

Decision

IN THE MATTER OF
SUN OIL COMPANY

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

Docket 6641. Complaint, Sept. 26, 1956—Decision, Jan. 5, 1959

Order requiring a gasoline supplier in Jacksonville, Fla., and adjacent territory to cease discriminating in price by selling gasoline to a favored service station customer at a lower price than it charged his competitors, entering into agreements with him to fix and maintain the resale price for its gasoline, and granting discounts or other considerations for that purpose.

Rufus E. Wilson, Esq., Ross D. Young, Jr., Esq., and John B. Clayton, Esq., for the Commission.

Leonard J. Emmerglick, Esq., of Washington, D.C.; Moffett, Frye & Leopold, by Henry A. Frye, Esq., of Philadelphia, Pa.; Rawle & Henderson, by Joseph W. Henderson, Esq., of Philadelphia, Pa.; and Osborne, Copp, Markham & Ehrlich, by Cyril C. Copp, Esq., of Jacksonville, Fla., for respondent.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

STATEMENT OF THE CASE

On September 26, 1956, the Federal Trade Commission issued its complaint against Sun Oil Company, a corporation (hereinafter called respondent), charging it with price discrimination in violation of Section 2(a) of the Clayton Act (hereinafter called the Clayton Act), 15 U.S.C. 12, *et seq.*, as amended by the Robinson-Patman Act, and unfair methods of competition and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act (hereinafter called the Act), 15 U.S.C. 41, *et seq.* Copies of said complaint together with a notice of hearing were duly served on respondent.

The complaint alleges in substance that respondent discriminated in price by the sale of its gasoline to one dealer at prices substantially lower than the prices charged other dealers in the same market area, and that respondent entered into an agreement with such dealer to fix and maintain the retail price at which he sold said gasoline. Respondent appeared by counsel and filed an answer admitting the corporate, commerce, competition and certain other factual allegations of the complaint, but

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denying any price discrimination in violation of the Clayton Act or any price-fixing agreement in violation of the Act.

Pursuant to notice, hearings were thereafter held before the undersigned hearing examiner, duly designated by the Commission to hear this proceeding, at various times and places from February 4, 1957, to December 30, 1957.

Both parties were represented by counsel, participated in the hearings and afforded a full opportunity to be heard, to examine and cross-examine the witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof. All parties filed proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof, and pursuant to leave granted presented oral argument thereon. All such findings of fact and conclusions of law proposed by parties, respectively, not hereinafter specifically found or concluded are herewith specifically rejected.¹

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. The Business of Respondent

The complaint alleged, respondent admitted, and it is found that respondent is a New Jersey corporation with its principal office and place of business located at 1608 Walnut Street, Philadelphia, Pa.

II. Interstate Commerce and Competition

The complaint alleged, respondent admitted, and it is found that it is now and for several years last past has been engaged in the offering for sale, sale, and distribution of gasoline in commerce in various States of the United States, including the City of Jacksonville, Fla., and adjacent territories. In the course and conduct of such business, respondent ships or otherwise transports its gasoline in tank cars, tankers, and trucks from its different refineries, terminals and distribution points, located in various States of the United States, to retail dealers located in the Jacksonville, Florida, area, and in various other states of the United States. All of such purchases by said retail dealers are and have been in the course of such commerce. There is now

¹ 5 U.S.C. § 1007(b).

and has been at all times mentioned herein a continuous stream of trade in commerce of said gasoline between respondent's refineries, terminals, and distribution points and said retail dealers. In the course and conduct of this business, respondent is in direct and substantial competition in commerce with other corporations, individuals and partnerships likewise engaged in the sale and distribution of gasoline.

III. The Unlawful Practices

The complaint contains two counts, one alleging price discrimination in violation of the Clayton Act, and the other alleging price fixing in violation of the Act, and they are considered *seriatim*.

A. The Price Discrimination

The issue here framed is one of alleged secondary-line price discrimination, in that it is contended that respondent sold its gasoline to a particular dealer in Jacksonville, Fla., at prices substantially lower than respondent charged its other dealers in the same market area. Respondent's answer admitted the sale at substantially lower prices to said dealer, but denied that such dealer was in the same market area as other dealers purchasing from respondent or was in competition with such other dealers, and denied that the effect of such discrimination in price may be to injure, destroy, or prevent competition with such other dealers, or others, or that such discrimination was in violation of Section 2(a) of the Clayton Act.

The facts with respect to the price discrimination itself are substantially undisputed. Respondent had some 38 retail dealers in Duval County, Fla., which may for the purposes of this decision be characterized as the Jacksonville area, most of whom were in the City of Jacksonville itself. These dealers are independent contractors who enter into contracts with respondent concerning the purchase of respondent's gasoline and oil, and who operate filling stations at which respondent's products are advertised and sold.

During 1955, Gilbert V. McLean as such an independent contractor operated a Sun Oil filling station located at the intersection of 19th and Pearl Streets in Jacksonville, Fla. In June of 1955, the Super Test Oil Company opened a competing station at the same intersection diagonally across from McLean's station. As established in the record, Super Test was a so-called "non-

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major" or "independent" brand of gasoline as compared with so-called "major" companies or "name" brands of gasoline, of which Sun Oil is one. During most of the time from June to December of 1955, the Super Test station sold its "Regular" gasoline at 26.9 cents per gallon while McLean sold his "Regular" gasoline for 28.9 cents per gallon. However, on three or four occasions between June and December of 1955, the Super Test station dropped its price substantially below 26.9, and as low as 21.9 on at least two occasions. Each time this occurred, McLean's sales of gasoline declined substantially. McLean complained several times to respondent about this situation, but nothing was done until December 1955. During that month the Super Test station reduced its prices several times on weekends, and respondent's salesman, Harry Harper, advised McLean that if it happened again respondent would try to do something.

On December 27, 1955, when McLean was still selling his gasoline for 28.9, Super Test dropped its price from 26.9 to 24.9. The same day respondent gave McLean a price allowance or discount of 1.7 cents per gallon and McLean dropped his retail price to 25.9, thereby reducing his margin of profit by 1.3 cents per gallon, the difference between the discount and the 3-cent reduction in the retail price of his gasoline. Respondent did not give this discount or lower price to any of its other retail dealers in the Jacksonville area. Approximately seven such dealers were in the same sales territory as McLean. This sales territory was one of three in the Jacksonville area established by respondent, and consisted roughly of the north one-third of Duval County. About six of these dealers were relatively close to McLean's station. This discrimination in price between McLean and respondent's other dealers continued until on or about February 16, 1956, when a price war broke out in the entire area and respondent reduced its wholesale or tankwagon price to all of its dealers in the area.

