Motor.
H. B. Milburn Co.....	Milburn Cub.

All of these manufacturers who entered the business since 1936 were actively engaged in the manufacture and sale of outboard motors on May 23, 1951.

Between 1936 and 1950 the outboard motor industry expanded saleswise from five million total to over forty million. Business boomed, particularly from 1946 to 1950—from fifteen million to forty million. Gross sales and percent of market enjoyed by respondent and its competitors for these years is as follows:³

³ Unit sales total and unit sales percent of total for the same companies show relatively the same pattern.

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Company	1946		1947		1948		1949		1950	
	Company's percent of industry	Dollar sales	Company's percent of industry	Dollar sales	Company's percent of industry	Dollar sales	Company's percent of industry	Dollar sales	Company's percent of industry	Dollar sales
A (1).....			0.69	\$360,813	0.41	\$210,687	0.21	\$79,949	0.24	\$97,599
B.....										
C.....										
D.....	1.58	\$251,039	10.86	5,678,888	6.82	3,504,599	3.20	1,218,274	3.10	1,260,654
E.....	.72	114,398	1.20	627,502	.96	493,316	1.38	525,380	1.02	414,796
F.....	4.16	660,964	3.40	1,777,921	2.59	1,330,926	.59	224,619	.78	317,197
G.....	5.22	829,383	10.57	5,527,242	11.32	5,817,018	5.36	2,040,608	5.99	2,435,908
H (2) ¹	54.63	8,679,707	32.87	17,189,688	35.68	18,335,250	42.34	16,122,596	43.44	17,665,565
I.....							1.09	414,974	1.24	504,261
J.....	7.72	1,226,597	10.46	5,469,721	14.80	7,605,289	19.07	7,260,149	20.56	8,360,980
K.....	8.22	1,306,039	9.93	5,192,575	7.20	3,699,870	8.92	3,395,938	9.44	3,838,894
L.....	3.40	540,211	7.59	3,968,947	6.20	3,185,999	7.03	2,676,395	7.04	2,862,904
M (3) ²	14.35	2,280,220	12.43	6,498,493	14.02	7,204,131	10.81	4,112,166	7.15	2,907,490
Industry total ³	100.00	15,888,558	100.00	52,291,790	100.00	51,387,085	100.00	38,071,048	100.00	40,666,248

¹ H (2) is respondent, Johnson and Evinrude.² M (3) is respondent, Gale Products.³ Respondent's Exhibit 32.

8. Respondent now sells, and for many years last past has been selling, outboard motors and parts therefor to distributors and dealers in such motors located throughout the several States of the United States, the Territories thereof, the District of Columbia and foreign countries, for resale within the United States, the Territories thereof, the District of Columbia and foreign countries. Both Johnson and Evinrude direct factory dealers are authorized by respondent to appoint associate dealers who are also sometimes referred to as sub-dealers. During the years 1937 through 1950, respondent's Johnson and Evinrude Divisions sold their products to direct factory dealers and to distributors. Such direct factory dealers sold to the public, and in some instances to associate dealers, and said distributors sold to distributors' dealers. A list showing the number of distributors and dealers of the various classes follows:

JOHNSON MOTORS DIVISION

	Distrib- utors	Distrib- utors' dealers	Direct factory dealers	Associate dealers		Distrib- utors	Distrib- utors' dealers	Direct factory dealers	Associate dealers
1937.....	6	488	1,369	60	1944.....				
1938.....	5	629	1,627	207	1945.....				
1939.....	4	491	2,008	218	1946.....	7	988	2,058	6
1940.....	4	487	2,018	289	1947.....	6	512	2,593	11
1941.....	4	523	1,771	97	1948.....	6	538	2,424	15
1942.....					1949.....	5	553	2,580	57
1943.....					1950.....	5	609	2,604	210

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EVINRUDE MOTORS DIVISION

1937.....	19	2,300	805	(1)	1944.....	14	-----	-----	(1)
1938.....	19	1,926	1,075	(1)	1945.....	14	-----	-----	(1)
1939.....	18	2,469	1,236	(1)	1946.....	14	2,455	1,522	(1)
1940.....	13	3,105	1,494	(1)	1947.....	14	2,500	1,516	(1)
1941.....	14	2,351	1,365	(1)	1948.....	15	2,760	1,431	(1)
1942.....	14	-----	-----	(1)	1949.....	17	2,666	1,349	(1)
1943.....	14	-----	-----	(1)	1950.....	6	1,207	2,570	(1)

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¹ No information.

Evinrude no longer has record information showing the number of associate dealers of its direct factory dealers prior to the year 1950. Johnson does not sell Johnson motors to Evinrude distributors or direct factory dealers, nor does Evinrude sell Evinrude motors to Johnson distributors or direct factory dealers. Total Johnson and Evinrude dealers out of total number of outboard motor dealers known of or reported for postwar years was as follows:

1946.....	7,029 out of total of 15,098
1947.....	7,132 out of total of 18,963
1948.....	7,168 out of total of 19,397
1949.....	7,205 out of total of 19,484
1950.....	7,421 out of total of 20,268
As of May 15, 1951.....	6,789 out of total of 19,085

Based on these statistics which show that respondent never had less than one-third of the total dealers, the finding is that respondent's outlets accounted for more than a substantial segment of total outlets.

9. Respondent, through its Johnson Motors Division and its Evinrude Motors Division, enters into written contracts with its direct factory dealers and with its distributors. These contracts are one-year agreements, expiring on September 30. They are terminable by either party on thirty-day notice any time during the fiscal year.

Respondent furnishes, to its distributors, forms of written contracts for use by its distributors in entering into relationship with distributors' dealers. Respondent furnishes, to its direct factory dealers, forms of written contracts for use by its direct factory dealers in entering into relationship with associate dealers. No other form of written contracts for entering into such relationships is known to have been used by respondent's direct factory dealers and distributors. To the best of respondent's knowledge, it receives copies of all written agreements entered into between distributors and their dealers and between direct factory dealers and their associate dealers; respondent knows of no instances in which this has not been done.

10. Respondent has consistently followed the policy and practice of making it known to prospective dealers and distributors that it will not franchise dealers and distributors, nor will it sell motors to

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them for resale, if they are offering for sale and selling outboard motors manufactured by a competitor.

