
IN THE MATTER OF
THE FIRESTONE TIRE & RUBBER COMPANY ET AL.

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

Docket 6487. Complaint, Jan. 11, 1956—Decision, Mar. 9, 1961

Order requiring the nation's second largest manufacturer of rubber products, including tires and inner tubes, engaged also in the purchase and resale of batteries, automotive parts and accessories, with net sales in 1954 in excess of \$900,000,000, and a large producer and distributor of petroleum products, with total sales and other revenue in 1954 exceeding 1¼ billion dollars, to cease entering into contracts with one another under which Firestone paid Shell an "override" commission ranging from 7½% to 10% on the net sales of TBA products to service stations and distributors selling Shell's petroleum products in return for the influence and aid given by Shell in promoting such sales.

Mr. Andrew C. Goodhope, Mr. Fredric T. Suss, and Mr. John Perechinsky for the Commission.

Mr. Louis A. Gravelle and Mr. Thomas S. Markey, of Washington, D. C., and *Mr. Joseph Thomas*, of Akron, Ohio, for respond-

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ent The Firestone Tire & Rubber Company, and *Mr. William Simon*, of Washington, D. C., and *Mr. George S. Wolbert, Jr.*, of New York, N. Y., for respondent Shell Oil Company.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding is based upon a complaint brought under Section 5 of the Federal Trade Commission Act, charging as unlawful certain contracts entered into between respondents, The Firestone Tire & Rubber Company and Shell Oil Company, whereby The Firestone Tire & Rubber Company agreed to pay the Shell Oil Company a sales commission on all tires, batteries and accessories sold by said The Firestone Tire & Rubber Company to service stations and other outlets of Shell Oil Company. The complaint further charged that the respondent, The Firestone Tire & Rubber Company, had entered into similar contracts with certain oil companies other than Shell Oil Company, and that Shell Oil Company had entered into a similar contract with The Goodyear Tire & Rubber Company.

This proceeding is now before the hearing examiner for final consideration upon the complaint; answers thereto; testimony and other evidence; proposed finding of fact, conclusions of law and briefs in support thereof filed by all parties; and reply filed by counsel supporting the complaint. The hearing examiner has given consideration to the proposed findings of fact and conclusions submitted by the parties, and their briefs in support thereof, and all findings of fact and conclusions of law proposed by the parties respectively, 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, The Firestone Tire & Rubber Company (hereinafter sometimes referred to as "Firestone"), is a corporation organized, existing and doing business under the laws of the State of Ohio with its principal office and place of business located at 1200 Firestone Parkway, Akron, Ohio. Said respondent, among other things, is engaged in the sale and distribution in interstate commerce of tires, batteries, accessories and supplies (hereinafter referred to as "TBA").

2. Respondent, Shell Oil Company (hereinafter sometimes referred to as "Shell"), is a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office and place of business located at 50 West 50th Street,

New York, New York. Said respondent is engaged in the production and in the sale and distribution in interstate commerce of petroleum products, including gasoline and lubricants sold to petroleum wholesalers and service stations.

3. Respondent Shell sells its petroleum products directly and through jobbers to approximately 20,000 service stations. These service stations, which purchase Shell products for resale at retail to the consuming public, are classified as "C" stations, "L" stations, "DL" stations, and "OD" stations. A "C" station is one that is owned by Shell, where the operator is a commission manager who receives gasoline from Shell on consignment and is paid a commission by Shell at an agreed rate on every gallon of gasoline sold. All sales by the commission manager, other than gasoline, and specifically including tires, batteries and accessories, are wholly for his own account. An "L" station is one which is operated by a lessee dealer who leases the service station from Shell, generally for a one year term. A "DL" station is one where the dealer owns his own service station and has leased the station to Shell for a period of years, Shell then leases the station back to the dealer for the same period of time and at the same rental. The purpose of the "DL" agreement is to permit the dealer to finance the purchase or construction of his own service station by using the lease to Shell as collateral for a construction or purchase loan. The "OD" station is a designation for "other dealers" and includes dealers who either own their own stations or lease from third parties, having no financial dealings with Shell other than payment for the petroleum they buy and having no contract with Shell other than an agreement for the purchase of petroleum products. Dealers in this category also include some restaurants, garages, and parking lots with gasoline pumps. Relatively few of these are modern service stations.

4. As of July 1956, Shell distributed petroleum through 847 jobbers. The jobber performs the complete service of distribution in his area, selling to dealers with whom the Shell Oil Company has no direct relationship. The jobber either owns one or more bulk plants or leases them from Shell. In the year 1955, Shell's direct accounts purchased 1,890,491,000 gallons of gasoline, and Shell's jobbers purchased 1,390,344,000. Shell is reputed to be the second largest supplier of jobbers in the United States.

5. The usual form of lease entered into by respondent Shell and its lessee dealers was for a term of one year, and thereafter from year to year, subject to termination by either party at the end of the first or any subsequent year on thirty days' prior written notice.

Earlier leases carried provisions of ten days' written notice. Rental provided by the lease was usually a flat rental, plus a cents-per-gallon charge, dependent upon location of the station, financial condition of the lessee, and potential income. Such lease contained so-called housekeeping provisions relating to the use, maintenance, and general appearance of the station, and breach of any of the terms, conditions or any of the covenants of the lease by the lessee constituted grounds for immediate termination by Shell on fifteen days' notice to the lessee. In the case of death or abandonment of the premises, or closing of the service station for more than 72 hours, the lease is subject to immediate termination with right to repossess premises.

6. In addition to the lease, Shell entered into an agreement of sale with its dealers. These agreements provide for the purchase of an annual minimum and maximum quantity of Shell gasoline, oils and greases at the current posted price at the time delivery was made. These agreements were usually for a period of one year and from year to year thereafter, subject to cancellation at the end of any year thereof by giving thirty days' written notice.

7. Tires, batteries and accessories have become a necessary and integral part of the business operation of the Shell dealer. He cannot profitably and successfully operate his business without the added revenue from TBA, which also enables the dealer to give complete service to his customers. The service station is important to TBA manufacturers as an outlet for distribution to customers. It is to the interest of the Shell Oil Company to have its dealers engaged in the sale of TBA as this builds a stronger dealer organization and increases the sale of gasoline.

8. The sales commission arrangement between Firestone and Shell commenced on a limited basis in 1940, and had its real beginnings in 1942 and 1943. Prior to 1943, the sales commission in dollars averaged approximately only \$1,600 a year. While the Sales Commission Plan was operative between Firestone and Shell, it was not until October 23, 1951, that it was formulated by letter contract. This agreement provided that in consideration for the assistance to be given to Firestone by the Shell sales organization in promoting the sale of Firestone TBA to Shell outlets, Firestone would pay a sales commission on net sales by Firestone of its TBA to Shell outlets accepted as customers by Firestone. This agreement provided, among other things, for the payment of a commission of 10 percent on sales to Shell dealers, and 7-1/2 percent on sales to commercial distributors and jobbers who sell Shell's brands of

gasoline. The Shell company also entered into a similar sales commission agreement with The Goodyear Tire & Rubber Company, Inc.

9. As early as December 22, 1948, Shell sent out letters to its existing dealers, and also prepared a letter to be delivered to new dealers as they were selected. These letters informed dealers that there was nothing in their contracts with the Shell Oil Company obligating them to buy their requirements of TBA items from or through the Shell company. From year to year thereafter, a similar letter was addressed to new and present dealers.

10. The services performed by Shell in promoting the sale of Firestone and Goodyear TBA to resellers of Shell gasoline pursuant to the sales commission contracts were as follows:

(a) Recommending that dealer carry TBA in order to obtain increased station revenue as well as petroleum sales and to furnish better service to their customers, and in so doing, recommending Firestone and Goodyear TBA.

(b) Notifying Firestone and Goodyear in advance of the opening of stations, thereby giving them an opportunity to contact the new or prospective dealer relative to his initial stock of TBA.

(c) Shell held sales meetings at which its dealers were invited and also provided training courses for its dealers, both of which included suggestions for displaying their TBA, and in some instances with the active participation of either Goodyear or Firestone.

(d) Shell sales personnel assisted in adjusting complaints of Shell dealers against Firestone and Goodyear and endeavored to remedy any dissatisfaction dealers might have with the service which these tire suppliers furnished to the dealer, and otherwise avoided customer dissatisfaction which, if not alleviated, could result in loss of that customer's business.

(e) Shell assisted in TBA advertising and participated in promotional activities on behalf of sponsored TBA and provided merchandising assistance to service station dealers and oil jobbers to help the oil dealers and jobbers to sell more TBA.

(f) Shell dealers were authorized to sell TBA to motorists on Shell credit cards on regular or six-months' extended credit without any carrying charge to the dealer or the motorist. The credit card and deferred payment facilities were valuable in promoting the sale of TBA.

(g) Shell representatives at times conducted joint solicitation of dealers with Firestone or Goodyear personnel for the purpose of introducing the TBA salesman at inception of the account; to adjust complaints of dealers and to see that their legitimate claims are

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met; and to fully inform the dealer, and the Shell salesman as well, when a new product is being placed on the market.

11. Both Firestone and Goodyear have sold substantial quantities of their TBA products to Shell outlets. The sales of Firestone to Shell outlets and the commissions paid thereon to Shell were as follows:

<i>Years</i>	<i>Total sales</i>	<i>Total commissions</i>
1957.....	\$21, 002, 825	Not available
1956.....	19, 788, 937	Not available
1955.....	17, 519, 433	\$1, 646, 621
1954.....	15, 352, 956	1, 449, 966
1953.....	14, 373, 854	1, 347, 147
1952.....	13, 553, 957	1, 271, 170
1951.....	11, 230, 684	1, 049, 472
1950.....	12, 064, 813	1, 144, 072
1949.....	8, 236, 544	776, 369
1948.....	9, 242, 203	855, 792
1947.....	8, 668, 663	791, 807
1946.....	8, 526, 205	807, 706
1945.....	4, 101, 159	386, 233
1944.....	2, 412, 267	231, 011
1943.....	685, 336	57, 681
1942.....	47, 697	3, 180

The sales of Goodyear to Shell outlets and the commissions paid thereon to Shell were as follows:

<i>Years</i>	<i>Total sales</i>	<i>Total commissions</i>
1946.....	\$5, 771, 000	\$489, 701
1947.....	5, 646, 000	550, 405
1948.....	7, 000, 000	619, 249
1949.....	8, 592, 000	780, 831
1950.....	13, 305, 000	1, 182, 120
1951.....	11, 865, 000	1, 138, 076
1952.....	16, 606, 000	1, 422, 122
1953.....	17, 984, 000	1, 603, 786
1954.....	18, 455, 000	1, 628, 175
1955.....	21, 299, 000	1, 856, 072
1956.....	22, 822, 000	Not available
1957.....	25, 838, 000	Not available

12. It is contended by counsel supporting the complaint that by reason of the control maintained by Shell over its dealers, resulting from the contractual arrangements, that Shell dealers constitute a captive market for the sale of TBA by Firestone and Goodyear, and that competitors of Firestone and Goodyear are prevented from selling their TBA products to a substantial number of Shell distributors and service stations so as to constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

13. Eleven former Shell dealers were called as witnesses in support of the charges of the complaint. Their testimony relative to coercion is summarized as follows:

(a) William E. Edwards, who was originally a sales representative for Shell, testified to efforts to induce certain Shell dealers to purchase Goodyear TBA, including threats of cancellation, while so employed. He later became a Shell dealer and handled Goodyear TBA. He did attempt to carry some U. S. retread tires, but Shell salesman objected and threatened cancellation of his lease if he did not do as he was told. On cross-examination an attempt was made to discredit this witness because of an alleged work ticket, which he claimed to have signed at the request of the customer but which the customer refused to pay. After a considerable amount of questioning, it developed that this ticket was for \$5.30.

(b) Robert Mattson, former Shell lessee dealer from 1935 to 1955, testified that at the time he discussed taking over the station he was informed that he could handle either Firestone or Goodyear, but that Shell would prefer that he handle Firestone. Put in Goodyear as he was more familiar with this line. The Shell representative objected to his buying Goodyear tires from a non-authorized supply point. When he left the Shell station he opened up a Goodyear store. After this, he called upon a Shell dealer, Switzer, and was present at a conversation held between this dealer and Shell representative, Thalman, in which the dealer informed the Shell representative that he proposed to buy his TBA from the witness and was told by Thalman that if he did not purchase from an authorized supply point he would be put out of the station.

(c) Victor C. Borowsky, who was a Shell commission dealer from August 1955 to July 1956, bought some non-sponsored antifreeze and was told to take it out of his window and put it in the back room. He was also told by Shell salesman that he should get rid of non-sponsored fan belts which he then placed in the back room. This witness testified that with the exception of a few chemicals and additives, he purchased all of his TBA from Firestone, as he felt doing otherwise would antagonize Shell. He gave up station because he could not keep open 24 hours a days.

(d) John N. Chycinski, who was a Shell station operator from 1950 to 1955, testified that when he took over the station he was told that he could display either Firestone or Goodyear. Later he handled some non-sponsored items, including wax, and was told by Shell salesman that he recommended that it be taken off his shelf, which he did. Shell salesman also objected to his carrying certain non-sponsored tires and threatened him with lease cancellation if

he continued these purchases. Later the Shell salesman backed down and he continued purchasing non-sponsored tires.

(e) Warren L. Henderson, Shell lessee from 1953 to 1956, testified that he was given a preference of either Goodyear or Firestone, and as he preferred Goodyear, selected this line. Left the station of his own accord.

(f) James H. Bradley, Shell station operator from 1954 to 1957, testified that when he discussed taking over the station he was told that he had a choice of Firestone or Goodyear TBA. He selected Firestone. In about a year, changed over to Goodyear because of competition with Firestone dealers. Shell representative informed him that it was not the policy to handle competitive tires. His departure from the station had nothing to do with TBA.

