

which respondents intend to comply, are complying or have complied with this Order. All compliance reports shall include, among other things that are from time to time required, a summary of all contacts and negotiations with potential purchasers of the specified facilities, the identity of all such potential purchasers, and copies of all written communications to and from such potential purchasers.

IN THE MATTER OF
SUN OIL COMPANY

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

Docket 6641. Complaint, Sept. 26, 1956—Decision, Mar. 25, 1965

Order setting aside the initial decision and dismissing the complaint which charged a major oil company with unlawful price discrimination in the marketing of gasoline, after a decision by the Supreme Court, 371 U.S. 505, 7 S.&D. 621, and a remand to the Commission by the Court of Appeals, Fifth Circuit, 7 S.&D. 808.

COMPLAINT

The Federal Trade Commission, having reason to believe that Sun Oil Company, a corporation, has violated and is now violating the provisions of Section 2(a) of the Clayton Act (15 U.S.C. Section 13), as amended by the Robinson-Patman Act, approved June 19, 1936, and the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. Section 45), 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 with respect thereto as follows:

COUNT I

PARAGRAPH 1. Respondent Sun Oil Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 1608 Walnut Street, Philadelphia, Pennsylvania. 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 in the city of Jacksonville, Florida, and adjacent territory.

PAR. 2. Respondent sells its gasoline to a number of retailers located in the Jacksonville area and with whom respondent has entered into contracts, now in force, obligating said respondent to sell and deliver to such retailers all of their respective requirements of respondent's brand of gasoline during the term of such contracts. For the purpose of supplying said customers and of making deliveries pursuant to said contracts, respondent ships or otherwise transports its gasoline in tank cars, tankers, pipe lines 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 Florida and from there by tank cars or trucks to the various retailers selling its gasoline, and there is now and has been at all times mentioned herein a continuous stream of trade in commerce of said gasoline between respondent's refineries, terminals, and distribution points and said retail dealers purchasing said gasoline in Jacksonville, Florida. All of such purchases by said retail dealers are and have been in the course of such commerce. Said gasoline is transported into Florida and sold by respondent for resale in the Jacksonville area.

PAR. 3. Since on or about December 1955, in the course and conduct of its business as above described, respondent has sold its gasoline to a dealer in the Jacksonville, Florida, market area engaged in selling said gasoline at retail at prices substantially lower than the prices charged by respondent to its other retail purchasers for gasoline of the same grade and quality in the same market area. Said dealer is one Gilbert V. McLean, who operated a gasoline station in Jacksonville, Florida, under contract with respondent, where respondent's gasoline was and is sold at retail to consumers thereof, in competition with other retailers of gasoline purchasing the same from respondent or from other manufacturers. The price at which respondent sold its gasoline to said dealers since on or about December 1955, ranged up to 1 7/10 cents per gallon lower than the prices charged by respondent to other Jacksonville retailers of the same gasoline.

PAR. 4. The effect of the discrimination in price described in the preceding paragraph hereof has been and may be to injure, destroy and prevent competition with each of the other retailers of respondent's gasoline, and others, in the resale of said gasoline at retail in the Jacksonville market area.

PAR. 5. The acts and practices of respondent, as above alleged and described, violate subsection (a) of Section 2 of the Clayton Act, as amended.

PAR. 6. The allegations of Paragraphs One through Four of Count I of this complaint are hereby adopted and incorporated herein by reference and made a part of this Count II the same as if they were repeated herein verbatim.

PAR. 7. In the course and conduct of its business respondent is now, and has been at all times referred to herein, engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, in that it ships or otherwise transports its gasoline in tank cars, tankers, pipe lines, and trucks from its different refineries, terminals and distribution points, located in various States of the United States, to retail dealers located in the Jacksonville, Florida, area and to various other States of the United States.

PAR. 8. Except to the extent that competition has been hindered, frustrated, and lessened as set forth in this complaint, respondent has been and is now in substantial competition with other corporations, individuals and partnerships engaged in the sale and distribution of gasoline in "commerce" as that term is defined in the Federal Trade Commission Act.

