

Decision

IN THE MATTER OF
INSTO-GAS CORP.ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 3 OF THE
CLAYTON ACT

Docket 5851. Complaint, Feb. 21, 1951—Decision, Dec. 19, 1957

Order dismissing for lack of proof, charges that one of the largest operators in the industry concerned, with principal office in Detroit, Mich., violated section 3 of the Clayton Act by tying the lease or sale of propane gas cylinders to the use of propane gas and equipment or appliances sold by it.

Mr. Rufus E. Wilson and Mr. Arthur Edgeworth supporting the complaint.

Fischer, Sprague, Franklin & Ford of Detroit, Mich., by *Mr. Richard Ford*, for respondent.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

On February 21, 1951, the Commission issued its complaint charging respondent with the violation of section 3 of the Clayton Act in connection with its business of leasing or selling cylinders for containing compressed propane gas, selling propane gas for use in filling and refilling said cylinders and selling a line of equipment for use with said cylinders. The complaint further alleged that respondent was among the largest owners, lessors, or vendors of cylinders in the United States for containing compressed propane gas and vendors of such equipment as are used in connection therewith. The violation of section 3 was alleged to consist of tying the lease or sale of the cylinders to the use of propane gas and equipment or appliances sold by respondent.

Respondent's answer admitted the jurisdictional allegations of the complaint and the alleged conditions attached to the leasing of its cylinders, denied the allegations in regard to cylinder sales or appliance sales and also denied the other material allegations of the complaint. Further answering, respondent set up certain affirmative defenses which will be dealt with in the findings of fact.

Hearings were held before Hearing Examiner Webster Ballinger at which evidence in support of and in opposition to the allegations of the complaint was adduced. Upon completion of the hearings and after proposed findings of fact, conclusions of law and orders and the reasons therefor had been filed by both sides, the hearing examiner, on May 12, 1952, issued his initial decision including an order to cease and desist from the practices complained of.

On September 24, 1954, the Commission sustained the appeal of respondent from the hearing examiner's initial decision and ordered the case reopened and remanded to the hearing examiner for further proceedings in conformity with the Commission's written opinion. The Commission, among other things, decided that the record did not afford adequate basis for an informed determination as to whether or not the effect of respondent's practices may be to substantially lessen competition or create a monopoly.

During the proceedings before Hearing Examiner Ballinger, he had, on motion of counsel supporting the complaint, over objection of respondent, stricken from the record certain testimony and exhibits offered in support of respondent's affirmative defense set up in the answer. Exception by respondent to this action was included in the appeal to the Commission. While not passing upon the evidentiary value of the stricken testimony and exhibits, the Commission, in its written opinion, indicated that this evidence should be considered.

Subsequent to the remand by the Commission, Hearing Examiner Ballinger was retired from Government service and Hearing Examiner Cox was, on October 21, 1954, appointed to serve in his stead.

On June 19, 1956, no additional evidence having been received, the undersigned was appointed as hearing examiner herein to replace Hearing Examiner Cox. Delay in proceeding since the remand was occasioned by representations of counsel supporting the complaint that difficulties were being encountered in obtaining the desired information and data.

On March 4, 1957, hearing was held before the undersigned to take testimony and evidence in accordance with the Commission's remand. In lieu of testimony a stipulation of counsel was offered and received. This stipulation among other things included certain additional exhibits offered by each side, which it was agreed might be received in evidence subject to the objection of the opposite side; a re-offer by respondent of the exhibits and testimony heretofore mentioned as stricken by Hearing Examiner Ballinger; an objection by counsel supporting the complaint to these exhibits and testimony being received; an agreement that upon acceptance of the stipulation and action by the hearing examiner upon the re-offer of respondent's exhibits and testimony, the record might be closed so far as proof was concerned.

The record was closed as to proof on March 4, 1957, but subsequently reopened on March 18, 1957 by order of the hearing examiner. Respondent's re-offered exhibits and testimony previously stricken by Hearing Examiner Ballinger were received in evidence. They were as follows: Respondent's exhibits 6 to 46 inclusive; 49 to 58 inclusive; 60

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to 64 inclusive and the witnesses Evans, White, Thomas, Reymer, Bogue, and Cedarberg (cross-examination). The record was then again closed as to proof.

