

1204

Decision

(60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained in the initial decision as modified.

IN THE MATTER OF
SOCONY MOBIL OIL COMPANY, INC.

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

Docket 6915. Complaint, Oct. 14, 1957—Order, Apr. 11, 1960

Order dismissing, as not sustained by the evidence, complaint charging one of the world's largest integrated petroleum producers with unfairly diverting trade from competitors by furnishing lubrication equipment and property improvement facilities to automobile dealers agreeing to handle its lubrication oil and grease preferentially or exclusively.

Lynn C. Paulson, Esq., and James H. Kelley, Esq., for the Commission.

Howrey & Simon by Edward F. Howrey, Esq., and Harold F. Baker, Esq., of Washington, D.C., and Henry C. Moses, Esq., and John P. Philbin, Esq., of New York City, for respondent.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

STATEMENT OF THE CASE

On October 14, 1957, the Federal Trade Commission issued its complaint against Socony Mobil Oil Company, Inc. (hereinafter called respondent or Socony), charging it with unfair methods of competition 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, by means of the loan, gift, lease, or sale upon easy terms of lubrication equipment, improvements and other facilities, upon the condition, express or implied, that the customer will thereafter handle Socony's petroleum products, preferentially or exclusively, induced a substantial number of such customers to discontinue handling competitive products and to handle Socony's products, preferentially or exclusively, with the effect of substantially lessening competition

among respondent's competitors and tending to create a monopoly in the purchase and resale of lubrication equipment and facilities.

Respondent appeared by counsel and filed an answer admitting the corporate, commerce, and competition allegations of the complaint, but denying the alleged unfair methods of competition and the alleged effects thereof. 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 September 16, 1958 to February 16, 1959. At the conclusion of the case-in-chief, respondent also rested. Both parties were represented by counsel, participated in the hearings and afforded 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. Both parties filed proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof. All such findings of fact and conclusions of law proposed by the 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 York corporation with its principal office and place of business located at 150 East 42nd Street, New York, New York.

II. Interstate Commerce and Competition

The complaint alleged, respondent admitted, and it is found that it is now and for several years has been engaged in producing, refining, storing, transporting, selling and distributing various petroleum products, including lubrication oil and grease, and selling and distributing such products to various wholesale and retail buyers, including automobile dealers, throughout the United States, for resale to the public. 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 petroleum products, including lubrication oil and grease, in commerce.

¹ 15 U.S.C. §1007(b).

Respondent is one of the largest integrated petroleum producers in the world. The record establishes and it is found that respondent's sales to said wholesale and retail purchasers, including automobile dealers, are and have been in the course of commerce, and that there is now and has been at all times mentioned herein a continuous stream of trade in commerce of said petroleum products, including lubrication oil and grease, between respondent and said purchasers located throughout the various states of the United States.

III. The Unlawful Practices

A. *The Issue*

The basic issue in this case is whether the sale, lease or loan of lubrication equipment or other facilities such as improvements to purchasers of lubrication oil and grease, upon terms which provide for the repayment or amortization of the cost of such equipment by the application of a designated portion of the purchase price of the oil and grease to be purchased pursuant to contract, is an unfair method of competition in violation of the Act.

B. *The Alleged Unfair Method of Competition*

The theory of the complaint is that as a result of the aforesaid furnishing of equipment, purchasers are induced or actually agree to handle respondent's products, preferentially or exclusively, thereby restraining and lessening competition among respondent's competitors and tending to monopoly in violation of Section 5 of the Act.

In addition, the complaint also alleged that respondent had furnished such equipment and improvements without charge, the cost of which did not bear a reasonable relation to the profits to be made on the prospective lubrication oil and grease sales, and that the practice of respondent tended to create a monopoly in the purchase and resale of lubrication equipment. Both of these latter allegations were abandoned during the hearings for want of proof. No proof whatsoever was offered with respect to any tendency to create a monopoly in the purchase and resale of lubrication equipment. With respect to the allegation concerning the cost not bearing a reasonable relation to the expected profits, the record establishes the contrary, and demonstrates that in each instance the equipment or improvements furnished bore a direct relationship to the profits expected to be made on such contracts, and were amortized by crediting a specific portion of the purchase price of each

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gallon of lubricant purchased, so that in carrying out the terms of the sale contract entered into, the cost of the equipment was fully amortized and paid for by the purchaser.

