

It is ordered, That respondents Arrow Food Products, Inc., a corporation, and Marcus Rosenberg (erroneously named in the complaint as Markus Rosenberg), Emanuel Rohan and David Rosenberg, individually and as officers of said corporation, 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 order to cease and desist.

IN THE MATTER OF
FRANK A. GORDON TRADING AS GORDON OF
CALIFORNIA ET AL.

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

Docket 8443. Complaint, Oct. 3, 1961—Decision, June 26, 1962

Order requiring a San Francisco furrier to cease violating the Fur Products Labeling Act by failing to show on labels and invoices when fur was dyed and the country of origin of imported furs; failing to label fur products with the true animal name of the fur used; and failing to comply in other respects with labeling and invoicing requirements.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Frank A. Gordon, an individual trading as Gordon of California, and Ida Gordon, an individual, hereinafter referred to as respondents, have violated the provisions of such Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Frank A. Gordon is an individual trading as Gordon of California, with his office and principal place of business at 16 First Street, San Francisco, Calif. Individual respondent Ida Gordon is the wife of, and is employed by, respondent Frank A. Gordon, and has her office at the same address. Both individual re-

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spondents formulate, direct, and control the acts, practices and policies of the business.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged, in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale, in commerce, and in the transportation and distribution, in commerce, or fur products; and have manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce as the terms "commerce," "fur," and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products whose labels failed:

- (1) To show the true animal name of the fur used in the fur product;
- (2) To disclose that the fur contained in the fur product was dyed, when such was the fact;
- (3) To show the country of origin of imported furs used in the fur product.

PAR. 4. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respect:

- (a) Required item numbers were not set forth on labels, in violation of Rule 40 of said Rules and Regulations.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act, and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products whose invoices failed:

- (1) To disclose that the fur contained in the fur product was dyed, when such was the fact;
- (2) To show the country of origin of imported furs used in the fur product.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they

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were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

(b) Required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

PAR. 7. The acts and practices, as set forth above, were and are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constituted and now constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

Mr. Bruce T. Fraser supporting the complaint.

Mr. Frank A. Gordon, Mrs. Ida Gordon and Gordon of California, Pro se.

INITIAL DECISION BY RAYMOND J. LYNCH, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the respondents on October 3, 1961, charging that the respondents violated certain provisions of the Fur Products labeling Act and the Rules and Regulations promulgated thereunder in that certain of the "fur products" were misbranded and falsely and deceptively invoiced in violation of said Act and the Federal Trade Commission Act. A copy of the complaint was served upon respondents who filed an answer thereto admitting all of the material allegations of the complaint and waiving a hearing. Counsel supporting the complaint filed proposed findings, conclusions and order. Respondents, as previously stated, admitted the allegations of the complaint but stated that the violations were unintentional.

This proceeding is before the hearing examiner for final consideration upon the complaint, answer and proposed findings of fact and conclusions filed by counsel supporting the complaint.

Consideration has been given to the proposed findings of fact and conclusions submitted and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected and the hearing examiner, having considered the entire record herein, makes the following findings of fact, conclusions drawn therefrom, and issues the following order:

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FINDINGS OF FACT

1. That respondent Frank A. Gordon is an individual trading as Gordon of California with his office and principal place of business located at 16 First Street, San Francisco, Calif. Individual respondent Ida Gordon is the wife of, and is employed by, respondent Frank A. Gordon, and has her office at the same address. Both individual respondents formulate, direct, and control the acts, practices and policies of the business.

2. That subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged, in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale, in commerce, and in the transportation and distribution, in commerce, of fur products; and have manufactured for sale, sold, advertised, offered for sale, transported or distributed fur products which have been made in whole or in part of fur which had been shipped or received in commerce, as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act.

3. That certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products whose labels failed:

(A) To show the true animal name of the fur used in the fur product;

(B) To disclose that the fur contained in the fur product was dyed, when such was the fact;

(C) To show the country of origin of imported furs used in the fur product.

4. That certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respect:

(A) Required item numbers were not set forth on labels, in violation of Rule 40 of said Rules and Regulations.

5. That certain of said fur products were falsely and deceptively invoiced in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act, and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products whose invoices failed:

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(A) To disclose that the fur contained in the fur product was dyed, when such was the fact;

(B) To show the country of origin of imported furs used in the fur product.

6. That certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(A) Information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

(B) Required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

CONCLUSIONS

That the aforesaid acts and practices of respondents, as herein found, were in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act, and that this matter is in the public interest.

ORDER

It is ordered, That respondents Frank A. Gordon, individually and trading as Gordon of California or under any other trade name, and Ida Gordon, individually, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the sale, advertising, offering for sale, transportation or distribution, of fur products, in commerce, or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation, or distribution of fur products which are made in whole or in part of fur which has been shipped and received in commerce as "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

(1) Failing to affix labels to fur products showing in words and figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

(2) Failing to set forth on labels affixed to fur products the item number or mark assigned to a fur product.

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B. Falsely and deceptively invoicing fur products by :

(1) Failing to furnish purchasers of fur products invoices showing the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

(2) Failing to set forth on invoices pertaining to fur products the item number or mark assigned to a fur product.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 4.19 of the Commission's Rules of Practice, effective July 21, 1961, the initial decision of the hearing examiner shall, on the 26th day of June 1962, become the decision of the Commission; and, accordingly :

It is ordered, That respondents herein 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 order to cease and desist.

IN THE MATTER OF

AMERICAN OIL COMPANY

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

Docket 8183. Complaint, Nov. 23, 1960—Decision, June 27, 1962

Order requiring the distributor of "Amoco" and "American" gasoline, selling its products throughout some 25 states, to cease discriminating in price in violation of Sec. 2(a) of the Clayton Act by such practices as it engaged in in October 1958, when it sold gasoline to certain dealers in and around Smyrna, Marietta, and Rome, Ga., at prices lower than those it charged their competitors.

COMPLAINT

The Federal Trade Commission, having reason to believe that the respondent named in the caption hereof, and more particularly designated and described hereinafter, has violated and is now violating the provisions of Section 2(a) of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent American Oil Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located 555 Fifth Avenue, New York, N.Y.

PAR. 2. Respondent is now and for several years last past has been, among other things, engaged in the offering for sale, and distribution of gasoline and other petroleum products throughout some twenty-five states of the United States and the District of Columbia under the brand names of "Amoco" and "American", as follows: Connecticut, Georgia, Delaware, Florida, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, South Carolina, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, Alabama, Arkansas, Kentucky, Louisiana, Mississippi, Tennessee and Texas.

PAR. 3. Respondent markets its gasoline and other petroleum products in the aforementioned area through its own company-owned and operated stations, as well as under contracts with independent lessee-dealer stations. In the latter category, respondent has entered into dealer contracts with service station dealers, hereinafter referred to as "Amoco" or "American" dealers, now in force and effect, pursuant to the provisions of which respondent sells and delivers to such dealers its "Amoco" and "American" gasolines, according to their requirements and orders.

PAR. 4. For the purpose of supplying said customers, and in making delivery thereto, respondent ships or otherwise transports, or causes to be shipped or otherwise transported, gasolines from its own refineries, as well as others, located in various states across state lines to bulk stations and other distributing points within the twenty-five state area, and the District of Columbia, in which it does business, from which said gasolines are thence sold and distributed to said Amoco retail dealers. There is now and has been at all times mentioned herein a continuous stream of trade and commerce, as "commerce" is defined in the Clayton Act, of said gasolines between respondent's terminals, bulk stations, or other distribution centers and said Amoco dealers purchasing said gasolines in the twenty-five state area and the District of Columbia. All of such purchases by said Amoco retail dealers and sales by respondent to such dealers are and have been in the course of such commerce. Said gasolines, after transportation and delivery into the twenty-five state area and the District of Columbia by respondent, and after sale and delivery by respondent to its Amoco dealers in said states and the District of Columbia, are then offered for resale and sold to motorists and others in the aforementioned area.

PAR. 5. In the course and conduct of its said business in commerce, respondent American has sold, and now sells, its gasolines to purchasers thereof, some of whom have been and now are in competition

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with each other in the resale and distribution of such products and with customers of competitors of respondent selling competing brands of gasolines.

Respondent, in the course and conduct of its business, is now and during the times mentioned herein has been in substantial competition with others engaged in the sale and distribution of gasoline and other petroleum products in commerce between and among the aforementioned states and the District of Columbia.

PAR. 6. Respondent, in the course and conduct of its business, has discriminated in price between different purchasers of its gasolines of like grade and quality by selling such gasolines to certain of its customers at higher prices than it did to other of its customers. Commencing on or about October 1958, respondent sold gasolines to certain dealers located in and around Smyrna, Marietta and Rome, Georgia, and other areas, at prices lower than the prices charged by the respondent to its other retail purchasers for gasolines of the same grade and quality in the same competitive market area.

PAR. 7. The effect of the aforesaid discriminations, or of any appreciable part thereof, has been or may be substantially to lessen competition or to destroy or prevent competition with those retailers of respondent's gasolines who received the lower prices, in the resale of such gasolines at retail in the Smyrna, Marietta and Rome, Georgia, areas, and other areas.

PAR. 8. The discriminations in price as hereinbefore alleged are in violation of the provisions of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. Rufus E. Wilson, Mr. Daniel R. Kane, and Mr. Americo M. Minotti for the Commission.

Kirkland, Ellis, Hodson, Chaffetz & Masters, of Chicago, Ill., and *Kirkland, Ellis, Hodson, Chaffetz & Masters*, of Washington, D.C., for respondent.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

The complaint herein was issued by the Commission on November 23, 1960, and charges that respondent has violated Section 2(a) of the Clayton Act, as amended. The complaint alleges that respondent has discriminated in price between different purchasers of its gasolines of like grade and quality by selling such gasolines to certain of its customers at higher prices than to other of its customers. Specifically, the complaint states that commencing on or about October 1958, respondent sold gasolines to certain dealers in and around Smyrna, Marietta, and Rome, Georgia, and other areas at prices

lower than the prices charged by respondent to its other retail purchasers for gasolines in the same competitive market area. The complaint further states that the effect of the discriminations in price alleged has been, or may be, substantially to lessen competition or to destroy or prevent competition with those retailers of respondent's gasolines who received the lower prices.

Respondent, in its answer, denies that it discriminated in price and denies that the effect of its alleged acts has been, or may be, substantially to lessen competition. It avers that commencing on or about October 1958, it granted certain temporary competitive allowances to dealers in and around Smyrna, Marietta, and Rome, Georgia, that any lower price to any dealer in those areas was made in good faith to meet an equally low price of a competitor, and that any differences in its prices were the result of price changes in response to changing conditions in the market for, or the marketability of, the goods concerned.

Hearings were held at Marietta, Georgia, from April 18 through April 21, 1961, when counsel supporting the complaint rested their case. On the representation of counsel supporting the complaint that everything with respect to the Rome, Georgia area, including the allegations in the complaint with respect to that area, had been excluded from the case, and that counsel were only concerned with "the Smyrna-Marietta, Georgia area," all documents, data, and testimony having to do with areas other than Marietta and Smyrna were stricken from the record and otherwise disregarded.

Respondent filed a motion to dismiss and a further motion to strike, which in due course were denied. Respondent then rested its case on the record theretofore made without presenting any evidence in addition to that introduced during the course of the case in support of the complaint. Thereafter proposed findings of fact, conclusions of law and order, with reasons therefor, were filed by the parties hereto, and oral argument was had thereon.