As early as 1939 the respondent entered into written contracts with dealers to sell its products. Such contracts entered into for the year 1939 with direct factory dealers contained, as to the Evinrude Division, the following:

If the right to sell is on the Single Dealer basis and is specifically so designated above, then the Manufacturer agrees to establish no other Evinrude dealer in said territory while this agreement is in effect, provided the Dealer establishes prior to, 1939, and maintains, not less than associate-dealers, in accordance with the policy of and upon forms provided by the Manufacturer for that purpose, and further provided the Dealer shall sell only Evinrude outboard motors and no others (except used motors); and the Dealer expressly agrees to perform and abide by these provisions.

In the year 1939 the Johnson Motors Division's contracts with direct factory dealers contained the following:

If the right to sell is on a "single dealer basis," and specifically so designated above, then the Manufacturer agrees to establish no other Dealers on Sea Horse Motor products in said territory while this Agreement is in effect, providing the Dealer establishes prior to, 1939, and maintains, not less than sub-dealers in accordance with the policy of, and upon forms provided by the Manufacturer for that purpose, and further providing that the Dealer shall sell only Johnson Sea Horse Outboard Motors and no others (except used motors); and the Dealer expressly agrees to perform and abide by these provisions.

Respondent's Evinrude Motors Division's contracts with direct factory dealers for the years 1940, 1941, and 1942 contained a comparable provision. Respondent's Johnson Motors Division's contracts with direct factory dealers for the years 1940, 1941, and 1942 contained a comparable provision.

11. Respondent's Evinrude Division furnished written contract forms to its distributors for use in entering into contractual relationship with distributor dealers. The forms for the year 1939 contained the following provision:

If the right to sell is on the Single Dealer basis and is specifically so designated above, then the Distributor agrees to establish no other Evinrude dealer in said territory while this agreement is in effect, provided the Dealer establishes prior to, 1939, and maintains, not less than associate-dealers, in accordance with the policy of and upon forms provided by the Distributor for that purpose, and further provided the Dealer shall sell only Evinrude outboard motors and no others (except used motors); and the Dealer expressly agrees to perform and abide by these provisions.

Comparable contract forms were furnished Evinrude distributors for the years 1940, 1941, and 1942. Respondent's Johnson Division furnished written contract forms to its direct factory dealers for

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use in entering into contractual relationship with associate dealers. The forms for the year 1942 contained the following provisions:

If the right to sell is on a "single" associate-dealer basis, and is so especially designated above, then the Dealer agrees that during the term of this Agreement it will establish no other Associate Dealer in Sea Horse Motor products in said territory on the express condition, however, that the Associate Dealer sells only Johnson Sea Horse Outboard Motors and no others (except used motors traded in on Sea Horse motors).

Respondent Johnson Division furnished contract forms to its distributors for use in entering into contractual relationship with distributor-dealers. The forms for the year 1939 contained the following provision:

If the right to sell is on a "single dealer basis" and specifically so designated above, then the Distributor agrees to establish no other Dealers on Sea Horse Motor products in said territory while this Agreement is in effect, providing the Dealer establishes prior to, 1939 and maintains, not less than sub-dealers in accordance with the policy of, and upon forms provided by the Manufacturer for that purpose, and further providing that the Dealer shall sell only Johnson Sea Horse Outboard Motors and no others (except used motors); and the Dealer expressly agrees to perform and abide by these provisions.

Comparable contract forms were furnished Johnson distributors for the years 1940, 1941, and 1942.

12. In the years 1943 and 1944 respondent was engaged wholly in war production and sold no outboard motors to its distributors and dealers except a small quantity which, by government order, was directed for use by commercial fisheries. No new contracts were entered into with distributors and dealers during these years, but the then existing contracts were, in some cases, extended by memorandum letters. In the year 1945 the Evinrude Motors Division and Johnson Motors Division manufactured a small quantity of outboard motors for sale to distributors and dealers. The contracts covering the year 1945 were either extensions of, or similar to, those used in the year 1942.

13. In the years 1946 to 1951, inclusive, the written contracts with direct factory dealers and distributors and the written forms of contract furnished by the Evinrude Motors Division and Johnson Motors Division to distributors and direct factory dealers for use in entering into contractual relationship with distributors' dealers and associate dealers, respectively, contained no reference or agreement as to exclusively selling respondent's motors.

14. The Evinrude Motors Division and the Johnson Motors Division from time to time send, to their respective distributors and the dealers of said distributors and to their respective direct factory

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dealers and the associate dealers of such direct factory dealers, form letters and publications which contain material and advice designed to assist all of such distributors and dealers in the sale of Johnson or Evinrude motors, as the case may be, in the servicing and repairing of such motors, in the advertising thereof, in arranging for appropriate financing of installment sales, and in other phases of merchandising. On occasion, in such form letters and publications, respondent has called to the attention of dealers the benefits which respondent believes such dealers derive from the practice of not selling more than one brand of outboard motors. For example:

And we shall continue to want only those loyal and enthusiastic dealers who believe with us that everybody is better off when the dealer handles ONLY ONE make of outboard motor. Further, any Johnson dealers who feel they don't wish to subscribe to that policy, we'd like to discuss the matter with them right now.

Respondent had a fixed policy since its incorporation of advising all dealers and respective dealers that it desired that its motors be handled exclusively, and that when a dealer was found violating this policy, he was told that he would either have to discontinue handling a motor manufactured by a competitor or his franchise agreement would be cancelled. If, however, the cancelled dealer ceased handling the competitive motor, respondent would refranchise him, provided other factors were satisfactory.⁴

15. Each of respondent's Johnson Motors and Evinrude Motors Division has traveling salesmen who are instructed to call on all direct factory dealers and associate dealers at least once a year, for the purpose of assisting such dealers in effectively advertising, selling, and servicing outboard motors. These salesmen have been instructed by such Divisions to report all cases in which they have found that Johnson or Evinrude dealers have been engaged in the business of selling new outboard motors manufactured by any competitor of respondent, or by the competing Division of respondent. The record shows an effective and vigilant policing of dealers, stocks, displays, advertising and general operations by respondent's salesmen to ascertain if any competitive outboard motor was on the dealer's premises, regular reports thereof to respondent and immediate threats of refusal to sell further if such report was admitted or substantiated.⁵ For example, from one such salesman to the director of sales:

I suggest immediate cancellation of the above dealer. I heard they were selling Scott-Atwaters so I called them on the phone from Duluth today. I didn't reveal my name and was offered immediate delivery on a Scott-Atwater. I'm not very well pleased with the outlet and don't believe we should try and straighten them

⁴ Tr. 62-3, 73, 100.