(g) Otis T. Dennard was a Shell dealer for six years, beginning in 1942. He testified that nothing was said about the brand of TBA to be carried at the time he took over the station. He handled what he wanted to buy. In 1948, he began to have difficulty in regard to TBA. Every time a salesman called, non-sponsored TBA was discussed. Witness refused to wear a Shell uniform; handle Firestone products 100 percent; or fire two employees. He received notice of termination of his lease. Controversy with Shell also included payment of higher rent.

(h) George Martin Eberenz was a Shell lessee from 1945 to 1957. When he took over the station, he was told he had a choice between Firestone and Goodyear. Chose Firestone. Carried some competitive items, principally Southern batteries, Prestone anti-freeze, Simonize wax and some small shelf stock. Had several conferences with Shell salesman objecting to his Firestone purchases being too low. In 1954, Shell salesman asked him to remove Southern batteries from display shelf as a favor to him, as he did not know what a salesman had to take when this was reported. As a result, removed the batteries to a rear room. Retired of his own volition.

(i) Fred C. Koenig was a Shell lessee from August 1956 to March 1957. Prior to taking over the station he was told that Shell handled Goodyear or Firestone. He told the Shell representatives that he would like to sell whatever his customers wanted, but they told him it wouldn't be a good idea, that he had better stick to Goodyear. Later, the Shell salesman called upon him and told him that since he had not gone along with stocking Goodyear products and was selling various other products, which was not to their liking, it might go rough with him. Every time the Shell salesmen called they suggested that he stock Goodyear products. Received 24-hour notice to vacate around March 11. No indication of lease cancellation

was given, although prior to termination there were repeated complaints of loss of gallonage. Witness was told Shell would either cancel or he could sign a resignation, and he signed a resignation.

(j) James W. Haney was a Shell employee from 1933 to 1944, when he became a Shell service lessee. He was told he would be expected to handle Goodyear products, which he did, but several months later, at the request of the Shell salesman, he changed to Firestone because of competition with station close by. Thereafter, he stocked Firestone. Haney put in some U. S. Royal white-wall tires because he could not get them from Firestone, and was told by the Shell salesman that it was not the company's policy to handle these tires. He also made a purchase of Exide batteries and was asked by the Shell salesman why he was handling Exide instead of Firestone. A short time later, the Shell salesman called on him and mentioned that he was on his way out to see another dealer to tell him that unless he takes Exide batteries out of his stock that the station would be taken away from him. Witness inferred from what the salesman, Johnson, said that he did not want him to handle Exide batteries, so he discontinued them. In 1950, Shell representative requested that he change back from Goodyear to Firestone, but he refused. After that, relations were somewhat strained, and in September 1954 he received a letter advising that when his lease expired it would not be renewed. On cross-examination it was brought out that his gallonage had decreased from 21,500 gallons to 17,000 gallons and that there were complaints about his keeping school buses parked on the property.

(k) James Hooper was a Shell lessee for a year and nine months, beginning May 27, 1952. When he took over the station it was explained that Shell had outlets for TBA through Firestone and Goodyear. Shortly after taking over the station began purchasing Schenuitt tires, Bower batteries and some competitive accessories. Shell salesman told him that he was not cooperating. Never threatened to cancel his lease, but mentioned to him that his lease was only good for a year. Shell refused to renew the lease at the end of the year, but he continued to operate the station until a new dealer was found. On cross-examination it was developed that gallonage went down from 10,500 gallons by a previous dealer to 6,000 or 7,000 gallons a month.

14. Certain representatives of suppliers of TBA, who were selling in competition with respondent Firestone, were called as witnesses in this proceeding. These parties testified generally that they had difficulty in selling TBA to Shell stations, and testified specifically as to reasons given by certain Shell dealers for not buying or selling

their TBA products. This testimony as to reasons given by Shell dealers for not purchasing competitive TBA was allowed under the authority of *Lawlor v. Loewe*, 235 U.S. 522. This latter testimony was received not as proof of the truth of the facts recited, but for the purpose of showing the state of mind of the dealer. This testimony, however, is competent to show that dealers did not purchase a substantial amount of competitive non-sponsored TBA because of their feeling that they were required to purchase Firestone or Goodyear TBA.

15. In the course of the defense to this proceeding, the Shell company introduced the testimony of approximately 123 Shell dealers and ex-dealers in approximately twenty-five States of the United States and in the District of Columbia. Substantially all of these witnesses testified to displaying and selling non-sponsored TBA without objection or complaint by Shell.

16. The hearing examiner recognizes that present dealers appearing to testify were under considerable pressure because they were naturally interested in not jeopardizing the renewal of their leases. The record as a whole shows that there were no exclusive dealers in the sense that they confined themselves entirely to sponsored TBA, as all dealers carry some non-sponsored TBA to satisfy demands of their customers either in varying amounts or on a pick-up basis. Many of the stations do not have the space or financing to stock a complete line of tires and batteries, but instead purchase non-sponsored items as well as sponsored items on a pick-up basis to satisfy customer demand. Many of the dealers called maintained a high sales volume in gasoline gallonage and also oil, and it naturally follows that Shell would not jeopardize this gallonage by pressure tactics sufficient to irritate or alienate such dealers.

17. Many of the dealer witnesses called by Shell testified that they were familiar with, and knew, the Shell policy with reference to the sale of TBA and considered themselves independent businessmen, free to purchase TBA as they might see fit. Many testified that when they were interviewed as prospective dealers they were told they could purchase TBA wherever they might wish. The ex-dealers, called in support of the charges in the complaint, testified that when they were interviewed as prospective dealers they were told that they could purchase either Goodyear or Firestone with no indication that they might purchase from other suppliers. It would be unusual to expect that Shell salesmen would vigorously insist to a dealer that he had a right to buy wherever he might wish and thereby deprive Shell of the commission it would otherwise receive from the sale of sponsored TBA.

18. After giving consideration to the testimony of the various witnesses appearing in this proceeding and giving consideration to their demeanor and credibility, it is the opinion of the hearing examiner that the record in this proceeding, as a whole, indicates that coercion and pressure were, in fact, brought on a substantial number of dealers to induce them to purchase sponsored TBA and to discontinue the purchase or display of non-sponsored items.

CONCLUSIONS

1. The complaint does not charge, nor does the evidence introduced in this proceeding prove, the existence of a conspiracy between Firestone and Shell to restrict and restrain competition in the sale and distribution of TBA products.

2. There is no evidence that The Firestone Tire & Rubber Company engaged in, or participated in, any acts or practices designed to force dealers and distributors of Shell Oil Company to purchase Firestone TBA products.

3. Neither the sales commission contract between Shell and Firestone, nor the contracts between Shell and its dealers and distributors, contain any clause or provision requiring such dealers or distributors to purchase only Firestone or Goodyear TBA.

4. In making a determination as to whether the leases made by Shell with its dealers are used to suppress competition, the extent to which they are in conformity with reasonable requirements in the field of commerce in which they are used will have a direct bearing on the legality. The housekeeping provisions of the leases are not unreasonable or oppressive. The renewal and cancellation provisions of the lease are in conformity with those which ordinarily appear in many leases of property.

5. The consideration for the payment of a commission to Shell under the sales commission contract is based upon substantial services rendered by Shell in promoting the sale of Firestone TBA to Shell dealers and distributors.

6. No inference or implication can be drawn simply from the contractual relationship between Shell and its dealers that the degree of control by Shell over its dealers is sufficient to force dealers to purchase only sponsored TBA.

7. It is further concluded that for the purpose of inducing the purchase of sponsored TBA by Shell dealers, Shell representatives have, in fact, attempted to, and did, coerce and force Shell dealers to purchase substantial quantities of Goodyear and Firestone TBA, and the respondent, Shell Oil Company, accepted the benefits of such acts and practices. These acts of coercion consisted of demands

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that dealers discontinue the purchase or display of non-sponsored TBA under threat of lease cancellation or other corrective action. Such coercion need not be 100 percent effective in order to constitute an unfair method of competition or an unfair act or practice in violation of the Federal Trade Commission Act.

8. The charges of the complaint are sufficiently broad to sustain an order prohibiting overt acts of coercion even though it be found that the contracts entered into between the parties are not illegal.

9. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents named herein.

10. The acts and practices of Shell Oil Company, as herein found, which involve coercion of its dealers, are all to the prejudice of the public and have a tendency and capacity to restrict, restrain or lessen competition in the sale of TBA products and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That respondent Shell Oil Company, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the promotion, offering for sale, sale and distribution of tires, inner tubes, batteries and other automotive parts, accessories and supplies (hereinafter referred to as "TBA products") in commerce, as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from, directly or indirectly:

1. Inducing, or attempting to induce, the purchase of TBA products of a particular supplier, by Shell dealers, by threatening to cancel or to not renew lease of dealer or to take other retaliatory action if said products are not purchased.

2. Threatening the cancellation or non-renewal of any contract or lease if the dealer purchases or continues to purchase TBA products not sponsored, recommended or approved by the respondent, or the sale of which is not promoted by the respondent.

3. Threatening the cancellation or non-renewal of any contract or lease if the dealer displays or continues to display TBA products not sponsored, recommended or approved by the respondent, or the sale of which is not promoted by the respondent.

4. The performance of any acts of intimidation or coercion, either through statements, oral or written, made directly to dealers or by representatives of respondent, which are designed to, or have, the purpose or effect of intimidating or coercing respondent's dealers

or other customers to purchase TBA products sold by any designated supplier sponsored, recommended or approved by respondent.

5. Compelling, or attempting to compel, dealers by any means or method to sell and distribute only products supplied by a designated supplier sponsored, recommended or approved by respondent.

6. Preventing, or attempting to prevent its dealers by means of threats, intimidation or coercion, from handling or displaying TBA or other similar products which the respondent does not sponsor, recommend or approve, or the sale of which is not promoted by the respondent.

It is further ordered, That the complaint be, and it is hereby, dismissed as to respondent The Firestone Tire & Rubber Company.

OPINION OF THE COMMISSION

By Kintner, Chairman:

This proceeding commenced with the issuance of a complaint on January 11, 1956, charging The Firestone Tire & Rubber Company and Shell Oil Company with acts, practices, and agreements constituting a violation of Section 5 of the Federal Trade Commission Act. 15 U.S.C. § 45 (1958). Both respondents answered on April 16, 1956, admitting in part the allegations of the complaint but denying that Section 5 had been contravened.

The principal issue framed by the pleadings is the legality of a contract between these respondents calling for the payment by Firestone of a sales commission to Shell in return for sales assistance in promoting automotive tires, batteries and accessories (hereinafter referred to as "TBA" or "TBA products") of Firestone to retail and wholesale petroleum outlets of Shell. In addition, Shell is charged with having entered into a substantially identical agreement with The Goodyear Tire and Rubber Company, and Firestone is charged with having entered into such agreements with a number of oil companies other than Shell, including The Atlantic Refining Company and The Texas Company.¹ Although Shell and Firestone are the only respondents in the instant case, Goodyear and The Atlantic Refining Company are joined as respondents in a companion case, Docket 6486,² and in another companion case, Docket 6485, The

¹ Other oil companies having sales commission arrangements with Firestone are Union Oil Company, D.X. Sunray Oil Company, Continental Oil Company, Ashland Oil and Refining Company, W. H. Barber Company, Jenney Manufacturing Company, Thiesen-Clemens Oil Company, Hancock Oil Company, Quaker State Oil Company, Champlin Refining Company, Leonard Refineries, Inc., and Lion Oil Company.

² Other oil companies having sales commission contracts with Goodyear, in addition to Shell and Atlantic, are Sinclair Refining Company, Richfield Oil Company, D.X. Sunray Oil Company, Quaker State Refining Company, Pan Am. Div. of American Oil Company, American Petrofina, Inc., Anderson-Pritchard Oil Corp., Ashland Oil & Refining Co., Carter Oil Co., and Shamrock Oil & Gas Corp.

Texas Company and The B. F. Goodrich Company are paired as respondents.³

The complaint charges, in substance, that the success enjoyed by Firestone and Goodyear in selling to Shell outlets has been purchased at the expense of competing TBA suppliers at the manufacturing and wholesale levels. Counsel supporting the complaint allege that the Shell-Firestone and Shell-Goodyear sales commission contracts are unlawful because, *in conjunction with Shell's economic power over its ostensibly independent wholesale and retail petroleum outlets*, these contracts operate to stifle the free choice of Shell's retail and wholesale dealers insofar as their TBA purchases are concerned. Among the unlawful competitive effects stemming from Shell's sales commission contracts charged by the complaint are these: 1) That suppliers of TBA competing with Firestone and Goodyear at the wholesale level have been foreclosed from access to Shell's retail outlets on the same competitive terms as have been made available to Firestone and Goodyear; 2) That competing manufacturers of tires and other TBA items have been foreclosed from access to Shell's wholesale distributors on the same competitive terms as have been made available to Firestone and Goodyear; 3) That competition between Firestone and Goodyear in selling to wholesale and retail outlets of Shell has been destroyed; 4) That a substantial number of Shell's petroleum distributors and service station operators have been denied their right to act as independent businessmen in exercising freedom of choice as to TBA products which they may purchase and stock for resale; and 5) That the consuming public has been deprived of the benefits of free competition at the wholesale and retail levels insofar as TBA distribution through service station outlets under the sales commission plan is concerned.

Respondents deny these allegations and assert that their sales commission contract has strengthened competition in the distribution of TBA. Shell, moreover, denies that it has power to control the TBA buying habits of its wholesale and retail outlets and denies that its sales effort on behalf of Firestone and Goodyear have been or are in any respect improper or coercive.