The products involved in this case are motor oil and greases used for lubricating automobiles. The purchasing market defined and proven was automobile dealers, and the geographic area was generally confined to portions of the states of New York, Massachusetts, Rhode Island, Connecticut and New Jersey.

The record establishes that about 17 percent of all automotive motor oil and grease is sold through car dealers, while about 83 percent of said products is sold through service or filling stations, with which this case is not concerned. There are a large number of competitors in the motor oil market, and they fall generally into three groups of suppliers selling to car dealers. The first group are the marketers of the so-called "premium" or "Penn" motor oils, with a high degree of consumer acceptance and which generally sell at higher prices than those charged by both the so-called majors and the blenders, the other two groups. This group of premium oils includes Quaker State, Pennzoil, Wolfshead, Alemite, Amalie, Macmillan and Kendall. In general, the premium oils are sold to automobile dealers through distributors.

The second group of suppliers in the relevant market are the so-called major oil companies, which include respondent, Esso, Gulf, Shell, Texas, and others. The prices at which their comparable oil products are sold are somewhat below the premium oils and somewhat above the other group, referred to herein as blenders.

The third group of suppliers are independent compounders and blenders who purchase base oil stocks from refiners, blend these stocks with appropriate additives, and then market the finished product under their own brand names. This group includes White & Bagley, U.S. Oil, Colt-Worthington, Davis-Howland, Paragon, and others. In general, the price charged by the blenders is lower than that charged by the majors. (White & Bagley is an exception, charging prices above the majors but not as high as the Penn oils.) In the same grades, all of the products of the various groups are comparable or equal in quality. In general, the blenders do not sell nationally. The record establishes that the blenders, premiums, and majors in general are in competition, in varying degrees, throughout the geographic area encompassed by this proceeding.

Socony has been engaged in the sale of automotive lubricants and oil to car dealers for approximately 50 years, and with the exception of some of the newer entrants in the field, many of the premiums and blenders have been engaged in the same market for

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substantial periods of years. Competition in the sale of automotive lubricants to car dealers has been keen for many years. In the years preceding World War II, it became common practice in the industry for sellers to furnish car dealers lubrication equipment, in varying degrees, in connection with the sale of lubricants to said dealers. At that time this usually consisted of relatively inexpensive dispensing equipment such as hi-boys, hand pumps and storage tanks, which were loaned to car dealers contracting for the purchase of oil. During the war the car dealer market declined substantially.

After the war, with the large increase in the sale of new automobiles, competition for the car dealer markets for oil became intense. In this connection, motor oil suppliers met this increased competition in various ways, such as lower prices, emphasis upon quality, furnishing lubrication equipment and other improvements to aid in the resale of automotive lubricants, quantity price discounts, and other promotional devices such as guaranteeing a purchaser's car against mechanical failure for life or 30,000 miles if the seller's oil was used exclusively. The type of equipment and improvements furnished increased substantially in complexity and cost, consisting of power lifts for lubricating cars, underground tanks, pumps, overhead reels, and in some instances improvements to the buyer's premises, such as structural changes, painting, and blacktopping. While under the pre-war practice the equipment furnished did not normally exceed a few hundred dollars in value, since the war increased competition and change in the type of equipment needed has brought about substantial equipment deals occasionally exceeding \$10,000. All of the competitors rely upon some of the above-mentioned programs to meet the intense competition; either lower prices or substantial discounts from list prices, furnishing equipment and improvements, furnishing guarantees to the automobile users of their products, or stressing consumer preference for the so-called premium oils. With a few exceptions, substantially all of the competitors offer automobile dealers equipment or improvement deals in exchange for a contract agreeing to purchase specified quantities of the seller's lubricants for a stated period of time.

There is no substantial evidence in the record concerning total sales of lubricants in the geographic area encompassed, nor is there any evidence of respective shares of such market or whether or not respondent's share of the market has increased in recent years. While respondent furnished counsel supporting the complaint with

statistics showing respondent's total sales and car dealer accounts for the years 1951-1957, this proof was not offered in evidence.