⁵ Tr. 66, 103.

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out. On my last visit Feb. 4, 1948, I was told they handled only Johnson Motors. They were not displaying Scott-Atwaters at the time. They know our policy and have no excuse.⁶

16. The respondent has the policy of terminating by thirty-day notice its agreement with, and ceasing to sell its products to, a dealer who sells new outboard motors manufactured by a competitor or competitors of respondent. The Johnson Motors Division has terminated Dealer Agreements in pursuance of this policy as follows:

1948—9

1949—5

1950—5

1951—1 (nine months)

The Evinrude Motors Division has terminated Dealer Agreements in pursuance of this policy as follows:

1948—12

1949—10

1950—31

1957—17 (nine months)

The company also has the practice, in selecting new dealers, of refraining from selecting a dealer who, at the effective date of the agreement with respondent, is selling new outboard motors manufactured by a competitor or competitors of respondent.

17. The extent to which this policy has been carried and the rigidity of the practice is well illustrated by a letter of April 15, 1948, from Bloomingdales to Johnson as follows:

After discussing the motor situation with your Mr. Adler, I feel it will be necessary for a store of this size to have more motors than the Johnson Motor Company can supply us this year. We would like very much to have your motors here at Bloomingdale's and hope we will receive our allocation of motors for this year.

Due to the great demand for motors in this area and the scarcity of your production, we feel it will be necessary for us to open new channels in the hope of securing enough motors to satisfy our customers.⁷

To the same effect is a May 27, 1948 letter from the Kaufmann Department Store in Pittsburgh⁸ but notwithstanding the prestige, sales potential and excellent volume of these accounts, their dealerships were cancelled. This was corroborated as of more recent date when Evinrude's Director of Sales told the hearing examiner no

⁶ Commission's Exhibit 78 (104).

⁷ Commission's Exhibit 78 (71).

⁸ Commission's Exhibit 78 (131).

matter how good or profitable the account, it would be cut off if a competitive line were added.⁹

18. The record is replete with evidence showing that Johnson and Evinrude make it as clear as possible that they will not sell, nor continue to sell, if a competitive motor is also retailed; that dealerships will be cut off regardless of justification or excuse, and that both through their salesmen and other sources, maintain a policing surveillance to find out whether the condition of sale is being observed.

19. Counsel supporting the complaint calls this exclusive dealing or, more formally, selling or contracting to sell on the "condition, agreement or understanding that the purchaser thereof shall not use or deal in the goods, wares, or merchandise * * * of a competitor or competitors of the seller." Respondent counsel, on the other hand, has consistently called it "single dealing" and claims it to be a unilateral policy of customer selection, without agreement, understanding or condition of sale. In reliance on the somewhat threadbare¹⁰ Colgate case,¹¹ the Adams Mitchell case¹² and the J. I. Case, case,¹³ respondent says it merely selects as its customers those who single deal.

20. To so assert, on this record, is to semanticize. To so hold, on this record, is to effectively emasculate the law and to provide a plausible and easy evasion of both its aim and prohibition. The words "condition, agreement or understanding" were designedly employed by Congress to prevent evasions on technical arguments as to whether informal understandings rose to the dignity of formalized written commitments, particularly where, as here, the latter were succeeded by the former, without substantial change in practical operation.

21. Without detailed discussion of the cases relied on, suffice it to say that no agreement or understanding was found to exist in any of them; that in the J. I. Case matter the "single dealing" affected only part of defendant's customers, even there the court emphasized that Case could not directly or indirectly employ coercion, pressure or business policy to obtain any understanding or condition. There were such instances but the court there found them to be sporadic and de minimis.

22. The record here is far different. Respondent's policy is practically universal and unyielding. Respondent has proved that its Johnson and Evinrude motors are two of the oldest, if not the oldest, outboard motors made, the best known, the most widely advertised

⁹ Tr. 1668.

¹⁰ Cf. *F. T. C. v. Beechnut Packing Co.*, 237 U. S. 441; *U. S. v. Schrader's Sons, Inc.*, 252 U. S. 85.

¹¹ 250 U. S. 300.

¹² 189 F. 2d 913.

¹³ 101 F. Supp. 856.

and most widely accepted and wanted on the market. Cutting off or threatening to cut off dealers reselling such motors by mere letter of cancellation is "business pressure" if not "commercial coercion." A typical telegram from respondent's sales manager to a field salesman reads: "How come dealer Princes Wickenburg selling Martins. Wire action you are taking."¹⁴ Another reads: "Geissler was warned last year about handling Scott-Atwater and I don't believe he deserves another chance. * * *."¹⁵ There are also instances in the record showing stores writing respondent that its local dealer is handling other outboard motors and in the same letter asking to be substituted for the local dealer.

23. If, as claimed, it is purely unilateral selection, rather than conditional sale or mutual understanding, the emphasis would seem to be, on respondent's part, on past performance of the prospect; not, as here, on future practice.

24. Here respondent offers its motors clearly stating that, if bought, no other motor must be offered for resale by the purchaser. Purchase with that knowledge conclusively implies, without benefit of Williston, acceptance of and agreement to the condition of sale. The record shows that respondent's dealers so regarded it, as exemplified by a letter from a cancelled Johnson dealer in Chisholm, Minnesota to respondent on August 7, 1948:

It certainly was a bomb from out of the skies this morning when I received your notification of the termination of the Johnson franchise.

Well you are acting according to the original agreement without question. * * * If motors had been more plentiful, or my allotments a little larger, I would have accepted no other make of motor ever. * * *

I hope you can see the picture my way and reinstate me as a Johnson dealer. and I will never again have another make of new motor in my place of business.¹⁶

Another letter from respondent to a dealer of May 6, 1948 states:

We were under the impression that our policy in this regard was very thoroughly understood. It has been publicized from time to time and frankly we were of the opinion that your outboard motor activity was entirely devoted to the Johnson line. Apparently this has not been the case.¹⁷

A letter from the Evinrude salesmanager to a salesman relating to the former's conversation with a visiting dealer who discussed taking on a competitive line, concludes:

So as matters now stand, Roy has agreed to go along with us and knows what will happen if he figures otherwise.¹⁸

¹⁴ Commission's Exhibit 78 (95).