After hearings extending from the latter part of 1956 through the early months of 1959, the hearing examiner filed his initial decision on October 23, 1959, dismissing the complaint as to Firestone but holding that Shell, by forcing a substantial number of its dealers to purchase sponsored TBA through use of threats of lease cancellation

³ Oil companies with which Goodrich has sales commission contracts, in addition to The Texas Company, include Continental Oil Company, Ohio Oil Company, Aetna Oil Company (Div. of Ashland Oil and Refining), Bay Petroleum Co., Crown Central Petroleum Corp., Emblem Oil Co., and Jenney Manufacturing Co.

or other retaliatory action, has engaged in unfair methods of competition and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act. He further held that the charges of the complaint are sufficiently broad to sustain an order prohibiting overt acts of coercion on the part of Shell even though the sales commission contracts themselves are not illegal. An order was entered against Shell prohibiting future acts of coercion or intimidation designed to force Shell dealers to purchase TBA products sponsored by Shell.

Both sides have appealed from the initial decision. Counsel supporting the complaint contend that while the order entered by the hearing examiner is well supported by the evidence of record, it will not be an effective means of remedying the unlawful effects on competition caused by the sales commission plan. They seek an order restraining respondents from continuing with their present sales commission agreement and enjoining them from entering into similar agreements in the future. They also contend that Shell should be enjoined from purchasing TBA products from any manufacturer or other vendor of such products for resale to any wholesalers or retailers of Shell petroleum products, "... or for distribution in any other manner, directly or indirectly, to any of the aforesaid wholesalers or retailers of Shell Petroleum products."

Shell appeals claiming, among other things, that the hearing examiner erred as a matter of fact in finding that Shell has coerced its dealers to purchase substantial amounts of sponsored TBA and as a matter of law in concluding that such action by Shell constituted an unfair method of competition and an unfair act and practice in commerce within the meaning of Section 5 of the Federal Trade Commission Act.

Reply briefs were filed by Shell and Firestone to the appeal brief of counsel supporting the complaint, and by counsel supporting the complaint to the appeal brief of Shell. Oral argument was heard by the Commission on June 21, 1960, and the matter is now before the Commission for decision. We find that Shell has in fact coerced a substantial number of its dealers to purchase substantial amounts of sponsored TBA through threats of lease cancellation or other retaliatory action. We further find that Shell has sufficient economic power over its wholesale and retail distributors to cause them to purchase substantial amounts of sponsored TBA even without the use of overt coercive tactics. For reasons set forth hereinafter, we conclude that the exercise of this power by Shell through the use of the sales commission plan in favor of Firestone constitutes an unfair method of competition and an unfair act or

practice in commerce within the meaning of Section 5 of the Federal Trade Commission Act.

CHARACTERISTICS OF THE SALES COMMISSION PLAN

Motorists may purchase replacement TBA items from several major classes of distributors. Manufacturers of these items, for example Firestone and Goodyear, maintain either company-owned or franchised wholesale and retail distribution facilities throughout the entire United States. The large mail order houses, Sears Roebuck and Montgomery Ward, purchase their own brands of TBA from original manufacturers of these commodities and resell them, either by mail or through Sears Roebuck or Montgomery Ward retail stores in many parts of the United States. Gasoline service stations comprise a third major category of TBA outlets.

The complaint in this case alleges that "Service stations, by the nature of their business, are particularly well adapted to be outlets for the sale of TBA products to the motorist consumer. They constitute a large and increasingly important market for TBA products." Shell concedes the truth of this statement in its answer and, in fact, introduced evidence in the course of the hearings tending to show that almost 45 percent of all replacement TBA sold to motorists is accounted for by service stations.

Service station operators may purchase their requirements of TBA from two principal sources: (1) Local wholesale TBA dealers, representing Firestone, or Goodyear, or some other TBA manufacturer; or (2) oil companies chiefly engaged in refining and distributing petroleum products, but which also purchase private brands of TBA, just as do the mail order houses, and resell such privately branded TBA along with the refinery products such oil companies distribute through their respective marketing organizations. No particular term is used in the industry to describe service station purchases of TBA from independent local wholesalers, but the term "purchase-resale" is customarily used to characterize the marketing technique whereby oil companies purchase privately-branded TBA and resell such TBA to their respective service station dealers. The sales commission plan is a hybrid deriving certain of its attributes from the first and other attributes from the second of these marketing methods. However, both the purchase-resale plan and the sales commission plan make use of the marketing facilities of marketing oil companies, but in different ways and with differing competitive effects.

The Sales Commission Plan. Firestone and Goodyear maintain either company-owned or franchised wholesale and retail TBA

outlets in most principal cities of the United States. Shell distributes its petroleum products throughout the continental United States with the exception of Oklahoma, Kansas, Nebraska, North Dakota, South Dakota, and parts of Texas, Arkansas, and Missouri. In cities and towns where Shell retail stations are located, such stations are assigned to either the local Firestone or the local Goodyear dealer, or occasionally to both. The assigned distributor is intended to be the supply point from which the Shell dealer will purchase a substantial percentage of his requirements of TBA.

The overwhelming majority of Shell's retail service stations are operated by independent businessmen who either own or lease their stations. These dealers not only buy and sell Shell petroleum products, but also offer TBA at their stations, and in addition perform various automotive services and repairs. Shell maintains sales offices throughout its entire marketing area and employs salesmen whose duty it is to solicit orders for Shell petroleum products from Shell dealers and to perform other functions in connection with the oil company's relationship to such dealers.

When orders for petroleum products are obtained, the salesmen cause these products to be delivered to the Shell service station dealers, who pay for them at time of delivery or at other specific times. The same Shell salesmen *also* act as agents for Firestone and Goodyear, soliciting TBA orders from Shell dealers, frequently accompanied on their rounds by salesmen employed by the local Firestone or Goodyear distributors. If TBA orders are obtained, they are turned in to the appropriate TBA suppliers—the local distributors of either Firestone or Goodyear—who deliver the merchandise and are paid by the Shell dealers. The TBA suppliers, in turn, make reports of such sales to the District Sales Offices of their respective companies.

Under the terms of the sales commission contracts between Firestone and Shell and Goodyear and Shell, Shell is entitled to a commission amounting to 10% of the net sales value of all sponsored (i.e., Firestone or Goodyear) merchandise sold to Shell retail dealers, as consideration for the assistance given by the Shell sales organization in obtaining TBA orders from Shell dealers.⁴ These payments are made by Firestone and Goodyear directly to Shell each month. Shell incurs no expense in connection with the financing, warehousing, or delivery of the TBA so supplied, and the

⁴ Shell has some 847 wholesale distributors ("jobbers"). Shell is entitled to a commission of 7-1/2% on purchases of sponsored TBA by these jobbers, compared with 10% on purchases by retail dealers.

sales commissions have been described by a Shell official as "almost all net profit."

The Purchase-Resale Plan. This method of distributing TBA through service station outlets differs from the sales commission method in many significant respects. Under the purchase-resale plan, a particular oil company purchases its TBA directly from the manufacturer, and usually at mill prices. The oil company then undertakes responsibility for financing, shipping, warehousing, and selling the TBA to its service station and its wholesale (jobber) distributors. Moreover, as indicated by Table I below, tires distributed under purchase-resale arrangements are usually marketed under the brand name of the marketing oil company (Amoco, Flying "A"), or under a private brand controlled by the oil company (Atlas), or under a secondary brand controlled by the TBA supplier (Fisk by U. S. Rubber Company, Brunswick by Goodrich).

TABLE I.—Oil companies marketing private-brand tires under the purchase-resale plan

Oil company	Tire supplier	Tire brand
American Oil Co.....	Mansfield Tire & Rubber Co.....	Amoco
Cities Service Oil Co. (Del.).....	U.S. Rubber Co.....	Cities Service
Cities Service Oil Co. (Pa.).....	Dayton Tire Co.....	Do
Billups Petroleum Co.....	U.S. Rubber Co.....	Billups
Esso Standard Oil Co.....	do.....	Atlas
Humble Oil & Refining Co.....	General Tire Co.....	Do
Standard Oil Co. of Calif.....	Mansfield Tire & Rubber Co.; U.S. Rubber Co.....	Do
Standard Oil Co. (Ind.).....	U.S. Rubber Co.....	Do
Standard Oil Co. (Ky.).....	do.....	Do
Standard Oil Co. (Ohio).....	Cooper Tire & Rubber Co.; Sel- berling Tire Co.....	Do
General Petroleum Corp.....	Goodyear.....	Mobil
Magnolia Petroleum Corp.....	do.....	Do
Socony-Mobile Oil Co.....	do.....	Do
Phillips Petroleum Co.....	Lee Rubber & Tire Corp.....	Phillips
Pure Oil Co.....	Mansfield Tire & Rubber Co.....	Pure
Tidewater Oil Co.....	U.S. Rubber Co.....	Flying "A"
Blakely Oil Co.....	Mansfield Tire & Rubber Co.; The B. F. Goodrich Co.....	Pbaris
Century Oil Co.....	U.S. Rubber Co.....	Brunswick Fisk

In contrast to the purchase-resale plan, in which private or secondary brand names are used, under the sales commission plan the tire supplier distributes its tires through oil company outlets under the principal brand of the tire manufacturer, i.e., "Goodyear" or "Firestone." In similar fashion, batteries distributed under the sales commission plan are branded with the name of the TBA supplier, "Firestone" or "Goodyear," whereas batteries moving along purchase-resale channels are usually marked with the private label of the marketing oil company, i.e., "Atlas." However, Firestone does not manufacture the batteries it distributes but rather purchases

such batteries from various battery manufacturers, including the Willard Division of the Electric Storage Battery Company and the Delco Division of General Motors Corp.⁵ These "Firestone" batteries are then distributed through Firestone's regular marketing organization.

The term "accessories" comprehends a wide variety of automotive products. Firestone produces several of the more important categories of automotive accessories, including tire retread and recap material, fan belts, and radiator hose, and distributes these products under the Firestone label. Other accessories are purchased from such manufacturers as Du Pont, S. C. Johnson & Son, Inc., and Fram Corporation and resold under the Firestone label, and still a third class of accessories are purchased for resale under the original manufacturers' own brands. Among the last-named class of accessories are Auto-Lite spark plugs, Du Pont Simonize and Mac's brands of cleaners, polishes, and waxes, and Trico wiper blades.

Tires and inner tubes comprise the most important of the three components of the TBA line, as is indicated by the fact that they represented almost 80 percent of total TBA sales by Firestone to Shell outlets under the sales commission plan in 1955. Accessories accounted for an additional 12.5 percent of the total, and batteries for the remainder. Firestone's TBA sales to Texaco and Atlantic outlets during the same year were in approximately the same ratio.⁶

ORIGIN AND DEVELOPMENT OF SHELL'S SALES COMMISSION CONTRACTS WITH FIRESTONE AND GOODYEAR

Shell first began to merchandise TBA products through its service station outlets about 1930. During the succeeding decade, a variety of brands of tires were purchased for resale through these stations, including Goodrich, Goodyear, U.S. Rubber and General tires. Sometime in 1940, Shell commenced the sales commission plan with Firestone on a limited basis, and the following year with Goodyear as well. By 1943 Firestone and Goodyear TBA were being sold throughout Shell's entire marketing area, although it was not until 1951 that

⁵ The record does not show the source of "Goodyear" batteries. However, witness MacGowan of Firestone testified that batteries are not manufactured by any tire manufacturer. It may be inferred, therefore, that Goodyear purchases and resells batteries in the same manner as Firestone.

⁶ In Commission Exhibit No. 360 A, a Goodyear official wrote to Mr. George L. Switzer of Shell in 1953:

"Dear George: We all recognize that in your T.B.A. sales tires and tubes represent the preponderance of dollar volume—somewhere between 70 to 80% as a matter of fact."

written contracts were executed between the two rubber companies and Shell.⁷

Prior to 1943, Firestone paid a sales commission of only 7½% on sales to Shell retail dealers as well as wholesale distributors. Then, in 1943, during World War II when demand for tires far exceeded available supplies, the commission rate was raised to 10% on purchases by Shell retail dealers. During the course of the hearings in this case, Mr. L. R. Jackson, Vice-Chairman of Firestone, explained the reasons for this increase:

Well, in 1943 we increased our sales commissions two and a half percent. At that time our study and knowledge of the situation bore out the fact that the oil companies were becoming much more interested and enthusiastic about the TBA business.

They were making plans to expand their organization, their staffs, they were going to become more aggressive in the promotion of this business and their help to us, and we felt that they earned and deserved a larger sales commission for that reason.

There were some other factors, however, that entered into the change that was made. We were doing business with Texas and Shell at that time, and some of our major competitive companies approached both of these important customers with a program and a proposal to make a private-brand tire for them on the purchase and resale basis.

We also were doing business with Gulf and Socony at that time, and both Gulf and Socony approached us requesting that we make a private-brand tire for them. So we felt, with the increased efforts of the oil companies behind the sales commission program, and the inroads that competition were trying to make with our customers, we had to make our sales commission more attractive and desirable to them, and that was the reason we increased in two and a half percent at that time.

The success of Shell's sales commission arrangements with Firestone and Goodyear was summarized in an intracompany memorandum in the late 1940's:

... It has been stated earlier herein that the *Service Station share* of the total TBA replacement market (at consumer level) for the year has been estimated at \$553,700,000. Using a mark-up of 33½%, Shell's 1947 sales, adjusted to consumer level, would amount to \$19,125,000. This represents an attainment by Shell—East of Rockies—of three and four-tenths percent (3.4%) of the *national service station TBA potential*.