Both sides were given the opportunity to and subsequently did file new or supplementary proposed findings, conclusions and the reasons therefor. The matter is now before the hearing examiner for a new initial decision. After carefully reviewing the entire record including that which was before Hearing Examiner Ballinger, the Commission's Opinion issued in connection with the order of remand, and that which has been placed in the record since then, the hearing examiner makes the following findings as to the facts, conclusion drawn therefrom and order. All proposed findings and conclusions by both sides not found or concluded are hereby specifically rejected.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Insto-Gas Corp. is a corporation organized and existing under and by virtue of the laws of the State of Michigan with its office and principal place of business located at 998 E. Woodbridge Avenue, Detroit, Mich. It is not domesticated or licensed to do business in any other State and does not hold any type of license or permit in any other State.

PAR. 2. Respondent is now and for many years last past has been engaged in the business of leasing cylinders used as containers for compressed propane gas, the sale of propane gas for use in filling or refilling said cylinders and the sale of equipment as appliances (gas burning torches, soldering irons, plumber's furnaces, etc.). The cylinders are leased and the gas and equipment are sold under the name "Insto-Gas." The word "Insto" is a registered trademark of respondent's and the combination "Insto-Gas" is added to the name of each product to identify it as respondent's. These products are used by plumbers, electricians, and other craftsmen for welding and other commercial purposes wherever portable heat is required.

PAR. 3. In the course and conduct of its business respondent causes its propane gas cylinders when leased and its propane gas appliances and equipment when sold to be transported from its place of business in Detroit, Mich., or other places of origin to the lessees and vendees of such products in various other States of the United States and in the District of Columbia. Respondent maintains now and has maintained for a number of years last past a substantial course of trade in said products between and among various States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of its said business respondent is now and for several years last past has been in competition in commerce with corporations, firms, partnerships, and individuals engaged in like commerce in leasing or selling similar type cylinders for containing propane gas, the sale of propane gas for use in filling or refilling the same and in the sale of equipment or appliances described in paragraph 2 hereof for use with such cylinders.

PAR. 5. Respondent's cylinders are manufactured for it by another concern and like those of its competitors conform in construction with specifications established by the Interstate Commerce Commission, but in one respect are unlike other competitive cylinders in that some of them are designed to hold only 5 pounds of compressed gas and the others are designed to hold only 18 pounds of compressed gas. No competitive cylinders are designed to hold only 18 pounds of compressed gas and it is this size cylinder that constitutes the great majority of those leased by respondent. Another size cylinder sold or leased by respondent's competitors in substantial volume is a cylinder designed to hold 20 pounds of compressed gas. Other propane gas cylinders have capacities ranging from 25 to 100 pounds.

PAR. 6. The gas respondent sells under the trade name "Insto-Gas," is known as propane gas. It is a liquefied petroleum gas that has been commercially purified and is available to the public in commercial quantities in all sections of the United States under many different trade names.

PAR. 7. Propane gas is a dangerous substance. It is inflammable and explosive when mixed with air in certain proportions and is under great pressure as ordinarily transported, stored, and used. When used with such appliances as are sold by respondent it must be contained in specially constructed cylinders.

PAR. 8. The Interstate Commerce Commission by regulation prohibits the transportation of propane in cylinders having been filled or refilled otherwise than by the owner's consent. A number of States have by statute and regulation prohibited the refilling of cylinders with propane other than by the owner or with his consent.

PAR. 9. In Detroit respondent has its new cylinders filled with "Insto-Gas." Then it ships them to its authorized distributors in other States of the United States, who are usually also dealers in paint, plumbing, heating, and mill supplies. By the use of three forms of contracts respondent leases its cylinders on condition that they can be refilled only with propane gas purchased either direct or through any of the respondent's distributors or authorized dealers. Prior to 1952 the leases also provided that the lessee use only "Insto-Gas"

equipment and appliances with "Insto-Gas" cylinders. That provision of the lease has been discontinued.