¹⁵ Commission's Exhibit 78 (98).

¹⁶ Commission's Exhibit 78 (60).

¹⁷ Commission's Exhibit 78 (80).

¹⁸ Commission's Exhibit 78 (144).

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25. The conclusory finding therefore is that respondent has been, and as of the date of the complaint was, making sales and contracts for the sale of its Johnson and Evinrude outboard motors in commerce to its direct factory dealers and distributors on the condition, agreement or understanding that they shall not purchase or deal in any outboard motors manufactured by a competitor or competitors of respondent. Respondent, through the practice set forth in the above findings, controls the sales policy of all purchasers of its outboard motors, including direct factory dealers, distributors, distributors' dealers, and associate dealers of direct factory dealers, to the extent of preventing them from selling the products of respondent's competitors.

26. Gale has never had, does not have, and is not charged with having, a single dealing or exclusive dealing policy such as Johnson and Evinrude and the policies and practices of the latter as found above extend to each other—that is, Johnson will not sell to an Evinrude dealer or vice versa.

27. The agreements entered into by Johnson and Evinrude with dealers were not requirements contracts. They did not provide for the purchase from Johnson or Evinrude by the dealer of all outboard motors required or sold by the dealer. They did not provide for the purchase by any dealer of any stated or minimum quantity of outboard motors, nor did they provide for the sale to the dealer by Johnson or Evinrude of any stated quantity, or minimum number, of outboard motors. Respondent did not require dealers to purchase any minimum quantity of motors.

28. These agreements, sometimes referred to as franchises, are for respondent's fiscal year, renewable upon expiration and terminable by either party on thirty days' written notice. From this, respondent argues that its dealers have that freedom which Congress sought to insure them by Section 3 of the Clayton Act—that the dealer is free to buy where he pleases. Legally and technically this is partially correct. Realistically, it is not. Respondent, as one of its witnesses put it, is the General Motors of the outboard industry; the oldest and best according to its proof. Its motors are prestige products, the most widely advertised and sought after. Its dealerships are apparently avidly sought after and its products find a ready and profitable market. The commercial balance between respondent and its dealers is so lopsided that rarely does a dealer cancel. Out of thirty terminations documentarily evidenced in the record, only one was by the dealer, Bloomingdales of New York City, which is too big to submit to any such sales policy as respondent's. As respondent has proved, most outboard motor dealers are economically weak. The compulsion to behave is far stronger than any desire to buy and sell free of

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restriction. To this is to be added the dead loss of former local and "tie-in" advertising, and the more modest problem of disposing of stock parts. Upon termination, respondent sometimes buys these back, sometimes does not. Furthermore, while a dealer may cancel, he still may not merchandise the motors of all makers; it's either Johnson or Evinrude, or others but there is no freedom of varied or universal choice. Lastly, optional termination by the buyer, as here, was present in both the *Dictograph Products Inc. v. F.T.C.* (217 F. 2d 821), and the *Anchor Serum Company* (217 F. 2d 867) cases.

29. Outboard motors are designated for convenience principally as to size by horsepower rating but two motors of the same, or substantially the same, horsepower rating vary in construction, price and other details. Respondent's Johnson and Evinrude Motor Divisions have consistently manufactured and offered for sale a fairly complete line of outboard motors, ranging in size from low horsepower ratings to high horsepower ratings. All other manufacturing competitors of respondent, except one, have consistently manufactured and offered for sale more limited lines of outboard motors consisting principally of low horsepower ratings. Beginning in 1949 the manufacturer of Mercury motors began to offer a full line of motors.

30. After the remand in this proceeding, counsel supporting the complaint offered direct evidence to show that the effect of respondent's exclusive dealing "may be to substantially lessen competition, or to tend to create a monopoly" in the testimony and records of three of respondent's competitors.

31. The first of these was Champion Motors Company, whose president testified in considerable detail. Respondent's counsel asserts this to be incredible because of many contradictions between it and that of numerous other witnesses.¹⁹ For the purposes of these findings, this testimony is disregarded, although counsel for respondent nevertheless cites and relies on it in some instances where it supports his argument. Regardless of that, however, the statistics of the company cannot be called false. These show dollar volume of sales as follows:

1947	\$ 5,394,373.49	1949	\$ 1,015,418.35
1948	3,425,785.94	1950	¹ 1,418,200.99

¹ Commission's Exhibit 80.

and unit sales as follows:

1947	\$75,474	1949	\$10,688
1948	39,775	1950	² 13,544

² Commission's Exhibit 81.

¹⁹ The request of counsel for respondent that he be branded as a false witness by specific finding is denied. There are other reasons for direct conflict than deliberate lying.

32. Respondent's counsel asserts that Champion's annual report of 12-31-48 explains fully the 46.3% drop in unit sales for 1948 over 1947 as due to delay in securing aluminum permanent mold castings seriously reducing production at the height of the selling season, and a strike at the plant of Champion's supplier of aluminum die castings. But the cited report says the sales decline was due only *in part* to these two factors.

33. Respondent's counsel also seeks to explain the 73.2% decline in Champion's unit sales in 1949 over 1948 as due in the first place to Champion moving its plant that year, and again cites Champion's annual report as so stating. There is no annual report of Champion for the year 1949 in evidence—only those for the fiscal years 1948 and 1950. The report for the year 1950 includes October and November of 1949; the remainder is the first ten months of 1950. The move was apparently in 1950—not in 1949. Secondly, counsel points to the business recession in 1949 as producing a 38% drop in sales, but the record shows this only as to Evinrude and Johnson whereas Champion's sales decline in units was far more—73.2%. Thirdly, counsel asserts that Champion's inability to produce to satisfy demand for its new Hydro Drive in 1950 explains its 1949 drop but there is no evidence as to 1949 of this new device.

34. At most, this explaining away and counter-assertion of respondent is inadequate and speculative, subject to inference only, just as is the inference, without the witness' rejected testimony, that the decline was due to respondent's exclusive dealing. The hearing examiner is of the opinion that these precipitate declines were due in part to all these causes and perhaps to others as well, in what precise degree to each being unknown.

