

It is further ordered, That respondent Erie Sand and Gravel Company, shall, within sixty (60) days from the date of service upon it of this order, submit in writing, for the consideration and approval of the Federal Trade Commission, its plan for compliance with this order, including the date within which compliance can be effected, the time for compliance to be hereafter fixed by order of the Commission, jurisdiction being retained for these purposes.

IN THE MATTER OF
SHELL OIL COMPANY

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

Docket 7044. Complaint, Jan. 16, 1958—Order, Oct. 26, 1959

Order adopting, as modified, the initial decision dismissing complaint which charged a leading producer of petroleum products with inducing customers, including automobile dealers, to prefer its lubrication oil and grease and to refuse to handle competitors' products by furnishing said customers expensive lubrication equipment and other facilities on lease, loan, or sale with easy terms of repayment; or by granting substantial benefits including gifts of cash, equipment, services, etc., loans of cash and equipment on varying terms, and sale of equipment on credit with varying repayment terms, etc.; or by furnishing other benefits including construction, painting, paving of lots, installation and maintenance of lubrication equipment, without charge—all upon the understanding, expressed or implied, that the customer would thereafter handle, preferentially or exclusively, its petroleum products, including lubrication oil and grease.

Mr. Lynn C. Paulson and Mr. James H. Kelley for the Commission.

Howrey & Simon, of Washington, D.C., by *Mr. William Simon*, and *Mr. George S. Wolbert, Jr.*, of New York, N.Y., for respondent.

INITIAL DECISION DISMISSING COMPLAINT BY EARL J. KOLB,
HEARING EXAMINER

This proceeding is based upon a complaint charging the respondent Shell Oil Company, a corporation, with unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act. At the close of the taking of testimony in support

of the allegations of the complaint, the respondent closed its case in opposition thereto without offering an affirmative defense.

This proceeding is now before the undersigned hearing examiner for final consideration on the complaint, answer thereto, testimony and other evidence, brief of counsel supporting the complaint, proposed findings of fact and conclusions of law filed by the respondent and brief in support thereof, and brief filed by counsel supporting the complaint in reply thereto. The hearing examiner has given consideration to the proposed findings filed by the respondent and all findings of fact and conclusions of law not hereinafter specifically found or concluded are herewith rejected, and the hearing examiner having considered the record herein, and being now duly advised in the premises, makes the following findings as to the facts, conclusions drawn therefrom, and order:

1. Respondent Shell Oil Company is a Delaware corporation with its principal office and place of business located at 50 West 50th Street, New York, New York. For several years last past respondent has been engaged in the sale and distribution of various petroleum products, including lubrication oil and grease, in interstate commerce to various wholesale and retail buyers, including car dealers in competition with other concerns who are also engaged in the sale and distribution of similar products in interstate commerce. The gross annual sales of this respondent are in excess of 1 billion dollars.

2. The grade of motor oil involved in this proceeding is heavy duty oil, conforming to military specifications (Mil-L-2104), which is generally recommended by car manufacturers for use in new cars. Respondent's oils for new cars meeting these qualifications are its X-100 and X-100 Premium.

3. The evidence in this proceeding is limited to the sale of heavy duty motor oil and greases to new car dealers located in the New York market, consisting of the five boroughs, Westchester County and Long Island; and the New England Market, consisting of the States of Maine, Massachusetts, Rhode Island and Connecticut. In the relevant market the total sales of lubricant oils and greases to car dealers comprise approximately 1/5th of the total lubricants sold. Prior to World War II this market was principally supplied by the independent compounders and blenders of motor oil.

4. There are basically three groups of suppliers selling motor oil to car dealers in the relevant market:

(a) Specialized suppliers of nationally advertised, so-called "Premium" or "Penn Grade" motor oils, with a high degree of consumer acceptance which are generally distributed through local distributors

and sold above the prices of the major oil company brands and local blenders. This group includes Quaker State, Pennzoil, Wolf's Head, Alemite, Amalie, McMillen and Kendall.

(b) The motor oils of so-called major brand companies, including Esso, Mobiloil, Gulf, Texaco, Atlantic, Sun, Amoco and Permalube, Calso, Tidewater, Union Oil, Cities Service, and respondent Shell.