PAR. 9. Beginning on or about December 1955, respondent, acting through its Regional Sales Manager, one Maximilian Dietsche, and the aforementioned Gilbert V. McLean, for the purpose of suppressing, preventing, hindering and lessening price competition in commerce among the various States, entered into and have since maintained and carried out a combination, understanding and agreement through which they fixed and maintained the retail price at which gasoline was sold in the gasoline service station leased by the said Gilbert V. McLean from respondent.

PAR. 10. Pursuant to and in furtherance of the aforesaid unlawful combination, understanding and agreement, respondent, acting through the aforesaid Maximilian Dietsche, together with the aforesaid Gilbert V. McLean, did and performed the following acts and things:

1. Agreed to fix and maintain and did fix and maintain the retail price at which gasoline was sold at the gasoline service station operated by the said Gilbert V. McLean under lease from respondent.

2. Agreed to and adhered to certain discounts, terms and conditions upon which the said gasoline would be sold to said Gilbert V. McLean and to the purchasing public.

PAR. 11. This alleged unlawful planned common course of action is singularly unfair, oppressive and to the prejudice of the public and

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respondent's competitors and retailers of gasoline in the Jacksonville, Florida, market area, and has a dangerous tendency to unduly restrain, hinder, suppress and eliminate competition between and among respondent's retail dealers, or others, in the sale and distribution of gasoline in commerce within the meaning of the Federal Trade Commission Act, and constitutes an unfair method of competition and an unfair act and practice in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Rufus E. Wilson and *Mr. Americo M. Minotti* for the Commission.

Mr. Leonard J. Emmerglick of Washington, D.C., and *Mr. Henry A. Frye* and *Mr. Richard L. Freeman* of Philadelphia, Pa., for respondent.

REVISED INITIAL DECISION AFTER REMAND BY ROBERT L. PIPER,
HEARING EXAMINER

JUNE 9, 1964

Preliminary Statement

On January 5, 1959, the Commission issued its decision,¹ affirming the undersigned, finding respondent in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, by reason of price discrimination; finding that the Section 2(b) defense under said Act was not available when the discriminatory lower price was given to a customer to enable him to meet price reductions of his competitor; and further finding respondent had engaged in price fixing in violation of Section 5 of the Federal Trade Commission Act. On July 24, 1961, upon appeal the United States Court of Appeals for the Fifth Circuit reversed, finding the Section 2(b) defense applicable and dismissing the price fixing count.²

On January 14, 1963, upon appeal the Supreme Court reversed the Court of Appeals, affirming the Commission and the undersigned with respect to the unavailability of the Section 2(b) defense under such circumstances.³ There was no dispute on appeal as to the requisite elements of a violation of Section 2(a), and no appeal from the dismissal of the price fixing count. The Supreme Court concluded that the defense under Section 2(b) of a lower price "to meet an equally low price of a competitor" is not available unless made to meet the price

¹ 55 F.T.C. 955 (1959).

² *Sun Oil Company v. Federal Trade Commission*, 294 F. 2d 465 (5th Cir. 1961).

³ *Federal Trade Commission v. Sun Oil Company*, 371 U.S. 505 (1963).

of the grantor's own competitor rather than to enable the customer to meet his competition. The Court held:

* * * we conclude that § 2(b) of the Act contemplates that the lower price which may be met by one who would discriminate must be the lower price of *his own competitor*; since there is in this record no evidence of any such price having been set, or offered to anyone, by any competitor of Sun, within the meaning of § 2(b),¹⁰ Sun's claim to the benefit of the good-faith meeting of competition defense must fail. * * * (Footnote omitted; emphasis supplied.)

In this connection the Court assumed, based on the absence of any other evidence in the record, that Super Test Oil Company, the competitor of Sun's customer, was solely a retailer. The Court pointed out that the Court of Appeals had assumed Super Test to be an integrated supplier-retailer of gasoline but that the record did not support this conclusion. The Supreme Court observed that if Super Test were an integrated supplier-retailer (*i.e.*, a competitor of Sun), or had received a price cut from its own supplier, a competitor of Sun, it would be a different case. With respect thereto the Court specifically stated in footnote seven:

‘ Were it otherwise, *i.e.*, if it appeared either that Super Test were an integrated supplier-retailer, or that it had received a price cut from its own supplier—presumably a competitor of Sun—we would be presented with a different case, as to which we herein neither express nor intimate any opinion.