PAR. 10. The first form of contract is with authorized distributors, of which there are between 150 and 200, located in every State of the Union except the States of Arizona, Nevada, and New Mexico. This contract provides in part as follows:

(7) CYLINDER LEASES: Aforesaid lease charge on any cylinder shall constitute the entire lease charge for such time as the distributor wishes to keep said cylinder, as a container for Insto-Gas. The distributor agrees that all Insto-Gas cylinders leased to him under this agreement, shall remain the property of the company at all times. The distributor agrees to have the company cylinders refilled only at such filling stations as shall be authorized in writing by the company.

(8) The distributor agrees to have the company's cylinder lease agreements (on forms supplied by the company) signed in triplicate by every customer to whom the distributor delivers the company's products, and to send said signed cylinder lease agreements to the company within a reasonable time. The distributor further agrees to deliver Insto-Gas cylinders only to customers having a cylinder lease agreement with the company.

The second form of contract is the cylinder lease agreement referred to in the first form. Prior to 1952 that form provided in part as follows:

(3) The lessee agrees that all INSTO-GAS cylinders leased to him, under this agreement, shall remain the property of the company at all times. The lessee agrees to purchase from the company, either direct or through any of the company's distributors or authorized dealers, all the gas used by the lessee in the operation of INSTO-GAS cylinders, and to use only INSTO-GAS equipment and appliances with INSTO-GAS cylinders. The customer agrees that he will not use INSTO-GAS as a motor fuel.

Since 1952, the comparable provision in this form has been changed to read as follows:

(3) The lessee agrees that all Insto-Gas cylinders leased to him under this agreement shall remain the property of the company at all times. The lessee agrees to purchase from the company, either direct or through any of the company's distributors or authorized dealers, gas used by the lessee in the operation of Insto-Gas cylinders. The customer agrees that he will not use Insto-Gas as a motor fuel.

The third form of contract is with the filling stations referred to in the first form who maintain bulk refilling stations numbering approximately 200. In this contract respondent is the buyer and the bulk filling station is the seller. It reads in part as follows:

Seller agrees to sell to buyer and buyer agrees to purchase from seller, buyer's liquefied petroleum gas requirements for use in resale in buyer's cylinders only from seller's bulk plants * * *.

VIII Cylinders

It is understood and agreed that seller will not be obligated to fill any cylinders presented by buyer for filling which cylinders are not owned or leased by buyer.

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Seller will not be obligated to fill any cylinders not approved by the Interstate Commerce Commission for the transportation of this commodity. Buyer may arrange for the seller to make repairs to buyer's cylinders and valves on a basis of actual cost of parts and labor. It is further understood and agreed that any fuel losses resulting from faulty conditions of buyer's cylinders or valves are for the buyer's account.

PAR. 11. As a matter of actual practice, when a gas cylinder leased from respondent becomes empty, the lessee of the cylinder takes it back to the authorized distributor of respondent from whom he obtained the full cylinder or another such authorized distributor and gets another full cylinder in its place, paying only for the gas. When respondent's authorized distributor accumulates a number of empty cylinders he takes or sends them to the nearest bulk refilling station with which respondent has a contract. There the valves on the cylinders are tested for leaks and the retest dates of the cylinders themselves shown on each cylinder are examined. If the valves do not leak and the time is not past the retest date of the cylinders, they are refilled and returned to respondent's distributor for leasing or further exchange with other lessees. The bulk refilling station then bills respondent for the propane gas put in the cylinders and respondent in turn bills its distributor.

PAR. 12. Of course respondent makes a profit on the gas by charging its distributor a higher price than the bulk refilling station charges respondent for it. Respondent's distributor makes a profit on the gas by charging the lessee a higher price than respondent charges the distributor for it.