Shortly after World War II, all of the majors and most of the motor oil suppliers undertook the furnishing of substantial equipment to car dealer customers. It is an industry practice that such purchasers sign contracts calling for the purchase of stated or minimum quantities of oil and grease for a specific period of time, varying from one to five years, and in some few instances as long as ten years. Although the complaint, at least in part, alleged that the furnishing of equipment was upon the condition or agreement, express or implied, that the customer would handle Socony's products preferentially or exclusively, the record establishes that the sales contracts entered into by respondent, without exception, are not exclusive dealing or exclusive requirements contracts, and leave the customer free to purchase lubricants from other sources than Socony. Although this case is brought under Section 5 of the Act as an unfair method of competition, it is clear from the complaint as well as counsel's brief that it is based primarily upon the theory of an exclusive dealing requirement which would, of course, be in violation of Section 3 of the Clayton Act, and hence under well-established legal principles constitute an unfair method of competition in violation of Section 5 of the Act. However, in addition to the alleged agreement or condition of preference or exclusiveness, the complaint also alleged that the practice of furnishing equipment induced, without reference to any condition or agreement, customers to handle Socony's products preferentially or exclusively, in violation of the Act.

Although the form and designation of the contracts covering the sale, lease or loan of equipment vary, in general the effect and result is the same in each instance. As previously found herein, substantially all of the motor oil suppliers engage in the practice of furnishing equipment to car dealers in varying degrees, depending upon their financial ability and the necessity of meeting competition. Although the terminology varies, the arrangement is one whereby the car dealer is furnished equipment by the seller which is paid for by the car dealer over the period of the contract, by means of the application of a percentage of the purchase price of each gallon of lubricant to the amortization of the cost of the equipment, mathematically computed so that the percentage of purchase price, or cents per gallon, multiplied by the estimated number of gallons a purchaser will use over the period of the purchase contract will equal the cost of the equipment and thus amortize it during the term of the contract. Actually, what the deals amount to is a

discount or reduction in price from the stated list price, with the reduction being credited to the amortization of the cost of equipment. The only difference between these arrangements and any other price reduction is that respondent, and all of its competitors who furnish equipment, in effect advance to the purchaser the price discount in full at the time the contract is entered into, by expending the approximate total of such discount for the period of the contract to purchase or pay for the equipment or improvements at the time the contract is signed.

Although some of the equipment and improvement arrangements are called loans, some are handled as conditional sales contracts, some are handled as leases, and some are handled by so-called reimbursement letters amending the retail purchase contracts, the net effect of all of them is that the purchaser acquires the equipment originally furnished and paid for by respondent by means of a price discount which is credited against the cost of the equipment as earned by the purchase of lubricants. Under the standard retail purchase contracts, purchasers are given an annual quantity allowance ranging from one to five cents a gallon. All purchasers receive this allowance each year regardless of equipment deals. Respondent's prices are substantially above those of the blenders, who in general charge fifteen to twenty cents a gallon less than Socony. In most of the equipment deals, respondent gave the purchaser an additional price discount equal to the annual quantity discount, and provided that both be applied to the amortization of the equipment. This usually would amount to a total of eight to ten cents per gallon, four to five cents of which the dealer would in any case receive. In a few instances the discount was greater. In general the total discount did not exceed ten cents per gallon, although in a few instances it was as high as twelve cents. The amount of the discount was so computed by respondent that it would amortize the equipment in the number of years provided for in the retail sales contract. In other words, in determining how much of an equipment advance would be feasible on a given contract, respondent estimated the annual purchases of lubricants by the car dealer, and this figure times the number of years the contract would run multiplied by the price discount per gallon would approximately equal the amount of investment made in the equipment.

In addition, respondent's policy required that such equipment deals be offered upon proportionately equal terms to all purchasers, and that respondent would not enter into any contracts providing for the furnishing of equipment or improvements unless necessary to do so in order to meet competition. In this connection, respondent-

ent required proof from the prospective customer that he had received offers from competing sellers at least as good or better than the arrangement offered by Socony.

On occasion respondent furnished improvements other than equipment, such as painting, blacktopping, and structural changes. These, of course, could not be repossessed or returned to respondent in the same manner as equipment under a conditional sales contract or loan agreement. However, the effect was identical. Under the terms of the arrangement, if the purchaser terminated his contract prior to the stated number of years, he was obligated to pay the unamortized balance of the improvements at that time. In the same way under the conditional sales contracts, if the contract was terminated prior to its fixed term of years or the price discount applied to the amortization was insufficient, the purchaser was required to make good the difference.