The hearing examiner has carefully reviewed and considered the proposed findings of fact and conclusions of law, with reasons therefor, and such proposed findings and conclusions which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

Upon the entire record in the case, the hearing examiner makes the following:

FINDINGS OF FACT

1. Respondent American Oil Company is a corporation organized, existing and doing business under and by virtue of the laws of the

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State of Maryland, with its principal executive office and place of business located at 555 Fifth Avenue, New York, N.Y., and its principal office located in Baltimore, Md.

2. Respondent is now and for several years last past has been, among other things, engaged in the offering for sale, sale and distribution of gasoline and other petroleum products under the brand names of "Amoco" and "American", throughout some twenty-five states of the United States and the District of Columbia namely: Connecticut, Georgia, Delaware, Florida, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, South Carolina, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, Alabama, Arkansas, Kentucky, Louisiana, Mississippi, Tennessee, and Texas.

3. Respondent markets its gasoline and other petroleum products in the aforementioned states, except in the State of Georgia, through its own company-owned and operated stations, as well as under contracts with independent lessee-dealer stations. In the latter category, and in the State of Georgia, respondent has entered into dealer contracts with service station dealers, hereinafter referred to as "Amoco" or "American" dealers. The aforesaid contracts are now in force and effect, pursuant to the provisions of which respondent sells and delivers to such dealers its "Amoco" and "American" gasolines, according to their requirements and orders.

4. (a) For the purpose of supplying said customers and in making delivery thereto, respondent ships or otherwise transports, or causes to be shipped or otherwise transported, gasolines from its own refineries, as well as others located in various states across state lines, to bulk stations and other distributing points within the twenty-five state area, and the District of Columbia, in which it does business, from which said gasolines are thence sold and distributed to said Amoco retail dealers.

(b) There is now, and has been at all times mentioned herein, a continuous stream of trade and commerce, as "commerce" is defined in the Clayton Act, of said gasolines between respondent's terminals, bulk stations, or other distribution centers and said Amoco dealers purchasing said gasolines in the twenty-five state area and the District of Columbia. For the purpose of supplying said Amoco dealers and of making deliveries pursuant to said contracts, respondent ships by pipelines, barges and ocean tankers or otherwise transports its gasoline in tank cars, tankers, and trucks from its different refineries, terminals and distribution points, located in various states of the United States, to distributing points within the State of Georgia, and

from there by tank cars or trucks to said Amoco dealers purchasing said gasoline in the Smyrna and Marietta, Georgia, area. All of such purchases by said Amoco dealers are, and have been, in the course of such commerce. Said gasoline is transported into Georgia and sold by respondent to said Amoco dealers for resale in the Smyrna and Marietta, Georgia, area.

5. (a) In the course and conduct of its said business in commerce, respondent has sold, and now sells, its gasoline to purchasers thereof, some of whom have been, and are now, in competition with each other in the resale and distribution of such products and with customers of competitors of respondent selling competing brands of gasoline.

(b) Respondent, in the course and conduct of its business, is now and during the times mentioned herein, has been in substantial competition with others engaged in the sale and distribution of gasoline and other petroleum products in commerce between and among the aforementioned states and the District of Columbia.

6. (a) Respondent, in the course and conduct of its business, has discriminated in price between different purchasers of its gasolines of like grade and quality by selling such gasolines to certain of its customers at higher prices than it sold to its other customers. Commencing on or about October 1958, respondent sold gasoline to certain dealers located in and around Smyrna, Georgia, at prices lower than the prices charged by the respondent to its other retail purchasers for gasolines of the same grade and quality located in and around Marietta, Georgia. The dealers to whom the lower price was given are George Hicks, H. E. Williams, Billy M. Green & James R. Crowder, and J. C. Mitchell, all of whom are located in and around Smyrna, Georgia. The dealers to whom an equal lower price was not given are Hoyt Seagraves, J. T. Smith, F. E. Hitt, L. W. Raines & Billy G. Pitts, and Roy C. Morris, all of whom are located in and around Marietta, Georgia.¹

(b) The favored dealers located in and around Smyrna, Georgia, are located, according to reliable and probative evidence, in the same competitive market area as the above-mentioned non-favored dealers located in and around Marietta, Georgia.

7. The lower price at which respondent sold its gasoline to said dealers located in and around Smyrna was not granted in good faith to enable the respondent to meet *its* price competition in the competitive marketing area of the gasoline stations operated by the American lessee-dealers in and around Smyrna.

¹ A tabulation based on information contained in Commission exhibits 156(A-B) through 180(A-B), which exhibits consist of respondent's price sheets authorizing competitive

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8. The price advantage which respondent granted to dealers located in and around Smyrna, Georgia, did substantially lessen, destroy and prevent the competition of each of the unfavored dealers located in and around Marietta, Georgia, with the dealers receiving lower prices.²

price assistance (CPA) to dealers in Smyrna and Marietta for the period preceding, during and following the price discrimination charged reflects the following:

COMM. EXHIBIT NUMBER	Effective date of CPA	Area and service station (S/S) number	Amount of CPA granted	
			Amoco (premium)	American (regular)
156a-b.....	8-22-58	Marietta (area No. 1).....	-----	0.7
157a-b.....	9- 4-58	Smyrna (area No. 5).....	-----	.7
158a-b.....	10- 7-58	Smyrna (area No. 1).....	0.7	.7
159a-b.....	10- 7-58	Marietta (area No. 5).....	.7	.7
160a-b.....	10-11-58	Smyrna and S/S 3071 and 7126 (area No. 1).....	4.2	4.2
161a-b.....	10-14-58	Smyrna and RFD, S/S 3071, 7126, 1546 and 1513 (area No. 1).....	6.7	6.7
162a-b and 163a-b.....	10-15-58	Smyrna and RFD, S/S 1513, 1546, 3071 and 7126 (area No. 1).....	8.7	8.7
164a-b and 165a-b.....	10-17-58	Smyrna and RFD, S/S 1513, 1546, 3071 and 7126 (area No. 1).....	10.7	10.7
166a-b and 167a-b.....	10-18-58	Marietta and RFD and S/S 1558 (area No. 5).....	3.2	3.2
168a-b.....	10-20-58	Smyrna and RFD, S/S 1513, 1546, 3071, 7126 and 7360 (area No. 1).....	11.7	11.7
169a-b.....	10-21-58	Smyrna and RFD, S/S 1513, 1546, 3071, 7126 and 7360 (area No. 5).....	14.7	14.7
170a-b through 173a-b..	10-22-58	Marietta and RFD and S/S 1558 (area No. 5).....	9.7	9.7
174a-b.....	10-28-58	Smyrna and RFD, S/S 1513, 1546, 3071, 7126 and 7360 and Marietta and RFD (area No. 5).....	4.7	4.7
175a-b through 179a-b..	10-29-58	Smyrna and RFD and Marietta and RFD (area No. 5).....	4.2	4.2
180a-b.....	11-13-58	Smyrna and RFD and Marietta and RFD.....	1.7	1.7

² The contrast in tank wagon prices per gallon (regular gasoline) shown by invoices during the most critical period of the price war, which was approximately from October 14 to October 27, 1958, is illustrated by the following tabulation:

TABULATION OF COMPETITIVE PRICE ALLOWANCES AND TANK WAGON PRICES GRANTED BY RESPONDENT TO DEALERS IN AND AROUND SMYRNA AND MARIETTA FROM OCTOBER 14 TO OCTOBER 27, 1958

Date	Smyrna dealers tank wagon prices	CPA	Marietta dealers tank wagon prices	CPA
	<i>cents</i>		<i>cents</i>	
November 14.....	19.7	(6.7)	25.9	(0.7)
November 15.....	17.7	(8.7)	25.9	(.7)
November 16.....	17.7	(8.7)	25.9	(.7)
November 17.....	15.7	(10.7)	25.9	(.7)
November 18.....	15.7	(10.7)	23.4	(3.2)
November 19.....	15.7	(10.7)	23.4	(3.2)
November 20.....	14.7	(11.7)	23.4	(3.2)
November 21.....	11.9	(14.7)	23.4	(3.2)
November 22.....	11.9	(14.7)	16.9	(9.7)
November 23.....	11.9	(14.7)	16.9	(9.7)
November 24.....	11.9	(14.7)	16.9	(9.7)
November 25.....	11.9	(14.7)	16.9	(9.7)
November 26.....	11.9	(14.7)	16.9	(9.7)
November 27.....	11.9	(14.7)	16.9	(9.7)

DISCUSSION OF EVIDENCE AND APPLICABLE LAW

1. The Discriminatory Allowances.

The evidence relating to the discriminatory price practices charged reveals that in August and September of 1958, and as late as October 7, 1958, dealers located both in and around Smyrna and Marietta were receiving a similar competitive price allowance of $\frac{7}{10}\text{¢}$ per gallon, regardless of the fact that Smyrna is designated by respondent as being in Area #1 and Marietta as being in Area #5. Under normal market conditions, therefore, as they existed prior to October 7, 1958, the dealers located both in and around Smyrna and Marietta were treated equally by respondent in that the amount of competitive price allowance (CPA) was granted to them on an equal basis.

However, on October 11, 1958, respondent increased its competitive price allowance from $\frac{7}{10}\text{¢}$ to 4.2¢ per gallon on Amoco and American deliveries to its dealers in Smyrna only (Area #1). This, according to uncontradicted testimony, was done as a result of the price war which was being waged in Smyrna by Shell Oil against Paraland, a private brand station.

The Marietta dealers continued to receive the $\frac{7}{10}\text{¢}$ competitive price allowance per gallon on both grades of gasoline which had been granted to them on October 1, 1958, together with the Smyrna dealers, until October 18, 1958, when they were granted a 3.2¢ per gallon increase. By this time, the favored dealers in and around Smyrna were receiving a competitive price allowance of 10.7¢ per gallon. The record shows that their competitive price allowance was continuously and increasingly raised from 4.2¢ to 6.7¢ per gallon on both grades of gasoline on October 14, 1958. On October 17, the day before the unfavored Marietta dealers received their 3.2¢ competitive price allowance, the Smyrna dealers' competitive price allowance was again increased to 10.7¢ per gallon on both grades of gasoline. On October 21, 1958, the favored dealers in Smyrna received an additional 4¢ increase in competitive price allowance, thus bringing their total competitive price allowance at this time up to 14.7¢ per gallon on both grades of gasoline. Meanwhile, the unfavored Marietta dealers did not receive until the following day, October 22, 1958, a 9.7¢ per gallon allowance. Up to this time, the unfavored Marietta dealers' competitive price allowance had remained at 3.2¢ per gallon. Thus the record discloses that the 14.7¢ per gallon competitive price allowance to favored dealers located in and around Smyrna and the 9.7¢ per gallon competitive price allowance to favored dealers located in and around Marietta were the maximum discounts which both groups of dealers ever received during

the period in issue. This resulted in a discrimination in price of 5¢ per gallon on both grades of gasoline. In this connection the evidence establishes that a discount of 1¢ is an important factor in competing or meeting competition in the retail sale of gasoline. A discriminatory 5¢ per gallon allowance could therefore be disastrous to competition and it apparently was since business according to the testimony was diverted to dealers who received the most favorable allowances.

2. The Relevant Geographic Market.

On October 21, 1958, respondent changed Smyrna from Area #1 to Area #5. Thus, the dealers located in and around Smyrna it would seem were designated as being in the same geographic market as the dealers in and around Marietta. Other reasons evidenced are not suggestive of plausibility.

The non-favored Marietta dealers testified that during the time of the price war, they failed to receive an appropriate competitive price allowance from respondent as would place them in a position that would enable them to lower their selling prices to meet the competition of the favored dealers in Smyrna. This evidence suggests that these dealers recognized both Smyrna and Marietta were in the same competitive market.