PAR. 13. Competitive bulk stations for filling or refilling cylinders with compressed propane gas operate in the various localities in which respondent maintains contract bulk refilling stations, whose prices for propane gas in some localities may be lower than the prices the lessees have to pay for the gas in the manner they have to acquire it under the terms of their lease. In at least one instance the price of the competitive station was \$1.60 while that charged the lessees by the distributor of respondent was \$3.50 for refilling an 18-pound cylinder. These competitive bulk filling stations can and do refill any cylinders in accordance with the specifications for refilling such cylinders when brought to them for refilling by the owner of such cylinder.

PAR. 14. Prior to the remand of this proceeding the evidence showed that respondent had more than 200 authorized distributors, some of whom were located in every state of the Union except the States of Arizona, Nevada, and New Mexico. It also had 150 to 200 contract bulk refilling stations at locations where they would be available to the authorized distributors. From the time respondent

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started its business in 1936 up until October 1951 it had leased approximately 80,000 18-pound propane gas cylinders, which were embraced in approximately 11,000 lease agreements entered into by respondent with its customers. The gross aggregate of respondent's annual sales in 1950 amounted to \$800,000. Prior thereto the annual average was between \$600,000 and \$700,000. The record presently shows that the number of 18-pound cylinders leased by respondent during the years 1954, 1955, and 1956 was as follows:

PAR. 15.

	1954	1955	1956
	10,934	12,658	9,954

The record also now shows the sales of propane gas by all suppliers in the United States including respondent to be as follows:

	Total U.S. sales in pounds ¹	Respondent's sales, in pounds	Respon- dent's share of market
1949.....	5,950,242,160	2,424,026	0.00040
1950.....	8,218,396,240	3,277,081	.00039
1951.....	10,255,669,600	3,393,639	.00033
1952.....	10,657,642,800	3,427,675	.00032
1953.....	12,009,778,800	3,468,512	.00029
1954.....	12,585,642,880	3,505,731	.00028
1955.....	13,824,321,040	3,815,532	.00027

¹ From Bureau of Mines Report No. MMS-2531 (7/27/56). Gallons converted into pounds by multiplying by 4.24 (weight of one gallon at 60° C.)

PAR. 16. A table showing respondent's yearly gross receipts from sale and lease of its products for the years 1947 through 1956, broken down into the various categories of cylinders, propane gas and equipment has been prepared by each counsel from exhibit "A" and "I" to the stipulation. There are only minor differences. The table prepared by respondent's counsel reads as follows:

	Cylinders	Gas	Tools	Total
1949.....	\$132,872 (21%)	\$300,152 (47%)	\$202,070 (32%)	\$635,094
1950.....	204,591 (24%)	374,514 (43%)	291,354 (33%)	870,459
1951.....	180,468 (22%)	387,777 (47%)	248,414 (31%)	816,659
1952.....	159,476 (20%)	376,058 (47%)	260,497 (33%)	796,031
1953.....	169,605 (21%)	332,210 (41%)	308,020 (38%)	809,835
1954.....	221,746 (23%)	349,318 (37%)	381,710 (40%)	952,774
1955.....	263,836 (24%)	377,261 (33%)	479,964 (43%)	1,121,061
1956.....	226,127 (21%)	356,311 (33%)	504,893 (46%)	1,087,331

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The value of this table is that it separates respondent's gross income for each year into the various categories. Such figures were not shown in the record prior to the remand.

PAR. 17. The stipulation among other things also includes the following:

A list showing the number of cylinders leased by respondent for each of the years 1949 through 1954 in certain areas and also the total pounds of propane gas purchased by respondent in each such area and the names of competing gas merchandisers in each such area.

Exhibit "D" to the stipulation attempts to compare the cylinders leased throughout the country by respondent during 1949 and 1950 with the number of 18- and 20-pound cylinders manufactured in those years. Only 9 of 14 known manufacturers inquired of answered and the exhibit states that no information is available as to the actual number of cylinders produced by all manufacturers. The value as evidence these tables and others made a part of the stipulation will be considered.