The concurring opinion of Mr. Justice Harlan and Mr. Justice Stewart suggested a remand to the Commission to ascertain whether such were the facts.

On October 9, 1963, the Court of Appeals, upon motion of Sun and request of the Commission, remanded the cause to the Commission with the following directions:

1. That the Federal Trade Commission afford Sun Oil Company an opportunity to adduce additional evidence relating to the status of Super Test Oil Company as an integrated supplier-retailer of gasoline and evidence relating to any price concessions Super Test Oil Company may have received from its supplier during the relevant 1955–1956 period, and afford counsel supporting the complaint an opportunity to adduce evidence in rebuttal;
2. That the Federal Trade Commission consider whether the Section 2(b) defense is available to Sun Oil Company on the evidence adduced and whether an order to cease and desist is warranted; and
3. That the Federal Trade Commission, if an order to cease and desist is deemed warranted, reconsider the question of the desirable scope of such order with respect to the products covered.

On November 14, 1963, the Commission remanded the proceeding to the undersigned “for such further proceedings as are necessary to comply fully with the said judgment of the Court of Appeals” and

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a revised initial decision thereafter. Pursuant to said order, additional hearings were held, concluding on March 25, 1964. Both parties filed additional proposed findings of fact, conclusions and briefs. All such findings of fact and conclusions proposed not hereinafter specifically found or concluded are herewith specifically rejected.

The facts prior to remand have now been found by the Supreme Court, the Court of Appeals, the Commission and the undersigned, and are substantially undisputed. For the purpose of clarity herein, a very brief summary is as follows: Sun granted a price reduction to only one of its independent service station dealers, McLean, who was in competition with other Sun dealers, to enable him to "meet" a price reduction of a "private" brand station, Super Test, across the street.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following additional findings of fact, conclusions and revised order.

FINDINGS OF FACT

I. The Issues

The issues, as delineated by the remand order of the Court of Appeals, are whether Super Test was an integrated supplier-retailer or received any price concession from its supplier, and if either, the availability of the Section 2(b) defense, and if an order is warranted, its scope with respect to the products covered.

II. Integrated Supplier-Retailer

Super Test operated a chain of some 65 retail service stations selling "non-major" or "private" brand gasoline, one of which was across the street from McLean, Sun's dealer, in Jacksonville, Florida. Sun, a major integrated refiner and supplier of gasoline, sold "major" brand gasoline. Unlike Sun and other major suppliers, Super Test itself operated its retail stations. (All of the above facts are from the prior decisions.) An integrated company in the oil industry is one performing the functions of production, refining, transportation and marketing (Tr. 932, 1205). Super Test, instead of being its own supplier, purchased all of its gasoline requirements from others, primarily Orange State Oil Company (RX 19, 31; Tr. 969). Orange State was a wholly owned subsidiary of Arkansas Fuel Oil Corporation, which in turn was owned in the majority by Cities Service Oil Company, a major integrated refiner like Sun (Tr. 867). Orange

State marketed only Cities Service products (Tr. 871). Cities Service branded gasoline was a major brand gasoline (Tr. 874, 945). (For the purposes of simplicity, Orange State will be referred to hereinafter as Cities Service.) The gasoline sold to Super Test by Cities Service was unbranded and had a lower octane rating than Cities Service branded regular gasoline (Tr. 876, 916-17). It could not be resold under the brand name Cities Service (Tr. 915). Super Test sold a small part, about ten percent, of its gasoline at "wholesale"⁴ to other retailers (Tr. 1024-25).

Cities Service, a major integrated refiner-supplier like Sun, was a competitor of Sun (Tr. 874). Sun not only concedes but contends that it was in competition with Cities Service (Tr. 873). Cities Service, as a major, operated on the same competitive level as Sun. Cities Service was the supplier and Super Test the customer. It seems clear that as such Super Test was not in competition with Sun. Super Test, Cities Service's customer, was in competition with McLean, Sun's customer.