Dealer Anderson of Marietta testified that the lower prices being posted by his Smyrna competitors, including Mr. George Hicks (an Amoco dealer nearest Marietta), during the price war cut his gasoline sales at least in half. This competitive effect would also suggest both municipalities were a part of the same market.

That Smyrna and Marietta, Georgia, four miles apart, consist of one competitive area is further supported by the fact that the pattern of traffic flow in and around Smyrna and Marietta, Georgia, is such that motorists traveling from Marietta to Smyrna and vice versa and also to and from industrial plants in this area have ready access to all of the favored Smyrna stations.

In connection with the inter-community proximity of Amoco gasoline stations, dealer Anderson, whose Amoco station is located on Route 3, or old Route 41, in Marietta, testified that the George Hicks Smyrna station is located only about a mile and a quarter from his station. Dealer Smith, another Amoco dealer, testified that his station was only about two miles from the George Hicks station.

The two communities also appear to be inseparable competitively because of shopping facilities. Testimony by dealers Seagraves, Smith, and Anderson, indicates that the large Belmont Hills Shopping Center, which is located in Smyrna and close to the favored George

Hicks station, is the only shopping center of size which, because of its location, is used by residents of both Smyrna and Marietta. Dealer Anderson further testified that the George Hicks station was located between his station and the Belmont Hills Shopping Center. Dealer Seagraves also testified that he had customers from Smyrna and Marietta who travel to Smyrna by way of the Smyrna-Roswell Road adjoining his station. This road leads into old Route 41 in Smyrna and the Belmont Hills Shopping Center. That the goods marketed and prices of one community must necessarily affect the other competitively is clearly evident.

3. Meeting Competition in Good Faith.

Respondent advances as an affirmative defense that its prices to dealers were reduced in good faith to meet competition. Counsel in support of the complaint contends that (1) this was arbitrarily done without regard to meeting an individual competitive situation, (2) that the defense is not available under the facts herein since the price reduction was to meet the buyer's competition (i.e., gasoline dealers' competition and not the seller's competition), and (3) the price reduction was not in good faith to meet competition since the competition met was not lawful.

Section 2(a) of the Clayton Act requires a seller to charge uniform prices to competing purchasers; proof of a price discrimination is essential in establishing a prima facie violation of Section 2(a). A price difference is the primary element of price discrimination. *Anheuser-Busch, Inc. v. Federal Trade Commission*, 1960, 363 U.S. 536, 80 S. Ct. 127, 74 L. Ed. 2d 1385. As the Seventh Circuit pointed out in *Anheuser-Busch* on remand, "the Supreme Court, at 553 disclaimed any flat prohibition of price differentials, recognizing that price differentials constitute but one element of a Section 2(a) violation. *Anheuser-Busch, Inc. v. Federal Trade Commission*, 1961, 289 F. 2d 835." *Sun Oil Company v. Federal Trade Commission*, No. 17658, (5th Cir.) U.S. Court of Appeals, July 24, 1961, decided July 24, 1961 (F.T.C. Docket 6641). Other parts of the statute allow price reductions which meet established criteria; the Act clearly places emphasis on meeting individual competitive situations in establishing permissible reduced prices.³

Section 2(b) of the Act, on which American relies, allows a seller, in an individual competitive situation, to rebut a prima facie violation of Section 2(a) by showing that his "lower price * * * was made in

³ *Federal Trade Commission v. Staley*, 1945, 324 U.S. 746, 753, 65 S. Ct. 971, 89 L. Ed. 1238.

good faith to meet an equally low price of a competitor". This proviso creates a substantive defense or "justification" that overrides the importance of any competitive injury and is absolute in nature.⁴ The Section 2(b) defense raises a question of fact in each case as to whether the competition justifies the discrimination.⁵

In *Enterprise Industries, Inc. v. Texas Co.*, D.C. Conn., 1955, 136 F. Supp. 421; rev'd on other grounds, 2 Cir., 1957, 240 F. 2d 457; *cert. den.*, 1957, 353 U.S. 965, 77 S. Ct. 1048, 1 L. Ed. 2d 915, the plaintiff operated a Texaco station selling gasoline purchased only from the defendant, Texas Company. The plaintiff's station, near Hartford, Connecticut, on a well-traveled interstate highway, competed with other stations on the highway for the business of transient motorists, and it also competed for local business with nine stations off the highway selling Texaco. Hartford gas stations were in a price war. Texas Company, under the spur of declining sales, made price allowances to both local and highway Texaco dealers in the gas war area on condition that they match (but not undercut) the prices of their competitors selling rival brands. The amount of the allowance depended on the prevailing neighborhood price. The price in Hartford was lower than it was on the highway, so that Texas Company sold to its Hartford dealers at a lower price than it sold to the plaintiff. The plaintiff sued for treble damages for price discrimination under Section 2(a). The district court rejected the meeting competition defense, holding that by granting a price differential between purchasers who competed with each other Texas Company violated Section 2(a) of the Act.⁶

⁴ *Standard Oil Co. v. Federal Trade Commission*, 1951, 324 U.S. 746, 71 S. Ct. 240, 95 L. Ed. 239.

⁵ Prior to the Robinson-Patman amendments, § 2 of the Clayton Act provided that nothing contained in it "shall prevent" discriminations in price made in good faith to meet competition. The change in language of this exception was for the purpose of making the defense a matter of evidence in each case, raising a question of fact as to whether the competition justified the discrimination. See the Conference Report, H. Rep. No. 2951, 74th Cong. 2d Sess., pp. 6, 7; see also the statement of Representative Utterback, the Chairman of the House Conference Committee, 80 Cong. Rec. 9418. *Federal Trade Commission v. Staley Mfg. Co.*, 1945, 324 U.S. 747, 752, 65 S. Ct. 971, 89 L. Ed. 1338.

⁶ In *Enterprise* the district court pointed out that the burden was on Texas Company to prove the price of its competing refiner. There was no evidence of such price and none that the Texas Company's prices were not lower than its competitors. Further, there was no evidence that the prices of the competitors were lawful prices. The defense of meeting competition failed on these grounds. The district court did not rule on whether a supplier was meeting his competition in giving an allowance to a dealer who also had competition to meet. That was not the case before it.

On appeal the Second Circuit did not reach the substantive issue, dismissing the case on the ground that the plaintiff had failed to prove the amount of its injuries. Nevertheless, Judge Hand, speaking for the Court, seemed to take it for granted that the supplier's action was the natural and lawful response to a price raid from a competitor. He said:

"It is not uncommon in the industry for a filling station to start what has come to be known as a 'gas war'; that is to cut the prevailing price of gasoline, which other com-

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Initial Decision

The district court stated:

Moreover, Texas could justify discrimination only by a showing that it dropped its price to the other stations to meet an equally low price made available to those other stations by a competing oil company. In view of the short term station and equipment leases in effect with some stations, perhaps it is a fiction to speak of price competition at the oil company sale to the station level. That is the competitive level at which the justification is provided for defendant in the Act however. The Act does not go so far as to allow discriminatory price cutting to enable a buyer to meet price competition, but only to enable the seller to meet a lawful price of the seller's competitor. (136 F. Supp. 421)

However, referring to the *Enterprise* case, the United States Court of Appeals for the Fifth Circuit in its review of *Sun Oil Company v. Federal Trade Commission*, No. 17658, decided July 24, 1961 (F.T.C. Docket 6641) states:

Nevertheless the district court was fully aware of the status of its approach, as is evident from the court's admission that it is a "fiction to speak of price competition at the oil company sale to the station level"; a filling station operator carrying a brand-name gasoline does not buy from several competing oil companies.⁷ Inherent in the court's conclusion is the notion that although a supplier's product competes with the products of other suppliers for the motorists' trade a supplier is not in competition at the consumer level—even with a supplier-retailer; or, if he is, the Act ignores it. * * *

To our way of thinking, the court's approach in *Enterprise*, and the Commission's doctrinaire approach here are inconsistent with the view of gasoline marketing taken in the "Detroit" opinion, *Standard Oil Company v. Federal Trade Commission*, 1951, 340 U.S. 231, 71 S. Ct. 240, 95 L. Ed. 239.⁸ Standard Oil of Indiana, to meet a competitor's price, sold gasoline to four wholesalers, jobbers, in the Detroit area at a lower price than it charged its retail dealers. The

peting stations must meet by a corresponding cut in order to keep up their sales; and that makes it important for the producing companies to reduce their prices to their own competing stations." (240 F. 2d 457, 458)

⁷ W. W. Wright, 35 years with Sun, Sales Manager and Vice President of Sun, testified: "I would say all gasoline is sold to the public through stations operating or handling one brand of gasoline."

⁸ Although the *Standard Stations* and *Richfield* cases dealt primarily with exclusive dealing in gasoline, there is in fact little future in the attempt to have stations handle more than one brand. "Split pump stations," as they were called, were formerly quite common, but defects of the system caused most of them to disappear. As early as 1931 two surveys showed 85 and 95 percent of motorists expressing themselves as opposed to it, primarily out of fear that the dealer would substitute the second brand for the desired one. Not only did dealers find that handling one brand required less investment and less bookkeeping, but six out of seven felt that it actually increased sales. As to suppliers, they naturally dislike operating through dealers whose lack of special enthusiasm for their own brand is obvious to the customer.

⁹ The canons of construction applied by the Supreme Court in the 1951 "Detroit" opinion are the direct antitheses of those employed by the District Court in *Enterprise*, Steed, *Antitrust Problems Under Price War Conditions*, *Southwestern Institute on Antitrust Laws*, 77, 100 (1958). (It should be pointed out that Steed is an attorney for the Texas Company).⁹

The *Enterprise* view of the good faith defense is in sharp contrast with that expressed by the Supreme Court in *Standard Oil Co. v. FTC*. Note, *The Good Faith Defense of the Robinson-Patman Act*, 66 Yale L. J. 935, 938 (1957).¹

jobbers passed on this saving to their customers who were able to undercut retail dealers buying directly from Standard Oil. The Commission took the position that section 2(b) merely allowed rebuttal of a prima facie case, and was not a substantive justification of an otherwise unlawful price discrimination. The Supreme Court held that section 2(b) good faith defense was absolute even though a substantial lessening of competition might result, and remanded the case to allow Standard "to show that its lower price to each jobber was made in order to retain that jobber as a customer and in good faith to meet an equally low price offered by one or more of its competitors." 340 U.S. 231, 236. The case is distinguishable on the facts, but the Court was acutely aware of the interaction of competition at various levels and recognized the validity of the defense even though the price differential would have an injurious effect on competition among the supplier's dealers and the dealers' purchasers:

"It must have been obvious to Congress that any price reduction to any dealer may always affect competition at the dealer's level as well as at the dealer's resale level, whether or not the reduction to the dealer is discriminatory. Likewise, it must have been obvious to Congress that any price reductions initiated by a seller's competitor would, if not met by the seller, affect competition at the beneficiary's level or among the beneficiary's customers just as much as if those reductions had been met by the seller." 340 U.S. 231, 250.

The "actual core of the defense," the Supreme Court stated, "still consists of the provision that whenever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower price." 340 U.S. 231, 242. Here, there is no doubt that Super Test's prices threatened "to deprive" Sun of McLean as a customer. They did in fact deprive Sun of McLean as a customer. And they deprived Sun of sales, through McLean, to the motoring public. "Clearly, a seller's need for a lower price in response to a decrease in his sales is the same whether the decrease occurs because his purchasers switch to a price cutting competitor or because [his purchasers] are unable to protect their share of the retail market from distributors of a rival product."⁹

The Federal Trade Commission¹⁰ and Senate Subcommittee on Retailing, Distribution and Fair Trade¹¹ have endorsed the *Enterprise* decision¹² as distinguished from the concept enunciated by the Circuit Court of Appeals in the *Sun Oil* case. Thus it would ap-

⁹ Note. The Good Faith Defense of the Robinson-Patman Act: A New Restriction Appraised, 66 Yale L. J. 935, 939 (1957). See also Casady & Jones, The Nature of Competition in Gasoline Distribution at the Retail Level, 79-92, 122-38 (1951).