PAR. 18. According to proposed findings submitted, the stipulation and the exhibits thereto the issues have now been limited to two questions:

(1) Whether the effect of the restrictive terms of respondent's leases to the users of its cylinders, thereby preventing the lessees from purchasing refills of propane gas from respondent's competitors, may be to substantially lessen competition or tend to create a monopoly in the sale of propane gas.

(2) Whether the protection of respondent's trade mark and/or the protection of the public in the use of propane gas, an inflammable and explosive substance, the shipping in commerce and the use of which is the subject of regulation by the Interstate Commerce Commission and the laws of many States, justify the restrictions contained in respondent's leases to the users of respondent's cylinders.

PAR. 19. This action was brought under Section 3 of the Clayton Act, the pertinent portion of which reads as follows:

That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, * * * for use, consumption or resale within the United States * * * or the District of Columbia * * * on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors, of the lessor or seller, where the effect of such lease, sale or contract for sale, or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly.

PAR. 20. In considering the first question listed above, it cannot be doubted that respondent's competitors in the sale of propane gas are effectively cut off from competing for the sale of propane gas to refill respondent's cylinders under lease to the users thereof. Competition in the sale of propane gas has been lessened to that extent. Is this sufficient to violate the act?

PAR. 21. Counsel supporting the complaint contends that it is. They argue that the dollar figures in the sale of propane gas each year by respondent to its 18-pound cylinder users represents a substantial share of the relevant market which is composed of 18- and 20-pound cylinders. We know, from the last table shown above, the dollar value of the propane gas sold by respondent each year under consideration. We also know that respondent only sells in 18-pound and 5-pound cylinders and that a great majority of respondent's leased cylinders are of 18-pound capacity. This is on a national basis. There is no reliable figure on a national basis for the dollar value or amount in pounds of gas sold by respondent's competitors in 20-pound cylinders. Exhibit "B" to the stipulation shows that there are 153 producers of liquefied petroleum gases. Information was requested from each of these as to the propane gas (in pounds and dollar volume) sold in 18- and 20-pound containers in 1949 and 1950. Only 7 out of the 153 reported sales by pounds and dollar volume. A table showing the reports made by these seven is not reliable even for their sales when the footnotes are considered. The only figure of any significance, comparing respondent's annual sales of propane gas with the sale of propane gas by others, is exhibit "C" to the stipulation. This shows that for the year 1949 respondent sold 2,425,026 pounds of propane while the total U.S. sales in pounds was 5,950,242,160, or respondent sold four-tenths of 1 percent of the total sold. Similar figures and percentages are given for other years. Of course this includes all sales in bulk and all sales in all sizes of cylinders.

PAR. 22. Exhibit "B" to the stipulation shows an effort to obtain the sales of respondent in 18-pound cylinders and sales of competitors in 20-pound cylinders for the years 1949 and 1950 in different marketing areas. Due to the fact that the records of many of respondent's competitors in the sale of propane gas were not kept on the basis of rated capacity of the cylinders filled but only in pounds of gas sold, the information obtained was of slight value. In the marketing areas of Cleveland, Ohio, Detroit, Mich., Chicago, Ill., and Pittsburgh, Pa., only 2 out of 20 answering the inquiry reported any record of sales in 20-pound cylinders. Thus, we are without any responsible guide or even any informed estimate in comparing either

nationally or in any particular marketing area, the volume of respondent's sales in 18-pound cylinders in 1949 or 1950, or any other year with sales by respondent's competitors in 20-pound cylinders.

PAR. 23 Counsel supporting the complaint argue in effect that competition is substantially lessened when it is shown that respondent's sales in 18-pound cylinders were in a substantial amount without any comparison with sales by competitors, or any information as to respondent's comparative standing in the industry. It is contended that the decision by the District Judge in the Standard Stations case ¹ was to that effect and that the Supreme Court in that case ² recognized the correctness of that standard of proof. It is further contended that this position is strengthened by the fact that in the Richfield Oil Corp. case the same standard of proof was applied by the District Judge ³ and the case affirmed by the Supreme Court ⁴ on the basis that the issues were substantially the same as in the Standard Stations case.⁵