As previously noted, the Supreme Court held that the 2(b) defense was available to Sun only to meet the lower price "of [its] *own* competitor." The Court further pointed out that there was "no evidence of any such price having been set * * * by any *competitor of Sun*." [Emphasis supplied.] From this clear statement, read in conjunction with its reference to an integrated supplier-retailer in footnote seven, quoted above, it seems apparent that the Court had reference to an integrated supplier-retailer in the sense of a direct competitor of Sun. In any other sense, based upon the Court's conclusion, such status would not be relevant. As the Court further stated: "(In this case, this would mean a competitor of Sun, the refiner-supplier, and not a competitor of McLean, the retailer dealer.)" Clearly, Super Test as a customer of Cities Service, an integrated supplier, was not a competitor of Sun, likewise an integrated supplier.

It seems clear that the Court had reference to a situation where the retailer is its own supplier. If Cities Service were substituted for Super Test, *i.e.*, ran its own retail station in competition with McLean, Sun's customer, then clearly Cities Service would be its own supplier, there would be no wholesale price from it to itself which Sun could meet, and the only way Sun possibly could meet the competition of Cities Service under such circumstances would be by a

⁴ While it is somewhat anomalous to refer to Super Test's sales to other retailers as "wholesale," inasmuch as the sales by Cities Service to Super Test were characterized as wholesale, nevertheless to this limited extent Super Test did perform the function of a distributing middleman.

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price reduction to McLean. This was the possibility postulated by the Court when it referred to an integrated supplier-retailer. That the Court of Appeals also had reference to an integrated supplier-retailer in the same sense seems clear from its statement:

Super Test, a vertically-integrated company operating its own filling stations, could fix any retail price it pleased. McLean's price to the public was dependent on Sun's price to him.

However, in fact, as the record on remand reveals, Super Test was a customer of Cities Service and Super Test's price to the public was as much dependent on Cities Service's price to Super Test as McLean's price to the public was on Sun's price to him.

The fact that Super Test also made some sales to other retailers did not make it an integrated supplier-retailer in competition with Sun. Super Test was still a purchaser from Cities Service, Sun's competitor. It is concluded and found that Super Test was not an integrated supplier-retailer, and was not in competition with Sun.

III. Supplier Price Concessions

Super Test purchased its gasoline from Cities Service pursuant to a written contract establishing a variable-price formula based upon the current, published low Gulf Coast price for unbranded gasoline plus certain added variable cost factors, such as freight and handling (RX 19, 28, 31; Tr. 951). While the price per gallon varied a fraction of one cent from time to time, it was always around 12 cents per gallon delivered at the Jacksonville terminal of Cities Service (Tr. 947, 1064, 1113; RX 40-47; RX 49a-z56; RX 54). As of July 1, 1955, the price to Super Test delivered at the terminal was \$.11691 (Tr. 1043; RX 40). The cost of delivery by Super Test from the terminal to its station was approximately $\frac{1}{4}$ of a cent per gallon (Tr. 1063). Super Test also paid the Florida State inspection fee of $\frac{1}{8}$ of a cent per gallon (RX 28).

As previously found, the gasoline Super Test bought was unbranded. It was substantially lower octane, 87 $\frac{1}{2}$, than Sun's gasoline, which was 92 $\frac{1}{2}$ octane (Tr. 638). Being unbranded and of lower quality, it normally sold at wholesale for several cents less than the tank wagon price of major brand regular grade gasoline (Tr. 605, 945-47, 1197). Super Test did not receive any price "cut" as such from its supplier during the relevant period, its price from Cities Service remaining fixed by the contract between them (RX 40-47, 49a-z56). Sun's tank wagon price excluding taxes to its dealers throughout the relevant period, as well as that of Cities Service and the other majors, was 15.1 cents per gallon (24.1 cents less 9 cents

taxes) for regular branded gasoline (previously found). While Cities Service did not give any price cut to Super Test, it is undisputed that its price to Super Test was lower than Sun's price to McLean, the net difference prior to Sun's price reduction to McLean being approximately 3 cents, *i.e.*, the difference between Super Test's cost of \$.12066 (\$.11691+.0025+.00125) delivered to its station and Sun's delivered price of \$.151.