¹⁰ Hearings Before the Subcommittee on Retailing, Distribution, and Fair Trade of the Senate Committee on Small Business, 84th Cong., 1st Sess. and 2d Sess. pt. 3, at 450, 458 (1956). See also *Pure Oil Co.*, F.T.C. Dkt. No. 6640 (complaint filed September 26, 1956).

¹¹ S. Rep. No. 2810, 84th Cong., 2d Sess. 20, 28-29 (1956).

¹² The position taken by the Commission in the *Enterprise* case represents a shift in its views. Before 1956, the Commission's position appears to have been similar to those enunciated in the *Sun Oil* case. See testimony of Gwynne, Chairman, Federal Trade Commission, before the Senate Committee on the Judiciary, Subcommittee on Antitrust and Monopoly, "To Amend Section 2 of the Clayton Act" Hearings, 84th Cong. 2d Sess. (1956), p. 229-232; cf. *ibid.*, p. 89-92. In 1956 the Senate Sub-Committee on Retailing, Distribution and Fair Trade endorsed views similar to those now held by the Commission. S. Rep. No. 2810, 84th Cong. 2d Sess. 20, 28-29 (1956).

pear that under the Commission's policy the Clayton Act 2(b) defense is not available to respondent since the proof indicates respondents price reduction was to meet its customers competition and not its own competition at the seller level. As pointed out by the court in the *Enterprise* case, "* * * * The Act does not go so far as to allow discriminatory price cutting to enable a buyer to meet competition, but only to enable the seller to meet a lawful price of the seller's competitor." The language of the statute itself is clear in this respect since the defense is permitted if the lower price is "to meet an equally low price of a competitor." Meeting the price of a competitor is distinctly different than meeting competition.

In the *Sun Oil* case, the Circuit Court of Appeals' decision not only opens the door to economic inequities, which the Clayton Act purports to prevent, but also interprets Section 2(b) in a manner that clearly makes it ambiguous. Under the legal theory enunciated by the Circuit Court of Appeals in its *Sun Oil* interpretation, a seller may not only adjust the price to meet the price of other sellers who are his competitors, but he may adjust his price to meet any competition with his product at any market level regardless of whether or not his seller competitor's price is the cause requiring him to meet competition. This approach if generally applied to construction could become economically disastrous. If the concept is inconsistently applied to different business situations and fictional relationships between sellers and customers, it would make the 2(b) defense provision incapable of foreseeable construction despite the present clarity of this part of the statute and its economic soundness. Such an interpretation of Section 2(b) is unrealistic and violates the rule of required reasonable statutory construction.

Under a general application of the Fifth Circuit's concept no independent retailer can successfully challenge price-wise an independently operated major station because, if the lower price is successful in substantially diverting business, the major station operator can call upon his nationally established supplier and make use of its power and size to wage a price war, obviously detrimental to the independent and competing purchaser-resellers of the same major supplier. This theory also gives a major supplier the opportunity to subsidize an inefficient retailer to the detriment of other efficient retailers, and inhibits the use of a lower price which reflects sound, lower-cost methods of merchandising.

Under the *Enterprise* concept adopted by the Commission as its policy, respondent has completely failed to establish that its 2(b) defense has merit, since the evidence, even assuming it does reflect a

meeting of competition, does not reflect that the competition met is at the gasoline supplier level. Furthermore the proof does not establish as evidenced in the *Sun Oil* case that there was not a price the respondent could meet at the supplier level since the competing suppliers were the retailers. In fact there is no evidence whatsoever of what the individual competitive situations were that respondent made an effort to meet at the supplier or dealer level. The respondent, therefore, is also precluded from prevailing in a Section 2(b) defense under the specific facts of the *Sun Oil* case if the Circuit Court's opinion is to be construed in the light of those facts only.¹³

Regardless of whether or not one accepts the concept enunciated in the *Enterprise* case, *supra*, or the *Sun Oil* case, *supra*, the respondent as heretofore stated has not adequately sustained its required burden of proving its price reductions were in good faith to meet individual competitive situations, as required in the *Staley* case.¹⁴ Such affirmative proof must be explanatory of each and every competitive situation and reflective of the competitive price met, when met, where met and the circumstances indicative of good faith in meeting competitors prices as distinguished from meeting prices known to be or which should have been known to be unjustifiably discriminatory. Rather than assume this burden, the respondent has rested its case and relied upon the proof in the Commission's case that there was a price war and that they reduced their prices to meet the general competitive situation in which their customer-dealers were involved at first in Smyrna and then in Marietta.

Not only has the respondent failed to adduce affirmative evidence of good faith in meeting competition, it has also failed, by resting its case, to rebut prima facie evidence of its knowledge of the illegality of the competition it was meeting. As heretofore stated, the amended Clayton Act does not permit a seller to meet an illegal price of a competitor. *Standard Oil Co. of Indiana v. Federal Trade Commission*, 340 U.S. 231 (1951). The element of scienter introduced by *Standard Oil Co. v. Brown*, 238 F. 2d 54 (5th Cir. 1956) does not remove respondent from the ambit of the Supreme Court rule.¹⁵ In the within case, as the evidence would seem to indicate, the respondent had full knowledge of how the price war began, of the attempt by a

¹³ The Circuit Court however appears to give more general application to its theory.

¹⁴ *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945).

¹⁵ This case interprets *Standard Oil of Indiana* case to mean that if the seller discriminates in price to meet prices he knows to be illegal or that are of such nature as are inherently illegal there is a failure to prove the good faith. However, the seller is not required to prove the legality of competition met.

major brand to illegally undercut the price of an unbranded dealer.¹⁶ This appears to have been a matter of common knowledge in the Smyrna-Marietta area.

The evidence herein would seem to indicate that all of the facts concerning the gasoline price war, from its inception and during the time at issue, were a matter of common knowledge in the Smyrna and Marietta areas, as reflected in the newspapers, and were a matter of common knowledge to those in the trade including American who were apprised of every detail of its inception and continuance. Thus, the initial price reduction by respondent in favor of the Hicks station and other Amoco stations located in and around Smyrna was to meet prices resulting from Shell's discriminatory price reduction to one Shell station to eliminate a private brand station (i.e., Paraland). The effect of this action on the part of Shell was not to meet competition but to beat competition in violation of the Robinson-Patman Act.* Obviously, Shell could not validly interpose a 2(b) defense to Section 2(a) charges under the Clayton Act. If Shell was not in a position to interpose such a defense, American Oil was in no better position to do so since it must be deemed to have had knowledge of the illegal act on the part of Shell. The prices that American Oil was meeting, therefore, are unlawful since they are predicated upon a chain reaction emanating from the unlawful price reduction of Shell in undercutting a normal market, which the evidence substantially indicates traditionally has customarily required a two-cent price differential between a name brand gasoline and unbranded gasoline sold at the lower price.

4. Competitive Injury.

With regard to the issues of the lessening of competition, competitive injury and loss of customers by retail dealers, the evidence is impressive.

Dealer Smith, of Marietta, testified that the competitive price allowance had an effect insofar as his sales were concerned. His daily sales record book shows that on October 14, 1958, he sold a total of 210 gallons and the following day, October 15, he dropped down to 165 gallons. His competitive price allowance on October 14 and 15 was 0.7¢ per gallon. It is noted that October 15 was the day on which the favored Smyrna dealers received 8.7¢ per gallon competitive price allowance. Dealer Smith further testified that on October 20, he

¹⁶ The evidence indicates a normal market requires that unbranded gasoline be sold at 2¢ less than name brand gasoline in order to compete with the latter. Therefore even meeting the unbranded gasoline price constitutes an undercutting of the normal market price which if discriminatory as in the within case is illegal.

* (i.e., Clayton Act, as amended, Section 2 (b))

sold a total of 112 gallons and on October 21, a total of 88 gallons. His competitive price allowance on October 20 and 21 was 3.2¢ per gallon. It is observed that October 20 was the day on which the favored Smyrna dealers received 11.7¢ per gallon competitive price allowance and October 21, the day these same favored dealers received 14.7¢ per gallon competitive price allowance. Dealer Smith testified that during the period of a price war he drove by the George Hicks station and saw that "people were lined up in their cars waiting to get up to the gasoline pumps"; that he observed from the curb sign that the Hicks station had a posted price of 16.9¢ per gallon; that his selling price at that time was 25.9¢ per gallon. Dealer Smith further testified that he lost customers as a result of his high prices compared to the lower prices of others. In this connection he named a specific customer that he had lost.

On cross-examination dealer Smith testified that in October 1958 he lost business to the favored George Hicks station. The reasons advanced by dealer Smith for so stating was the fact that the Hicks station sold the same American Oil Company products that he (Smith) sold and the fact that the majority of the customers that traded with him (Smith) were habitual Amoco customers. Also during cross-examination dealer Smith testified that in October 1958 he bought regular gasoline through a dealer in Smyrna to obtain it at a lower price than it was available in Marietta.¹⁷ The dealer had purchased this gasoline for Smith. Smith repaid him for it.

On direct examination dealer Smith testified that on October 22, 1958, he sold 2,249 gallons of regular gasoline; whereas on the 21st of October, the preceding day, he had sold only 88 gallons of gasoline. The reason for such a difference in gallonage sold was the fact that his price was lower on the 22nd than it was on the 21st. In response to the hearing examiner's question as to "what the difference in price was between the 21st and the 22nd", dealer Smith testified that he had a posted retail price of 14.9¢ per gallon on the 22nd and a posted retail price of 25.9¢ per gallon on the 21st. The price for American gasoline on October 14 for the Marietta dealers was 25.9¢ per gallon. There was no change until October 18.¹⁸ The buying price for the same Marietta dealers then became 23.4¢ per gallon. The 23.4¢ price to dealers in Marietta was not changed by respondent until October 22 when it was dropped to 16.9¢ per gallon. Also on cross-examination, dealer Smith testified that his posted retail price on October 22 was

¹⁷ The testimony reveals the price was 16.9¢ per gallon in Marietta and 11.9¢ per gallon in Smyrna.

¹⁸ Commission exhibit 166(A-B).

14.9¢ per gallon and that this price lasted one day only. On the 23rd the price was raised again to 25.9¢ per gallon, where it remained until prices returned to normal in the low 30's. By raising his price, dealer Smith's gallonage on subsequent days declined as follows: October 23, 695 gallons; October 24, 531 gallons; October 25, 355 gallons; October 26 was a Sunday and the station was closed; October 27, 257 gallons; and on October 28, 168 gallons. This evidence suggests that on October 22, 1958, dealer Smith sold gasoline below the prevailing retail posted price and at a loss.

Also, indicative of competitive injury and loss of customers, dealer Anderson testified that the price reductions of his competitors decreased his gas sales fifty percent; that it has been his experience that on occasion his customers would go to another station if there was a one-cent differential and that during the price war in question he temporarily lost "quit a few" customers including J. T. Blackwell, J. D. McKee, and A. M. Victory.

To establish actual loss of customers by the F. E. Hitt Amoco station, the unfavored Marietta station located farthest from Smyrna, counsel in support of the complaint called as witnesses two regular customers of the Hitt station, whose names are Henry Brown and George Wright. Brown operates a garage located at 1662 Church Street Extension, Marietta, Georgia, a quarter of a mile from the Hitt station. Wright, a part-time worker at the Hitt station, lives a quarter of a mile from the Hitt station. Both witnesses testified that as they became aware of the lower prices of gasoline in Smyrna during the month of October 1958 they diverted their trade to Smyrna and purchased gasoline from dealers there at cheaper prices.