As a result, McLean's sales of gasoline increased substantially. In October 1955, he sold approximately 6,500 gallons, about the same as his sales in August and September. In November, 1955, he sold 5,900-odd gallons, in December, 8,300-odd gallons, while in January, 1956, after he reduced his price on December 27, he sold 32,100-odd gallons, almost four times as much as in December and five times as much as he averaged during August, September, October, and November. McLean's daily sales during February,

1956, until he went out of business on or about February 18, averaged approximately the same as January.

Counsel supporting the complaint called four of the Sun dealers who were in the same sales territory in Jacksonville, and the record establishes and it is found that they were in competition with McLean and adversely affected by the discriminatory price allowance granted McLean and denied them. From December 27, 1955 to February 16, 1956, they did not receive the discount given McLean and continued to sell their gasoline for 28.9 cents per gallon while McLean was selling the same product for 25.9 cents per gallon. Respondent contends that these other Sun dealers were not in the same competitive area as McLean, were not in competition with him, and therefore the granting of a lower price to McLean could not have had the effect of lessening competition or of injuring, destroying, or preventing competition with McLean. Respondent also contends that even if such dealers were in competition with McLean, counsel supporting the complaint has failed to establish that the effect of such discrimination may be to substantially lessen competition or to injure, destroy, or prevent competition with McLean, the statutory prerequisites of Section 2(a) of the Clayton Act.

With respect to respondent's first contention, the record establishes the contrary. The four dealers called as witnesses in support of the complaint were Calvin Peery, William Crabtree, Clair Winning, and Jesse McClung. Peery's station was located at the intersection of 11th and Main Streets, three blocks east and eight blocks south, and less than a mile from, McLean's station. There were received in evidence as Commission's Exhibit 21-A and respondent's Exhibit 5, maps of Duval County and Jacksonville showing the location of the various Sun stations as well as the amount of traffic flow past them. Main Street, as the name connotes, is the main thoroughfare running north and south through Jacksonville, and is also the route of U.S. 17 through Jacksonville. Pearl Street is a main artery running north and south parallel with Main Street, three blocks west of it. According to Respondent's Exhibit 5, while Main Street carries the heaviest volume of traffic, Pearl Street also carries a heavy volume of traffic, approximately one-half as much as Main Street but substantially in excess of the majority of streets in Jacksonville. Much of the traffic from the north and the northwest can proceed to the downtown area alternatively by way of either Pearl or Main Streets, and in the process pass either or both McLean's and

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Peery's stations, as well as McClung's and Winning's stations, to be considered hereinafter.

From December 27, 1955, until the general price reduction in February, Peery, as well as the others, paid a wholesale price of 1.7 cents per gallon more than McLean. During December, 1955, Peery sold 10,900-odd gallons of gasoline, which was approximately his monthly average for the last six months of 1955. In January, 1956, after the discount to, and price reduction by, McLean, Peery's gallonage dropped to 9,300-odd gallons, a decline in excess of 1,500 gallons. In fact, on only six days during January did Peery sell as much as he averaged per day during December. Peery was informed not only by Crabtree and McClung but by his own customers as well that McLean was selling Sun gasoline for three cents per gallon less. Peery complained to respondent about this and the discount to McLean but was advised that nothing could be done about it. The loss of customers, as well as the geographic proximity and pattern of traffic flow, clearly demonstrate that Peery's and McLean's stations were in competition with each other. The loss of gallonage clearly demonstrates the effect of the discriminatory allowance and reduced price.

McClung operated a Sun station at the intersection of 35th and Main Streets, east and north approximately one mile from McLean's station. There are eleven streets connecting Main Street with Pearl Street between McClung's and McLean's stations. McClung testified that most of his local trade came from west of his station, which is logical because most of the area east of his station is occupied by a large cemetery. McClung also testified that most local traffic originating west of him used Pearl Street in traveling downtown, which would take them past McLean's station. McClung's credibility was seriously impaired by what proved to be an obvious alteration of his sales records, and accordingly his testimony is not credited unless it is corroborated by the testimony of other witnesses or by established facts. As previously found, the record establishes that there is a substantial flow of traffic from the north and northwest which can easily choose between Pearl and Main Streets and readily pass either or both McClung's and McLean's stations. Independently of McClung's testimony, the record establishes that McClung was aware of the discrepancy in price occurring at McLean's station, that he and Crabtree called on McLean to ascertain what was occurring, and that McClung complained about the disparate

treatment to respondent, which latter fact was admitted by respondent. As with the others, respondent did nothing for McClung.

In spite of the apparent alterations of McClung's sales record for the days in December after the price allowance to McLean, a careful analysis of these records reveals a substantial decline in gallonage during the first two weeks in January. McClung was in credit difficulties with respondent and as a result thereof respondent would not sell him gasoline except for cash, McClung went out of business in the latter part of January, and his operation and sales were not normal after January 14, 1956. An examination of Commission's Exhibit 22-E, McClung's sales records for December, 1955, reveals that the last three gallonage sales figures for December 29, 30, and 31 were altered by reducing the amount of gallonage approximately 276 gallons for the three days. A casual examination of the figures reveals erasures and changes as well as the fact that whoever did so made the mistake of forgetting to make the appropriate changes in the monthly total and in the dollar amounts listed in the column next to the gallonage figures. The first column for December 29 shows 275 gallons with an obvious erasure of the first digit, while the second column shows corresponding receipts of \$79.45, with an obvious erasure of another figure appearing underneath. This amount of money is approximately correct for the gallonage listed, but it is apparent that both figures have been altered. However, on December 30 the gallon figure is 276 with an apparent change in the first digit, whereas the amount received is \$108.77, the amount which would have been received for 376 gallons, obviously indicating a change in the first digit from 3 to 2 or a total reduction of 100 gallons. The same thing occurred on December 31: The first figure has obviously been changed from 402 to 302, whereas the dollar amount remains unchanged and is the correct amount for 402 gallons. In addition, a totaling of all the gallons sold in December appearing at the foot of the column exceeds by 276 gallons the actual figures appearing in the column, but is the correct total if the changed gallonages referred to above are restored to their apparent original amounts. In spite of the foregoing discrepancies, McClung's sales records do show a substantial drop in gallonage, on an average basis, for the first two weeks in January, 1956, compared with his monthly sales prior thereto.