As previously found, these contracts were not requirements contracts or exclusive dealing contracts, and the purchaser was free to purchase lubricants from other sources although agreeing to buy a minimum amount from respondent. In actual practice the equipment deals had no effect upon the purchaser's freedom to enter into contracts with other sellers for future purchases of lubricants. Because of the competitive conditions, substantially all of the sellers would take over equipment furnished by a competitor to a dealer, purchase such equipment or pay the unamortized portion thereof to the competitor, and provide for the amortization of same by the dealer in return for a contract agreeing to purchase oil from it. In other words, although unamortized amounts might still be owed on such equipment, in practice this in no way hindered the dealer from changing suppliers and negotiating new contracts with competitors.

In addition to the theory of an exclusive dealing arrangement, which it has been found did not exist, counsel supporting the complaint takes the position that the furnishing of equipment or improvements is an unfair method of competition because it tends to lessen competition and tends to monopoly in respondent by taking business away from others who are either unable or unwilling to meet such competition. The record establishes that in fact substantially all of the competitors, except a few who prefer not to do so, also enter into equipment deals with car dealers, and the extent to which each competitor engages in this practice is limited only by its financial ability and choice. Admittedly respondent, as well as other majors, has greater financial resources than most of the blender and premium competitors. In this connection it must

be borne in mind that respondent does not engage in this form of competition predatorily, but only in order to meet competition in attempting to secure and retain car dealer customers. Incidentally, counsel supporting the complaint argues that meeting competition is no defense to an unfair method of competition. Obviously this is correct and has been so held frequently. However, such proof was not offered for that purpose, but to cast light upon the issue of whether the practice lessened competition. Patently a competitive practice engaged in to meet competition does not have the effect of lessening competition, but in fact increases it.

Counsel supporting the complaint called a number of competitor witnesses, both blenders and premiums, but the record fails to establish any substantial loss of business or lessening of competition attributable to respondent's method of competition. In fact if anything the record establishes the contrary. Testimony was received from two of the distributors of premium oils and representatives of four of the blenders. Without reviewing this evidence in detail, the record establishes that most of these competitors substantially increased their volume of sales during the period when the practices allegedly were lessening competition, from the conclusion of World War II to the time of the hearing, and said competitors not only met such competition but in fact were more successful than respondent, taking away or winning from respondent more accounts than respondent succeeded in taking or winning from them. As a matter of fact, the record reveals that the so-called small competitors captured more than twice as many accounts as Socony as a result of competitive offers. The record reveals that other competitive devices used, such as the 30,000-mile warranty, the lifetime warranty, substantially lower list prices, special reductions from list prices, and equipment and improvement deals based upon a surcharge added to the list price, successfully took away from Socony accounts which it had previously had, and also successfully captured new accounts in competition with Socony and many of the other majors.

Of the six competitors testifying, at least three showed very substantial increases in total sales from 1946 to the time of the complaint, the period encompassing the major equipment deals entered into by Socony and its competitors. Of the other three, while there is practically no reliable or substantial evidence in the record concerning their sales volume, what little there is indicates that their sales steadily increased at least until 1956, and that the decline, if any, since then has been moderate and can in no sense be attributed to respondent's practices. The fact that these same competitors

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were able to capture more accounts from Socony than it was able to capture from them is substantial evidence that Socony's competitive practices in no way contributed to any decline in their sales figures. In addition thereto, the record establishes that the peak year for new car sales was 1955. Since then sales of cars have declined substantially, as well as the number of car dealers in business, both of which facts necessarily would cause a decline in the overall sale of lubricants to car dealers. It is concluded and found that there is no reliable, probative and substantial evidence in the record from which an inference may be drawn that the methods of competition engaged in by respondent have caused any decline in the sales of competitors, or any lessening of competition.

Actually, respondent's equipment deals amount to a price discount which still leaves respondent's price substantially higher than that of the blenders, and while it is substantially lower than that of the premiums (as it has always been), the record evidences that the premiums are competing effectively by means of their guarantee plans and superior public acceptance of their products. As a matter of dollars and cents, the deals offered by respondent are actually not as good as those obtainable from the blenders. The blenders' list prices are as much as 15 to 20 cents a gallon below those of respondent. In addition thereto, they frequently reduce this price in order to sell a customer. The record establishes that the discount given by respondent normally does not exceed ten cents per gallon, which includes the annual quantity allowance of four cents a gallon which the buyer receives in any event. By means of this discount, respondent's price was actually reduced only about six cents a gallon. That amount, together with the buyer's earned discount, is used to pay for the equipment over the term of the contract.