To attain such a substantial share of the national potential, at a gross profit of 9.1% (which in reality is practically all *net profit*), and without any burdensome details such as warehousing, delivery, and accounting, should convince

⁷ On February 2, 1949, Mr. O. E. Scholz of Shell wrote to the company's Division Retail Managers: "As you know, written agreements covering these programs between Shell and Goodyear and Firestone do not exist and we, therefore, strongly feel that the attached information should not be disseminated beyond Division Office people, in written form."

the most skeptical that the Shell-East of Rockies TBA program is sound, both from a sales, profit, and economic point of view.⁸

Both Firestone and Goodyear, on the one hand, and Shell on the other, have continued to benefit from their sales commission arrangements. Firestone's sales to Shell outlets jumped from about \$12 million in 1950 to \$21 million in 1957 while Goodyear's rose from \$13 million in the earlier year to \$26 million in the latter. Thus, by 1957, combined sales of the two rubber companies to Shell outlets were running about \$47 million per year, and they were paying more than \$3.5 million in sales commissions to Shell annually. In order to understand how Shell's marketing organization has been integrated into the distributive mechanisms of Firestone and Goodyear, however, a more detailed familiarity with the operations of these companies is necessary.

DISTRIBUTION SYSTEM OF SHELL OIL COMPANY

Shell is a major integrated producer, refiner, and distributor of petroleum products. In 1957 the company's assets were in excess of \$1 billion and its total revenue exceeded \$1.7 billion. More than 3.2 billion gallons of Shell gasoline were sold in 1955, and this volume represented over 5% of national gasoline sales in that year.

Shell markets its refinery products to two major classes of customers: (1) wholesalers ("jobbers") and (2) retailers (chiefly service stations but including also garages, grocery stores, restaurants with outside gasoline pumps, taverns, etc.). Some 847 jobbers purchase from Shell and, in turn, supply about 13,000 retail outlets. Shell has no direct dealings with these retailers, who purchased over 1 billion gallons of Shell gasoline in 1955. Shell also sells petroleum products directly to some 10,062 additional retail outlets, mainly

⁸ Mr. R. E. Atkinson of Dilmar Tire Company, Inc., a Firestone distributor in Latta, S.C. wrote to Firestone's Vice-President Tompkins on October 7, 1955, complaining that "Under the present set-up Shell is getting more out of our operations than we are ourselves." Mr. Atkinson subsequently sent a copy of this letter to the Federal Trade Commission with the following comment:

"We were told by Mr. Tompkins that he realized that there was considerable question as to whether or not Shell would be entitled to an override commission on this account, but if they did not pay the override on this particular account that he was afraid Shell Oil Company would demand same. You can realize that 7-1/2% paid to Shell Oil Company on this volume would reflect a greater earning to Shell Oil Company than it would be to Dilmar Tire Company, which has produced all sales."

Many tire distributors and service station operators use the term "override commission" or "overriding commission" rather than "sales commission". However, as Shell and Firestone normally use "sales commission" in their correspondence, and as most of their witnesses in this proceeding also did so, we are using this term in the present opinion. In instances where the term "override" or "overriding" appears in quoted documents or testimony herein, it should be understood to mean "sales commission".

service stations. These direct dealers purchased about 1.9 billion gallons of gasoline from Shell in 1955.

Shell's principal market areas are the West Coast, the East Coast, the Middle West and the Deep South. The company has 17 marketing divisions subdivided into 84 districts, each district consisting of a city or other marketing center and surrounding territory.

Direct Retail Customers. There were some 10,062 direct retail customers of Shell in 1955 comprising four distinct sub-groups, as shown by Table II:

TABLE II.—Types of Shell direct dealers, 1955

Type of dealer	Number	Percent of total	Percent of gallonage
C Stations.....	999	9.9	14.7
L Stations.....	3,910	38.8	46.7
DL Stations.....	1,922	19.1	20.2
OD Stations.....	3,231	32.2	18.4
Total.....	10,062	100.0	100.0

C Stations are owned by Shell and operated by managers appointed by the company under the terms of a Service Stations Manager's Agreement. Gasoline stocks are consigned to these stations and the managers are required to sell at prices fixed by Shell. Although C managers are employees of Shell insofar as their sales of consigned gasolines are concerned, and are paid therefor on a commission basis, in other respects they are independent businessmen and are authorized to purchase and sell TBA for their own account. A manager's employment may be terminated by either Shell or the manager by giving 24 hours notice.

The 999 C stations of Shell represented slightly less than 10 percent of the total number of directly-supplied Shell outlets in 1955; however, they accounted for almost 15 percent of the total volume of Shell gasoline distributed through direct retail outlets that year.

L stations are owned by Shell and leased to station operators, usually for a one-year term, although there are some three-year leases and perhaps a few for longer terms. The leasehold instrument does not require the lessee to handle Shell products, but does provide that the premises shall be used for an automotive service station. The lease further provides that the lessee is to have entire control of his business free from any control or direction by Shell.

At the time he signs his lease, each L dealer also signs a Dealer Sales Contract with Shell, providing that the latter will furnish and the former will purchase such quantities as he may order of automotive gasoline, oil, and grease offered by Shell. (Prior to July,

1951, the dealer agreed to purchase his requirements of Shell refinery products.) Each contract contains an "excuse for nonperformance" clause providing that "Shell shall be excused from performance of its obligations under this contract when and to the extent that such performance is delayed or prevented by any cause reasonably beyond Shell's control. If Shell's supply of any products covered hereby at the place at which deliveries thereof are usually made hereunder, is or will be insufficient at any time for Shell to fill all orders which normally are or would be filled from such place, then Shell, *irrespective of the cause of such insufficiency*, may discontinue deliveries of such products hereunder or apportion deliveries thereof among orders received from dealers and from other purchasers, in such manner as Shell, *in its sole discretion*, may determine." (Emphasis added.)

Notwithstanding the economic power possessed by an oil company as a consequence of being both landlord and supplier to its lessee-dealer customers, the powers and responsibilities of an oil company's lessee-dealer "... satisf[y] all the requirements of an independent enterprise." *United States v. Richfield Oil Corp.*, 99 F. Supp. 280, 288 (1951), affirmed 377 U.S. 922 (1952). Judge Yankwich's comments in the Richfield case as to the relationship of an oil company to its lessee-dealers apply with equal force to the instant case:

Implicit in the contract is the lessee's assumption of obligation and responsibility for his own acts upon the premises and those of his employees in their relation to the public, who come in contact with them during the time of his dominion. The lessee is not the employee of Richfield. Richfield pays him no wages or other remuneration. He must carry his own workmen's compensation. He is not carried on their books as an employee for the purpose of social security taxes or any of the withholding taxes, state or federal, incidental to the employer-employee relationship. Richfield is not required to withhold any moneys from him for income tax purposes. Neither are they required to perform any of the duties just mentioned as to any of the employees who may assist the lessee in the conduct of the station or any auxiliary repair work upon the premises. The lessee is solely responsible for his own conduct and that of his employees which may cause damage to the persons or property of others.

L dealers accounted for about 39 percent of Shell's total number of direct dealers in 1955 and purchased about 46.8 percent of the 1.9 billion gallons of gasoline distributed by this company to its direct dealers in that year.

DL dealers have substantially the same relationship with Shell as do L dealers, including both a leasehold agreement and a sales contract, except that the DL dealer owns a reversionary interest in the service station property which he occupies as a lessee of Shell. This results from the fact that the DL dealer owns outright the service station he occupies; however, he leases it to Shell for a term

of years, and Shell re-leases it back to the dealer. One of the chief reasons for this type of arrangement is to enable the operator who owns his station to obtain outside financing for purposes of modernization, securing such a loan with a lease to the Shell company. Shell had lease and re-lease relationships with 1,922 DL dealers in 1955, or approximately 19 percent of total direct Shell dealers, accounting for 20.2 percent of Shell gasoline sales to direct dealers in that year.

The initials OD refer to a class of Shell dealers known as "open dealers". An OD is a retail dealer who either owns his service station property, or leases it from someone other than Shell. Although he has no landlord-tenant relationship with Shell, he purchases petroleum products from the oil company under the terms of the same Dealer Sales Contract referred to above in connection with L and DL dealers.

Actually about 75 percent of Shell's 3,231 OD dealers in 1955 were not service stations at all, but were merely gasoline dispensaries in conjunction with other establishments such as barbecue stands, garages, grocery stores and taverns, located for the most part in rural areas. According to Shell, non-service station OD outlets have no TBA potential, and therefore only some 800 OD outlets can be regarded as potential purchasers under Shell's sales commission agreements with Firestone and Goodyear.

Jobber Customers. Shell's jobbers maintain and operate bulk storage plants capable of receiving direct deliveries of gasoline and other refinery products. These products are then resold to retail dealers who have no direct relationship with Shell. In many cases jobbers own their own retail outlets and lease them to service station operators much the same as Shell with its own directly-supplied stations. Shell's jobbers supplied almost 1.4 billion gallons of gasoline to approximately 13,000 retail outlets in 1955, compared with the 1.9 billion gallons sold by Shell to its 10,062 direct dealers in the same year.

Some jobbers own their own bulk plants and some lease them from Shell. Those who lease are subject to both a leasehold agreement and a sales contract, while those who own their own plants are parties only to a sales contract with Shell. Among Shell's jobber customers there is no counterpart to either the C or the OD retailer.

THE ISSUE OF COERCION

The complaint in this case charges that Shell has caused its various classes of dealers to purchase substantial quantities of Firestone and Goodyear TBA through the use of threats to terminate either their employment (if C dealers), their tenure of lessees (if L or DL

dealers) or their petroleum supply contracts (if L, DL, or OD dealers). This charge is supported by the testimony of former Shell dealers who appeared as witnesses on behalf of the Commission and further reinforced by intra-company documents taken from the files of Shell. In addition, representatives of many suppliers of TBA engaged in competition with Firestone and Goodyear testified that they had difficulty selling TBA to Shell dealers because the latter group felt that they were required to purchase Firestone and Goodyear TBA and feared reprisal by Shell if they purchased non-sponsored TBA. Testimony of these competing TBA suppliers as to reasons given by Shell dealers for not purchasing competitive TBA was allowed under the authority of *Lawlor v. Loewe*, 235 U.S. 522 (1915). This testimony was received not as proof of the facts recited, but for the purpose of showing the state of mind of the dealers. Such testimony is competent to show, however, that Shell dealers did not purchase a substantial amount of competitive non-sponsored TBA because of their feeling that they were required to purchase Firestone or Goodyear TBA.

Among the former Shell dealers who testified in support of the complaint, several recounted specific instances in which either express or implied threats of lease cancellation were made. Other ex-Shell dealers testified to incidents occurring during their tenure as Shell lessees or station managers which made it apparent to them that they were expected to handle either Firestone or Goodyear TBA, and that if they failed to purchase sufficient quantities of such TBA, that their relationship with Shell might be terminated.

This evidence must be assessed in the light of subpoenaed correspondence taken from the files of Shell relating to the TBA sales objectives of the Shell company. A memorandum entitled "T.B.A. Situation" written by a Division Department Manager of Shell and addressed to his District Managers contains this statement:

. . . Presently our dealers are purchasing far too many mongrel brands. Profits on batteries are very attractive to the dealers and the battery buying season is just ahead. Let's keep these lowpriced and troublesome batteries out of our stations. Both our suppliers are well-stocked, and both Goodyear and Firestone have just recently announced attractive . . . terms on batteries. WE NEED THIS BATTERY BUSINESS!

A memorandum from the Retail Manager of Shell's Chicago Division to the District Sales Supervisor of the Rockford District states:

When the writer was in the Rockford District and we rode the service stations in the Joliet area, I was somewhat surprised to learn that both Firestone and Goodyear have been calling on all the Shell dealers in Joliet and in some instances, Firestone is selling the dealer merchandise and Goodyear is likewise selling the same dealer merchandise.

As you know, we have tried to sell the dealer on a 100% program either to be a Firestone outlet or to be a Goodyear outlet, because over a period of time, we have found that the supplier gives 100% outlets better attention, and of course the dealer in turn qualifies for better buying prices and gets greater attention. These are factors that should be pointed out to the dealer and we believe that the Shell District Salesman in that area should be cognizant of the importance of having a uniform program throughout the area and not have a number of exceptions in the Town of Joliet.

We believe that it is timely to start cleaning house insofar as our TBA program is concerned and to work out a program whereby the Shell District Salesmen definitely spend time with the Firestone and Goodyear salesmen in calling on Shell dealers. If it is necessary the writer believes it would be a good idea for you together with the salesman and the Firestone or Goodyear man to call on Shell dealers to find out why it is necessary in Joliet to have a number of split accounts and also to find out why there is so much competitive TBA merchandise in Shell stations throughout the Rockford area.

In still another subpoenaed document, Shell's District Salesman in Greenville, S.C. writes to his Sales Supervisor in Columbia as follows:

... regarding the firm known as Carolina Colorwall [a wholesale tire dealer in Greenville] I would like to say that if something cannot be done about this firm selling Firestone and Goodyear tires at cutrate prices, it will be necessary for me to replace the [Shell] dealer at Augusta and Woodfin d/b/a Dean Brothers.

It seems that Carolina Colorwall has been using him as an example of a satisfied Shell dealer as I have discussed the TBA situation with several Dealers and they always come back with the statement that "Tom Dean buys his tires from Carolina Colorwall and when he stops buying from them, we will too." Among the dealers making this statement are Riley Davenport and John Linville.

I then discussed this matter with T. Dean and he says that he will continue to buy from them as long as they are cheaper as a man has to look out for himself.

Would appreciate anything that can be done to stop this unfair trade practice by Carolina Colorwall . . .

It is significant that Mr. Dean was to be replaced, not because he insisted upon purchasing mongrel brands of TBA, but because he purchased approved brands at cut-rate prices from the wrong supplier.

The record of this case is filled with internal Shell correspondence exhorting ever-greater pressure on Shell outlets to cause them to purchase increased amounts of sponsored TBA. In our opinion, these documents lend credence to the testimony of the ex-Shell dealers. Moreover, representatives of competing suppliers of TBA gave testimony suggesting a general belief on the part of Shell dealers that if they were to purchase competitive TBA, their continued status as lessees or dealers would be in jeopardy.