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The record establishes and it is found that McClung's station was in the same competitive area as and in competition with McLean's station.

As found above with respect to Peery and McClung, and as will be found hereinafter with respect to Crabtree and Winning, the record establishes injury to them by respondent's discrimination. However, it must now be considered well settled that it is not necessary for the Commission to prove injury to competition in a secondary-line price discrimination case because of the meaning of the statutory language, "where the effect may be to substantially lessen competition," as construed by the Supreme Court, the Courts of Appeal and the Commission. In the recent *Sorenson* case,² the Commission quoted with approval the holding of the Supreme Court in the *Morton Salt* case,³ no doubt the leading case dealing with the meaning of the effect clause in a secondary-line price discrimination as follows:

It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a "reasonable possibility" that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing *in itself* is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence. [Emphasis added.]

The dissent in *Morton Salt*, while preferring the language "reasonable probability" to "reasonable possibility," nevertheless agreed that the facts therein fully warranted an inference of adverse effect on competition without any actual showing of injury. Recent decisions of the Courts of Appeal are to the same effect.⁴

It seems self-evident that where a producer is selling a homogeneous product, such as salt, automotive parts or gasoline, where competition is extremely keen among retailers, and where margins of profit or markups are small, a lower price to one or some of such competing retailers not only "may" but must have the effect of substantially lessening competition.

Crabtree operated a Sun station at 58th and Main Streets, east and north approximately two and one-half miles from McLean's station. As previously found, the flow of traffic in either direction

² *Sorenson Mfg. Co., Inc.*, 52 F.T.C. 1659, Docket 6052 (1956).

³ *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

⁴ *Moog Industries, Inc. v. FTC*, 238 F. 2d 43 (C.A. 8, 1956); *Edelmann & Co. v. FTC*, 239 F. 2d 152 (C.A. 7, 1956), cert. den.

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easily could alternate between Main and Pearl Streets and readily pass either or both such stations. Crabtree's gallonage fell off substantially in January after the price allowance to McLean on December 27. Crabtree sold approximately 17,000 to 18,000 gallons per month the last four months of 1955, but in January his gallonage dropped to 14,500. About January 1 Crabtree discovered that McLean was selling Sun gasoline for three cents per gallon less and visited McLean to find out why. While Crabtree was present at McLean's station, he helped McLean pump gas and waited upon, and talked to, several of his own former customers, who told him they were buying at McLean's station because of the lower price. It is difficult to conceive of more direct evidence of both competition and effect than this. Subsequently Crabtree and McClung together visited McLean and discussed the price situation with him and ascertained that he was receiving a price allowance from respondent. Crabtree, too, complained to respondent about the price discrimination but received no assistance until the general price reduction on February 16, 1956.

Winning operated a Sun station at 8028 Lem Turner Road, approximately three and one-half miles northwest of 19th and Pearl. Lem Turner Road is a main artery from the northwest section of Jacksonville feeding directly into Pearl Street a few blocks north of McLean's station, so that most of the traffic headed for downtown which passes Winning's station would also pass McLean's. Respondent's Exhibit 5 reveals that Lem Turner Road carries a high traffic flow, approximately one-half as large as that carried by Main Street. Winning was advised of the lower price for Sun gasoline at McLean's station by Winning's own customers. Winning stated that a number of his customers, four of whom he identified by name and address, told him they could purchase the same gas for three cents less at McLean's and thereafter stopped buying from him for about one month. Winning's gallonage did not drop substantially in January. However, he testified that he worked much harder and tried to improve his service in an attempt to prevent any substantial loss of business. The indirect effect upon Winning is demonstrated by the fact that in February, after he received the price discount for the first time when the general price war broke out, his gallonage jumped from 410 gallons one day to 903 the next and stayed at such levels for several months.

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As was pointed out by the witness Peery, the loss of customers to McLean also had an effect upon the sale of other items such as oil, tires, batteries, and accessories. While respondent contends that the price differential at McLean's station could have no effect upon its other dealers because they were not in the same competitive area, which respondent would limit to a very small area adjacent to and in the immediate vicinity of 19th and Pearl Streets, in addition to the facts found, hereinbefore, one of respondent's principal witnesses, its vice president, Willard Wright, in testifying before a Senate Small Business Subcommittee in 1955 on behalf of respondent, had this to say:

Keen competition always has existed in the marketing of gasoline in most parts of the country. Motorists are particularly price conscious when they buy gasoline. Americans of all income brackets own and operate automobiles. For those in the lower brackets gasoline is an important item in their family budgets and they seek opportunities to reduce the cost of that item.

Moreover, unlike consumers of most commodities, motorists are mobile. They can without trouble drive several blocks down the street to another service station, if the first fails to please them. Indeed motorists will go out of their way a mile or two to save two or three cents on a gallon of gasoline. Out on the open highways, motorists sometimes drive past 10 to 20 stations before they stop at one whose appearance and posted prices suit them.

Naturally the sellers of gasoline respond to these characteristics of their customers. Alert service station operators keep a sharp eye on the prices of their competitors and price changes, particularly on the downside, are quickly followed. Delay in doing so inevitably would mean a loss of business. Volume is important to the dealer because many of his operating costs are more or less fixed, irrespective of the number of gallons of gasoline he sells. Any substantial drop in volume means an increased unit cost of doing business.⁵

The fact that the effect of respondent's price discrimination "may be to substantially lessen competition" was fully elucidated in a recent Federal court decision, the *Enterprise* case,⁶ where Judge Smith said, with respect to facts substantially similar to those herein: "The effects on gallonage of price differentials in the same brand and grade of gas within an area no larger than the Greater Hartford area must be found to be substantial."

In addition to its foregoing contentions, respondent also urges that its lower price was given to McLean in good faith to enable respondent to meet competition, as provided in Section 2(b) of the Clayton Act. For several reasons this contention is without merit.

⁵ Commission's Exhibit 14-C.

⁶ *Enterprise Industries, Inc. v. The Texas Company*, 136 F. Supp. 420 (U.S.D.C., Conn. 1955).