Simple arithmetic demonstrates that a price fifteen to twenty cents below respondent's list price is nine to fourteen cents lower than respondent's price including the discount, which is an excellent reason why the blenders are able to compete with more success than respondent, and capture more accounts from respondent than respondent is able to capture from them. The only advantage a buyer gains from respondent's arrangement is the cash advance of the discount from the list price over a period of years in the form of equipment or improvements. However, if a ten-cent surcharge is added to the blenders' list price in order to amortize equipment furnished car dealers by them, the deal is exactly the same but the net result and price to the purchaser is better than

the arrangement offered by respondent. In addition to this fact, it is a very simple matter for a car dealer, having secured equipment or improvements from respondent or one of its competitors, to enter into a contract with one of the blender competitors for the purchase of lubricants at fifteen to twenty cents a gallon less, use ten cents of this saving to pay off the conditional sales contract, and still effect a saving of five to ten cents a gallon on his lubricant purchases as well as keeping the equipment. Numerous other potential arrangements exist whereby a car dealer can effectuate a greater savings by means of the lower price offered by the blenders and still realize the same benefits offered by respondent.

It is apparently counsel's theory that because respondent has greater financial resources than some of its competitors it is an unfair method of competition for it to invest in equipment loans paid for by the purchaser by means of a price discount credited against such indebtedness, even though such discount still leaves the price in excess of the competitors, because such competitors are not financially able to engage in as much of the same type of competition as competitors with greater financial resources. If respondent engaged in such methods of competition with a predatory purpose or power to acquire unlawful monopoly, such practices, even though legal in and of themselves, might be considered an unfair method of competition as part of such a predatory scheme or objective tending toward monopoly. However, the record here demonstrates not only that the competitors are able to meet, and indeed beat, such competition, but that respondent only makes such competitive offers when compelled to do so in order to meet competition. This factor negates any inference of predatory intent or attempt to monopolize. The record establishes that if respondent did not meet such competition of the various types hereinabove considered, it would soon find itself completely out of the car dealer market.

Even assuming *arguendo*, that respondent's competitive offers were better than its competitors, in the final analysis what counsel supporting the complaint appears to be contending is that competing successfully is an unfair method of competition. Such a contention is, of course, the antithesis of the objectives of the Sherman Act—which seeks to preserve strong competition by outlawing those practices which eliminate such competition, e.g., price-fixing, boycotts, division of territory, and other restraints of trade, that the public may benefit by effective competition producing better products, service, and lower prices. Lessening of competition is used by counsel supporting the complaint in the sense of one competitor gaining a greater share of the market and hence the others a smaller

share, or, in other words, in the Clayton Act sense rather than the Sherman Act Section I sense. His contention in effect is that *any* method of competition which has the effect of lessening competition in that sense, i.e., reducing the share of the market of some competitors, is an unfair method of competition. Strong competition, by offering lower prices, better products, or better service, by those able to do so, necessarily has the effect of causing others not able to meet it to lose business and hence to lessen competition in that sense; *ergo*, successful or effective competition, or competition within the true meaning of the word, must necessarily be an unfair method of competition. *Webster's Dictionary*, 1954, defines competition as follows: "The effort of two or more parties, acting independently, to secure the custom of a third party *by offering most favorable terms*." [Emphasis added.] Hence it would seem that the attainment of the objective necessarily included in the definition would be an unfair method of competition in counsel's theory, inasmuch as it would lessen competition in the sense used by him.

The logical corollary to this reasoning is that only weak or ineffective competition, or a lack of competition, which does not gain or lessen any share of the market, is the fair method. However, that is the very type of conduct outlawed by the Sherman Act. Price fixing, division of territory, boycotts, etc., tend to eliminate competition among competitors and not permit anyone to capture a larger share or gain any public preference for its product. A method of competition, e.g., hard or effective competition, which, by reason of a better offer to purchasers in terms of price, product, or service, lessens competition in the sense of causing purchasers to prefer that seller and give it a larger share of the market, cannot be an unfair method of competition merely because it lessens competition. It follows that the original premise is false.

Certain types of competition which capture larger shares of the market, and in that sense lessen competition, such as price discrimination, exclusive dealing arrangements, and unfair and deceptive practices, have been legally declared unfair methods of competition. The methods used are unfair—and demonstration of probable effect is necessary—but the effect is not what creates the unfairness. If successful competition, which lessens competition by capturing a greater share of sales by means of lower prices, etc., is outlawed as an unfair method of competition, all real competition will cease and the very objectives sought by the antitrust laws, better products at lower prices achieved by the forces of real competition in the market place, will be negated.