Brown's testimony also established that it was well known in the area that prevailing prices in Smyrna were less than in Marietta. He stated he had learned of the price war and the prevailing lower prices in Smyrna through the Marietta Journal newspapers and that, on the strength of what he read in the newspapers, he went to Smyrna and more than once purchased gasoline at the George Hicks Amoco Station at 15.9¢ and 16.9¢ per gallon.

Competitive injury appears to have been clearly established since gasoline purchases were substantially diverted from Marietta to Smyrna where gasoline prices were lower.

Opinion

60 F.T.C.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the acts and practices of the respondent in this proceeding.
2. Respondent has violated section 2(a) of the Clayton Act as amended for the reasons hereinbefore set forth.
3. It is further concluded that this proceeding is in the public interest and the following order shall issue.

ORDER

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

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

OPINION OF THE COMMISSION

By DIXON, *Commissioner*:

This matter is before the Commission on the appeal of respondent, American Oil Company, from an initial decision of the hearing examiner holding that respondent had violated subsection (a) of Section 2 of the Clayton Act, as amended, and ordering respondent to cease and desist from the practices found to be unlawful.

Respondent sells and distributes gasoline and other petroleum products in twenty-five states, and in the District of Columbia. Its products are sold to the public by company-owned and independent lessee-dealer stations.

In substance, the complaint alleges that respondent sold gasolines of like grade and quality at different prices to competing retailer customers located in and around Smyrna, Marietta, and Rome, Georgia, and that the effect of such price discriminations has been or may be substantially to lessen competition or to destroy or prevent competition in the resale of such gasolines with those customers who received the lower prices. The allegations with respect to price discriminations on the part of respondent in the Rome, Georgia, area were, in effect, abandoned by counsel supporting the complaint, and the evidence of record pertains only to alleged violations of Section 2(a) in the Smyrna-Marietta area.

The hearing examiner held that respondent had discriminated in price between competing customers and that "the price advantage which respondent granted to dealers located in and around Smyrna, Georgia, did substantially lessen, destroy and prevent the competition of each of the disfavored dealers located in and around Marietta, Georgia with the dealers receiving lower prices." He also rejected respondent's attempt to justify its discriminations by a showing under the Section 2(b) proviso, holding that this defense was not available to respondent as a matter of law and that, in any event, respondent had failed to establish on the record that its lower prices to certain customers were made in good faith to meet the equally low prices of its competitors.

The pertinent facts concerning respondent's alleged discriminatory pricing practices are as follows: On or about October 10, 1958, a gasoline price war began just north of the city limits of Smyrna, Georgia. Prior to that time respondent had been selling its regular and premium grades of gasoline at the same prices to nine independent lessee-dealers located in and around Smyrna, and Marietta, a town about two miles north of Smyrna. There is some disagreement between counsel as to the actual distance between the city limits of the two towns, but the record is clear that the towns are in such close proximity that their residential areas adjoin each other. On October 14, respondent began to grant lower prices to its dealers in and around Smyrna. These lower prices were given in the form of "competitive price allowances", known as CPAs, or discounts from the prevailing tank wagon prices of both the premium and regular grades of gasoline. The CPAs given to this group of dealers ranged from 6.7 cents a gallon on October 14

to 14.7 cents a gallon from October 21 through October 27. On October 18, respondent gave its customers in and around Marietta a competitive price allowance of 3.2 cents per gallon, which it increased to 9.7 cents on October 22. Throughout the period of the price war, the price differential between the two groups of dealers ranged from 5 cents per gallon to 11½ cents per gallon.

Respondent does not take issue with the finding that it had discriminated in price in favor of its Smyrna dealers, and, indeed, it could not since the evidence of record leaves no doubt on this point. It argues, however, that these price discriminations did not result in actual injury to competition and that there was no showing that competitive injury was likely to occur. Respondent contends that the record fails to show that customers receiving the benefit of the discriminatory prices were competing with nonfavored customers or that there was any causal connection between any competitive injury sustained by nonfavored dealers and the price discriminations in question. It also points out that the price discriminations lasted only about two weeks and argues that there is no evidence that there was a substantial diversion of trade from its nonfavored customers.

Although Section 2(a) does not require a finding that a price discrimination has, in fact, caused injury to competition, the hearing examiner nevertheless found that respondent's price differences had that effect in the Smyrna-Marietta area. As the Supreme Court¹ has pointed out, the statute is designed to reach price discriminations before harm to competition is effected and requires only that the effect of the discrimination "may be substantially to lessen competition . . . or to injure, destroy or prevent competition." In this case, the competition alleged to be affected is competition between respondent's customers in the resale of respondent's products. Consequently, proof that the competitive opportunities of any respondent's customers, were injured by reason of the discrimination is sufficient to establish a *prima facie* violation of Section 2(a). Hence, it is unnecessary to determine whether the hearing examiner's finding of actual injury is supported by the record.

The Supreme Court has held in *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37 (1948), that in price discrimination cases involving competition between buyers, the requisite injury to such competition may be inferred from a showing that the seller charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors and that the amount of this discrimination was substantial. Complete reliance

¹ *Corn Products Refining Co. et al. v. Federal Trade Commission*, 324 U.S. 726 (1945).

upon this doctrine, however, is not crucial here. The record in this case contains evidence of a positive character fully justifying a finding of probable injury to competition.

The evidence in this case establishes that competition did exist between the favored and nonfavored customers in the resale of respondent's gasolines and that the price difference between the two classes of customers was sufficient to give the former a significant competitive advantage. The nonfavored dealers were located at distances of approximately one to four miles from the station of George Hicks, one of the beneficiaries of respondent's price discriminations. The proximity of these dealers to the stations of Hicks and other favored customers, together with the showing that people residing in and around Marietta regularly drove into or near Smyrna to work or to shop, and the further showing that there was a preference on the part of some motorists for the brands of gasolines sold by respondent convinces us that competition did exist between the favored and nonfavored customers. Respondent's District Sales Manager admitted that a price difference of 5 to 6 cents a gallon at retail would be sufficient to affect competition between dealers located in Smyrna and those located in Marietta. One dealer testified that differences of a cent or two a gallon can cause a diversion of business from one dealer to another.² The evidence also shows that the normal gross profit realized by a dealer is 5 cents per gallon of gasoline. As stated above, the differences in the prices charged favored and nonfavored customers ranged from 5 cents to 11½ cents per gallon. These price differences are so clearly substantial on their face that no further evidence would be necessary to show that the competitive opportunities of those dealers who were required to pay the higher prices were seriously impaired. The testimony of various nonfavored dealers, of which the following is illustrative, convinces us that respondent's price discriminations did have the prescribed effect on competition in the resale of its products:

Mr. Seagraves testified: I felt it [business] slacking up each day, and the customers would stop up there and want to know when I was coming down, and I told them I couldn't come down until I got relief on it, and they were heading for George Hicks [a favored customer], and if I hadn't had my tank full in my car I'd of went over there.

Mr. Smith testified: Well, Mr. Hicks sold the same brand product that we did, and the majority of customers that traded with us were customers—I mean

² Dealer Anderson so testified. His station was located about 1 mile from Hicks and we think that at that distance a difference in price of 1 or 2 cents would be sufficient to divert business from one to the other. We do not believe that the record supports a finding that such a small price differential would necessarily attract customers from respondent's dealers located several miles from a favored station.

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had bought American Oil Company products, and they would have gone to the nearest American Oil Company station, which was Mr. Hicks, and we were concerned more with losing customers that were habitual Amoco buyers than people who just bought anywhere.

Respondent argues, however, that the nonfavored customers would have been injured in any event by the lower prices of dealers selling other brands of gasoline. The record shows in this connection that the nonfavored customers were competing with customers of other major oil companies as well as with favored customers of respondent. We agree that some users of American Oil Company's products may have been attracted by the low prices of service stations selling other brands of gasoline. Since the nonfavored customers could not meet these low prices, they were undoubtedly at a disadvantage insofar as competition with other major brand dealers is concerned. It is also true, as respondent points out, that any injury to the nonfavored customer's ability to compete with Texaco, Shell or other brands of gasoline cannot be attributed to the price discriminations challenged by the complaint. We fail to see the relevancy of this argument, however. The fact that nonfavored customers of respondent may have been unable to compete effectively with other major brand dealers does not tend to rebut the finding that competition between respondent's customers in the resale of respondent's gasoline may have been adversely affected by respondent's discriminatory prices.

Respondent also contends that its price discriminations could not have had any harmful effects on competition since its disparate competitive price allowances between Smyrna and Marietta dealers existed for a period of only about two weeks and since there is no evidence and no suspicion that any difference in its prices to dealers existed after October 27, 1958, in Smyrna, Marietta, or elsewhere. In so arguing, respondent is in effect saying that a violation of Section 2(a) did not occur since it discontinued its discriminatory pricing practices before they caused actual injury to competition. As we have previously stated, however, Section 2(a) requires only that there be a reasonable probability of substantial injury to competition and this probability existed when respondent granted price concessions to its Smyrna dealers. Moreover, it was not incumbent upon counsel supporting the complaint to prove that respondent would resume the practices shown to be unlawful. The burden of proof is on respondent if it would have us believe that these practices were discontinued and that there is no reasonable likelihood that they will be resumed in Smyrna, Marietta, or elsewhere. Not only has respondent failed to make this showing but we are convinced from our examination of the evidence

of record that respondent will continue to violate Section 2(a) unless ordered to cease and desist.

Respondent also contends that a price discrimination which substantially lessens competition between customers of the seller who grants the discrimination is prohibited by Section 2(a) only if the customer or customers receiving the low prices did so with knowledge that such prices were lower. There is no support for this position, however, either in the language of the statute or in applicable case law. Nor is there any logical reason why, in the factual situation before us, protection of nonfavored customers from the harmful effects of respondent's discriminatory practices should be made to depend upon the state of knowledge of the favored customers. Section 2(a) prohibits price discriminations which may injure competition "with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them" (italics supplied). The words "either of them" include the seller or person granting the discrimination and, in this case, the dealers receiving the lower prices were customers of respondent, the person granting the discrimination.

We will next consider respondent's argument that the hearing examiner erred in rejecting its defense that its lower prices were made in good faith to meet the equally low prices of competitors. Respondent first takes exception to the hearing examiner's ruling that this defense is not applicable where a seller reduces its prices to certain of its customers when those customers were not offered lower prices by competing suppliers. In so ruling, the hearing examiner followed our decision in *Sun Oil Company*, Docket No. 6641 (1959), wherein we held that the Section 2(b) proviso has reference to the good faith meeting of the competition of the seller, rather than that of the buyer, and that the defense is inapplicable where a supplier of gasoline reduces its price to help a customer meet its competition. Our order in that case was set aside by the Fifth Circuit (*Sun Oil Company v. Federal Trade Commission*, 294 F. 2d 465 (1961)), and the matter is now pending before the Supreme Court on certiorari. The holding of the hearing examiner that respondent cannot, as a matter of law, avail itself of this defense is in accord with the position we have taken on appeal and it will, therefore, be sustained.

We also agree with the hearing examiner that even if the Section 2(b) proviso could be interpreted to permit justification of discriminatory price concessions granted to enable a customer to meet competition, respondent has failed to establish this defense. In so holding, the hearing examiner ruled that respondent had failed to rebut *prima facie* evidence of its knowledge of the illegality of the competition it

was meeting. He found, in this connection, that the price war in the Smyrna area had begun when a Shell service station had undercut the price of a competing private brand station. He further held that the discriminatory price reduction made by Shell Oil Company to its service station could not be justified under the Section 2(b) proviso as a good faith meeting of competition and that respondent met this price reduction, knowing it to be illegal.