It is true that since 1948, Shell has notified its dealers by form letter that they are not obligated to purchase their requirements of petroleum products nor of TBA from or through Shell. However, apart from the fact that this notice strongly implies that Shell dealers should purchase at least a substantial portion of their requirements of petroleum products and TBA from or through Shell, the hearing examiner found and the evidence in this case establishes that agents of Shell have in fact coerced a substantial number of Shell dealers to purchase substantial quantities of Firestone and Goodyear TBA, and that Shell has accepted the benefits of such coercion in the form of sales commissions. These acts of oppression are compounded by the fact that Shell, for its own business purposes, and in order to avoid responsibility for such outlets under numerous state and federal laws (for example, state chain store tax legislation and federal social security legislation) has consistently sought to create and maintain for its retail dealers the status of independent businessmen.

Respondent Shell cites *United States v. J. I. Case Co.*, 101 F. Supp. 856 (D.C. Minn. 1951) as authority for the proposition that the hearing examiner erred in concluding that Shell has coerced its dealers in violation of Section 5 of the Federal Trade Commission Act. Counsel supporting the complaint described the *Case* decision as a "strange and lonely District Court opinion . . . unfollowed, uncited and ignored for nine years." We need not dwell on the *Case* decision, however, since the subject of coercive practices has received careful scrutiny from the Seventh Circuit and from the Supreme Court in a line of cases in the field of automotive financing. In *United States v. General Motors Corporation*, 121 F.2d 376, (7th Cir. 1941), General Motors and its affiliates, General Motors Sales Corporation, General Motors Acceptance Corporation and General Motors Acceptance Corporation of Indiana, Inc., appealed from a conviction of criminal conspiracy in violation of the Sherman Act. The indictment charged that these defendants had conspired to coerce franchised dealers of General Motors Corporation to finance their purchases and sales of automobiles through General Motors Acceptance Corporation. In affirming the criminal convictions, the court stated:

The record leaves no doubt that the dealer body as a whole was made acutely aware and had knowledge of the set policy of the appellants with respect to use of GMAC financing facilities. The fear of cancellation or refusal to renew contracts was great, so much so that the dealer was reluctant to refuse the terms and policies dictated by the appellants.

Approving the trial judge's instructions to the jury in the *General Motors* case, the Supreme Court stated in *Ford Motor Co. v. United States*, 335 U.S. 303 at 316-317 (1948):

... Their plain effect is to draw a line between such practices as cancellation of a dealer's contract, or refusal to renew it, or discrimination in the shipment of automobiles, as a means of influencing dealers to use GMAC, all of which fall within the common understanding of "coercion," and other practices for which "persuasion," "exposition" or "argument" are fair characterizations.

We are of the opinion that the record contains ample evidence to support the hearing examiner's finding that Shell has coerced and forced a substantial number of its dealers to purchase sponsored TBA. However, we regard these overt acts of coercion as mere symptoms of a more fundamental restraint of trade inherent in the sales commission itself. The more dramatic and immediate impact of this system, to be sure, is upon retail service station dealers of Shell and other oil company dealers similarly situated. Their freedom to buy and sell as independent merchants is shown to be less complete in practice than in theory. Yet from the point of view of the antitrust laws, it is the devastating competitive effects of the sales commission system on competitors of Firestone and Goodyear which raise the most grave questions in this proceeding.

We turn, therefore, from an examination of the restrictive effects of the sales commission system upon service stations as buyers of TBA to an assessment of this system's impact upon wholesale and retail distributors of TBA engaged in competition with wholesale and retail distributors of Firestone and Goodyear. Preliminary to this inquiry, however, a more detailed understanding of the sales commission plan and the manner in which it has been integrated into Firestone's nation-wide distribution system will be helpful.

THE SALES COMMISSION PLAN IN FIRESTONE'S SYSTEM OF DISTRIBUTION

Firestone is the second largest manufacturer of rubber products in the United States (Goodyear is the largest), with net sales of \$916,047,000 during the fiscal year ending October 31, 1954. The company has five tire factories located respectively in Ohio, Iowa, California, Tennessee, and Pennsylvania, with warehouses maintained at each factory. There are 75 additional tire warehouses, 12 large auto-supply warehouses, and 770 company-owned and operated retail stores throughout the United States. Apart from these company stores, Firestone asserts that "... there are about 50,000 independent Firestone dealers, *including service station dealers*" in the United States. (Emphasis added.)

These 50,000 independent dealers are classified by Firestone as either "direct dealers" or "associate dealers". Direct dealers buy directly from the Firestone district sales office and usually execute a Dealer Franchise Agreement the parties to which are Firestone and the particular dealer involved. Associate dealers do *not* buy from the district sales office, but instead make their purchases from either the company-owned stores or from Firestone's direct dealers. Moreover, associate dealers do not execute a Dealer Franchise Agreement with Firestone, but rather sign a Firestone Dealer Agreement with the particular Firestone direct dealer or company-owned store to which they have been assigned.

Normally, associate dealers purchase smaller quantities of TBA than direct dealers, and hence usually pay higher prices for their merchandise than do direct dealers. Most service station customers, including Shell stations, are classified as associate dealers by Firestone, although some Shell stations are direct dealers and function as supply points to other Shell stations which are merely associate dealers.⁹ (The term "supply point" is used by respondents to refer to the local TBA supplier to which individual Shell stations have been assigned.) A number of Shell jobbers also function as supply points for Firestone, and distribute TBA to the same retail stations which the jobbers supply with Shell petroleum products. A supply point, then, is a local wholesaler of Firestone TBA, although it may be primarily a retail dealer of Firestone, a retail dealer of Shell, or a jobber of Shell as well.

An integral part of the Firestone-Shell and Goodyear-Shell sales commission plans is the assignment or allocation of each Shell outlet to a specific supply point designated by Firestone or Goodyear. When a new Shell station is opened, or when a new dealer replaces a retiring operator, Shell reports to Firestone (or Goodyear, as the case may be) the name and address of the new Shell outlet on the appropriate Firestone (or Goodyear) form. The Firestone (or Goodyear) District Manager then assigns this outlet to a specific supply point, and notifies the supply point and the Shell outlet of the assignment which has been made. No sales commission is paid to Shell unless the Shell outlet purchases from the designated supply point to which it has been assigned. In other words, even though a Shell dealer purchases Firestone or Goodyear TBA exclusively, unless he buys from his assigned supply point, the Shell company receives no sales commission. According to Firestone, this arrange-

⁹ A Shell service station may become a supply point if there are no Firestone company-owned stores nor franchised Firestone dealers in the area to perform this function, or if for some other reason Firestone wishes such station to be a supply point in preference to franchised dealers or company-owned stores in the area.

ment is necessary "For efficiency of record keeping, and for orderly payment of commissions."

Although in some cases the Shell dealers may be assigned to two or more Firestone supply points, in the majority of cases, each Shell outlet is assigned to but one. The testimony is conflicting as to the extent to which Shell retailers are assigned to supply points of both Firestone and Goodyear. Mr. J. G. Jordan, Vice-President of Marketing for Shell stated at page 2971 of the record that "It is not infrequent that the dealers [meaning Shell dealers] are nominated to both rubber companies, at their request of course." At page 6074, however, Firestone's witness MacGowan contradicts Mr. Jordan:

Our understanding with Shell is that there will not be dual nominations with ours [supply points] and Goodyear. There are not supposed to be such nominations. It is obvious, I think, why an arrangement of that kind would be in existence. The reason why the arrangement exists is another question, but it is not intended that there should be dual nominations, and it is not intended by Firestone that there should be, and our understanding with Shell is that there are not dual nominations. Now, any element of dual nominations, according to everything I have ever known about this particular business, any element of dual nominations is very small . . .

Despite these conflicting statements, on the basis of various statistical data introduced into evidence in the course of this proceeding, it seems reasonable to conclude that approximately 10 percent of Shell's 10,062 direct retailers and 847 jobbers have been assigned to both Firestone and Goodyear. The remaining 90 percent of these direct dealers and jobbers have, apparently, been assigned to either Firestone or Goodyear, but not to both.¹⁰

A reporting technique has been established whereby Shell may determine the exact amount of Firestone and Goodyear TBA purchased by each Shell outlet from its assigned supply point or points each month. As both rubber companies use substantially the same reporting procedure, only the one used by Firestone need be described in detail here.

Once a month Shell sends to Firestone a form known as a "Report of Firestone Purchases by Outlets." This form lists Shell's current retail outlets, showing both proprietor and trade name, with a separate page for each supply point. These forms are sent to the Firestone sales office in each sales district, and from there to the appropriate supply points. Upon receipt of these forms the supply points insert their sales to the various Shell dealers assigned to them during the current month and return the completed forms to the

¹⁰ As noted previously, some of Shell's OD stations have no TBA potential and probably have not been assigned to either Firestone or Goodyear.

Firestone district offices. From there the forms are forwarded to Firestone's home office, with copies going to Shell. While these forms provide the basis for computation of sales commission accruing to Shell each month, they also afford Shell a means of determining the volume of sponsored TBA purchases by individual Shell dealers during the same period of time.

A different procedure is followed with respect to TBA purchases by Shell jobbers. These jobbers purchase directly from the Firestone or Goodyear district offices, and then resell such TBA to their own retail dealers. About 13,000 Shell outlets are supplied by jobbers. Shell receives a 7-1/2% sales commission on the net sales value of all sponsored TBA purchased by these jobbers, but no additional sales commission is paid when the jobbers resell such TBA to their respective retail dealers.

Firestone, of course, has sales commission contracts with a number of other marketing oil companies and these agreements are in all material respects identical with the Firestone-Shell contract. A total of about 25,000 retail outlets and some 2,200 jobber outlets of all such oil companies were assigned to Firestone in 1957, with Shell accounting for approximately 6,000 at the retail level and probably about 450 at the jobber level. Firestone's total sales under its sales commission contracts amounted to about \$91 million in 1957.

Many advantages accrue to Firestone, and Goodyear as well, as a consequence of their sales commission contracts with oil companies. A prime advantage is participation with each oil company's sales force in a number of joint merchandising programs. This advantage commences with the selection of persons to operate newly-opened service stations or to replace outgoing dealers in previously-operated stations. A continuing responsibility of Shell salesmen is to help such new dealers get established. Through these salesmen, the local Firestone or Goodyear supply points are notified of the names and addresses of new dealers *before* they actually take over operation of their stations and, consequently, before local competitors of Firestone and Goodyear in any community become aware of a new dealer's identity. The importance of such advance notification may be gauged from the fact that the initial stocking order of TBA by a new dealer may amount to as much as \$3,000. And Shell's turnover of dealers is high—in the Chicago area in 1951, 39 percent of the total number of Shell dealers were replaced, and in 1955, in Milwaukee, there was a 45 percent turnover of dealers. Frequently such new dealers have recently completed Shell training schools in which Firestone and Goodyear TBA were used in demonstrations, and have already

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formed biases in favor of one or the other brands of TBA. Also, the Shell salesmen may inform new dealers that the Shell company sponsors or carries the Firestone and Goodyear lines, and ask them which they prefer to offer in their new stations, thereby implying that they must handle one or the other. Even as between authorized supply points of Firestone and Goodyear, however, the Shell dealer is sometimes given no choice, although he might obtain superior service from one of the two, as illustrated by the following inter-office memorandum taken from the files of Shell:

Frankly, in installing Firestone in our recently opened service station at South Boulevard and Shuman Avenue, the decision was rigged. We never gave Goodyear a chance to solicit the business, knowing full well that if we did they would end up with the account. Having gone out of our way to establish Firestone in the location, we are particularly upset with the developments which have since transpired.

Numerous other examples of joint merchandising programs favorable to the rubber companies having sales commission programs with Shell could be cited. For instance, at periodic intervals Shell participates on a cost-sharing basis with Firestone in "Banner Day" promotions, at which times Firestone products are extensively promoted at Shell stations. Then, too, sponsored as well as non-sponsored TBA may be sold on Shell credit cards, including up to six months' extended credit without any charge to the motorist or the dealer. Without doubt, however, the most effective joint merchandising tactic is joint solicitation, or "double-teaming". This refers to the practice of a Shell salesman accompanying a Firestone or Goodyear salesman in calls upon service stations to urged them to purchase sponsored TBA. A Firestone District Manager expressed his confidence in the effectiveness of joint solicitation in a 1954 memorandum to a Shell Sales Supervisor as follows:

Mr. J. L. McDonald, our Greensboro, N. C. Store Manager, was in Charlotte yesterday, at which time I reviewed some matters with him, particularly our TBA business in Greensboro, and more specifically the amount of business that we have been getting from Shell accounts and where we are showing some losses.

As you and I know, when we run into a situation like this, the best remedy is the organization of joint solicitation, because then the problem can be pretty well handled. We are approaching the heavy tire buying season and we are awfully anxious to do an outstanding job in Greensboro through the Shell dealers. I would appreciate it if you would arrange for your salesman to meet with Mr. McDonald and our store salesman Hayes and set up a joint solicitation program to cover each and every account. We can get some more business from the ones who are active, and certainly reactivate the ones who have gotten away from us.

In another internal Firestone document, a company official wrote in part, in reference to a meeting scheduled in the Shell Dearborn area:

At this meeting the Shell and Firestone salesmen will agree on the dating quota for each individual dealer and the Shell men will be given assignments to work with our men on joint solicitation . . . Our past experience has proven that we cannot do a good job . . . in this area unless we bring the Shell salesmen actively into the campaign.

This correspondence indicates that Shell salesmen, whose principal function is the sale of petroleum products, are considered almost indispensable by Firestone salesmen selling TBA to Shell dealers. Perhaps one reason is that the evaluation by Shell salesmen of their various lessee-dealers carries substantial weight with the District Managers of Shell when the latter group make decisions as to extensions of the dealers' leases for another year. Although respondent Shell has made vigorous efforts to create a record image of the typical Shell lessee-dealer as a stoutly independent businessman, able to close up shop as a Shell lessee on Saturday night and reopen down the street in an Amoco or Esso station the following Monday morning, the record as a whole suggests that this is a romanticized picture of a small businessman who is, more often than not, in a woefully weak bargaining position vis-a-vis his oil company lessor. One of Shell's own defense witnesses, Mr. James Purser, former Shell station operator and past president of an association of retail service station dealers in North Carolina, made this response on cross-examination:

MR. GOODHOPE: Didn't you tell Mr. Suss [an FTC investigator] that you believed that most of the dealers were afraid to speak up while they were still lessees from an oil company with regard to any complaints that they might have?