Fundamentally, the question is: Is it illegal to offer a better

product, better service, or a uniform lower price? If one competitor is able to do so, the inevitable effect must be the capturing of a greater share of the market. The very statement answers the question, if competition is to have any significant meaning. It is a contradiction in terms to argue that competition which causes buyers to prefer a product is an unfair method of competition. Nothing would achieve what counsel supporting the complaint seeks except the elimination of competition by reducing all competitors to the level of the lowest common denominator.

In addition to the foregoing contentions, counsel supporting the complaint, apparently recognizing that there is no substantial proof evidencing any lessening of competition attributable to respondent's practices, appears also to be engaged in a boot-strap operation. He argues, first, that it is well-established that the Commission may infer a lessening of competition from an unfair method of competition, *ergo*, we draw here such an inference. Having thus established a lessening of competition, we may now conclude that it is an unfair method of competition, proceeding from the premise that a method of competition which tends substantially to lessen competition is an unfair method of competition. By this process nothing plus nothing equals something. In each syllogism appears a fatal fallacy. In the first, the assumption that the method is unfair, and in the second, the assumption that a lessening of competition alone demonstrates unfairness.

While counsel supporting the complaint leans heavily upon the holding of the Court in the *Hastings* case,² which concededly affords him some basis for argument, although the facts are predominantly inapposite, perhaps the most conclusive answer to his contention is that the Supreme Court in the *Sinclair* decision,³ upon substantially similar but considerably stronger facts, has decided that the competitive practice herein is not an unfair method of competition under Section 5 of the Act. In that case the facts as found by the Commission were that Sinclair was lending and leasing gasoline dispensing equipment to retail dealers at nominal prices upon the condition that the equipment be used only with gasoline supplied by the lessor. The contracts in the instant proceeding contain the same provision that the equipment furnished by respondent be used only in connection with its lubricants. The Commission brought more than thirty cases against various refiners of gasoline. Four Courts of Appeal, the Second, Third, Sixth and Seventh Circuits, reversed the Commission's holding that the aforesaid practice was an

² *Hastings Co. v. F.T.C.*, 153 F. 2d 253 (C.A. 6, 1946).

³ *F.T.C. v. Sinclair*, 261 U.S. 463 (1923).

unfair method of competition. The Supreme Court considered all of the cases jointly in its decision.

In *Sinclair* the facts were considerably stronger in that the Commission and the Courts found that the equipment was loaned at prices which did not represent a reasonable return on the investment, and that many competitors, because of insufficient capital, could not purchase and lease such devices *as a result of which they lost* numerous customers to Sinclair. In the instant case the complaint contained a similar allegation, that the cost of the equipment furnished by respondent does not bear a reasonable relation to the profits to be made. As hereinabove found this allegation was abandoned and in fact the record establishes the contrary. In the present case the record also establishes, contrary to the facts in *Sinclair*, that most competitors are able to furnish such equipment, and that not only have they not lost numerous customers to respondent, but have actually gained more customers from respondent than respondent has been able to gain from them.

Even though the facts found in *Sinclair* are substantially stronger than herein, all of the Courts of Appeal, as well as a unanimous Supreme Court, held that the furnishing of such equipment was not an unfair method of competition. They also held, as previously found herein, that the contract did not require exclusive dealing within the meaning of Section 3 of the Clayton Act, and that the purchasers were free to deal with others. The requirement that the equipment be used only with products supplied by the seller was held not to result in any exclusive dealing requirement. Incidentally, the *Sinclair* complaint also included a similar allegation that the effect of the practice might be to lessen competition in the sale of equipment. With respect to this, the Supreme Court said that the suggestion was sterile and required no serious discussion. The Courts of Appeal treated it at greater length but in the same manner.

The instant case is almost identical except that the facts, as noted above, are substantially weaker than in *Sinclair*. In that case the Seventh Circuit said:

The fact that the tank and pump are much more expensive does not make the transaction different, or unfair. If that is not true, then the law must mean that the Trade Commission is set as a watch on competitors, with the duty and the power to judge what is too fast a pace for some and to compel others to slow up; in other words, to destroy all competition except that which is easy. We are of the opinion that Congress did not intend to bestow any such power. * * *

* * * nor do we find anything in the law which indicates that it is illegal for one competitor to do that which is beyond the financial ability of an-

other competitor; nor do we find anything that authorizes respondent to regulate competition for that reason.