First and most importantly, as found by the Court in the *Enterprise* case, *supra*, and as clearly evidenced by the decision of the Supreme Court in the *Standard Oil* case,⁷ the proviso in 2(b) has reference to the good faith meeting of competition of the *seller*, and not the competition of the *buyer*, as in this case. Exactly the same contention was made and disposed of in the *Enterprise* case, where the Court said:

Moreover, Texas could justify discrimination only by a showing that it dropped its price to the other stations to meet an equally low price made available to those other stations by a competing oil company. . . . That is the competitive level at which the justification is provided for defendant in the Act, however. The Act does not go so far as to allow discriminatory price cutting to enable a *buyer* to meet price competition, but only to enable the seller to meet a lawful price of the *seller's* competitors.

The decision of the Supreme Court in the *Standard Oil* case, *supra*, clearly establishes that the price which a seller may in good faith meet is that offered to a customer of the seller by the seller's competitor.

It is true, of course, as respondent argues, that where one or some of its dealers are faced with ruinous price competition respondent must take some action or suffer the loss of such dealership and respondent's sales thereto. Respondent would equate its dealers' competition with its own competition, but of course this is not the law and cannot justify price discriminations injuring others. Respondent could, if it chose to, meet such competition at the dealer level by nondiscriminatory reductions in price to all dealers, or by operating its own stations and thus being in direct competition with other stations which reduce prices. Respondent's argument is essentially one of difficulties and problems claimed to have been brought about by the statute, which is not for the Commission to pass upon and more properly should be directed to Congress.

The second reason negating respondent's attempted reliance upon Section 2(b) is that the lower price at which respondent sold its gasoline to McLean was not made in good faith to enable McLean to *meet* his price competition. With regard to this, there is considerable evidence in the record concerning a contention by counsel supporting the complaint that the usual and customary price differential between so-called regular major gasoline and regular non-major gasoline is two cents a gallon. There is also

⁷ *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951).

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considerable evidence in the record that the price differential between the two is frequently one cent a gallon. Suffice it to say that there is not sufficient reliable, probative and substantial evidence in the record to establish what, if any specific amount, is the usual and customary differential between major and nonmajor regular brands of gasoline. However, the record does establish that the usual differential between McLean's station and the Super Test station across the street was two cents a gallon. McLean unequivocally testified that such a differential did not harm him competitively, but that when the differential was greater it caused him substantial injury. The record establishes that respondent gave McLean a 1.7-cent price allowance in order to enable him to post a price of 25.9, or one cent above the price to which Super Test had cut its gasoline. In the light of McLean's undisputed testimony, it is apparent that this was more than a good faith meeting of competition, even assuming *arguendo* such defense to be applicable, but was in effect a beating of competition which, of course, is not permitted by Section 2(b) of the Clayton Act. The proviso is after all a proviso and can only justify price discriminations when made in good faith to *meet* competition, and as such obviously cannot justify price discriminations in excess of those necessary to meet competition.⁸

The third reason the 2(b) defense is not applicable here is that the lower price at which respondent sold its gasoline to McLean was not made in *good faith* to enable McLean to meet his price competition. As is found hereinafter in Section III-B, in connection with the granting by respondent of the discount to McLean, respondent and McLean entered into an agreement fixing the retail price at which McLean would resell the gasoline. Section 2(b) provides a defense to a seller if his lower price is made in "good faith" to meet an equally low price of a competitor. Numerous decisions have emphasized the fact that such a lower price must have been made in good faith and have even held in this regard that the price met must be a lawful one. It is apparent that a lower price granted as consideration for an illegal agreement to fix prices could under no circumstances be considered as one made in good faith.

⁸ *Porto Rican Tobacco Co. v. American Tobacco Co.*, 30 F.2d 234 (C.A. 2, 1929); *Moss, Inc. v. FTC*, 148 F.2d 378 (C.A., 2, 1945); *Anheuser-Busch, Inc.*, 54 F.T.C. 277, Docket No. 6331 (1957); *Cf. Standard Oil Co. v. FTC*, 340 U.S. 231 (1951).

A preponderance of the reliable, probative and substantial evidence in the entire record convinces the undersigned, and it is found, that respondent by engaging in the above-found acts and practices has discriminated in price between different purchasers of commodities of like grade and quality, and that the effect thereof has been, is, and may be substantially to lessen competition and to injure, destroy, and prevent competition with other retailers of respondent's gasoline, in violation of Section 2(a) of the Clayton Act. It is further concluded and found that such price discrimination was not made in good faith to meet an equally low price of a competitor.

B. The Price-Fixing Agreement

As previously noted, Count II of the complaint alleged that respondent and McLean entered into a combination, understanding and agreement through which they fixed and maintained the retail price at which McLean sold his gasoline. It is undisputed in the record that McLean was an independent contractor with sole and exclusive authority to fix the retail price at which he sold his gasoline. The same incident on December 27, 1955, when respondent granted a discount to McLean, is also alleged as the price-fixing arrangement between respondent and McLean. As previously found, from August to December of 1955, McLean complained several times to respondent about the price cutting by the Super Test station across the street. Until December 27, each time McLean complained to respondents agents, he was advised that there was nothing they could do about it. Respondent employs salesmen who, among other things, call upon the filling station operators in their territory. Prior to December 27, McLean had been contacted by salesman Elbey and Harper and also by Edward Beardsley, respondent's district manager.

The testimony of respondent's witnesses reveals that respondent had the situation at 19th and Pearl Streets under careful consideration for some time. McLean had made it clear that unless something was done to meet the Super Test competition he would be forced out of business. Beardsley advised Maximilian Dietshe, respondent's regional manager, of the situation, and Dietshe in return advised Willard Wright, respondent's vice president at its home office in Philadelphia. After consideration of the situation and examination of the facts, they were all in agreement that something would have to be done to help McLean.

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McLean testified that on December 27 Harper contacted him and advised him that if Super Test dropped its price again respondent would try to do something. Later the same day after Super Test dropped its price, Harper returned and advised McLean that he would be given a price adjustment of 1.7 cents if he would absorb 1.3 cents himself and drop his retail price to 25.9. As previously found, McLean had been selling his gasoline at 28.9. His gross margin of profit or difference between wholesale and retail price had been 4.8 cents per gallon. As a result of dropping his price to 25.9 and absorbing 1.3 of this reduction, his gross margin of profit was reduced to 3.5 cents per gallon.

The key issue is, of course, just what arrangement or understanding was reached between respondent and McLean on December 27. Respondent contends, and its officials so testified, that there was no agreement with McLean concerning his retail price and that he voluntarily and unilaterally elected to post a price of 25.9 cents and take a cut in profit of 1.3 cents. McLean, too, testified that there was no "agreement" between him and respondent to fix his retail price, but his testimony concerning what was actually said and done on December 27 reveals quite clearly that there was an agreement entered into between respondent and McLean fixing the price at which he would sell his gasoline in consideration of being granted a price allowance or discount by respondent.