MR. PURSER: I would have to say that I think that there is a certain—there would be some of that with a dealer that has built up a business. Now I am not speaking of a Shell dealer. I think any lease dealer would have a certain amount of fear. Just, for instance, if I were renting a house from you and I felt like you wanted me to take care of the house, you had certain policies you used in renting, if I didn't go along and abide with it there would be a certain amount of fear in me even though I could move into another house.

The typical lessee-dealer's dependence upon his lessor-supplier is explained by the following facts: The cost of constructing a modern service station, including land, averages about \$90,000. Few men who become service station operators have this amount of money—a majority have between \$5,000 and \$15,000, and some as little as \$1,000. Most marketing oil companies, therefore, build a substantial portion of their own stations and lease them to operators. The lessee-

dealer uses his own capital to purchase an initial inventory of petroleum products, TBA, small tools, and for other expenses incurred in commencing operations.

Most service station operators never manage to purchase the stations they lease. Perhaps one reason for this is the fact that if an operator finds that he has a favorable location, and if he is a good businessman and builds goodwill, thus increasing the monthly gallonage of his station beyond the amount contemplated by the oil company in establishing his original monthly rental, his rent is likely to be raised to take account of the increased value of his leased station. But no matter how long an operator may remain as lessee, and no matter how much effort he may make to establish goodwill in his community, the time may come when his lease is not renewed—for any one of a number of reasons or for no reason at all except that the lessor would prefer to have someone else operate that particular service station.

Many of the control devices available to Shell in its relationship with L dealers are also applicable to DL dealers. Many of the latter are heavily indebted, and grant leases to Shell as security for their financial obligations. When they then become lessees of Shell they place themselves in precisely the same position as the L dealers. Under some of the leases to Shell the oil company is given an option to purchase the premises at any time during the original term of the lease or any extension thereof. The weakest group of Shell dealers, however, are the C dealers who may be replaced upon 24 hours' notice.

Service station operators are understandably susceptible to the urgings and recommendations of their oil company suppliers and lessors in the matter of TBA. The Firestone salesmen encounter less buyer resistance on the part of such a customer when an oil company salesman is standing nearby adding his endorsement to the sales presentation of the Firestone representative. The technique of joint solicitation thus symbolizes in microcosm the competitive effects of the sales commission plan of a national TBA supplier when introduced throughout the entire marketing area of a major oil company. It is to these macrocosmic effects that we now turn.

COMPETITIVE EFFECTS OF THE SALES COMMISSION PLAN
AT THE MANUFACTURING, WHOLESALE, AND RETAIL LEVELS

On April 15, 1951, Mr. E. B. Hathaway of Firestone wrote to the Firestone District Manager in Milwaukee as follows:

During the 1950 calendar year we suffered a substantial loss in our sales position with Shell as compared with *our competitor* who shares Shell with us. [Emphasis added.]

Trouble spots remained as late as 1954, as is shown by this excerpt from a letter from Mr. Hathaway to Firestone's West Coast Division:

I have just been reviewing our sales performance with Shell nationally with Mr. Addison, and it is evident to me that one of our major problems is in this important division of the Shell Company . . .

More important . . . *our competitor* has a substantial increase with this division, amounting to approximately 11% . . .

. . . We are determined to recapture our original position and improve it to the point where we would enjoy at least 50% of the Shell Company's business in the coast area. [Emphasis added.]

Steps were being taken in other Firestone divisions to increase the sales volume to Shell, as is indicated by these instructions sent out to all Firestone District Managers in the company's Central Division in March, 1955:

I want you to give me a list of all Texas and Shell accounts handling competitive products, (other than Goodrich with Texas and Goodyear with Shell), showing the tire brands handled, estimated T.B.A. annual volume, and the territory salesman or store assigned to sell the account . . . Then set up a definite follow through on these assignments to close these accounts on a Firestone contract.

Apparently Shell remained dissatisfied with Firestone's showing, however, for on April 29, 1955, the rubber company's Vice-President for sales, Mr. H. D. Tompkins, made this comment in a letter to Firestone's District Manager in Albany, New York:

I was in New York last week with Mr. Hathaway, and we called on the Home Office officials of the Shell Oil Company. We were very much disturbed to learn that our sales performance with Shell for the first three months of this calendar year compares very unfavorably with Goodyear, in fact, we were told that Goodyear have an increase in their sales through Shell outlets which is about double our increase for the first quarter.

The Shell management were quite critical of Firestone in this situation, and it was impossible for either Mr. Hathaway or myself to explain it satisfactorily.

. . . Mr. Hathaway and I told the Shell officials in New York we would be back with greatly improved results. So, please don't let us down.

These quotations pose two paradoxical questions: How can Goodyear be Firestone's "competitor" if Goodyear's TBA products are not regarded as "competitive products"? And why is Shell critical of Firestone's sales performance when it is Firestone that is paying Shell for sales assistance? Some light is shed on the first question by recalling that only about 10% of Shell's retail outlets are assigned to supply points of *both* Firestone and Goodyear. The remaining 90% are assigned to supply points of either one or the other, and the "competitive" efforts of Firestone are thus directed toward selling a greater volume of TBA to those Shell accounts assigned to Fire-

stone than Goodyear is able to sell to its own assigned Shell outlets. One possible answer to the second question is that Shell is urging Firestone on to greater sales efforts in order that the sales commission paid to Shell may be greater.

Whatever the explanation for these paradoxes may be, it is apparent from the record that both Firestone and Goodyear have had considerable success in selling their TBA to Shell outlets. As will be recalled, in 1957 Firestone's sales to its Shell customers amounted to about \$21 million while those of Goodyear were nearly \$26 million.

We find that Shell has used its economic power as a major wholesale and retail distributor of gasoline and as a lessor of numerous wholesale and retail gasoline distributing facilities to cause its dealers to purchase substantial amounts of a different class of products, TBA, as a condition to their continuance as Shell lessees and dealers. This finding, in conjunction with Shell's market position and the volume of TBA affected, would appear to bring this case within the Supreme Court's ruling in *Northern Pac. Ry. Co. v United States*, 356 U.S. 1 (1958) and the more recent decision by the Fourth Circuit in *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (4th Cir. 1960).

The Court held in the *Northern Pacific* case that tying arrangements are *per se* violative of Section 1 of the Sherman Act "... whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the tied product and a 'not insubstantial' amount of interstate commerce is affected." (356 U.S. at 6) The content of the phrase "sufficient economic power" with respect to the tying product was defined by the Fourth Circuit recently in the *Osborn* case.

Osborn was a lessee of Sinclair Refining Company from 1936 to 1948, at which time his lease was terminated and a new lease entered into which was continued until May 1956, when it was finally cancelled by Sinclair. During the years of Osborn's tenure as a Sinclair dealer, the oil company of its subsidiary, Sherwood Bros., Inc., was party to a sales commission contract with Goodyear in all material respects identical to the Firestone-Shell and the Goodyear-Shell agreements in the instant case. Osborn filed suit for treble damages under the Sherman Act, claiming that the sale of Goodyear TBA to Sinclair dealers in Maryland was in furtherance of an illegal restraint of trade. On appeal, the court held that Sinclair had gone beyond mere salesmanship in inducing its dealers to carry substantial quantities of Goodyear TBA if they wished to continue selling Sinclair gasoline under their lease and sales agreements

with Sinclair.¹¹ As phrased by the court, quoting its own earlier decision in *McElhenny v. Western Auto Supply Co.*, 268 F.2d 332, 338 (4th Cir. 1959):

Probably nothing is more firmly settled in our antitrust jurisprudence than that an illegal contract may be inferred from all the circumstances.

According to the court, Sinclair had violated Section 1 of the Sherman Act through a series of *implied* tie-in agreements with its dealers in Maryland. Moreover, the court did not regard it as significant that Sinclair had not required its dealers to purchase all their requirements of TBA from Goodyear:

To insist upon such exclusivity in a tie-in would be inconsistent with the trend of decisions in this area. If a substantial amount of commerce is restricted by such arrangements, the standard for illegality would seem to have been met.

As to the requirement of "sufficient economic power" in the tying commodity—Sinclair's position in the petroleum retail market—the court found that in 1956, Sinclair had operated about 300 out of some 2300 retail service stations in Maryland and that those stations had sold about 10 percent of the total sale of gasoline in the same state in that year. This was held to afford Sinclair sufficient economic power in the gasoline market appreciably to restrain commerce in TBA. No one questioned that Goodyear TBA purchased by Sinclair dealers in Maryland comprised a substantial amount of commerce. Accordingly, the implied tie-in agreements between Sinclair and its dealers were held to constitute a *per se* violation of the Sherman Act.

Here we find that Shell sold 3.2 billion gallons of gasoline nationally in 1955 through some 10,000 directly-supplied outlets and 847 jobbers who, in turn, supplied an additional 13,000 retail stations. In the same year Shell accounted for at least 5% of the total volume of gasoline sold at retail in the United States.¹²

But we do not rest our decision on a mechanical application of the rule of the *Northern Pacific* and *Osborn* cases. The issue here is the legality of a *particular method* of distributing TBA products used by the respondents. Shell has sufficient economic power with respect to its wholesale and retail petroleum distributors to cause them to purchase substantial quantities of sponsored TBA even without the use of overt coercive tactics or of written or oral tying agreements and this power is a fact existing independently of the

¹¹ Sinclair did not have a sales commission plan in effect throughout its entire marketing area, but only in Maryland and, to some extent, in adjacent states. 286 F. 2d at —.

¹² Actually, as Shell does not market gasoline in many of the mid-continent states, the company's market share in its own marketing area is undoubtedly greater than 5 percent.

particular method of distributing or sponsoring TBA used by Shell. Determination of illegality in this context requires an evaluation of competitive effects resulting from respondents' use of the sales commission method of distributing TBA.

The record of this case conclusively establishes, in our minds, that the sales commission contracts between Shell and Firestone and Shell and Goodyear have unlawfully injured competition in the distribution of TBA at the manufacturing, wholesale and retail levels.

There are at least 18 manufacturers of automotive tires in the United States, 10 of which also offer lines of batteries and accessories. Those selling batteries and accessories in addition to producing and selling tires are:

- (1) The Goodyear Tire & Rubber Company
- (2) The Firestone Tire & Rubber Company
- (3) United States Rubber Company
- (4) The B. F. Goodrich Company
- (5) Cooper Tire & Rubber Co.
- (6) Dunlop Rubber Co.
- (7) Gates Rubber Co.
- (8) General Tire & Rubber Co.
- (9) Lee Rubber & Tire Corp.
- (10) Seiberling Rubber Co.

Those companies which produce and sell only tires are:

- (11) Armstrong Rubber Co.
- (12) Corduroy Rubber Co.
- (13) Dayton Rubber Co.
- (14) Denman Rubber Manufacturing Co.
- (15) Mansfield Tire & Rubber Co.
- (16) McCreary Tire & Rubber Co.
- (17) Mohawk Rubber Co.
- (18) Schenuit Rubber Co.

As shown by Table I, *supra*, some of the companies named above sell private brand tires to oil companies under the purchase-resale plan. Others, such as Goodyear and Goodrich,¹³ have both purchase-resale and sales commission contracts, while Firestone, with a single exception, avoids purchase-resale arrangements but is heavily committed to the sales commission plan.

TBA products are distributed to ultimate consumers by a number of methods other than through service stations, as has been shown.

¹³ Dayton, Dunlop, General and Lee each has a sales commission arrangement with one small marketing oil company, and U. S. Rubber has such agreements with six small marketing oil companies and, to a limited extent, with two large oil companies.

Sears Roebuck, Montgomery Ward, and Western Auto Stores all offer their own brands of TBA to consumers, although as to tires, at least, these companies obtain private brands from one or more of the 18 companies named above. Sears Roebuck, for example, purchases "All-State" tires from Goodrich, Dayton, Dunlop, and Armstrong, while Montgomery Ward is supplied with "Riverside" tires by U. S. Rubber and Mansfield. These two nation-wide mass distributors alone accounted for almost 15% of all new (as opposed to recapped) replacement tires purchased by automobile owners in 1954:

TABLE III.—*Replacement tire purchases by automobile owners in 1954*

<i>Brand of tire</i>	<i>Percent of total</i>
Goodyear.....	21.4
Firestone.....	15.3
Sears Roebuck (All-State).....	10.7
United States.....	7.4
B. F. Goodrich.....	8.9
Atlas.....	6.0
Montgomery Ward (Riverside).....	4.2
General.....	2.4
Western Auto.....	2.2
Armstrong.....	1.0
Lee.....	2.7
Gulf.....	1.3
Seiberling.....	1.5
Mobil.....	1.6
Kelly.....	1.2
Fisk.....	1.0
Dunlop.....	1.6
All others.....	9.6
Total.....	100.0

This table shows that Firestone accounted for 15.3 percent and Goodyear 21.4 percent of total replacement tire sales at consumer level in 1954. While the bulk of Firestone's retail volume may have resulted from sales by the 770 company-owned stores and the many thousands of franchised Firestone dealers located throughout the United States, it is clear that a substantial portion of this retail volume was accounted for by the more than 25,000 service station outlets supplied by Firestone under its sales commission contracts with oil companies.¹⁴

¹⁴ Firestone paid sales commissions on about \$91 million of sales to oil company outlets in 1957, which was probably about 10% of Firestone's total sales volume in that year.