Respondent takes issue with the hearing examiner's holding that Shell's price was illegal and points out that the hearing examiner's conclusion that Shell had undercut a competitor's price was based on the finding that it had posted the same price as a private brand station. It argues in this connection that there is nothing in the record to show that the private brand gasoline customarily sold at a lower price than major brands and that, even if this fact had been established, there is no valid reason why the price of a major brand could not be reduced to eliminate this differential.

This argument must be rejected. The following testimony by respondent's District Sales Manager, Mr. Doyle A. Myers, fully supports the hearing examiner's finding that the private brand gasoline, Paraland, normally sold for two cents less than major brands:

Q. You testified that Paraland started the price war in 1958, or Paraland posted the price?

A. That is my opinion; yes.

Q. In other words, Shell Oil Company or the Shell dealer posted the same price as Paraland—

A. Yes, sir.

Q. —as the Paraland independent cutrate private brand station?

A. They post under the major brands; yes, sir.

Q. And at that time what was Paraland posting, that is, immediately prior to Shell meeting it?

A. Whatever the normal posted price was; I don't recall right offhand.

Q. You mean the normal posted price for private brand stations?

A. Posted 2 cents under.

Q. And at that time Paraland was posting 2 cents under?

A. When they opened up they posted 2 cents a gallon under the major brand prices.

Q. And Shell, instead of posting prices 2 cents over that of the independent Paraland, met Paraland on the nose?

A. Yes, sir.

There is also ample precedent for the ruling that a seller is not meeting competition or equalizing an actual competitive situation when it reduces the price of its product to the level of a competitor's product which normally sells at a lower price. *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F. 2d 234 (2nd Cir. 1929); *Federal Trade Commission v. Standard Brands*, 189 F. 2d 510 (2nd Cir. 1951);

Minneapolis-Honeywell Regulator Co., 44 F.T.C. 351 (1948); *Anheuser-Busch, Inc.*, Docket 6331 (1959). See also the court's opinion in *Sun Oil Co. v. Federal Trade Commission*, *supra*. If two products usually sell in competition with each other at a price differential, it is unnecessary for the seller of the premium product to eliminate this differential in order to meet competition. In this case, the record clearly establishes that not only had the private brand gasoline, Paraland, traditionally sold at a lower price than the major brands but that the Shell station which reduced its price to the level of Paraland had not been injured in any manner whatsoever by the lower price of the private brand station. Under the circumstances, we think the hearing examiner was fully justified in concluding that the Shell station, with the assistance of Shell Oil Company, had undercut the price of a private brand gasoline for the purpose of "beating competition".

Respondent also contends that there is no evidence in the record to show that the Shell station was operated by the Shell Oil Company rather than by an independent dealer. This argument is defective in two respects. In the first place, respondent and not counsel supporting the complaint would have had the burden of showing who operated the station if such information had any bearing on the lawfulness of the price cut. In the second place, respondent loses sight of its basic premise that an oil company and its dealer are a "marketing unit."³ Certainly respondent cannot in good conscience contend that this "marketing unit" concept exists only when the oil company is "meeting competition" in good faith and can be discarded when the dealer is engaged in activities which would be unlawful if engaged in by the oil company. If such were the case, competition which now exists between private brand gasolines and the major brands could be effectively eliminated. The major brand dealer could reduce his price to the level of or below that of a private brand gasoline and could then call upon his supplier for assistance in the event the private brand station attempted to restore the price differential. Contrary to respondent's position, we do not believe that a supplier could justify a discriminatory price concession to such a dealer as a good faith meeting of competition.

Respondent also argues that even if Shell's price was illegal, the evidence is unchallenged that on each occasion when respondent met Shell it also met, at the same time, the pre-existing price reduction

³ Respondent contends that "an oil company and the dealers to whom it sells gasoline together constitute a marketing unit competing for the motorists' trade with other such units, each made up of another oil company and its dealers or of a single supplier-retailer."

of at least one of the other major oil companies, i.e., Texaco, Sinclair and Gulf. The obvious answer to this argument is that the other major oil companies also met Shell's price which they knew or had reason to believe was unlawful and that they were in no better position than respondent to justify their discriminatory prices under the Section 2(b) proviso.

In any event, we find no merit to respondent's contention that counsel supporting the complaint had the burden of proving the illegality of all prices which respondent now claims to have met. In *Federal Trade Commission v. A. E. Staley Mfg. Co.*, *supra*, the Supreme Court stated that there was a "clear Congressional purpose not to sanction by Section 2(b) the excuse that the person charged with a violation of the law was merely adopting a similarly unlawful practice of another". And in *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (1951), the court stated that the interpretation put on the proviso in the *Staley* case is "that the lower price which lawfully may be met by the seller must be a lawful price". We have not construed the proviso, however, as placing on respondent the burden of proving the legality of the price it was meeting although the Supreme Court has indicated that the person claiming the defense has this burden, 340 U.S., at 249, n. 14. And we need not decide at this time whether proof of the illegality of a competitor's price in itself is sufficient to rebut a claim of meeting competition. We are of the opinion, however, that a seller who meets a competitor's lower price which he knows or has reason to believe is illegal has failed to meet the good faith requirement of the defense. *Standard Oil Co. v. Brown*, 238 F. 2d 54 (5th Cir. 1956). Since the seller claiming this defense has the affirmative duty of establishing each element thereof, including good faith, we think it incumbent upon him to show, at least the existence of facts which would lead a reasonable and prudent person to believe that the price he was meeting was lawful. In this case, however, respondent not only did not sustain this burden but merely averred good faith in the face of evidence that it knew or should have known that it was meeting discriminatory prices which could not have been justified under any of the exceptions to the prohibitions of the statute.

Respondent also attempts to justify its discriminatory prices under the "changing conditions" proviso to Section 2(a) ⁴. It contends in this connection that its lower prices to favored Smyrna dealers were

⁴"And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned."

"price changes . . . in response to changing conditions affecting the market for or the marketability of" its gasoline. The examples of "changing conditions" which may justify a price discrimination set forth in the aforementioned proviso are deterioration of perishable goods and obsolescence of seasonal goods, distress sales under court process, and sales in good faith in discontinuance of business in the goods concerned. Apparently the condition affecting the market for or the marketability of respondent's products was a change in the retail price of gasoline brought about by discriminatory price concessions granted by a major oil company to permit its dealer to eliminate the usual and customary price differential between a major brand and a private brand gasoline. We do not believe that this situation is in any way analogous to the conditions referred to in the statute.⁵ Respondent's argument is, therefore, rejected.

Respondent's final contention is that the order to cease and desist contained in the initial decision is too broad in that it would prohibit respondent from discriminating in the price of products other than gasoline and would apply to sales made by respondent outside of the Smyrna-Marietta area. There is no evidence that respondent has discriminated in price in the sale of products other than gasoline, nor does the record indicate that respondent may discriminate in the price of other products. Consequently, we are of the opinion that the order should be limited in its application to the sale of gasoline. There is no substance to respondent's argument, however, that the order should not prohibit it from engaging in unlawful price discrimination outside of the Smyrna-Marietta area. The purpose of the order is to prevent respondent from engaging in a practice found to be unlawful. There is certainly nothing to indicate that respondent has engaged, or will engage, in discriminatory pricing only in the Smyrna-Marietta area. To the contrary, the record reveals that respondent has granted discriminatory price concessions whenever it has deemed it expedient to do so during a "price disturbance." It is also clear from the testimony given by Mr. Myers and a former official of American Oil Company that "price disturbances" occur frequently and that they occur in areas other than Smyrna-Marietta. On the basis of the evidence relating to respondent's participation in the "price disturbance" in the Smyrna-Marietta area and the testimony concerning respondent-

⁵ In *Moore v. Mead Service Co., et al.*, 190 F. 2d 540 (1951), the court said:

"It is evident that it [the 'changing conditions proviso'] deals with special situations in connection with specific lots of goods which are of a perishable nature or become obsolete with the seasons or distress sales under court process or goods sold when a business is discontinued in good faith. The exceptions are not confined specifically to those set forth but the plain language of the statute limits the exceptions to those which are 'such as' or similar to those named."

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ent's policy of granting competitive price allowances, it is our opinion that, unless prohibited from doing so, respondent will probably continue to discriminate in price between competing customers in any area in which it is doing business.

To the extent indicated herein, the appeal of respondent is granted; in all other respects it is denied. The initial decision is modified to conform with the views expressed in this opinion and, as so modified, will be adopted as the decision of the Commission.

The motion filed by respondent March 6, 1962, requesting the Commission to strike the hearing examiner's order of February 26, 1962, correcting the initial decision will be granted.

Commissioner Elman dissented to the decision herein.

DISSENTING OPINION

By ELMAN, *Commissioner*:

I

The Commission's disposition of this case calls to mind the observation of Mr. Justice Holmes that "To rest upon a formula is a slumber that, prolonged, means death." (*Collected Legal Papers*, p. 306) In the same vein he had warned, when he sat on the Supreme Judicial Court of Massachusetts, of the danger "of being misled by ready-made generalizations, and of thinking only in phrases to which as lawyers, the judges have become accustomed, instead of looking straight at things, and regarding the facts in all their concreteness, as a jury would do. Too broadly generalized conceptions are a constant source of fallacy." *Lorenzo v. Wirth*, 170 Mass. 596, 600.

It seems to me, with all deference to my colleagues, that they are deciding this case by resting upon, and applying uncritically, "formulas" and "too broadly generalized conceptions" derived from significantly different factual contexts. I shall not attempt to catalogue all the difficulties and doubts that, in my mind at least, are engendered by the majority opinion. My disagreement here is with the basic presuppositions underlying the Commission's decision.

In a Section 2(a) Robinson-Patman Act case, two elements of proof are crucial to a finding of violation: price discrimination, and probable injury to competition. The former is clearly present here, as all agree. Respondent does not deny that the differences in price to its customers constituted "discriminations". It contends rather that the price differentials were not shown to have caused the requisite injury to competition, and were in any event justified by its competitive need to meet the lower prices of rival sellers.

The Commission finds no difficulty in disposing of the question of probable injury to competition. The law on this point, it declares, has been authoritatively settled by the Supreme Court's decision in *Federal Trade Commission v. Morton Salt Co.* 334 U.S. 37 (1948). There, the Commission's opinion states (p. 1806), the Supreme Court held "that in price discrimination cases involving competition between buyers, the requisite injury to such competition may be inferred from a showing that the seller charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors and that the amount of this discrimination was substantial". The Commission's opinion continues: "Complete reliance upon this doctrine, however, is not crucial here. The record in this case contains evidence of a positive character fully justifying a finding of probable injury to competition." The "positive" evidence cited by the Commission, however, simply shows that "competition did exist between the favored and nonfavored customers * * * and that the price difference between the two classes of customers was sufficient to give the former a significant competitive advantage." (Opinion, p. 1807)

In other words, the legal formula which the Commission derives from *Morton Salt* is that "competition between buyers" *plus* "substantial difference in price" *equals* "significant competitive advantage" to the favored buyers, which in turn *equals* "probable injury to competition".

The attractiveness of this formula cannot be denied. Its application dispenses with the need for inquiry into the probable effects on competition, either generally or with disfavored customers, of a price discrimination, so long as the difference in price is substantial in amount. But the Supreme Court surely did not intend in *Morton Salt* to relieve the Commission of the duty to make an informed expert judgment, based upon the relevant economic facts, as to the likelihood of injury to competition resulting from differing kinds of price discrimination. The Court did not lay down a hornbook black-letter formula, to be applied automatically and indiscriminately to every type of price discrimination without regard to differences in economic effect.