PAR. 24. In the Standard Stations case the Supreme Court found, in addition to the other things mentioned, that the defendant, Standard Oil Co., was a major competitor in the field at the time the system of exclusive dealing contracts were inaugurated and had remained so, being the largest seller of gasoline in the area. In the *Richfield Oil Corp.* case ⁶ the district judge found that the agreements affected a substantial number of outlets and a substantial number of products whether considered comparatively or not. This is a finding that the agreement did affect a substantial number of outlets and a substantial number of products when considered comparatively. It is true that no evidence is mentioned in the opinion justifying this portion of the finding. However, it was a specific finding and there must have been evidence in the record justifying it or it would not have been made. In the *International Salt* case ⁷ also cited by counsel in support of their position, the Court said that it was established by pleadings or admissions that the International Salt Co. was the country's largest producer of salt for industrial use. The contracts in that case were in regard to the industrial use of salt, and required the lessees of the Salt Co.'s. patented machines to use in them only salt bought from the lessor.

¹ U.S. v. *Standard Oil of California, et al.*, 78 F. Supp. 850.

² *Standard Oil of California, et al. v. U.S.* 337, U.S. 293.

³ U.S. v. *Richfield Oil Corp.*, 99 F. Supp. 280.

⁴ *Richfield Oil Co. v. U.S.* 343, U.S. 922.

⁵ See footnote 2, *Supra*.

⁶ See footnote 3, *supra*.

⁷ *International Salt Co., Inc., v. U.S.* 332, U.S. 392.

PAR. 25. In the *Dictograph Products* case ⁸ the Court of Appeals for the Second Circuit stated in part:

Where the alleged violator dominated or was a leader in the industry, proof of such fact was, at an early stage, determined to be sufficient predicate from which to conclude that the use of exclusive-dealing contracts was violative of section 3 and other factors appear to have been largely ignored (citing cases). More recently, the Supreme Court extended the rule to business organizations enjoying a powerful, though clearly not dominant position in the trade and doing a substantial share of the industry's business by means of these contractual provisions.⁹

PAR. 26. The Supreme Court recognized in the *Standard Stations* case that section 3 was not intended to reach every remote lessening of competition. It then went on to say later in the opinion that the cases do indicate that some sort of showing must be made as to the actual or probable economic consequences of the agreement and that Standard's requirements contracts, affecting a gross business of \$58 million, comprising 6.7 percent of the total in the area, goes far towards supporting the inference that competition has been or probably will be substantially lessened.¹⁰ This inference was undoubtedly further supported by the fact, previously mentioned, that Standard was a major competitor in the field, being the largest seller of gasoline in the area. Here there is no such showing, nor is there any showing from which a similar inference can be made, only the fact that respondent's receipts from the sale of propane gas in 1949 were \$300,152 and in 1950 were \$291,354 and that the great majority of such sales were in 18-pound cylinders. These figures could be sufficient to cause a substantial lessening of competition between respondent and its competitors for the business of refilling cylinders of 18- and 20-pound capacity, but there is nothing in the record from which such inference can be drawn. In some lines of business these figures might put respondent in a dominant position in the industry. In other lines of business they probably would not cause even a remote lessening of competition. The burden is on counsel supporting the complaint to

⁸ *Dictograph Products Inc., v. F.T.C.*, 217 F. 2d 821.

⁹ In *Anchor Serum Co., v. F.T.C.*, 217 F. 2d 867 the record showed actual effect upon competition. In the matter of *Reclon Products*, docket No. 6519, respondent was the largest seller of lipstick and actual effect on competition is shown. In *Beltone Hearing Aid*, docket No. 5825, the record showed respondent to be one of the largest manufacturers, ranking fourth in the industry. In docket No. 5698, *Harley-Davidson Motor Co.* was the largest domestic manufacturer of motorcycles. In docket 5882, *Outboard Marine & Manufacturing Co.*, respondent's comparative position in the industry is shown to range between 54 percent and 82 percent of the total sales.