Three of Firestone's major competitors—Goodyear, United States Rubber, and Goodrich—are also manufacturers of tires, while the three next largest competitors at retail—Sears Roebuck, Atlas, and Montgomery Ward are not manufacturers at all, but merely purchase for resale from such companies as Dayton, Dunlop, U.S. Rubber, Mansfield, Goodrich, Cooper, Seiberling, and General. Among other manufacturing competitors of Firestone, Lee with 2.7 percent and General Tire with 2.4 percent were the only companies with more than 2.0 percent of the replacement tire market in 1954.

These data indicate that the smaller tire companies may well be able to compete with the larger ones for the business of oil companies using the purchase-resale method of distributing TBA. However, the record demonstrates that the smaller tire companies are *not* able to compete effectively with larger manufacturers such as Firestone and Goodyear for the business of marketing oil companies using the sales commission plan because the smaller tire companies lack distribution facilities which blanket the entire marketing areas of major oil companies. This was made clear by the testimony of defense witness MacGowan of Firestone:

The competition for sales commission contracts has tended to be more among the larger tire companies than it has among the smaller tire companies, I would say for the reason that to be successful in the sales commission business, a tire company has to have in the first place a complete TBA line to be most useful to the dealer, because dealers need a complete TBA line. Second, of course, if a marketing oil company has wide-spread distribution itself, it needs to be doing business, if on a sales commission basis, with a company or companies that also have wide-spread distribution facilities *and which have in particular sufficient and adequate number of supply points from which to make deliveries, serve the dealer, and so on.* [Emphasis added.]

The latter part of Mr. MacGowan's statement, as to the need of a marketing oil company using the sales commission plan to do business with a tire company having wide-spread distribution facilities, is supported by the record evidence in this case relating to the Atlantic Refining Company's adoption of the sales commission method of distributing TBA in 1950. Prior to 1950, Atlantic purchased Lee tires and Exide batteries for resale to the oil company's wholesale and retail petroleum distributors. Within one year after Atlantic decided, in January 1950, to shift to sales commission arrangements with Firestone and Goodyear, and in spite of the fact that Lee established new distribution centers from Florida northward through Pennsylvania in an effort to maintain its former volume of distribu-

tion to Atlantic outlets, Lee had lost approximately 75 percent of its Atlantic business.¹⁵

Witness MacGowan's statement indicates that in order to make use of the sales commission method of distributing TBA, a tire company must not only have a widespread distribution system with an adequate number of supply points, but must also offer a complete line of TBA; and this is no doubt true. But what the statement fails to take account of is that independent wholesalers competing with Firestone's local wholesale distributors throughout the land *do* offer a complete line of TBA to service station customers. Such independent competing wholesalers do not have to obtain batteries and accessories from their tire suppliers, since they can procure batteries and accessories directly from the original manufacturers of these items. (Firestone, it will be recalled does not manufacture any of the "Firestone" batteries and only certain of the "Firestone" accessories it distributes.)

Seventeen representatives of wholesale TBA suppliers in the cities of Milwaukee, Chicago, Charlotte, N.C., Atlanta, Jacksonville, Fla., and Baltimore testified in support of the complaint in this proceed-

¹⁵ The evidence also suggests that battery manufacturers may be hard hit when a major oil company decides to enter into sales commission agreements with one or more tire manufacturers. Prior to 1950, Atlantic Refining Company purchased Exide batteries from the Electric Storage Battery Company and resold such batteries to Atlantic dealers, along with the Lee tires purchased from Lee Rubber & Tire Corp. When Atlantic decided to sponsor Firestone and Goodyear products under the sales commission plans of these companies, Atlantic wished to continue to purchase and distribute Exide batteries. The reason why Atlantic did not do so was set forth in this memorandum from Exide's Sales Manager Connell to his company's Vice-President in Charge of Sales:

"Mr. Colley [Vice-President and General Manager of Atlantic Refining Company] has clearly indicated to Mr. Heideman [TBA Manager for Atlantic Refining Company] that the one TBA item he would prefer to retain is Exide batteries. He likes our company, he likes our way of doing business, and believes our product is one of the best. However, as explained previously both tire companies have refused to go along with the TBA commission plan unless it includes batteries and all other TBA items."

Commenting on the possibility of his company shifting from the purchase-resale of Lee Tires and Exide batteries to the sales commission method of distributing Firestone TBA, Mr. Heideman of Atlantic stated as follows in an intracompany memorandum:

"It is probable that one of the apparent major advantages to the Firestone program is that it offers some solution to our present warehousing problem. In other words, batteries and accessories—more than tires—are contributing to this problem. If with this change we present to our dealer the viewpoint that he should handle these associated lines of Firestone, we quickly find the tire national acceptance point reversed as neither Firestone batteries nor accessories have the national acceptance of the lines we presently handle. A picture on Firestone batteries was secured from Exide which indicated that their production of Firestone batteries is somewhere between 66-2/3 and 75% of the amount of batteries that are purchased by the Atlas Corporation. When it is considered that Atlas is a private brand battery sold only in Standard Oil service stations and that Firestone has the entire national market open for their solicitation, there is certainly an indication that consumer acceptance of the Firestone brand in batteries is very limited. This becomes more obvious when we consider Firestone's tire position, where they are either #1 or #2 in the industry in replacement sales."

ing. Typical of these witnesses was Mr. Raymond L. Berry, Jr., representing Berry Tire Company of Chicago. He testified that his company sells Dunlop and Miller tires, Auto-Lite batteries and spark plugs, and various accessory items such as antifreeze, light bulbs, etc. Among the classes of customers served by his company are service stations, car dealers, garages, and repair shops, and a few commercial trucking accounts. He testified to a number of instances in which Shell dealers told him they could not buy TBA from Berry Tire Company because, as Shell dealers, they felt that they must purchase Firestone TBA. The other sixteen representatives of wholesale supply companies competing with Firestone testified to the same effect.

Twenty-one Firestone wholesale dealers appeared as witnesses for respondent Firestone and were practically unanimous in stating that if the sales commission plan were to be discontinued, the effect on their businesses would be disastrous. Witness Brooks, for example, a franchised Firestone wholesale dealer in the Chicago area engaged in competition with witness Berry, and with two Goodyear distributors in his area, Maier and Jensen, testified that he is a supply point for about 43 Shell, Texaco and DX Sunray service stations and that these stations account for the bulk of his company's wholesale TBA sales, which run about \$200,000 per year. On direct examination, in response to a question from counsel for Firestone, this information was developed:

MR. GRAVELLE: As a small businessman . . . what would be the effect on your business if there were no sales commission plan?

MR. BROOKS: Well, I have thought about that, too. I have been at this about 12 years. I am 56 years old right now. And if there were no sales commission plan, I would have to start all over from scratch. My wholesale business would be gone.

On cross-examination the following exchange took place, with reference to the testimony quoted above:

MR. GOODHOPE: Are you saying that if Firestone didn't pay the ten percent override to Shell and Texas you wouldn't be able to sell to those Shell and Texas stations?

* * * * *

MR. BROOKS: That is what I am saying, yes. I think that is true.

MR. GOODHOPE: Do you have a further explanation?

MR. BROOKS: Yes. I would like to say how I reasoned that out in my own mind.

In the majority of oil companies doing business in my trading area, I figured this up once, too, and I don't remember the figures, but I would say about two-thirds of them operate with the oil company selling TBA products directly to the gas station, with no middle man. And I assume if there were no agreements of this type, this commission type deal, that Shell and Texas,

my two big accounts, would probably do like the majority do and sell directly.

MR. GOODHOPE: To the station?

MR. BROOKS: To the stations, yes.

MR. GOODHOPE: And that would cut you out?

MR. BROOKS: Yes sir.

* * * * *

MR. GOODHOPE: As far as the Shell stations which you have in your territory, I believe you stated that there were 21 of them to whom you sell TBA?

MR. BROOKS: Yes, sir.

MR. GOODHOPE: Does your principal competition, as far as those stations are concerned, come from Maier and Jensen [local Goodyear dealers in the area]?

MR. BROOKS: In the ones I am now selling—do I understand you?

MR. GOODHOPE: Yes.

MR. BROOKS: No. Our principal competition comes from outside sources, what we call wagon peddlers, and things of that type. Pretty well Jensen and Maier stay out of the stations we are selling and we try to reciprocate, because there is no use trying to start a first-class fight. We call on them and make ourselves available, and they do the same for our stations.

MR. GOODHOPE: You are talking about the Shell stations?

MR. BROOKS: Yes.

In short, seventeen wholesalers testified that they could not sell to Shell stations *because of* the sales commission plan, and twenty-one Firestone wholesale dealers testified that they could not be able to sell to Shell stations *without* the sales commission plan. The success of the one group is not due to the fact that its members are more able competitors, nor because they offer superior products and services, and the failure of the other group is not traceable solely to the possible inferiority of their products and services. The one outstanding fact is that the group of Firestone dealers has been successful in selling to Shell stations because of the sales commission system and *not* because of either their own competitive abilities or because of the competitive advantages of their products.

The Firestone dealers who testified in this proceeding almost without exception expressed apprehension that they would be unable to sell TBA to Shell's dealers if Shell were to adopt the purchase-resale plan. This, in itself, is eloquent testimony to Shell's economic power over its various classes of petroleum outlets. Nevertheless, the point deserves consideration since it implies that no useful purpose would be served by outlawing the sales commission plan between Firestone and Shell as Shell would merely shift to the purchase-resale method of distributing TBA, with the result that Firestone and Goodyear dealers would lose a substantial volume of sales, but without improving the lot of competing TBA suppliers as they would still be unable

to sell TBA to Shell dealers. We believe this argument to be without merit for several reasons.

First of all, what course of action Shell may follow with respect to TBA if the sales commission plan is outlawed is entirely speculative. Assuming for the moment, however, that Shell will adopt the purchase-resale plan and flout the antitrust laws by requiring its dealers to handle Shell TBA exclusively, or even substantially, it is obvious that local wholesalers of TBA competing with Firestone and Goodyear dealers in Shell's marketing area will at least no longer be laboring under the handicap of their competitors representing Firestone and Goodyear having already preempted a substantial share of the local wholesale TBA market. As the situation stands under the sales commission plan, local dealers representing Firestone and Goodyear are assured of a substantial chunk of the market before the competitive race at the wholesale level even begins. Abolition of the sales commission system will at least terminate the unjust advantage presently enjoyed by distributors of Firestone and Goodyear over local competitors representing other tire manufacturers and TBA suppliers.

However, this unfair competitive advantage is not confined to the wholesale level; many of the wholesalers who testified in this proceeding—both in support of and in opposition to the complaint—*also* sell at retail directly to motorists. To the extent, therefore, that suppliers of TBA competing with distributors of Firestone and Goodyear at the wholesale level are weakened by the operation of the sales commission system, these dealers are also weakened at the retail level, in instances where they are engaged in retail as well as wholesale operations.

Moreover, the competitive inequalities engendered by the sales commission plan extend backward to the manufacturing level as well as forward to the retail level. As has been shown, although the smaller tire manufacturers are able to compete with the larger ones in selling to oil companies using the purchase-resale method of distribution, such smaller manufacturers are *not* able to compete with the larger ones for the business of oil companies using the sales commission plan. This is chiefly because the smaller manufacturers lack the widespread distributive facilities of Firestone, Goodyear, and other nation-wide tire manufacturers using the sales commission plan. In any particular or specific local market area, to be sure, one or more of the smaller manufacturers may have a wholesale and retail distributing organization which is every bit as effective as its larger competitors in that particular market. Throughout the *entire* mar-

keting area of any large oil company, however, no one of the smaller manufacturers may have as effective a distributive organization as do the larger manufacturers. But, as one of the chief characteristics of the sales commission plan is that it strengthens wholesale and retail distributors of such companies as Firestone and Goodyear by pre-empting for their benefit a substantial segment of all of the various local wholesale markets throughout the land, the sales commission system stands as a bar to the *expansion* by smaller tire manufacturers of their distributive organizations. For according to Shell, about 45 percent of all replacement TBA items sold to motorists are accounted for by service stations.

We think the fact that Firestone's dealers believe that they will lose a substantial segment of their sales to Shell outlets if the sales commission plan is discontinued in no way detracts from, but in fact supports, our conclusion that the sales commission method of distributing TBA used by Firestone and Goodyear in selling to Shell dealers is an unfair method of competition and an unfair act or practice in commerce in violation of Section 5 of the Federal Trade Commission Act. Furthermore, we reject the suggestion by these Firestone witnesses that Shell will ignore the teaching of such landmark decisions as *Standard Oil Co. v. United States*, 337 U.S. 293 (1949);¹⁶ *Northern Pac. Ry. Co. v. United States*, *supra*; *Osborn v. Sinclair Refining Co.*, *supra*; and *United States v. Sun Oil Co.*, 176 F. Supp. 715 (E.D. Pa. 1959). Consequently, we believe that the abolition of the sales commission agreements between Firestone and Shell and Goodyear and Shell will unfetter the forces of competition in TBA distribution, not further restrain them.

Other anticompetitive effects of the sales commission system are so obvious that they require no detailed consideration. Competition between Firestone and Goodyear in selling to individual service stations assigned to one or the other of these rubber companies has been wrecked by this system. The public is disadvantaged because it cannot rely upon the competitive rivalry among local TBA wholesalers to insure that service station outlets will be able to obtain price savings which may be passed along to the buying public. And, finally, the system prevents the service station operator himself from using his buying power to further his own business advantage, instead of that of his oil company supplier. For, as the Court of Appeals said in the recent *Osborn* case, in a situation identical in

¹⁶ In footnote 8 to this case the court stated: "It may be noted in passing that the exclusive supply provisions for tires, tubes, batteries, and other accessories which are a part of some of Standard's contracts with dealers who have also agreed to purchase their requirements of petroleum products should perhaps be considered, as a matter of classification, tying rather than requirements agreements."

its essentials with the present case, insofar as the service station dealer is concerned:

Because of its financial interest in having its lessee-dealers sell Goodyear TBA rather than competing brands, Sinclair-Sherwood engaged in a course of conduct designed to bring about this result. The facts in this case utterly fail to reveal any other business motive for the defendant's policy that its dealers should handle Goodyear products instead of others. Admittedly, it was proper for Sinclair-Sherwood to desire its lessees to carry a complete, high-quality line of TBA. It is conceded, however, that there are other competing brands, and there is no suggestion that Goodyear was superior to the other brands of TBA or that there was any benefit to the dealers in handling Goodyear rather than one of the other lines.