35. The president of another competitor of respondent, the Scott-Atwater Company, manufacturing and distributing outboard motors under that name since 1946, testified, and it is so found, that its line was short in horsepower range compared to respondent's, that respondent's exclusive dealing policy made it difficult for his company to add dealers in the field, and that he was unable to get many first class retail outlets; that he had less dealers in 1951 than when he entered the field in 1946 notwithstanding the expansion of his line in the interim at considerable capital expenditure.

36. A third competitor, the National Pressure Cooker Company, manufactures, through a subdivision, the Martin Motor. Its records show its sales and number of dealers as follows:

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	Unit	Dollar volume	Dealers
1946.....	8,094	\$830,033.83	2,500
1947.....	52,059	5,326,305.91	3,500
1948.....	59,129	5,815,059.78	3,151
1949.....	20,829	2,039,534.36	2,697
1950.....	21,102	2,438,164.97	2,891
As of May 15, 1951.....			12,627

¹ Commission's Exhibit 82-b, d.

The cause of the decline reflected above is in dispute. The company's vice president in charge of sales since 1949 attributed the decline to respondent's exclusive dealing arrangements. The former general manager attributed it to satisfaction of pent-up war demand; recession in 1949; improper inspection and rejection; connecting rod trouble resulting in large returns and repairs with consequent dealer and customer dissatisfaction; and failure of top management to originate or offer new horsepower ratings and improvements. He stated flatly that respondent's exclusive dealing arrangements had no material effect on Martin sales. Dispute with top management over these matters of policy led to this witness' discharge by the company in June 1949. The former general manager's testimony regarding cause of sales decline is largely corroborated by two other witnesses—one, Martin's ex-service manager; the other, a distributor—and the lack of experience in the outboard field of the vice president and the fact that he had no connection with it until June 1949 gives the weight to respondent's contention that its sales policy was not the sole or even primary cause of Martin's sales decline and it is so found.

37. The fact that Martin's vice president in charge of sales was, prior to his appointment in June of 1949, a millinery salesman, or a peddler of pots and pans as respondent's counsel refers to him, does not detract from his personal knowledge of being told by respondent's dealers, whom he approached in an effort to sell Martin motors, that, although some of them wanted to buy Martin, they could not because it would be at the risk of losing their Johnson or Evinrude franchise; or from his evidence that Martin did not have a satisfactory number of first class or satisfactory dealers to market its product and that Martin did not have as complete horsepower range as did respondent.

38. Whether or not respondent's exclusive dealing policy was the direct and sole cause or the partial cause of the decline in the sales and dealerships of those of its competitors who testified, or whether this was due, as indicated, to other causes, wholly or in part, the fact remains and it is so found that respondent's policy did foreclose a substantial number of established dealers to those competitors who sought satisfactory outlets for their outboard motors, thereby sub-

stantially lessening and hindering their competitive efforts and causing them substantial injury.

39. The Martin distributor for lower Michigan since 1948, who directed his early efforts toward building up a dealer organization, found that he was considerably handicapped by two factors—having only a 7.2 hp motor in 1948, a 2.3 hp and a 4.5 hp motor in addition in 1949 and a 10 hp motor added in 1950; and by respondent's exclusive dealing policy. He was never able to sell his Martin motors to a Johnson or Evinrude dealer, although several of them would have purchased his motors had it not been as one Johnson dealer expressed it, "restrained from handling any competing line of engines by my franchise" and by another, "Johnson forbade him taking any other line on. If he had been able to, his business would have increased." Even his one 7.2 hp motor would have complemented the Johnson line since the latter then had no horsepower rated motor between 5 and 10. The best dealer for his organization was an established marine dealer of good repute, with facilities and experience for constant maintenance and service and in business long enough to have built up contacts. In his area respondent had most of these dealers. Because of respondent's exclusive dealing policy, he was therefore confined to inferior dealers. His business declined in 1949 over 1948 but if he had had the subsequently introduced 10 hp Martin motor, it would not have. He had unsuccessfully solicited other "good" dealers than respondent's, succeeding in not much more than 10% of his attempts. Between 1948 and 1951 he increased substantially the number of his dealers apparently from other than competitive sources. He never had any exclusive dealing policy nor did Martin and some of his good dealers sold other brands than Martin. His lower sales in 1949 over 1948 were not in his opinion caused by respondent's exclusive dealing policy but by his short line and by competitors bringing out new and attractive features such as gear shift and auxiliary gas tank which Martin did not have. He lost no good dealers to respondent until 1951.

40. The Martin distributor or factory representative for Missouri, Illinois and Iowa from 1948 to 1951 lost four dealers to respondent at Mattoon, Illinois; Mount Carmel, Illinois; Harrisburg, Illinois, and Poplar Bluff, Missouri. They had been selling Martin motors, or Martin motors and others, but when they were franchised by respondent to sell either Johnson or Evinrude they ceased to buy Martin's because they "had to agree not to sell another motor" or "if they wanted another line, then they could forget the franchise" from respondent. Some of these outlets had been established by this distributor and from his standpoint were good outlets. He was never

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able to sell to a dealer handling respondent's motors. Because he knew respondent's policy, he would not ordinarily contact Johnson or Evinrude dealers who, in some cases, were the best outlets but did reach the point at times and in various places where he could find no other suitable outlet and approached them—without success, however. He had in his territory about 200 dealers in Martin motors of which about 15% were first class outlets, the remainder being second class or lower. He was not always able to sell dealers handling other makes than respondent's but he did not lose any dealers to such other makes. The four accounts which he lost to respondent were buying 20, 25, 10 and 15 motors annually, respectively. Two of them continued to sell Martins surreptitiously after taking on Johnson but sales of Martins fell to almost nothing. This distributor preferred a dealer to handle only his brand but some of them did not and he made no effort to compel them to. To develop a good dealer from scratch takes from one to three years. Johnson dealers in his territory, where he lost his four accounts, were selling 60 motors a year. When he lost these accounts to respondent he had to seek other outlets and develop them but the substitutes were not as good as the ones he had lost. If a Martin dealer took on another make, Martin's sales to that dealer would decrease. His principal competitors were respondent and the makers of Mercury.