McLean testified that he was required to take a 1.3-cent cut in profits in order to get the adjustment. Again, after testifying that there was no "agreement" to fix his retail price at 25.9 cents per gallon, McLean testified as follows:

Q. So that was a reduction of three cents a gallon?

A. Yes, sir.

Q. Did Mr. Harper or any representative of the Sun Oil Company say to you that they would attempt to keep this differential of three cents?

A. No, sir, not that I remember.

Q. But on that particular time, did he say that to you?

A. It was *made* that I wanted and *they stated* that I drop my gas to that price according to Super Test across the street, but as far as dropping it any lower or raising it—[Italics added.]

It is clear from the testimony of McLean that he was required by respondent to take a cut in profits of 1.3 cents per gallon, i.e., to post a price of 25.9 cents per gallon, in order to secure the price discount of 1.7 cents per gallon from respondent. Harper,

respondent's agent who made this arrangement with McLean, was not called as a witness, and accordingly McLean's testimony stands undisputed.

In addition to McLean's direct testimony concerning the arrangement, the factual circumstances surrounding it also lead inevitably to the conclusion that McLean did not voluntarily and unilaterally post the price of 25.9 cents, but did so as the result of an agreement with respondent in order to obtain the price assistance. It has previously been found as McLean himself testified, that he was not hurt competitively as long as the price difference between his station and the Super Test station did not exceed two cents a gallon. In addition to his testimony to that effect, undisputed statistical facts in the record clearly reveal that McLean was not hurt competitively when the difference between his price and Super Test's was two cents per gallon. This is dramatically illustrated by what happened after December 27.

When McLean cut his price to 25.9 cents on December 27, Super Test was selling its gasoline at 24.9. On January 3, 1956, approximately one week later, Super Test dropped its price to 23.9 and thereafter for substantially the entire month of January a two-cent differential existed between McLean's and Super Test's prices. Nevertheless, although the record reveals that Super Test's gallonage at 19th and Pearl had been averaging between 10,000 and 11,000 gallons per month up to December and was approximately 19,000 gallons in December, during which month Super Test cut its price several times, in January 1956, Super Test's gallonage jumped to 61,000-plus gallons and McLean's gallonage jumped approximately four or five times in excess of the preceding months. These facts make it abundantly clear that it was not necessary for McLean to reduce his price to within one cent of Super Test in order to be competitive, inasmuch as after a price reduction his gallonage increased tremendously during a month when for all but two days the difference in price between McLean and Super Test was two cents per gallon. If McLean had not been required to reduce his price to 25.9 in order to receive the 1.7-cent allowance from respondent, he could have reduced his price to 26.9, within two cents of Super Test's price, not have been hurt competitively, and yet retained a margin of four and one-half cents per gallon, thereby reducing his gross

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profit only .3 cents per gallon. If he had done this, it is clear from the record that his competitive situation would not have been injured and he would have maintained a much more adequate margin of profit.

McLean told Crabtree and McClung when they contacted him concerning his lower prices that he was very dissatisfied with the arrangement because while he was selling a lot of gasoline he was doing a lot of work and not making much profit. This is corroborated by the fact that although McLean substantially increased his gallonage in January and February, on or about February 18 he gave up and went out of business. It is apparent that if McLean had retained unilateral control of his retail price, he could have reduced his price to within two cents of Super Test, retained substantially all of his margin of profit, and substantially increased his gallonage because that is exactly what happened during January with a reduced price and a two-cent differential between the stations.

It is well settled, and requires no extended discussion, that price fixing, no matter in what manner, shape, or form, and regardless of the motivation, is illegal *per se*.⁹ The following comments of the Supreme Court in the *Socony-Vacuum* case¹⁰ seem appropriate here:

* * * But the thrust of the rule is deeper and reaches more than monopoly power. Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference.

* * * Nor is it important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible. Price fixing as used in the *Trenton Potteries* case has no such limited meaning. An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price fixing was used. * * * Hence, prices are fixed within the meaning of the *Trenton Potteries* case if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. They are fixed because

⁹ *Ethel Gas Corporation v. U.S.*, 309 U.S. 436 (1940); *U.S. v. Socony-Vacuum Oil Company*, 310 U.S. 150 (1940); *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384 (1951); and *Virginia Excelsior Mills, Inc.*, 54 F.T.C. 455, Docket No. 6630, October 25, 1957.

¹⁰ Footnote 9, *supra*.

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they are agreed upon. And the fact that, as here, they are fixed at the fair going market price is immaterial.

While it has been found above that there is direct evidence of the price-fixing agreement, it is settled law that such an agreement also may be proven by circumstantial evidence,¹¹ as also found above. It further has been held by the Supreme Court that business behavior is admissible circumstantial evidence from which the fact finder may infer agreement.¹²

In addition to denying that it had engaged in price fixing, respondent contends that even if it had it was not in violation of the Act because of the amendment of Section 5 by the McGuire Act authorizing pursuant to State laws fair trade agreements prescribing minimum or stipulated prices for the resale of branded products. The short answer to this contention is that the Florida Fair Trade Act was held unconstitutional as to nonsigners by the Supreme Court of Florida.¹³ This decision, as well as numerous others, makes it clear that the McGuire Act amendment refers only to written agreements or contracts for fair trade prices, and, of course, there was no written agreement here. In addition, the Supreme Court in the *McKesson-Robbins* case¹⁴ held that a corporation which both manufactures and wholesales a product cannot, under the Miller-Tydings or the McGuire Acts, enter into fair trade agreements with wholesalers because in effect such agreements would be between competitors and hence in violation of Section 5(a) (5) of the Act. Respondent itself operates certain filling stations known as company stations, and accordingly if there were any fair trade agreement, it would be in violation of Section 5(a) (5) of the Act and no defense to a price-fixing agreement.