The Court of Appeals for the Third Circuit held:

That the practice imposes upon a competitor the investment of more capital is an argument which would apply with equal force—and with equal infirmity—to competition based on superiority of goods and liberality of credit.

The Supreme Court, in unanimously affirming all four Circuits, held:

Certainly the practice is not opposed to good morals because characterized by deception, bad faith, fraud, or oppression. *Federal Trade Commission v. Gratz*, 253 U.S. 421, 427, 64 L. ed. 993, 995, 40 Sup. Ct. Rep. 572. It has been openly adopted by many competing concerns. * * * No purpose or power to acquire unlawful monopoly has been disclosed, and the record does not show that the probable effect of the practice will be unduly to lessen competition * * *.

The powers of the Commission are limited by the statutes. It has no general authority to compel competitors to a common level, to interfere with ordinary business methods, or to prescribe arbitrary standards for those engaged in the conflict for advantage called "competition." The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain. And to this end it is essential that those who adventure their time, skill, and capital should have large freedom of action in the conduct of their own affairs.

Curiously enough, both parties rely upon the Supreme Court's statement in *Sinclair*, quoted above, that: "No purpose or power to acquire unlawful monopoly has been disclosed." Counsel supporting the complaint argues that the holding in *Sinclair* justifies a finding herein that the practice is an unfair method of competition and the issuance of an order, upon his conclusion that the evidence clearly shows a purpose and power to acquire unlawful monopoly. Counsel makes no reference to any evidence supporting this conclusion. The record in fact demonstrates the contrary. As previously found herein, the record establishes that Socony did not engage in these practices with a predatory intent or objective tending toward monopoly, but rather in a good faith effort to meet competition. Certainly *Sinclair* is a major oil company in the same sense as Socony. Here the evidence reveals, contrary to *Sinclair*, that the equipment was furnished at prices which did represent a reasonable return thereon, that most if not all of the competitors were able to furnish equipment in varying degrees, and that Socony did not capture numerous customers from its competitors as a result of such practice but on the contrary the competitors were more successful in capturing customers from Socony. The record in the *Sinclair* case appears to constitute much stronger evidence of a purpose or

power to acquire unlawful monopoly, yet the Supreme Court held upon those facts that no such purpose or power had been disclosed.

For all of the foregoing reasons, it is concluded and found that counsel supporting the complaint have failed to establish by reliable, probative, and substantial evidence that respondent, by engaging in the above-found practices, has engaged in an unfair method of competition within the intent and meaning of the Act.

CONCLUSIONS OF LAW

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

2. The acts and practices of respondent hereinabove found do not, and do not tend to, substantially lessen competition or create a monopoly.

3. The acts and practices of respondent hereinabove found do not constitute unfair methods of competition or unfair acts and practices in commerce within the intent and meaning of Section 5 of the Act.

4. Respondent has not, as alleged in the complaint, engaged in unfair methods of competition or unfair and deceptive acts and practices in commerce in violation of the Act.

ORDER

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

OPINION OF THE COMMISSION

By the Commission:

The complaint in this matter charges respondent with unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. The hearing examiner in his initial decision held that the allegations were not sustained by the evidence and ordered dismissal of the complaint. Counsel supporting the complaint have appealed from that decision.

The Commission is of the opinion that the issues presented herein are the same as those decided in *Shell Oil Company*, Docket No. 7044. Since the same questions of law are involved in both cases, the requirements of proof are identical in each.

Counsel supporting the complaint argue that the record in this proceeding contains evidence to establish a violation which was not before the Commission in the *Shell* case. However, upon the basis

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of our review of the whole record, it is our opinion that the proof here, like the proof in the *Shell* case, has failed. Under the circumstances, the Commission has no alternative to an affirmance of the initial decision.

Accordingly, the appeal of counsel supporting the complaint is denied and the initial decision is adopted as the decision of the Commission.

ORDER DISMISSING COMPLAINT

This matter having been heard by the Commission upon appeal of counsel supporting the complaint from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission having determined, for the reasons stated 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 hearing examiner's initial decision, filed July 2, 1959, be, and it hereby is, adopted as the decision of the Commission.