41. One of these four accounts denied, in testifying for respondent, that he had become a Johnson dealer prior to the date of issuance of the complaint and that he had ceased dealing with Martin as of that date or for the reason that respondent's policy required him to; further, that he was dissatisfied with the Martin motor because it did not have the new features other outboards had, did less advertising and was two or three years behind Martin competitively. His outboard business was only about 1% of his total sporting goods business.

42. Another Martin dealer in St. Louis, whom the Martin dealer had established and built up, although not considered a first class outlet, testified for respondent that he sold Martin motors exclusively until May of 1951 but had tried to obtain a Johnson franchise because of his dissatisfaction with the Martin motor; that it was obsolete; that key personnel had left the Martin organization; that it was an incomplete line, not up to date, and he could see no future in it for himself.

43. The distributor for Scott-Atwater outboard motors in most of Michigan since 1948 testified that on starting to merchandise them, "we just went out to attempt to find dealers in outboard motors and as such went to the dealers who we thought were the finest marine dealers that you could go to, and we found that they were tied up with other

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competitive motors," in many cases, respondent's, and that he was unable to sell them because "we were told when we called on these various outlets that they were franchised on an outboard motor and that they were happy with their present franchise and that as such if they considered other motors they were in jeopardy of losing their present franchise." When he called on dealers in other makes than respondent's, he was able to sell and he secured multiple distribution. He found no other make of motor in his area handled on an exclusive or single basis than respondent's. Scott-Atwater has no objection to its dealers handling other makes. All of respondent's dealers in his area were desirable dealers to him. Unable to secure what he regarded as the best dealers, he solicited what he regarded as second-rate outlets. Scott-Atwater was then selling only two sizes of motors, one of which the 7.5 hp would have, in his opinion, "rounded out" the Johnson and Evinrude line in a dealer's stock because neither of these at that time had a motor at, nor near, that horsepower rating but he was unable to sell that motor to any of respondent's dealers. He was unable to build up what he considered a strong dealer organization. In addition to outboard motors, witness' organization sold a varied line of household appliances. As of May 1951 it had about 100 dealers for Scott-Atwater motors but witness did not know how many handled that motor only. He preferred a dealer to do so because in his opinion the dealer could do a better job for him. However, he had both single and multiple dealers who were doing comparable jobs. Single dealers, in his experience, concentrate on that one line and do a better job for him but he did not know whether they did a better job for themselves. He was not only unable to sell respondent's dealers in setting up his organization but due to the short line of Scott-Atwater at that time had some difficulty in selling to dealers in other makes than respondent's, but he had a number of Mercury and Martin dealers take on his line. As a distributor, it is good business for him to handle only one line of outboard motor. It takes about \$900.00 to become a small dealer. No dealer can make a living selling outboard motors only. Witness knew of no dealer who carries as many as seven different brands of outboard motors and would not franchise such an outlet. Three different brands were the most he knew of being carried.

44. On this question of distributor effect and injury, it is also found that pent-up postwar demand for outboard motors caused respondent to ration supplies thereof to its dealers during 1946, 1947, part of 1948 and again in 1950 and 1951, but in spite of these insufficient shipments respondent refused to allow its dealers to buy and resell competitive motors and terminated its franchise with them if they did. There is

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substantial documentary evidence in the record that respondent's exclusive dealing policy caused some of its dealers curtailed sales and volume.

This competitive race for dealers between respondent and its competitors and the latter among each other is shown in the following table in which Company "H" is identified as respondent's Johnson and Evinrude Divisions, Gale products not selling through dealers. Company "G" is Martin Motors. Companies "A" and "C" are omitted—one was bought out and the other discontinued manufacturing motors. Company "D" is omitted as it furnished no dealer figures. Blanks indicate no figures available.

Company	Number of dealers as of—					
	1946	1947	1948	1949	1950	May 15, 1951
B.....		520	736	717	803	823
E.....	1,252	1,550	1,174	981	944	639
F.....	372	401	427	0	201	92
G.....	2,500	3,500	3,151	2,697	2,891	2,627
H.....	7,029	7,132	7,168	7,205	7,421	6,789
I.....				424	934	1,576
J.....	2,445	2,860	3,241	3,460	3,324	3,039
K.....	1,500	3,000	3,500	4,000	3,750	3,500
	15,098	18,963	19,397	19,484	20,268	19,085

¹ Respondent's Exhibit 22-G to -M.

45. The evidence is preponderant that an established outlet, in business for years, with the public confidence, reputation and contacts which that usually connotes, is the best outlet for outboard motors, particularly where, as is usual, such an outlet has trained service mechanics; that it takes from 1 to 3 years or even longer to develop someone new to the outboard business to the point of becoming a satisfactory dealer.

46. From the above evidence of effect on distributors, it is found that respondent's exclusive dealing policy adversely affected its own dealers during some years by curtailing their business potential and deprived them of unlimited choice of brands and that it hampered and prevented distributors of other brands from securing satisfactory outlets by foreclosing many, if not most, of the best outlets to them and directly therefore affected manufacturers of competitive brands in the same way. At the least it was a clog and obstruction in the competitive race for outlets.

47. There is no substantial evidence of any injury to outboard motor retail dealers of brands competitive with respondent's Johnson and Evinrude motors—on the contrary, the evidence is affirmatively the other way and the fact is so found.

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48. There is no evidence that the buying public had any difficulty in finding dealers from whom to buy motors manufactured by competitors of respondent, and the fact is so found.

49. In addition to the negative evidence developed by cross-examination, respondent has offered, and due to the language of the remand, there was received, much statistical and other evidence as an "economic" excuse or justification for the sales policy complained of, or as proof that the prescribed effect of that policy does not in fact exist.