(c) Independent compounders and blenders of motor oil who buy base oil stocks from refiners, blend these base stocks with appropriate additives to a suitable grade of motor oil, and market such motor oils under their own brand names. These include White & Bagley, U.S. Oil, Colt-Worthington, Paragon and Jenney. These compounders sell a motor oil comparable to Shell's X-100 at prices substantially under the prices of the nationally advertised specialty "Premium" motor oils.

5. Motor oil purchases by car dealers bear a direct relationship to new car sales. The warranty service furnished by the car manufacturer induces the motorist to bring his car back to the dealer for the first few oil changes. As the car gets older the motorist will go to a service station for his oil change with the result that the motor oil potential of new car dealers decreases with the age of the car. The year 1955 was the best year for the sales of new cars, but new car sales have declined in 1956 and further in 1957 and 1958. A substantial number of car dealers have gone out of the market in the last two years.

6. It has been the practice of oil suppliers for many years to supply lubrication equipment to car dealers in connection with the sale of motor oil. Originally, this usually consisted of dispensing equipment, such as hi-boys and storage tanks, which were loaned without charge and removed at the termination of the contract. The combined value of this equipment at present costs amounts to about \$200.00. After World War II, when the supply of new cars became more plentiful, dealers found their resale competition more intense with a resultant drop in profits and began to exert more pressure upon the oil suppliers to furnish more expensive lubrication equipment, such as car lifts and overhead reels. Such equipment deals may involve expenditures from \$2,000.00 to \$18,000.00, depending upon the equipment furnished.

7. Respondent undertook the furnishing of major equipment to car dealers in 1946. When such equipment was furnished, an agreement was entered into between the respondent and the car dealer known as the "Equipment Loan Agreement." Originally this agreement was a straight loan of the equipment with title remaining in the respondent, and rental charge was paid by crediting 5¢ to 15¢

per gallon of oil purchased. As early as December 23, 1952, the division manager was authorized at his discretion to provide for sale instead of rental in the "Equipment Loan Agreement" on the cents-per-gallon formula, credited against the amount of oil and grease purchased with title retained by respondent until the agreed price was paid either by cash or on the amortization plan. In entering into the contracts with car dealers, the value of the equipment to be sold or leased and the period of time allowed for amortization were both predicated upon the estimated quantity of motor oils and greases which the car dealer could consume over the period of the contract. Consequently, the term of these contracts ranged from four to ten years with permission to dealers in some instances to extend the contract period if value was not fully amortized.

8. In addition to the "Equipment Loan Agreement" the car dealer also executed a "Lubricant Sales Contract" covering the same period of time as required for amortization under the "Equipment Loan Agreement" which provided for the purchase each contract year of the specified gallonage of lubricants and greases based upon an estimated amount for the entire contract period required for amortization. This contract provided that the car dealer shall purchase during any contract year not less than 90 percent of the estimated quantity per contract year as specified in the contract.

9. In addition to the equipment arrangements hereinbefore described, respondent in some instances sold certain equipment, including non-recoverable facilities such as painting or installation of backdrops in a lubricating room or blacktopping a lubricating area on a so-called conditional sales contract, providing for payment by a surcharge on the oil gallonage.

10. It was not the general policy of the respondent in the New York and Boston areas to make cash loans to car dealer customers, and the practice has been specifically prohibited by the respondent in its policy statements since 1954. Prior to 1954, there was one instance of a loan in the New York division which was paid in full. It was emphasized by the New York division manager, who was called as a witness, that this loan was an isolated case and not a general practice.

11. The testimony of representatives of six competitors was introduced in evidence. These competitors were either vendors of motor oils or distributors of "Premium" oils. Briefly, the competitive situation as developed by this testimony was as follows:

(a) Charles A. Goyert & Co., Inc. This company was a distributor of Sonnebron Oil, a "Premium" oil sold under the trade name of "Amalie." To the extent that working capital permitted, this

respondent furnished lubricating equipment in the maximum of \$3,200.00 to car dealers on two or three year contracts on the basis of 3¢ to 10¢ per gallon surcharge on motor oil purchased. This distributor has not lost any accounts to the respondent, although it has lost a number of accounts to other oil companies. This distributor bid upon one account, offering as high as \$6,000.00 in equipment, but lost the bid to respondent. This distributor's sales gallonage of motor oils has dropped from 55,000 to 43,000 gallons during the last two or three years. While admitting that the decline in new car sales has a bearing on the decline of motor oil sales, this drop in business was attributed to loss of accounts and not to slackening off of purchases of existing accounts.