Morton Salt was a classic "secondary line" case, where the seller established and regularly maintained a discriminatory "two-price system" under which his favored, usually larger, customers paid substantially less for the same products than other customers with whom they were in competition. Quite obviously, as the Supreme Court held, the systematic and continued maintenance of such discriminatory price differentials had the inevitable result of impairing the ability

of the disfavored customers to hold an effective competitive position vis-a-vis their favored rivals. 334 U.S. at 47-50; *cf. Standard Motor Products, Inc. v. Federal Trade Commission*, 265 F. 2d 674 (C.A. 2), *cert. denied*, 361 U.S. 826. In *Morton Salt*, the probable injury to competition was clearly and easily identifiable as an inevitable aspect of the discriminatory two-price system. But, in so holding, the Supreme Court was expressing a conclusion based on the particular facts, not a universal rule of law.¹

A finding of probable injury to competition does not require evidence that the disfavored buyers have gone out of business or are on the verge of bankruptcy. By the same token, evidence that such buyers have suffered a temporary loss of sales does not, without more, establish that their capacity to compete vigorously and effectively in the market has probably been injured. Whether probable injury to competition will result from a price discrimination entails, at the least, an inquiry into the nature, size, scope, and duration of the differential. Where, as in *Morton Salt*, a systematic, established, and continuing price discrimination between competing groups of buyers is maintained, the injury to competition is manifest, and no one would seriously suggest in such a case that the Commission must show that the disfavored buyers have been driven to the wall. But where the price discrimination is not comparable to that involved in *Morton Salt*, the effects on competition should be found "in the light of the actual competitive situation surrounding the particular pricing practice charged to be illegal," *Fred Bronner Corp.*, Docket 7068 (September 29, 1960)²

¹ "The scope given to the new concept of injury in the *Morton Salt* case was explicitly justified by the Supreme Court on the ground that without it cumulative effects would go uncurbed. A question necessarily arises as to whether or not the scope of the concept of injury to a class of competitors should vary from one context to another with changes in the probability that there will be such cumulative effects." Edwards, *The Price Discrimination Law* (1959), p. 538, (emphasis added).

As Edwards also points out:

"It is unreasonable to use the law of price discrimination to attack minute inequalities among buyers. Where such inequalities are ephemeral or have no central pattern, they may well be offset at other times or on other commodities. Any one buyer may sometimes be favored and sometimes disfavored. Moreover, since the defense of cost justification is not readily available, insistence on equal treatment in all particulars except where cost differences can be shown tends to make price structures unduly inflexible." (at p. 639)

"There is little reason to try to assure by law an equality of prices so pervasive that it prevails generally in the relation among small and numerous buyers. Though price discrimination may create disparities of opportunity among such concerns, the likelihood of offsetting disparities on other goods or at other times is so great that little would be gained from an effort to curb such inequalities. Substantial, consistent, cumulative inequality is to be expected only where favored buyers are relatively large and strong. Only in such circumstances are we justified in considering an intervention that subjects the detail of price relationship to pervasive control." (at p. 641)

² The same requirement is reflected in the Commission's 1948 Policy Statement, issued immediately after the Supreme Court's decision in *Morton Salt*. Relevant portions of this Statement are quoted in *General Foods Corp.*, 50 F.T.C. 885, 887-888 (1954).

At this point, perhaps, it might be helpful to refer to another leading Robinson-Patman Act case, *Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960). That case is relevant here not because of any similarities in the factual situations involved, but because it makes clear the inappropriateness of adopting an automatic, verbal-formula approach in determining probable injury to competition. In *Anheuser-Busch* the Court held that under the Act a price "discrimination" is merely a difference in price. But, as the Supreme Court was careful to point out, its decision in that case "does not raise the specter of a flat prohibition of price differentials inasmuch as price differences constitute but one element of a Section 2(a) violation. In fact, as we have indicated, respondent has vigorously contested this very case on the *entirely separate grounds of insufficient injury to competition* and good faith lowering of price to meet competition." (*Id.*, p. 553; emphasis added.)

Anheuser-Busch exemplifies what are described in antitrust jargon as "territorial" price discriminations. As the legislative history of the Clayton Act of 1914 shows, one of the primary evils at which it was directed was injury to seller competition resulting from geographical or area price discrimination, typified by destructive local raids against small competitors by large multi-state sellers. As was stated in the House Judiciary Committee Report (H. Rept. 627, 63d Cong., 2d Sess., p. 8) :

It [Section 2] is expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain great corporations * * * have heretofore endeavored to destroy competition and render unprofitable the business of competitors by selling their goods, wares, and merchandise at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country.

In the instant case, it must be emphasized, neither the complaint alleges nor the proof shows that respondent, a major producer of gasoline, acting individually or in concert with other majors, engaged in selective price warfare directed against individual outlets of smaller, independent producers. Independents, as is well known, do not ordinarily have the resources to compete successfully with the majors in such price warfare; and where undertaken by major producers, its purpose and effect may well be either to drive the independents out of business or to coerce them into avoiding price competition, with the inevitable long-range result of rigidifying the price structure in the industry and thus injuring competition in a most vital way.

But that is not this case. The facts here present a special and unique kind of price discrimination, with effects on competition that

cannot automatically be assimilated to the familiar, systematic, continuing price discriminations which the Commission is accustomed to dealing with and to which it customarily applies the *Morton Salt* formula. What this case involves is a short-lived flurry of competitive price-cutting by all sellers of gasoline in a local area. This phenomenon, usually described with dramatic hyperbole as a "price war", has long been familiar in the gasoline industry. But, although price wars have large importance to the gasoline industry and have been the subject of extensive study, no apparent consensus exists as to whether this phenomenon signifies the vigor of competition in this industry or the lack of it.

Ordinarily, of course, consistent uniformity of price between competitors is not regarded as proof of the existence of healthy, free competition in the industry. Nor, by the same token, would it generally be said that fluctuations in price and active underselling of competitors reflect unhealthy and restrictive competitive conditions. Whether particular price activity manifests the "competition that kills" or the competition that enables a free economy to grow and expand can only be determined upon inquiry into the relevant economic facts. Such inquiry has not been made in this case. The Commission's conclusion that the gasoline price "war" here was injurious to competition reflects only an unverified assumption based on a legal formula derived from *Morton Salt*. Thus, whether the periodic or occasional outbreak of gasoline price-cutting in a local area serves to increase or decrease competition at the producer, distributor and retailer levels of distribution remains an unresolved question of fact on which the Commission's opinion casts no light.

To repeat: my main difficulty with the majority opinion springs from its failure to recognize and to bring to bear an expert evaluation of the special and distinctive effects on competition of a local, limited gasoline price war. The Commission, it seems to me, has transformed a hard case into an easy one by applying an old well-worn formula taken from a different economic context and which, though appropriate for the situation in which it was developed, is out of place as applied to the facts of this situation—to which I now turn.

II

Respondent, a major gasoline producer, was caught squarely in the middle of a brief but intense price "war" that flared up in and around Smyrna and Marietta, Georgia, for about two weeks in October of 1958. The complaint charged that, in the course of this two-week skirmish, respondent lowered prices to its dealers in Smyrna by greater

amounts than to its competing dealers in Marietta. It was alleged that the result of respondent's actions "may be substantially to lessen competition or to destroy or prevent competition with those retailers of respondent's gasolines who received the lower prices." (This is the boiler-plate allegation of injury to competition at the "secondary" line of commerce.)

Smyrna is located approximately five miles northwest of Atlanta on State Route 3. Marietta is approximately four miles farther north at the point where Route 3 and U.S. Route 41—which parallel each other from Atlanta—converge. Route 41 is a major north-south artery extending from Copper Harbor, Michigan to Miami, Florida. In 1958 American sold gasoline in four States along this route—namely, Kentucky, Tennessee, Georgia, and Florida.

The price melee here began about October 10, 1958, when a Shell station lowered its price to meet the price of a newly-opened Paraland station. Shell is, of course, a major producer. Although "Paraland" is not regarded in the industry as a major brand, respondent's district sales manager testified that the company was owned by or affiliated with Phillips, another major producer. From this humble beginning the price-cutting rapidly spread throughout the Smyrna area. As in the case of most so-called "wars" in the gasoline industry, the dealers were not left to fight it out by themselves, but received the ammunition of "competitive price allowances" (or CPA's) from their suppliers. These lowered prices, in the form of CPA's, were apparently a matter of general knowledge in the trade. Unless he received these CPA's from his supplier, a particular dealer would not be able to survive very long. If he had to pay more for gas than the price at which a station across the street was selling a competing brand, a dealer would not be likely to stay in business.

In the series of price reductions which ensued as the Smyrna "war" increased in intensity, American was never the leader. Its price reductions were made only to meet those previously made by its competitors. Thus, on the 11th of October, American increased its dealers' discount in Smyrna to 4.2 cents per gallon, meeting a price reduction by Sinclair on the previous day. On the 14th its discounts were increased to 6.7 cents, to meet Gulf and Shell; on the 15th to 8.7 cents, to meet Gulf and Sinclair; on the 17th to 10.7 cents, to meet Shell, Texas, and Sinclair; on the 20th to 11.7 cents, to meet Gulf, Shell, and Sinclair; and, finally, on the 21st to 14.7 cents, to meet Texas, Shell, and Sinclair. No further price reductions were made after October 21st, and by the 28th higher prices were restored and the

two-week war, in which more gas than blood was spilled, was over.³

The impact of these events in Smyrna on prices in Marietta, five miles away, was neither immediate nor severe. Again only following the lead of its competitors, American had by October 22 increased the CPA's granted its Marietta dealers to 9.7 cents, but there still remained a differential of 5 cents per gallon between the prices to its dealers in the two communities.

Since Smyrna and Marietta are geographically adjacent, gasoline dealers in one community compete with those in the other. The price war here gave the Smyrna dealers a brief, temporary advantage in this competition, in that their lower prices attracted business away from gas stations in Marietta. American dealers in Marietta were among those who lost sales and, according to the evidence, customers who usually purchased American's products in Marietta switched to stations in Smyrna. But, so far as appears, the business of the Marietta dealers returned to normal at the end of the two-week war, and this temporary diversion of sales had no effect on their ability to remain in effective competition with other dealers.

III

Although the marketing effects of a concentrated, confined outburst of price-cutting such as occurred here are far from clear, the Commission, relying upon the *Morton Salt* case, infers probable injury to competition from the fact that American charged substantially different prices to competing customers. But, as already pointed out, that case involved a regular, established, continuing multiple-price system, which inevitably impaired the capacity of the disfavored customers to remain effective competitors in the market. American's price discriminations, however, were immediate and transient responses to a temporary competitive situation over which it had no control. This does not mean that what American did was necessarily legal. It does

³ The following account of the war was given by American's district sales manager:
Q. Mr. Myers, would you tell us your understanding concerning the circumstances relating to the start of the price war in Smyrna in October 1958?

A. Well, I understand it was Paraland who operates or posts prices as an independent. They had a station on South Cobb Drive, and when they had that station under construction Shell or someone indicated that they would post the same price as Paraland should they open up as an independent, and when Paraland did open up as an independent, Shell did meet them. Shell had a station one block north of the Paraland location. Shell did meet them, and Paraland dropped their price again, I believe it was another 2 cents a gallon, and Shell met that when they did.

Then I think the next company was Sinclair, and I think Gulf and several others dropped to meet that competition. Then all companies dropped to meet it to meet the other major competition. And then they kept this price decreasing until it got to the ridiculous extent that it got to. (Tr. p. 576)

mean, however, that the necessary competitive injury cannot be inferred simply on the authority of *Morton Salt*.