50. Thus, respondent has shown, testimonially and by survey, that about 95% of outboard motor dealers prefer to handle only one brand of motor, that less than 5% handle two brands and 1/2 to 1% handle three or more brands²⁰ and that this is because the outboard motor market is thin, seasonal, non-necessitous for the most part; that outboard motors require constant service and repair, hence, adequate parts inventory; that parts are not interchangeable between brands; that the outboard motor business is always incidental to other lines of merchandising and is easy and relatively inexpensive to enter; that location is relatively unimportant and credit unnecessary, although there is conflict in the evidence on the latter; that no competitor of respondent requires exclusive dealing from its outlets, hence, single dealing is not imposed by respondent but is a spontaneous and voluntary matter with dealers; and that single dealing is frequent among competitors' dealers also. The evidence as to whether long and specialized training is necessary to become a dealer, whether a good mechanic can service different brands equally efficiently, whether different horsepower ratings of different brands would complement satisfactorily competitive brand lines, is in conflict, which conflict it is not necessary herein to resolve because all this evidence was flatly rejected as a defense by both the Commission and the Court of Appeals in the recent cases of Dictograph Products, Inc., (217 F. 2d 821) and Anchor Serum Company (217 F. 2d 867). Similarly rejected therein were the claims, here made in more muted fashion, that this exclusive dealing was not initiated or imposed by the respondent on the buyer or that such restriction is really for the benefit of the latter.

51. Respondent has also proved, and it is so found, that its Evinrude motor has been known to the public since 1909, its Johnson since 1922; that these motors have been long and favorably known to and sought after by the public; that it has contributed more improvements and "firsts" than any of its competitors; that its motors are among the best, if not the best, on the market; that it makes a wider range of sizes in both lines than most of its competitors; that it maintains

²⁰ This naturally raises the question: Why have the policy if respondent can secure single dealing from 95% of the dealers without it? The commercial reasons therefor were never satisfactorily explained to this examiner (Tr. 1593-5).

schools for the training of dealers and service personnel at great expense; that it spends more on advertising than any of its competitors, and in some years than all of its competitors did; and that it maintains more salesmen than any of its competitors. This is claimed to show that respondent's often dominant, always substantial, share of the market was not due to its exclusive dealing policy. But the record shows the latter to have been consistently adhered to since respondent's organization. On this record, and from the very nature of the "policy" it is impossible to say that it did not contribute, and contribute strongly, to its position of affluence and economic power in the industry and with its necessarily insulating effect against competition, inevitably contributes to the maintenance of that position.

52. Respondent has proved, and it is so found, that from respondent's incorporation in 1936 to May 15, 1951 79.5% of its Evinrude dealers had had no previous experience before becoming such, and 69.8% of Johnson dealers had likewise had no previous experience in selling outboard motors before becoming dealers. Johnson sent out 3,000 questionnaires to obtain this information and received back 2,215 replies; Evinrude sent out 2,200 questionnaires and received back 1,941 replies. Broken down further, Johnson had 898 replies from dealers who became such prior to World War II, 636 of whom had had no previous experience in selling outboard motors prior to becoming Johnson dealers; 212 had had such experience. Of 1,317 replies from dealers who became such since World War II, 911 had had no previous experience; 406 had had. Comparable data for Evinrude showed of 957 replies of pre-World War II dealers, 792 had had no previous outboard experience but 157 had had; and of 984 replies from post-World War II dealers, 682 had had no previous outboard selling experience but 297 had had. Respondent has also shown, and it is so found, that its dealer turnover between 1941 and May 15, 1951 was 53% for Johnson dealers and 73% for Evinrude dealers. This evidence is claimed by respondent to show that outlets with no previous outboard experience can be developed into dealers, and this is so found also. But that can be no justification for respondent foreclosing experienced and "developed" dealers from its competitors or their distributors. The fact that the latter can go the longer and more expensive route is no answer to the law's evident command that they should have equal competitive opportunity to sell through all dealers, "developed" as well as ignorant. Here they have been walled off from the best outlets and left to persuade and train newcomers.

53. Next, respondent has proved, and it is so found, that a number of manufacturers of outboard motors have entered the industry since respondent's organization in 1936; that as of 1951, these were all still

actively engaged therein; that during this period some of its competitors have increased their business while others have lost ground; therefore, that its sales practices had no actual, and have no potential, effect on competition. This same claim was made, argued and laid to rest in the Dictograph Products, Inc. case, *supra*. Furthermore, the record shows that in 1946 it cost a capital outlay of \$1,500,000 to produce one size motor, the cost being substantially higher now, and \$350,000 to add one more size.

54. Respondent has also shown, and it is so found, that its dealers are primarily engaged in a wide range of other pursuits ranging from marine dealers and sporting goods stores to undertakers, optometrists, insurance agents and barbershops. Then, by taking 18 of the most prevalent of these occupations and going to the 1948 U.S. Census for the number of such establishments in the nation, respondent arrives at the figure of 963,551 potential outboard motor dealers prospects as a basis for argument that there are plenty of prospects available to competitors. This argument ignores the fact that outboard business is geographical as well as seasonal; that there are many unprofitable areas for outboard sale in the nation; that it takes from one to three or more years to develop a dealer; that it takes six months to a year to train service mechanics; that respondent has many, if not most, of the best dealers in some localities and that as respondent itself asserts there is a relatively low saturation point for the number of worthwhile outlets. Lastly, this "plenty of business for everyone" argument was likewise interred by the Dictograph decision.

55. All this evidence of economic necessity or justification was ordered received and considered by the remand. It has been so received, considered and is rejected for the reasons stated. In its remand, the Commission did not hold or indicate that any or all of it was necessarily considered as a defense or justification except by the implication arising from ordering it received and considered. There is no Commission opinion since then so holding. On the contrary, since remand, the Commission has successfully defended appeals in Dictograph Products, Inc. and Anchor Serum Company, in which much of this same evidence was rejected by it and the two Circuit Courts of Appeals have affirmed. The hearing examiner is of course bound to follow these decisions. To sustain as defenses the evidence summarized in paragraphs 49-54, *supra*, would, as the Second Circuit said in another connection "quite effectually draw the teeth of Section 3 and of the anti-trust laws generally"²¹ and in effect amend it to provide exemption for all those sellers who supply side line products only.

²¹ 217 F. 2d §21.

56. The instant case is far stronger than the Dictograph case. Dictograph's sales volume was almost \$2,000,000 a year, respondent here in 1950 on Johnson and Evinrude alone sold more than \$17,000,000; Dictograph is third largest in its industry, respondent here is the largest, accounting for never less than 33% up to 50% of sales; Dictograph had one-fifth of the prime dealers, respondent had no less than one-third of all dealers. Furthermore, there is here more substantial evidence of inability of respondent's competitors and their distributors to secure adequate outlets because of respondent's "single dealing practice and policy," and some evidence of loss of sales by respondent's competitors.