Sun was not privy to the contract between Super Test and Cities Service and hence had no knowledge concerning what price Cities Service actually was charging Super Test (Tr. 1189-90). Sun did know that Cities Service's posted terminal wholesale price for unbranded gasoline was 12.9 cents per gallon (Tr. 1112, 1165; RX 54). Sun knew that Super Test's gasoline was only 87½ octane compared to Sun's 92½ octane (Tr. 638, 1169; RX 1, 2, 10, 11, 61).⁵ Sun also knew that unbranded gasoline of such octane normally sold at wholesale for several cents less than the tank wagon price of major-brand regular gasoline (Tr. 605, 1112, 1163, 1189-90); RX 54).

As found above, Cities Service unbranded gasoline was of inferior quality and public acceptance. The Supreme Court found that the normal *retail* price differential in the area between major and non-major brands of gasoline was two cents, stating:

The two-cent per gallon difference in price between McLean and Super Test represented the "normal" price differential then prevailing in the area between "major" and "non-major" brands of gasoline. This "normal" differential represents the price spread which can obtain between the two types of gasoline without major competitive repercussions * * * .

As previously found in this matter, on December 27, 1955, Super Test dropped its retail price to 24.9 cents a gallon, four cents below McLean's price of 28.9 cents. Prior thereto the difference between them had been the "normal" two cents. McLean advised Sun that he wanted to post a price of 25.9 cents in order to "meet" this competition. Sun then gave McLean a price discount of 1.7 cents. This exact amount was arithmetically required because of Sun's established policy that no dealer should have a mark-up or gross margin of profit less than 3½ cents per gallon, because he could not "exist" on less. Because Sun's tank wagon price was 24.1 cents and McLean intended to post 25.9, a 1.7 cents discount was arithmetically required to enable him to gross 3.5 cents. Without exception Sun's witnesses all stated that that was the reason that the discount Sun gave McLean

⁵ While not directly germane to the issues here, it is interesting to note that the octane difference between major brand "regular" and "premium" gasolines of the same brand presently is approximately the same, and the "normal" price differential is 4 cents per gallon.

totalled 1.7 cents (Tr. 185, 363, 371-2, 388, 621-24, 630-31). In accordance with his stated intention (CX 26). McLean did post the price of 25.9 cents.

In considering whether Super Test, not being its own supplier, received any price concessions from its supplier, we are again concerned with such supplier as a competitor of Sun. The remand order of the Court of Appeals refers to price "concessions." In footnote seven (quoted above), the Supreme Court said it would be a different case: " * * * if it appeared * * * that Super Test * * * had received a price *cut* from its own supplier—presumably a competitor of Sun— * * * ." (Emphasis supplied.) As previously noted, the Supreme Court also found that "the lower price which may be met * * * must be the *lower price* of his own competitor," and that there was "no evidence of any *such* price having been * * * offered to anyone by any competitor of Sun." (Emphasis supplied.) While the Supreme Court referred in note seven to a price "cut," it will be noted that in its concluding statement it referred to the competitor's "lower price," the same terminology found in Section 2(b), which provides that the seller's "lower price" must be "made in good faith to meet an equally low price of a competitor." In view of this, it would appear that such a "lower price" would meet the test of the Court and the statute.

Inasmuch as Super Test did receive a "lower price" from Cities Service, it becomes necessary to determine whether Sun's price reduction to McLean was "made in good faith to meet an equally low price of [its] competitor." The Supreme Court has held in construing Section 2(b) that while the discriminatory price does not have to in fact meet the competitive price, "the statute *at least* requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would *in fact meet* the equally low price of a competitor." * (Emphasis supplied.) Here Sun's lower price to McLean had no connection whatsoever with Cities Service's price to Super Test. Not only did Sun not know what Cities Service's actual price was, or have any reason to believe that Sun's reduced price would in fact meet it, but on the contrary Sun's price was set to enable McLean to post the price he selected, and was dictated by Sun's policy concerning dealers' minimum gross margins.