In the first place, it appears to have been the price war generally—a situation which American did not create—which was responsible for any competitive injury to its Marietta dealers. Section 2(a) requires that probable competitive injury derive from the discrimination or difference in price charged to different buyers. But American reduced prices to its Smyrna dealers only after equally large price reductions had been made by competing producers and by their dealers. The much lower prices generally prevailing in Smyrna would have diverted customers from American's Marietta dealers, regardless of the prices which respondent charged its dealers in Smyrna. Any injury to American's Marietta dealers was caused not by the difference in the prices which American was charging its dealers in these two communities but by the fact that as long as a general price war was going on in Smyrna, and all dealers there were selling gas far below the prices in Marietta, dealers in the latter town—American dealers included—were bound to lose business. No matter what American did, the lower prices brought about by the war in Smyrna would have caused many customers in Marietta to drive to Smyrna to buy gasoline.

Second, the Smyrna price "war" was but a skirmish, lasting barely two weeks. True enough, in that period many of the Marietta dealers' customers bought gas in Smyrna. But the Act does not insulate businessmen from transient losses of sales, but only against the likelihood of "injury to competition". At the end of the war the business of the Marietta dealers returned to normal, and there is neither allegation nor proof of any permanent diversion of customers. In fact, the record shows that at least one of them enjoyed substantially greater sales in October 1958 than he did in the same month of either the preceding or following year. This is certainly a far cry from the injury to competition found in *Morton Salt*.

I see no justification for the Commission's statement that the burden of proof is on respondent to show that "these practices were discontinued and that there is no reasonable likelihood that they will be resumed in Smyrna, Marietta or elsewhere." The burden is upon the Commission to establish the required competitive injury. A finding that such injury would result from a continuation of the allegedly illegal discriminations must be predicated on facts showing the likelihood of such continuation, not speculations or inferences drawn from the absence of facts in the record. And where, as in this case, the only competitive injury alleged is to particular disfavored customers, the

evidence must relate to them and not to other dealers "elsewhere."⁴ This is not an "abandonment" problem. The fact that the Commission is "convinced . . . that respondent will continue to violate Section 2(a) unless ordered to cease and desist" would be relevant if illegality had been proved. It is irrelevant in determining whether the facts in the record prove the requisite competitive injury alleged in the complaint.

Finally, and perhaps most important, the competitive effects of American's price discriminations cannot be viewed apart from the effects of the price war as a whole. American's price cuts to Smyrna dealers were its competitive response to dynamic market conditions which it did not create and over whose rapid changes it had no control. In a price war someone is bound to be hurt, and if American chose the course of action having the least injurious effects on competition, it should not be condemned as a law-violator merely because sales were temporarily diverted from some of its dealers.

IV

In the situation shown by the record in this case, American—which, I repeat, did not start the price fracas but found itself caught helplessly in the middle of all the shooting—had three alternatives open to it.

First, it could have done nothing, maintaining its regular prices to all of its dealers in Smyrna and Marietta. The result would have been that these dealers would have lost all or most of their business to other dealers selling competing brands who had already received price reductions from their suppliers. Competitively, the injury to respondent's dealers would have been far more drastic.

Secondly, American could have done what it in fact did, with the results shown by this record.

Thirdly, American could have done what the Commission apparently thinks it was required to do by Section 2(a)—either reduce its prices equally to all of its dealers, or "feather" them out in some way, perhaps diminishing in concentric circles from the starting point of the war, on the theory that the differentials between stations would then not have been sufficiently large to cause any diversion of business

⁴ The recurrence of a price war which would cause American again to disfavor its Marietta dealers seems highly unlikely. As this record clearly shows, gas wars of this type are not planned or the product of a policy of systematic price discriminations, but are the immediate competitive responses to individual competitive situations. The Smyrna price war was not respondent's idea or invention, and respondent terminated its price cuts, for competitive reasons, as soon as the actions of its competitors permitted. The record shows no recurrence of price warfare affecting dealers in either Smyrna and Marietta between October 1958 and the filing of this complaint in November 1960.

between competing stations. But either of these courses of action would surely have intensified the price-cutting, transforming the brief skirmish into a prolonged, widespread, all-out devastating price war. This dilemma is described in the testimony of American's Atlanta branch manager. In response to Commission counsel's question as to whether American's 9-cent differential to dealers two miles apart was a sufficient ground for him to recommend an increase in the unfavored dealer's CPA, he replied:

Quite frankly, at that time I was in a dilemma as to what to do. If you put it in you could spread it; if you kept it out you might be hurting your dealers. That was the way I presented it to my Division Manager, and we didn't know what to do (Tr. p. 570)⁵

If American had chosen to give equally large discounts to its Marietta dealers, where could it have safely stopped? Smyrna and Marietta are located along a major north-south highway with gasoline stations in every town along the way. A price cut to any station or group of stations would be bound to affect the sales of nearby stations up or down the road, and if American made its reductions to all stations on this highway there would undoubtedly be effects upon stations located on adjacent and intersecting roads. Under the Commission's theory American's only safe alternative would be to reduce its prices to all of its dealers everywhere. But is the Commission prepared to say that this enlargement of a local brush fire into a nuclear price war would have effects upon competition less injurious than those of the course of action which American actually pursued?

Determination of the questions posed by this case, it seems to me, involves much broader considerations than those on which the majority here base decision. For example, the effects upon the independents who seem to provide much of the competition which exists in this industry must be taken into account.⁶ I do not believe that these

⁵ The possibility of "feathering" would not have resolved respondent's dilemma. In the first place, it ran the risk that any differences in price between competing customers would be regarded by the Commission as "substantial" and hence *prima facie* illegal. Second, if a two-cent reduction was sufficient to start the war, any price cut by American large enough to help its dealers in areas which the war had not yet reached would simply have served to set off the spiral of reductions anew.

⁶ The possibility of "feathering" would not have resolved respondent's dilemma. In duers which might result from the spread of the war would have a far more serious effect upon the vigor of competition in the industry as a whole than would the temporary diversion of sales from a few dealers in Marietta. Commenting upon the current prevalence of price wars in the gasoline industry, a recent article in the New York Times (May 20, 1962) stated:

"In the present disturbed markets, the distributor and also the dealer of the major companies generally are getting at or near their normal margin of profit and they are not being particularly hurt in the present price struggle. But the independent dealer and the distributor who does not have a major company to back him are being hurt badly in the price wars. The independent refiner, who supplies their products, also is finding it difficult to make ends meet."

knotty questions can properly be avoided by focusing narrowly on "secondary line" injury and adopting a mechanical test designed for the entirely different factual situation involved in *Morton Salt*. The Commission's approach here again illustrates the danger of dealing with the complexities of a free competitive economy simply by adopting a verbal formula which seems to provide the easiest route to an order to cease and desist (see my dissent in *National Retailer-Owned Grocers, Inc., et al.*, Docket 7121, May 14, 1962), [p. 1208].

V

The majority opinion also raises substantial questions concerning application of the meeting competition in good faith defense. For example, in its discussion of the lawfulness of the lower competitive prices met by American, the Commission seems again to have overlooked that the controlling inquiry is the seller's subjective good faith. A seller's burden of establishing good faith is satisfied by showing that he had no reason to believe the lower price met was unlawful. He should not be required, as the Commission states (opinion, p. 1812), to go further and show positive facts, known to him when he met the competitive lower price, "which would lead a reasonable and prudent person to believe that the price he was meeting was lawful." See my dissent in *Tri-Valley Packing Association*, Dockets 7225 and 7496, May 10, 1962 [p. 1134].

While the difference between these evidentiary burdens may seem slight, the evidence on which the Commission relies to show that respondent was not acting in good faith illustrates how important the difference actually is.

The Commission finds (opinion, pp. 1810-1812) that the price war in the Smyrna area began when a Shell service station met the price of a competing Paraland station; that Paraland is a "private brand" of gasoline which is "traditionally sold at a lower price than the major brands"; that "the Shell station which reduced its price to the level of Paraland had not been injured in any manner whatsoever by the lower price of the private brand station"; that, therefore, the Shell station was "beating", and not meeting, competition when it reduced its price to the same level as that of its newly-opened Paraland competitor; that Shell's price reduction, being discriminatory and not made in good faith to meet the lower price of a competitor, was therefore illegal; that when respondent and the other major oil companies in turn reduced *their* prices to meet the competition of Shell's lower price, they were meeting a price which was illegal; and that, accordingly, respondent "knew or should have known that

it was meeting discriminatory prices which could not have been justified under any of the exceptions to the prohibitions of the statute."

Let us assume—although I have the most serious doubts about it—that the record supports all of these findings made by the Commission. The Smyrna price war occurred in October 1958. If the Commission had received a telegram from respondent at that time, could and would it have been able to render an advisory opinion that the price reductions made by respondent's competitors were illegal? Now, almost four years later and only after an extensive hearing, the Commission finds that the lower prices of respondent's competitors—who are not parties to this proceeding—were illegal and that respondent's "good faith" defense must therefore be rejected. If they were parties to this proceeding, respondent's competitors might be able to justify the legality of their price reductions. At all events, their "conviction" here, in a case where they are not parties and where no complaint was made against them, is the basis of "convicting" respondent of violating the law in not acting in "good faith".

This seems to me to place an unrealistic and competitively unfair burden on businessmen. "Good faith" does not require businessmen to be put in the impossible dilemma of either (1) losing business by not meeting competitors' lower prices, or (2) meeting the competitive lower prices and running the risk that years later the Commission will find these "third-party" prices to be unlawful, after complex and protracted proceedings whose outcome could not confidently be predicted even by legal experts specializing in the field of trade regulation. In this case, for example, how was respondent in October 1958 to know that "Paraland", owned by a "major" producer (Phillips), would be regarded by the Commission in June 1962 as a "private" brand entitled, apparently as a matter of law, to a "normal" differential of 2 cents a gallon lower than "major" brands? Why should respondent have "known" in October 1958 that the Commission would in June 1962 find that all of the competitive lower prices which it met were discriminatory, injured competition, were not cost-justified, were not made "in response to changing conditions affecting the market", were not made in good faith to meet competition, etc. As I said in my *Tri-Valley* dissent, "The law should not be construed as forcing a seller to compete at his peril." I fail to see what the requirement of this kind of long-range prophesying in the dark by a seller in a competitive market has to do with his subjective good faith.

Finally, as in the *Tri-Valley* case, if the illegality of the prices met by respondent was so apparent, why is it that the Commission did not simultaneously bring price discrimination charges against all of

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its competitors who were equally involved in the Smyrna price war? The Commission obviously knew of these "unlawful" price reductions by respondent's competitors before this complaint was issued. It seems to me inequitable and not in the public interest to have proceeded against respondent alone. The order here operates as a broad, floating, punitive restraint on respondent's pricing activities in every market in the United States in which it engages in business in competition with other sellers. But respondent alone is now being subjected to such order, drastically limiting its ability to compete effectively. It seems fair to ask: Has the Commission's action here really promoted the "competition" which the Robinson-Patman Act was intended to protect and encourage?

FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission, for the reasons stated in the accompanying opinion, having granted in part and denied in part the aforementioned appeal and having modified the initial decision to conform with the views expressed in said opinion:

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

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

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

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

It is further ordered, That the hearing examiner's order filed February 26, 1962, entitled "Order Correcting Initial Decision", be, and it hereby is, stricken from the record.

It is further ordered, That respondent, The American Oil Company, shall, within sixty (60) days after service upon it of this order, file

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with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

By the Commission, Commissioner Elman dissenting.