(b) Frank R. Zimina. He is a distributor for McMillen Petroleum Corporation. This distributor started four years ago with sales of approximately 6,000 gallons per year, which has increased to present gallonage of 35,000 gallons a year, and is still growing steadily. He sells to automotive garages, service stations, car dealers, agricultural accounts and marine accounts. He has competed with respondent on three car-dealer accounts all of which were customers of respondent, but lost out on equipment deals he could not meet, but did succeed in getting part of the business through the 30,000-mile warranty of lubricating parts of the car if his oil is used exclusively. This distributor makes a limited amount of equipment available at cost plus interest.

(c) Colt-Worthington Oil Works, Westbury, Long Island, New York. This company compounds and blends stock oils fortified with chemicals, which are sold under the trade name "Argolene." Since 1946 this company has increased its sales from approximately \$25,000 to \$500,000 a year, and has increased its net worth from a deficit of \$8,000 in 1946 to \$150,000 as of the present time. This company has made equipment deals with car dealers since 1946, offering \$3,000 to \$4,000, but has gone as high as \$11,000. This company is limited on the amount it can borrow to make these deals. When equipment is furnished, it charges the car dealer a surcharge of 10¢ per gallon of oil purchased. It has in the past paid out approximately \$5,000 in cash gifts charged against the cost of the contract. This company lost two car-dealer customers to respondent, and lost bids on three to respondent—all on equipment deals, and in turn was successful in taking at least three accounts from respondent, and in one case buying out equipment originally supplied by respondent.

(d) U.S. Oil Company, Providence, Rhode Island. This company has been an independent blender of lubricants since 1925. It has furnished equipment to car dealers on a surcharge of 10¢ to 15¢ per

gallon of oil sold. All equipment deals provide for a $33\frac{1}{3}$ percent reimbursement at the end of each 12-month period. The company lost three accounts to respondent, lost bids to respondent on three accounts, and took three accounts from respondent in recent years. Gallonage sales of motor oil in the five New England states were as follows:

1952	-----	280,376
1954	-----	317,855
1957	-----	226,359

showing a drop of approximately 93,000 gallons from 1954 to 1957. In the same territory it had 110 car dealer accounts in 1954, and 73 in 1957.

(e) Irving Schultz. He is a distributor for Kendall Refining Company, a "Premium" oil. He has approximately 300 car dealer accounts in Massachusetts, exclusive of Boston and the Bay area. He has only two equipment accounts involving one lift or chassis lubricant or shaft gun and cannot afford to compete on equipment deals.

(f) White & Bagley Company, Worcester, Massachusetts. This company compounds and blends motor oil sold under the trade name "Oilzum" and has a sales volume of 500,000 gallons to car dealers. Sales have increased every year up to 1956. This company does not sell or loan equipment. It lost one account to respondent, and 50 percent of another, and also lost bid to respondent on one account.

CONCLUSIONS

1. It is the theory of this proceeding that the practice of the respondent of leasing or selling major lubricating equipment to car dealers on an amortization basis with the cents-per-gallon formula, induces a substantial number of car dealers to refuse to handle, or to discontinue handling, competitive petroleum products and to deal preferentially and exclusively in respondent's petroleum products contrary to the public policy established by the Clayton Act; and, consequently, constitutes unfair methods of competition within the intent and meaning of the Federal Trade Commission Act.

2. The equipment and lubricant contracts used by the respondent were designed to assist in the sale of oil to car dealers, but did not in fact exclude competitors from selling the car dealer customer. In fact, car dealers were required by customer preference and demand to maintain a substantial stock of "Premium" oils which were usually carried in package form. Even so, the agreements, many of which are 90% requirement contracts, on their face indicate the

possibility of a restriction of the market. There is, however, no direct evidence in this record to establish the probability of the required competitive injury. In fact, at least two representatives of respondent's competitors testified in this proceeding that they were able to sell certain car dealers with whom respondent had contracts or had split the business of certain dealers with respondent. Furthermore, it was a common practice in the industry for dealers to change suppliers during the term of the contract, the new supplier buying the equipment from the old supplier. The record shows that competitors did, in fact, take over some of respondent's contracts with oil dealers by paying respondent the balance due on the cost of equipment.