A preponderance of the reliable, probative and substantial evidence in the entire record convinces the undersigned, and accordingly it is found, that respondent and McLean entered into, maintained and carried out a planned common course of action, agreement, combination, or understanding to fix and maintain

¹¹ *United States Maltsters Assn. v. FTC*, 152 F.2d 162 (C.A. 7, 1945); *Milk & Ice Cream Can Institute v. FTC*, 152 F.2d 478 (C.A. 7, 1946); *Fort Howard Paper Co. v. FTC*, 156 F.2d 899 (C.A. 7, 1946); *Allied Paper Mills v. FTC*, 168 F.2d 600 (C.A. 7, 1948); *Triangle Conduit & Cable Co. v. FTC*, 168 F.2d 175 (C.A. 7, 1948), *aff'd*, 336 U.S. 956; and *National Lead Co. v. FTC*, 227 F.2d 825 (C.A. 7, 1955).

¹² *Interstate Circuit, Inc. v. U.S.*, 306 U.S. 208 (1939); and *Theatre Enterprises, Inc. v. Paramount*, 346 U.S. 537 (1954).

¹³ *Miles Laboratories, Inc. v. Eckerd*, 73 So. 2d 680 (Fla. Sup. Ct. 1954).

¹⁴ *U.S. v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1955).

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the retail price at which McLean was to sell gasoline, all to the prejudice and injury of the public, respondent's competitors, and McLean's competitors, which constitutes an unfair method of competition and an unfair act and practice in commerce within the intent and meaning of Section 5 of the Act.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce, and engaged in the above-found acts and practices in the course and conduct of its business in commerce, as "commerce" is defined in the Act and the Clayton Act.

2. The effect of the acts and practices of respondent hereinabove found in Section III-A may be and has been to substantially lessen competition, and to injure, destroy, and prevent competition with the recipient of respondent's discrimination, such acts and practices constituting a violation of Section 2(a) of the Clayton Act.

3. The acts and practices of respondent hereinabove found in Section III-B are all to the prejudice and injury of the public and competition, and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Act.

4. As a result thereof, substantial injury has been done to competition in commerce.

5. This proceeding is in the public interest, and an order to cease and desist the above-found acts and practices should issue against respondent.

ORDER

It is ordered, That respondent Sun Oil Company, a corporation, its officers, directors, agents, representatives or employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of its products in commerce, as "commerce" is defined in the Act and the Clayton Act, do forthwith cease and desist from:

A. Discriminating in price by selling such products of like grade and quality to any purchaser at net prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of respondent's products;

B. Entering into, continuing, cooperating in, or carrying out,

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or attempting so to do, any planned common course of action, understanding, agreement, combination, or conspiracy with any person or persons not parties hereto, to attempt to, or to establish, fix, adopt, maintain, or adhere to, by any means or method, prices at which said product is to be resold;

C. Granting any discounts, rebates, price reductions or other form of consideration for the purpose, or with the effect, of fixing or maintaining the prices at which said product is to be resold.

Provided, however, That nothing herein contained shall be construed to limit or otherwise affect any resale price maintenance contracts which respondent may enter into in conformity with Section 5 of the Act as amended by the McGuire Act (Public Law 542, chapter 745, 82d Cong., 2d Sess., approved July 14, 1952).

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

In Count I, complaint charges respondent with a violation of Section 2(a) of the amended Clayton Act in the sale of gasoline to one customer at prices substantially lower than prices charged competing customers, with resulting injury. In Count II, respondent is charged with a violation of Section 5 of the Federal Trade Commission Act by conspiring with such favored customer to fix and maintain the retail price at which such customer sold gasoline at his filling station. The hearing examiner found against respondent on both counts and entered his order accordingly. Respondent has appealed.

Count I

Respondent is engaged, among other things, in the sale and delivery by tank wagon of gasoline to independent filling station operators. The alleged favored customer and co-conspirator, Gilbert B. McLean, during 1955 and part of 1956, operated a filling station under contract with respondent at the intersection of 19th and Pearl Streets, Jacksonville, Florida. In June, 1955, the Super-Test Oil Company, selling a nonmajor or private brand of gasoline (as distinguished from the gasoline sold by McLean under the brand of a major supplier), opened a new service station across the street from that operated by McLean. From its opening until December, 1955, the price usually posted by Super-Test for

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its regular gasoline was 26.9¢ per gallon, although on occasion, its price was lower and even as low as 21.9¢ per gallon.

The competition of this new station in selling its gasoline at substantially reduced prices caused injury to McLean who was selling at 28.9¢ per gallon, and he appealed to respondent for help. On December 27, 1955, Super-Test dropped its price to 24.9¢ per gallon. Respondent then agreed to give McLean a discount of 1.7¢ per gallon on tank wagon price and McLean dropped his price to 25.9¢. Respondent did not give a similar allowance to any other retail dealer in the Jacksonville area. This difference in price continued until February 16, 1956, when a major price war involving various other companies broke out in Jacksonville and all dealers of respondent were given a price which was the same for all.

Respondent first challenges the sufficiency of the evidence to support the findings of the hearing examiner as to Count I in the following particulars:

1. That the respondent discriminated in price between customers who were competitors within the meaning of the statute.
2. That the difference in price was of such a character as to create a probability of substantially lessening competition.

Considerable evidence was introduced on these propositions. It is reviewed at some length in the initial decision and will not be repeated here. Generally, it consists of:

1. Figures showing increase or decrease in the gallonage of certain affected stations.
2. Evidence as to the loss of specific customers.
3. Geographic details as to location of stations and streets and highways and other facts which might influence buying habits of customers.

On the subject of gallonage, the hearing examiner found that McLean's sales of gasoline were as follows:

	<i>Gallons per month</i>
August, September, and October 1955.....	6,500
November 1955	5,900
December 1955	8,300
January 1956	32,100

Daily sales until February 1956, when McLean quit business, averaged approximately the same as January.

The sales of Calvin Peery, who sold respondent's gasoline at

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28.9¢, and whose station was less than a mile from McLean's, were as follows:

	Gallons per month
December 1955	10,900
(which was approximately his monthly average for the last six months of 1955)	
January 1956	9,300

Jesse McClung, also selling respondent's gasoline at 28.9¢ and whose station was about a mile distant from McLean's, also, according to the hearing examiner, sold a substantially lesser amount of gasoline on an average basis for the first two weeks of January 1956, than he did in the previous month.

William Crabtree's Sun Station, about 2½ miles from McLean's, sold about 17,000 to 18,000 gallons per month during the last four months of 1955 and 14,500 in January, 1956.

Clair Winning, operating a Sun station about 3½ miles from McLean's, did not lose gallonage in January. After February 16, 1956, when he received the general price reduction previously referred to, his gallonage increased from 410 gallons on one day to 903.