Respondents contend, however, that "... all judicial (and legislative) authorities firmly uphold the right of a manufacturer-distributor of a basic product to sell or sponsor to its dealers complementary or related products, including specifically the right of oil companies to sponsor TBA to their dealers." Among the cases cited in support of this proposition, those involving oil companies are *Standard Oil Co. v. United States*, *supra*, *United States v. Richfield Oil Corp.*, *supra*, *United States v. Sun Oil Co.*, 176 F. Supp. 715 (E.D. Pa. 1959), and *Osborn v. Sinclair Refining Co.*, 171 F. Supp. 37 (D. Md. 1959). Of these cases, the legality of a sales commission contract between an oil company and a tire manufacturer was at issue in only one, *Osborn*, and that decision was reversed on appeal.

Exclusive dealing agreements relating primarily to petroleum products, but including TBA as well, between Standard Oil of California and its dealers, between Richfield and its dealers, and between Sun Oil and its dealers were declared unlawful in the other three cited cases. But those decisions did not "validate" the sales commission *method* of distributing TBA by a marketing oil company—no distinction was made in those cases as to the legality or illegality of any particular *method* of distributing TBA. They held simply that it is unlawful for an oil company with a substantial share of the relevant market to enter into exclusive agreements with its dealers obligating them to purchase all their requirements of petroleum from the oil company or all their requirements of TBA from either the oil company or its nominee. In the instant case we are concerned primarily with the sales commission contracts between Firestone and Shell and between Goodyear and Shell, and with the adverse effects of those contracts on competing manufacturers, wholesalers, and retailers of TBA. Service stations represent a vitally important segment of all of the various local wholesale markets for TBA throughout the land. In this decision, we hold that it is an unfair method of competition for a large manufacturer and dis-

tributor of TBA, engaged in competition with other tire companies and other manufacturers and distributors of TBA, to enter into a contract with a major marketing oil company which has the effect of pre-empting for its own wholesale and retail TBA distributors a substantial segment of the wholesale TBA market in local market areas before the competitive race has even begun at that level.

Shell also contends that this Commission "has approved both the sales commission and the purchase-resale methods of marketing TBA by oil companies," citing as authority therefor our decisions in *United States Rubber Company*, 28 FTC 1489 (1939) and *Atlas Supply Company*, 48 FTC 53 (1951). The former case involved price discrimination under Subsections 2(a) and (d) of the Robinson-Patman Act, and the issue of restraint of trade caused by a particular *method* of distributing TBA was not even raised; respondent was required to cease and desist discriminating in price among its customers no matter which of several district methods of distribution it used. The latter case does not seem relevant to this proceeding since *Atlas Supply* was concerned with the manner in which the five Standard Oil Companies exercised their *purchasing power* through Atlas Supply Company—it had no connection at all with the sales commission method of *distributing* TBA.

Council for respondents refer us to several cases dealing with business practices somewhat analogous to the sales commission plan under consideration here. Those dealing with automobiles and automobile financing, *United States v. Ford Motor Co.*, Civil No. 8, N.D. Ind., Nov. 15, 1938; *United States v. Chrysler Corp.*, Civil No. 9, N.D. Ind., Nov. 15, 1938; and *United States v. General Motors Corp.*, Civil No. 2177, N.D. Ill., Oct. 4, 1940, were subsequently settled by consent decrees.¹⁷ Each respondent agreed to an injunction prohibiting, among other things, its recommending, endorsing or advertising any particular finance company to its dealers and from engaging in joint solicitation of its dealers with representatives of any finance company or companies. We fail to see how these cases aid the respondents' contention that the sales commission method of distributing TBA is perfectly lawful and has been so recognized by the courts; to the contrary, any inference that may be drawn from them supports our position here.

In the field of automobiles and automotive parts and accessories, respondents cite this Commission's decision in *General Motors Corp.*,

¹⁷ These decrees are reported in full in CCH Trade Cases as follows: *United States v. General Motors Corp.*, 1952 Trade Cases Par. 67324, at 67777 (N.D. Ill. July 28, 1952); *United States v. Ford Motor Co.*, 1953 Trade Cases Par. 67437, at 68195 (N.D. Ind. January 19, 1953); and *United States v. Chrysler Corp.*, 1953 Trade Cases Par. 67438, at 68209 (N.D. Ind. January 19, 1953).

34 FTC 58 (1941) and the court case of *Miller Motors v. Ford Motor Co.*, 149 F. Supp. 790 (M.D.N.C., 1957), *affirmed* 252 F. 2d 441 (4th Cir. 1958). The issue in *General Motors* was the legality of General Motors' practice of requiring its franchised automobile dealers to purchase automotive parts and accessories manufactured by General Motors or its subsidiaries or, in some cases, purchased by General Motors or its subsidiaries and resold to such dealers as a condition to renewal of their franchises. The Commission ordered respondents to cease and desist, among other things, using "... any system or practice, plan, or method of doing business, for the purposes, or having the effect, or coercing or intimidating automobile retail dealers who have contracts or selling agreements or franchises of the respondents for the sale of new motor vehicles into purchasing or dealing in accessories or supplies manufactured or supplied by the respondents, or by any one designated by them, for use in and on automobiles sold by the respondents." This remedy was considered adequate in *General Motors* since, unlike Shell in the instant case, the respondents were actually engaged in manufacturing and distributing many of the tied automotive parts and supplies. Moreover, the evidence in that case showed that General Motors and its subsidiaries had actually discouraged their dealers from purchasing sponsored parts and supplies from local distributors representing General Motors' parts and accessories manufacturing subsidiary, United Motors Service, Inc.

There are thus at least two critical distinctions between the facts of the *General Motors* case and this case: (1) In *General Motors*, the automobile company was not using its economic power in the automobile market to destroy competition among competing groups of small businessmen at the wholesale level whereas Shell is using its economic power with this effect; and (2) unlike Shell, General Motors was actually engaged in manufacturing and distributing, or purchasing and reselling, the automotive parts and accessories distributed by the automobile company to its franchised automobile dealers. And, apart from these factors, as Shell's sales commission actually operates, it amounts to little more than a market allocation by the oil company of its dealers between Firestone and Goodyear.

Miller Motors v. Ford Motor Co., *supra*, was a treble damage action for violation of the Sherman and Clayton Acts. The Clayton Act charge involved business practices identical with those considered by the Commission in the *General Motors* case. However, as the court on appeal disposed of this question on the ground that plaintiff had not shown that it sustained any damages in connection with

parts and accessories as a result of anything done by Ford or its representatives, the Clayton Act count need not be considered here.

The Sherman Act count in the *Miller Motor* case involved Ford's practice of levying upon each Lincoln-Mercury dealer an assessment based upon the price of new automobiles delivered to the dealer and turning the funds thus collected over to Lincoln-Mercury Dealer Associations throughout the country. The various Lincoln-Mercury Dealers Associations then used such funds for advertising purposes. Significantly, in ruling that this practice did not constitute a Sherman Act violation the Court noted:

It is not shown that Ford had any interest in the Kenyon and Eckhardt advertising agency except to obtain effective service from it. Ford was not using its economic position as an automobile manufacturer to invade and dominate the advertising business.

By way of contrast, Shell *does* obtain substantial financial benefits from its sponsorship of Firestone and Goodyear TBA, and we have specifically found that Shell has been using its economic power as a petroleum marketer to destroy competition in the TBA business. Finally, it is noteworthy that the opinion in the *Miller Motor* case was written by Judge Sobeloff of the Fourth Circuit, who also authored the recent decision by the same court in the *Osborn* case.

A number of additional points are raised by Shell and Firestone, but we believe only one of these requires detailed consideration in this opinion. Respondents contend that it was error, depriving them of due process of law, for the same hearing examiner to have presided over and rendered initial decisions in all three of the TBA cases: this case, Docket 6487; and the companion cases, Docket 6485 in which the respondents are The Texas Company and the B. F. Goodrich Company; and Docket 6486, in which the respondents are The Atlantic Refining Company and The Goodyear Tire and Rubber Company. The crux of the contention seems to be that the hearing examiner could not possibly have rendered his initial decision in this case solely upon the basis of the record of the instant proceedings, since he also heard testimony and received evidence involving Shell's sales commission contract with Goodyear in Docket 6486, and heard testimony and received evidence involving Firestone's sales commission contracts with The Texas Company and other oil companies in Docket 6485 and with Atlantic Refining Company and other oil companies in Docket 6486. As Firestone puts it, respondents conclude that "... the admixture of respondents and evidence in this and the companion cases, all heard by the same examiner, has resulted in a denial of due process so flagrant as to vitiate and make a nullity of the whole proceeding."

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Our study of the initial decision and of the record in this case indicates that there is no basis for the claim that the hearing examiner considered extra-record evidence in making his findings of fact and conclusions of law. Substantial evidence is present in the record of this case to support every finding of fact and conclusion of law by the hearing examiner. In any event, our own independent study of the record herein is the basis for the findings of fact and conclusions of law set forth in this opinion.

CONCLUSION

Other exceptions of respondents Shell and Firestone have been considered and rejected. The appeal of respondent Shell is denied. The appeal of counsel supporting the complaint is granted in part and denied in part. The initial decision, to the extent that it is contrary to the views expressed in this opinion, will be modified to conform with such views. An appropriate order will be entered.

FINAL ORDER

Counsel supporting the complaint and respondent Shell Oil Company having filed cross-appeals from the hearing examiner's initial decision in this proceeding; and

The Commission having considered said appeals including the briefs and oral arguments of counsel and the entire record, and having rendered its opinion denying the appeal of respondent Shell Oil Company and granting in part and denying in part the appeal of counsel supporting the complaint, and having determined that the initial decision should be modified in certain respects:

It is ordered, That the findings and conclusions of the initial decision be, and they hereby are, modified and supplemented to conform with the findings, conclusions and views set forth in the accompanying opinion of the Commission.

It is further ordered, That the following be, and it hereby is, substituted for the order contained in said initial decision:

It is ordered, That respondent Shell Oil Company, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the promotion, or offering for sale, or sale and distribution of tires, inner tubes, batteries, and automotive accessories and supplies (hereinafter referred to as "TBA products") in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from, directly or indirectly:

1. Entering into or continuing in operation or effect any contract, agreement or combination, express or implied, with the Firestone

Tire and Rubber Company, or with any other rubber company or tire manufacturer, or any other supplier of tires, batteries, and/or accessories, whereby Shell Oil Company receives anything of value in connection with the sale of TBA products to any wholesaler or retailer of Shell petroleum products by any marketer or distributor of TBA products other than Shell Oil Company;

2. Accepting or receiving anything of value from any manufacturer, distributor, wholesaler, or other vendor of TBA products, for acting as sales agent or for otherwise sponsoring, recommending, urging, inducing, or promoting the sale of TBA products, directly or indirectly, by any such vendor to any wholesaler or retailer of Shell petroleum products;

3. Using or attempting to use any contractual or other device, such as, but not limited to, agreements, leases, training programs, promotions, dealer meetings, dealer discussions, service station identification, credit cards, and financial loans, to sponsor, recommend, urge, induce, or otherwise promote the sale of TBA products by any distributor or marketer of such products other than Shell Oil Company to or through any wholesaler or retailer of Shell petroleum products;

4. Employing any method of inspecting, reporting, or surveillance or using or attempting to use, in any manner, its relationship with Shell outlets to sponsor, recommend, urge, induce, or otherwise promote the sale of any specified brand or brands of TBA products by any distributor or marketer of such products other than Shell Oil Company to any wholesaler or retailer of Shell petroleum products;

5. Intimidating or coercing or attempting to intimidate or coerce any wholesaler or retailer of Shell petroleum products to purchase any brand or brands of TBA products;

6. Preventing or attempting to prevent any wholesaler or retailer of Shell petroleum products from purchasing and reselling, merchandising, or displaying TBA products of his own independent choice.

It is further ordered, That respondent, The Firestone Tire and Rubber Company, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the promotion, offering for sale or sale and distribution of tires, inner tubes, batteries and automotive accessories and supplies (hereinafter referred to as "TBA products") in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from, directly or indirectly:

1. Entering into or continuing in operation or effect any contract, agreement or combination, express or implied, with Shell Oil Company or with any other marketing oil company whereby The Fire-

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stone Tire and Rubber Company, directly or indirectly, pays or contributes anything of value to any such marketing oil company in connection with the sale of TBA products by The Firestone Tire and Rubber Company or any distributor of Firestone products to any wholesaler or retailer of petroleum products of such marketing oil company;

2. Paying, granting or allowing, or offering to pay, grant or allow, anything of value to Shell Oil Company or to any other marketing oil company for acting as sales agent or for otherwise sponsoring, recommending, urging, inducing or promoting the sale of TBA products, directly or indirectly, by The Firestone Tire and Rubber Company or any distributor of Firestone products to any wholesaler or retailer of petroleum products of such marketing oil company;

3. Reporting or participating in the reporting to Shell Oil Company or to any other marketing oil company concerning sales of TBA products to wholesalers or retailers of petroleum products, individually or by groups, of any such marketing oil company.

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

It is further ordered, That respondents Shell Oil Company and The Firestone Tire and Rubber Company, corporations, shall, within sixty (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 aforesaid order to cease and desist.

IN THE MATTER OF
COLGATE-PALMOLIVE COMPANY