3. There is no competent evidence in this proceeding proving or permitting any inferences to be drawn, that competitors suffered a loss of business as a result of the practices of the respondent. Of the six competitors of the respondent, concerning whom evidence was introduced, only two showed loss of business—Charles A. Goyert & Co., Inc., and U.S. Oil Company:

(a) The gallonage sales of Charles A. Goyert & Co., Inc., of motor oil dropped from 55,000 to 43,000 gallons in the past three years. During that time there was a decline in new car sales and a decline in new car dealers. This decline cannot be disregarded, and inferences cannot be drawn that the drop in its business was due to respondent's practices when it appears that Goyert did not lose any accounts to respondent and lost out to respondent on one bid where he had gone as high as \$6,000 on equipment.

(b) The U.S. Oil Company, during recent years, lost three accounts to respondent and was successful in taking three accounts from respondent, so that on this the score was about even. In bidding on accounts, U.S. lost three bids to respondent. This is not sufficient to support a reasonable inference that a drop of 93,000 gallons from 1954 to 1957 in the New England area was due to the practices of the respondent. Also the period subsequent to 1955 showed a decline in new car sales and a decline in the number of car dealers.

(c) The remaining competitors other than Goyert and U.S. Oil showed an increase in business in recent years and no losses that could be attributed to the practices of the respondent. One competitor, White & Bagley Company, testified to an increase in business every year up to 1956. Although he claimed it was extremely difficult to add new accounts, he did state that industry sales in general, of oil, were down in 1958 in comparison with 1957, and that there are fewer car dealers than there were four years ago.

5. One of the elements advanced in support of the charges of the complaint was the size of respondent corporation. The suggested inference to be drawn from this was that since respondent's gross sales throughout the country were over 1 billion dollars, it was in a position to use its large financial resources to restrain competition. The hearing examiner cannot accept such a theory in the absence of proof that the practices engaged in are in themselves illegal, regardless of the size of the respondent. Although the respondent has been furnishing major lubricating equipment since 1946, its share of the relevant market is very small and on the basis of this record there is no indication of a tendency to establish a monopoly or even to unlawfully restrain competition in the relevant market.

6. Since the practices of the respondent have not been found or concluded to be contrary to the public policy established by the Clayton Act, or otherwise in violation of the Federal Trade Commission Act, the charges of the complaint have not been sustained.

ORDER

It is ordered, That the complaint in this proceeding be, and the same is hereby, dismissed.

ORDER DENYING APPEAL FROM INITIAL DECISION DISMISSING COMPLAINT

This matter having been heard upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision dismissing the complaint in this proceeding; and

The Commission having considered the entire record, including the briefs and oral argument of counsel, and having determined that, except as hereinafter indicated, the hearing examiner's findings and conclusions are fully substantiated on the record and that the order of dismissal contained in the initial decision is an appropriate disposition of this matter:

It is ordered, That the third sentence of Paragraph 2 of the conclusions in the initial decision be deleted and the following sentences substituted therefor: "Even so, the agreements, many of which are 90% requirement contracts, on their face indicate the possibility of a restriction of the market. There is, however, no direct evidence in this record to establish the probability of the required competitive injury."

It is further ordered, That paragraph 11(d) of the findings contained in the initial decision be modified by changing the figure for 1952 in the annual gallonage schedule therein from 28,376 to 280,376 and that paragraph 4(b) of the conclusions contained in the initial

decision be modified by deleting from the end of the third sentence thereof the words "particularly when it appears that from 1952 to 1954 U.S. Oil increased its sales by 290,500 gallons," such modification being intended to reflect the Commission's order of May 20, 1959, directing that the official transcript in this proceeding be corrected by changing the figure 28,376 at page 584, line four thereof, to the figure 280,376.

It is further ordered, That the hearing examiner's initial decision, filed January 27, 1959, as modified herein, be, and it hereby is, adopted as the decision of the Commission.