As against these figures, respondent introduced figures from the Florida Tax reports indicating a decrease in total gasoline sales in Duval County (roughly the same as Jacksonville) from December 1955, to January 1956, of 6.8%. Respondent's appeal also calls attention to other evidence. For example, McClung's faulty records (for which the hearing examiner made due allowance in evaluating his testimony); the fact that Peery did not keep his station open on Sundays in January 1956 (a fact also true of December, 1955); Crabtree's working at the post office (although his station was operating as usual).

These circumstances have all been considered but we believe they do not explain the changes in gallonage figures as previously pointed out.

Secondly, all the station operators above named were called as witnesses and gave instances of loss of specific customers. For example, Crabtree saw some of his former customers buying gas at McLean's station and heard from them that it was because of the cheaper price. Winning identified four customers by name and address who abandoned him because of the cheaper price at McLean's. Furthermore, some of these station operators testified that they complained to respondent that they were losing business

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because of this discriminatory pricing and asked for a reduction in price similar to that given McLean.

The situation disclosed by the record is similar to that considered by the Commission and the courts on several occasions. See, for example, *Federal Trade Commission v. Morton Salt Company* (1948) 334 U.S. 37; *In the Matter of Sorensen Manufacturing Company* (1956), Docket No. 6052.

Here, we have a number of small independent retailers selling an identical product at the same price and under substantially the same conditions. All were operating at a small margin of profit and in an area which was a reservoir of potential customers who, because of the geographic situation, had easy access to that dealer who offered an advantage in price or in services rendered. When such a situation is shown to exist, together with proof that one competitor received a discount from a common supplier, an inference of injury to the others may reasonably be drawn from that fact. Even where other evidence showing injury is presented, this inference may be considered in addition to other proof. The question involved has to do with the inference which may properly be drawn from admitted or proven facts and not with the burden of proof. Although *Samuel H. Moss, Inc. v. Federal Trade Commission* (1945), 148 F. 2d 378, is often cited to the contrary, the weight of authority is to the effect that counsel supporting the complaint has the burden of proof to establish the necessary injury. See *In the Matter of General Foods Corporation* (1954), 50 Federal Trade Commission Decisions 885.

In spite of certain statements made in the initial decision, the hearing examiner stated: "As found above with respect to Peery and McClung and as will be found hereinafter with respect to Crabtree and Winning, the record establishes injury to them by respondent's discrimination."

We agree with this finding.

The respondent next argues that the hearing examiner erred in failing to find that the respondent had established in fact and as a matter of law the defense of good faith meeting of competition within the proviso of Section 2(b) of the amended Clayton Act, which provides:

Provided, however, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was

made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

The discount given by respondent to McLean was not made to meet a lower price made to the latter by another supplier. It was given to enable McLean to meet the competition of the Super-Test station across the street. Respondent would justify broadening the proviso of Section 2(b) to cover this situation on the theory that respondent and its dealer McLean were, in fact, competing as a unit with other channels of competition.

As pointed out by the hearing examiner, this argument goes beyond the plain wording of the proviso which has reference to the good faith meeting of competition of the seller, rather than that of the buyer. This construction of the proviso was upheld in *Enterprise Industries, Inc. v. The Texas Company* (1955), 136 F. Supp. 420 (reversed on another ground).

Count II

Prior to December 27, 1955, when Super-Test cut its price, McLean did not make any reduction. However, on several occasions, he talked to representatives of respondent and was advised they could do nothing about it. It does appear, however, that its officials were giving consideration to the matter. On December 27, 1955, Super-Test dropped its price to 24.9¢. On that same day, Harry Harper, a salesman for respondent, called at the McLean station and advised McLean that he would get a reduction of 1.7¢ per gallon.

Direct evidence as to what was said on this occasion is found in the testimony of McLean. There is some conflict in this testimony. The hearing examiner concluded that Harper advised McLean "that he would be given a price adjustment of 1.7¢ per gallon if he would absorb 1.3¢ himself and drop his retail price to 25.9¢."

The hearing examiner had the opportunity to observe the witnesses as they testified. His conclusions as to the weight to be given their various statements should be given proper consideration by the Commission. *Universal Camera Corporation v. National Labor Relations Board*, 340 U.S. 474; *Folds v. Federal Trade Commission* (1951) 187 F. 2d 658.

There are other facts in the record that support the hearing examiner's conclusion. For example, it appears that in order to compete with Super-Test, McLean needed only a 2¢ margin which, of course, would have given him a larger margin of profit.

Crabtree and McClung both testified that McLean indicated dissatisfaction with the arrangement with respondent and that McLean told them that he was selling a lot of gas, doing a lot of work, but not making much profit. On or about February 18, 1956, McLean went out of business.

These facts lend support to the view that in posting his price, McLean was complying with an agreement, rather than acting as a free agent.

Secondly, Harry Harper was not called as a witness nor was any reason given for failure to do so. That this is a circumstance to be considered is well settled. *Runkle v. Burnham* (1894) 153 U.S. 216; *Local 167 International Brotherhood of Teamsters v. United States* (1934) 291 U.S. 293.

Robert H. Gravette, Jr., an examiner for the Federal Trade Commission, testified as to a conversation he had with McLean in which the latter told of a telephone conversation on December 27, 1955, with someone representing respondent, who said: "If you lower the price of gasoline in your station by 3¢, we will give you a promotional allowance of 1.7¢ per gallon"; that McLean reported he agreed and reduced his price accordingly.

It is not disputed that respondent knew of McLean's competitive problem and did give him a 1.7¢ reduction and that McLean thereafter reduced his price. The question to be determined is whether that reduction (either expressly or by implication) was conditioned on the posting of a certain price by McLean.

It is well known that conspiracies are often not capable of proof by direct testimony and may be inferred from the things actually done and from the circumstances. *Bausch Machine Tool Company v. Aluminum Company* (1934) 72 F. 2d 236, 15 C.J.S. 1043, et seq.

The situation here is somewhat similar to that in *Eastern States Lumber Association v. United States* (1914) 234 U.S. 600, involving a conspiracy to violate the Sherman Act. There it was shown that members of a retail lumber dealers association collected information about wholesalers who also sold direct to consumers—a practice in disfavor with retail dealers. The names of such wholesalers were made available to all members of the association. There was no direct proof of any agreement among retailers to refrain from dealing with these wholesalers. The court held that, nevertheless, such agreement would be inferred. Here, there is direct testimony as to the agreement. The conclu-

sion that it amounted to a price fixing agreement is substantially supported by the circumstances as shown in the record.