¹⁰ Other later cases cited containing language which it is contended imply a different standard of proof, do not involve section 3. See *Transamerica Corp. v. Board of Governors*, Federal Reserve System 296 F. 2d 170; *Times-Picayune Publishing Co., et al v. U.S.* 345 U.S. 594; *U.S. v. E. I. du Pont de Nemours*, decided June 3, 1957 by Supreme Court.

produce evidence showing or from which a logical inference can be drawn that respondent's leasing practices may be to substantially lessen competition or tend to create a monopoly. That burden has not been fulfilled and it is so found.

PAR. 27. It is believed to be incumbent on the hearing examiner to pass on all the issues raised by the pleadings, the proposed finding and conclusions, in view of the remand. In support of its affirmative defense, respondent claims that regardless of the effect of its practices on competition the facts in this case bring it within the rule announced in the *Sinclair Refining Co.* case.¹¹ In short, this contention is that respondent's leasing practices are not in violation of section 3, regardless of their effect on competition, because the leases to the users do not undertake to limit the lessees' right to use propane gas furnished by competitors but only prevent the lessees from using competitors' gas in respondent's cylinders. The hearing examiner is unable to distinguish the holding in the *Sinclair* case from decisions in later cases on the same point which reject the principle contended for by respondent.¹² Hence this contention of respondent is rejected here.

PAR. 28. Respondent's other contentions come under the second issue in this case mentioned in paragraph 18. These contentions are in effect that it has a right to prevent its trade-marked cylinders from being used as containers for propane gas sold by others, that, its leasing practices are necessary to protect the public in the use of a dangerous substance, propane gas, and help prevent the public from violating Interstate Commerce Commission regulations and various state statutes and regulations designed for protection of the public.

PAR. 29. The cases cited in support of the position that respondent has the right to prevent its trade marked cylinders from being used for propane gas sold by others are contained in the proposed findings submitted to Hearing Examiner Ballinger and in respondent's appeal to the Commission. These cases generally support the principle that the user of a competitor's container for the sale of a competing product, where the purpose or the effect of such use enables the producer or retailer to pass off the user's product as the product of the seller originally using the container, is unfair competition. Respondent's contention might be applicable if its agreements with its distributors were under attack. Respondent's distributors obtain the cylinders by lease with the agreement that the cylinders will be refilled only at such

¹¹ *Sinclair Refining Co. v. U.S.* 261 U.S. 463.

¹² These cases are reviewed in *Judson L. Thompson Manufacturing Co., v. F.T.C.* 150 F. 2d 952 where contention similar to that made by respondent herein was rejected.

filling stations as shall be authorized by respondent. These distributors have the cylinders refilled for leasing to users and for exchange for cylinders brought in by lessees who are the actual users of the cylinders and the gas. If the distributors had respondent's cylinders refilled with the gas of a competitor and then leased them to users or exchanged them for empty cylinders brought in by the lessee-user they could pass off the gas of a competitor for that of respondent. But these agreements with their distributors by respondent are not in issue. It is the lease agreements with the users of respondent's cylinders that are attacked in the complaint. If the lessee-user had the right to have the cylinders refilled for his own use wherever he chose there could be no palming off of the gas of a competitor for that of respondent's because the lessee-user would know whose gas went into the cylinder. Respondent's restrictions in the lease with the lessor-user cannot be defended on the grounds of protecting respondent from unfair competition. Also the trademark law provides that the holder of a registered trademark may not use it to violate the antitrust laws of the United States.¹³

PAR. 30. The restrictions in the lease with the lessor-user cannot be defended in this case on the grounds that such restrictions are necessary to protect the public in the use of a dangerous substance or help prevent the public from violating Interstate Commerce Commission regulations or various State statutes designed for the protection of the public. No cases are cited in support of respondent's position on this, nor has the hearing examiner's attention been called to any statute or regulation imposing such duty on respondent. Furthermore, the only provisions of such statutes and regulations on which respondent seems to rely is the Interstate Commerce Commission regulation which prohibits the transportation in commerce of propane gas in cylinders having been filled or refilled otherwise than by the owner or with the owner's consent, and the various state statutes prohibiting the refilling of cylinders otherwise than by the owner or his consent. It is the retention of title to the cylinders by respondent without giving the lessee the right to have them refilled where he chooses that prevents the lessee-user from having the cylinders refilled by respondent's competitors, rather than any statute or regulation. The record shows that some competitors of respondent sell their cylinders instead of leasing them. The record also shows that respondent's competitors in the sale of propane gas can and do refill cylinders of all kinds in accordance with directions contained thereon when permitted by the owners.