57. Respondent's counsel argues that the Dictograph case is not in point, because hearing aids are the sole product handled by Dictograph dealers whereas outboard motors are a side line to other businesses. To the hearing examiner this is a distinction without a difference. Hearing aids are a side line to many dealers. The law makes no differentiation in the "goods, wares and merchandise" as to whether they are main or incidental products to a dealer. Lastly, outboard motors are no more of a side line or incidental line than hog cholera serum, nail polish, or salt were to the dealers involved in the following cases:

Anchor Serum v. F.T.C., 217 F. 2d 867.

F.T.C. v. Revlon Products Corporation, Docket 5685.

International Salt Co. v. U.S., 332 U.S. 392.

58. The conclusory finding, therefore, is that respondent has, in commerce, sold its outboard motors on the condition, agreement or understanding that the purchasers thereof would not deal in the outboard motors of respondent's competitors and that the effect thereof has been and may be to substantially lessen competition and tend to create a monopoly.

CONCLUSIONS OF LAW

1. Respondent has sold its Johnson and Evinrude outboard motors to purchasers thereof in commerce, for resale, on the condition, agreement or understanding that such purchasers will not deal in outboard motors manufactured and sold by competitors of respondent.

2. Because of such condition, agreement or understanding the great majority of purchasers from respondent have refused to deal in, and in fact have been prevented from dealing in, competitive products.

3. As a result thereof, such purchasers have been deprived of their freedom to deal in all makes of outboard motors. That such purchasers may or do wish to deal in one make of outboard motors only is no

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defense. That they must be left free to do so, if they wish, is the primary purpose of Section 3 of the Clayton Act.

4. As a result of this exclusive dealing condition of sale, respondent's competitors and their distributors have been foreclosed from a substantial segment of the best marketing outlets, have been relegated to creating, training and developing inexperienced potential outlets and have thus been hampered and restrained in marketing their products.

5. The number of the best marketing outlets thus foreclosed by respondent constitutes both quantitatively and qualitatively a substantial and important segment of outboard retail distribution.

6. As a result of this exclusive dealing condition of sale, respondent's competitors have suffered loss of sales, which condition will, in all probability, continue if not become more marked.

7. The effect has been and will be to substantially lessen competition between respondent and its competitors, and this exclusive dealing condition of sale has the tendency to create a monopoly in respondent in the sale of such outboard motors.

8. The acts and practices as herein found constitute a violation of the provisions of Section 3 of the Clayton Act (15 U.S.C.A. 14).

ORDER

It is ordered, That the respondent, Outboard Marine and Manufacturing Company, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offer for sale, sale or distribution of outboard motors for boats, or parts therefor, or other similar or related products in commerce, do forthwith cease and desist from:

1. Selling or making any contract or agreement for the sale of any such products on the condition, agreement or understanding that the purchaser thereof shall not use, or deal in, or sell, outboard motors or parts therefor, or other similar or related products supplied by any competitor or competitors of respondent.

2. Enforcing or continuing in operation or effect, any condition, agreement, or understanding in, or in connection with, any existing contract of sale, which condition, agreement, or understanding is to the effect that the purchaser of such products shall not use or deal in outboard motors or parts therefor, or other similar or related products supplied by any competitor or competitors of respondent.

ON APPEAL FROM INITIAL DECISION

Per Curiam:

We are of the opinion that the issues presented in this matter are basically the same as those previously decided by the Commission in

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Order

Maico Company, Inc., Docket 5822; *Dictograph Products, Inc.*, Docket 5655, aff'd, 217 F. 2d 821 (2 Cir. 1954), cert. den., 349 U.S. 940 (1955); *Anchor Serum Company*, Docket 5965, aff'd, 217 F. 2d 867 (7 Cir. 1954); *Harley-Davidson Motor Company*, Docket 5698; *Revlon Products Corp.*, Docket 5685; and *Beltone Company*, Docket 5825. The trial record fully supports a conclusion of probable injury to competition through the foreclosure of competitors from a substantial and highly desirable portion of the outboard motor market.

Upon the basis of our review of the whole record herein, respondent's appeal is denied and the initial decision is adopted as the decision of the Commission.

FINAL ORDER

Respondent, Outboard, Marine & Manufacturing Company, having filed on September 26, 1955, its appeal from the initial decision of the hearing examiner in this proceeding; and the matter having been heard by the Commission on briefs and oral argument; and the Commission having rendered its decision denying respondent's appeal and adopting the initial decision as the decision of the Commission:

It is ordered, That respondent, Outboard, Marine & Manufacturing Company, 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 the order contained in said initial decision.

IN THE MATTER OF
THE YALE AND TOWNE MANUFACTURING COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (a)
OF THE CLAYTON ACT

Docket 6232. Complaint, Sept. 16, 1954—Decision, June 28, 1956

Order dismissing, for lack of reliable evidence to support a desist order, complaint charging one of the nation's largest manufacturers of industrial trucks, with discriminating in price between customers through use of quantity discount plans.

Mr. William H. Smith and Mr. Brockman Horne for the Commission.

Milbank, Tweed, Hope & Hadley, of New York City, for respondent.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

GRANTING RESPONDENT'S MOTION TO DISMISS

The complaint here charges that by reason of respondent granting single order quantity discounts, and cumulative volume discounts, available to all, on the sale of its industrial lift trucks, respondent has diverted business to itself from competitors who do not grant such discounts, and that there is a reasonable probability that such discounts will so divert business whereby competition in respondent's line of commerce is or may be substantially lessened and hindered and that such discounts have a dangerous tendency to create a monopoly in respondent. Answer admitted the descriptive and jurisdictional facts, the respondent's acts and practices charged, in substance, but denied the effects thereof charged. At the close of proponent's evidence, respondent moved to dismiss for failure to adduce sufficient substantial, reliable, and probative evidence of the results and effects charged as to make out a prima facie case. After argument by contending counsel said motion was granted. Pursuant to the Commission's Rules of Practice and after consideration of proposed findings conclusions submitted by respondent's counsel, the hearing examiner therefor makes the following:

FINDINGS OF FACT

1. Respondent Yale & Towne Manufacturing Company is a corporation, organized, existing and doing business under the laws of Connecticut with its principal office located in the Chrysler Building, New York 17, New York.