Respondent also contends that even if an agreement were made as to price, it was, nevertheless, legal under the McGuire Act which permits agreements between a seller and a buyer prescribing minimum or stipulated resale prices under certain conditions, when such agreements are lawful under any statute, law or policy in effect in the jurisdiction in which such resale is to be made.

In *Liquor Store v. Continental Distilling Corporation* (Fla. 1949), 40 So. 2d 37, the Supreme Court of Florida declined to enforce the resale agreement on the ground that it was arbitrary and unreasonable and contrary to the public policy announced by the Florida Constitution and statutes. In *Miles Laboratories, Inc. v. Eckerd* (1954), 73 So. 2d 680, after the adoption of the McGuire Act, the Court arrived at the same conclusion. Although both of these cases had to do with "nonsigners," the decisions were not put on that ground. (For comment on these decisions, see note in 19 ALR 2d 1139, and *Shakespeare Company v. Lippman's Tool Shop Sporting Goods Company* (Mich. 1952), 54 N.W. 2d 268.) In *Sunbeam Corporation v. Masters of Miami* (1955), 225 F. 2d 191, the Federal Circuit Court of Appeals for the Fifth Circuit, in commenting on the "strong and consistent declarations of the Florida Supreme Court to the effect that the public policy of Florida is opposed to price maintenance" had this to say:

We think it may well be that Fair Trade contracts are unenforceable in Florida even between the parties; however, it would seem that this is unnecessary in our decision here and we do not decide that question.

That case also involved nonsigners.

The McGuire Act covers agreements "prescribing minimum or stipulated prices." In this respect, it differs from the Miller-Tydings Act which has to do only with minimum prices for resale. Each statute immunizes certain agreements from attack under the Sherman Act but only to the extent that such agreements are lawful in the jurisdiction where the resale is to take place.

The Florida Fair Trade statute provides that a contract relating to the sale or resale of a commodity may lawfully contain a provision "that the buyer will not resell such commodity at less than the minimum price stipulated by the seller." Thus, the authority granted in regard to resale contracts is more limited than that contained in the McGuire Act.

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Prior to the adoption of the Florida Fair Trade statute, price fixing was illegal in Florida and the contract under consideration here would clearly have been contrary to law. Even though the statute be considered to be Constitutional and enforceable as to parties to the agreement, it affords exemption from the general laws against price fixing only to the extent provided in the Act, that is, as to the establishment of a minimum price for resale. It does not give a buyer and a seller a free hand to make what contract they wish as to agreed price and thus virtually repeal the general policy of Florida against price fixing.

The agreement between respondent and McLean was not for the purpose of establishing a minimum resale price. On the contrary, it was a contract under which the parties jointly agreed to share the loss of profits incident to selling gasoline at a lower price. It was obviously not made with the Florida Fair Trade Act in mind. Nor can it derive any protection from it. Consequently, the condition laid down in the McGuire Act which is necessary for immunity from Sherman Act attack has not been met and the Act is not available to respondent.

United States v. Socony Mobile Oil Company (1957), 157 F. Supp 202, cited by respondent, is not in conflict with the conclusion herein. In that case, the Court pointed out that under Massachusetts law, a wholesaler or distributor has an absolute right to designate the terms of resale and that a producer of a trademarked article, which is of a class in open competition, may fix the price at which the retailer may sell. Consequently, the condition necessary for the McGuire Act to become effective is found to exist. In Florida, the opposite is true.

The hearing examiner also found that respondent operates some "company" filling stations in competition with its retailers and that, under *United States v. McKesson and Robbins Company, Inc.* (1955) 351 U.S. 305, the agreement between respondent and McLean would not be within the protected area afforded by the McGuire Act.

We agree with the conclusion of the hearing examiner that the defenses based on the Florida Fair Trade Act or the McGuire Act have not been established.

Finally, respondent claims that "the examiner's cease and desist order is unwarrantedly broad and punitive."

Similar objections have been made many times and rejected by the courts. In *Maryland Baking Company v. Federal Trade Commission* (1957) 243 F. 2d 716; *Federal Trade Commission v.*

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National Lead Company (1957) 352 U.S. 419; *Moog Industries, Inc. v. Federal Trade Commission* (1956), 238 F. 2d 43.

The findings and order of the hearing examiner are adopted as the findings and order of the Commission. Respondent's appeal is denied, and it is directed that an order issue accordingly.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of the respondent from the initial decision of the hearing examiner and upon the briefs filed in support of and in opposition to the appeal and oral argument of counsel; and

The Commission having rendered its decision denying the appeal and adopting the findings, conclusions and order contained in the initial decision:

It is ordered, That respondent Sun Oil 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 to cease and desist contained in the aforesaid initial decision.

IN THE MATTER OF
JOSEPH W. GRAHAM TRADING AS
GRAYSTONE PORTRAIT AGENCY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket 7075. Complaint, Feb. 28, 1958—Decision, Jan. 5, 1959

Order requiring a seller of enlarged colored photographs and particularly frames therefor, with headquarters in Chattanooga, Tenn., to cease representing falsely, through his door-to-door salesmen or otherwise, that the finished enlargement was a hand-painted oil portrait done by an artist and as good as the samples exhibited; that frames ordered would be 24 carat gold or walnut, would be airtight, dust proof, and waterproof, with unbreakable glass; and requiring him to disclose that the finished enlargements would be convex and oddly shaped so that they required specially designed frames obtainable only from him.

Mr. Edward F. Downs and *Mr. Garland S. Ferguson*, for the Commission.

Mr. Bruce C. Bishop, of *Folts, Bishop & Thomas*, of Chattanooga, Tenn., for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

This proceeding involves charges that respondent has violated the Federal Trade Commission Act by soliciting, selling, and distributing commercially in interstate commerce tinted or colored enlargements of photographs and photographic frames. It is alleged in the complaint that respondent, by means of false, misleading, and deceptive statements and representations of his sales agents or representatives to members of the consuming public, has sold substantial quantities of such photographs and frames in the course and conduct of his business. Respondent in his answer and testimony admits the location and nature of his business, that such business is in interstate commerce and in direct and substantial competition with others in like business, but denies, in substance, that he has violated the Federal Trade Commission Act in any way. This initial decision finds generally that the allegations of the complaint are sustained upon the whole record by a preponderance of the reliable, probative and substantial evidence as required by §7(c) of the Administrative Procedure Act and the Commission's Rules of Practice for Ad-