¹³ Section 1115, Title 15, U.S.C.A.

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The record further shows that in actual practice respondent has no way of knowing who has which cylinder at any given time.

CONCLUSION OF LAW

The record now, as at the time of remand, does not afford an adequate basis for an informed determination as to whether the effect of respondent's practices may be to substantially lessen competition or tend to create a monopoly. It appearing that such information is unavailable, the proceeding should be dismissed.

ORDER

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

OPINION OF THE COMMISSION

By Tait, Commissioner:

On September 24, 1954, the Commission remanded this case to the Hearing Examiner for further proceedings since the evidence of record was not adequate to resolve the questions raised on appeal.

Pursuant to such remand, additional evidence, including testimony and exhibits previously stricken, was received and considered by the hearing examiner. On June 28, 1957, an initial decision was filed wherein the hearing examiner, in a well considered opinion, ordered dismissal of the complaint. The matter is now before us on cross-appeals from this initial decision.

Basically, the issues presented here are the same as those which existed at the time the Commission rendered its opinion upon remand. It is our view that the trial record now established will not support a conclusion that respondent has violated the provisions of section 3 of the Clayton Act as alleged in the complaint. Accordingly, the complaint should be dismissed.

An appropriate order will be entered adopting the initial decision as the decision of the Commission.

ORDER ADOPTING INITIAL DECISION DISMISSING COMPLAINT

This matter having come on to be heard by the Commission upon the cross-appeals of counsel supporting the complaint and respondent from the hearing examiner's initial decision dismissing the complaint, and the briefs and oral argument with respect to said appeals, and the Commission having determined, for the reasons appearing in the accompanying opinion, that an order should be entered adopting the initial decision as the decision of the Commission:

It is ordered, That the initial decision be, and it hereby is, adopted as the decision of the Commission.

Decision

IN THE MATTER OF

A. HARRIS & CO.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING
ACTS

Docket 6862. Complaint, Aug. 14, 1957—Decision, Dec. 19, 1957

Consent order requiring a furrier in Dallas, Tex., to cease violating the Fur Products Labeling Act by failing to comply with the labeling and invoicing requirements and by misrepresenting prices in advertising and otherwise failing to observe the advertising requirements.

Harry E. Middleton, Jr., Esq., for the Commission.

Thomas, Knight, Wright & Simmons, by Sol Goodell, Esq., of Dallas, Tex., for respondent.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

The complaint in this proceeding charges that A. Harris & Co., a corporation, hereinafter called respondent, has violated the provisions of the Federal Trade Commission Act, the Fur Products Labeling Act of 1951 and the rules and regulations promulgated under the last-named act by misbranding and falsely and deceptively invoicing and advertising fur products.

After issuance and service of the complaint, the respondent, its counsel and counsel supporting the complaint entered into an agreement for a consent order. The agreement has been approved by the director and assistant director of the Bureau of Litigation. The order disposes of the matters complained about.

The pertinent provisions of said agreement are as follows: Respondent admits all jurisdictional facts; the complaint may be used in construing the terms of the order; the order shall have the same force and effect as if entered after a full hearing and the said agreement shall not become a part of the official record of the proceeding unless and until it becomes a part of the decision of the Commission; respondent waives the requirement that the decision must contain a statement of findings of fact and conclusion of law; respondent waives further procedural steps before the hearing examiner and the Commission, and the order may be altered, modified, or set aside in the manner provided by statute for other orders; respondent waives any right to challenge or contest the validity of the order entered in accordance with the agreement; and the signing of said agreement is