The record demonstrates beyond doubt that the lower and discriminatory price to McLean had nothing to do with the price of Cities Service to Super Test. For the same legal reason that a seller

* *Federal Trade Commission v. Staley Manufacturing Co.*, 324 U.S. 746 (1945).

must have good reason to believe his price would in fact meet the equally low price of his competitor, an *ex post facto* showing that a discriminatory price coincidentally met that of a competitor does not constitute a good faith meeting of such lower price.⁷ In fact, the Supreme Court has held that hearsay evidence of a competitor's offers, believed by the respondents therein, was not sufficient "to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor."⁸ Thus Sun's price to McLean was not made in good faith to meet the equally low price of its competitor, Cities Service, to Super Test.

The Supreme Court has also held that the meeting of competition defense under Section 2(b) does not permit the undercutting of a competitor's price. The Court has specifically stated:

It [the defense in subsection (b)] also excludes reductions which undercut the "lower price" of a competitor * * * .⁹

Even assuming *arguendo* that Sun's lower price to McLean was made in an effort to meet Cities Service's price to Super Test, Sun knew that the gasoline sold Super Test by Cities Service was unbranded and hence had substantially less public acceptance, that it was five octane ratings lower than Sun's gasoline and hence of substantially inferior quality, and that it normally sold at wholesale for several cents less than the tank wagon price for major brand regular gasoline. Sun was also aware of the usual retail price differential of two cents. As above noted, the Supreme Court found this to be the prevailing normal retail differential, which represented "the price spread which can obtain without major competitive repercussions." In other words, increasing or decreasing the normal retail price spread would cause major competitive repercussions.

Manifestly such a retail price differential reflects and indeed necessitates a concomitant price differential at the wholesale level. In fact, Cities Service, a major brand refiner-supplier and a competitor of Sun, in effect acknowledged the normal and competitively necessary price differential between unbranded and major brand gasoline at the wholesale level by charging substantially less for its unbranded gasoline while charging the same tank wagon price for its branded gasoline as Sun and the other majors. Sun had no reason to believe that Cities Service had reduced its wholesale price of unbranded gasoline

⁷ *Forster Mfg. Co., Inc.*, 62 F.T.C. 852, D.N. 7207 (1963); *Exquisite Form Brassiere, Inc.*, 64 F.T.C. 271, D.N. 6966 (1964).

⁸ *Corn Products Refining Co. v. Federal Trade Commission*, 324 U.S. 726 (1945).

⁹ *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (1951).

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to Super Test, *i.e.*, increased the normal differential in price between unbranded and branded regular gasoline, and in fact Cities Service had not.

If Sun had set the same tank wagon price to McLean for its gasoline as Cities Service's price to Super Test (which Sun argues it had a right to do under Section 2(b)), clearly such action could and undoubtedly would have eliminated the "normal" retail price differential and resulted in "major competitive repercussions." In short, unbranded inferior gasoline could not sell at the same price. Thus a meeting of such price, or a destruction of the competitively necessary differential, would have resulted in undercutting and destroying competition rather than "meeting" competition. The courts and the Commission have held that meeting the price of an inferior product or one of substantially less public acceptance amounts to undercutting rather than meeting a competitor's price.¹⁰ By reducing the normal wholesale differential between branded and unbranded gasoline, Sun necessarily enabled a corresponding reduction at the retail level, which would cause a major competitive repercussion, the converse of a bona fide meeting of competition. Patently a "meeting" of competition in good faith would not cause such a competitive repercussion. By doing so, Sun was "undercutting" the competitive price rather than "meeting" it.

It is concluded and found that Sun's discriminatory lower price to McLean was not made in good faith to meet an equally low price of a competitor. It is further concluded and found that, since Super Test was not an integrated supplier-retailer in competition with Sun, and Sun's lower price was not made in good faith to meet an equally low price of Super Test's supplier, the defense under Section 2(b) is not available to Sun.

At the conclusion of the remand hearings, counsel for respondent moved to dismiss the complaint for lack of public interest upon the bases of staleness and an isolated occurrence, in reliance upon two recent decisions of the Commission.¹¹ The motion was taken under advisement. The issues in this remand were delineated by the Supreme Court and defined by the Court of Appeals. As noted in the concurring opinion of Mr. Justice Harlan:

¹⁰ *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F. 2d 234, 237 (2d Cir. 1929); *F.T.C. v. Standard Brands*, 189 F. 2d 510, 514 (2d Cir. 1951); *Minneapolis-Honeywell Co.*, 44 F.T.C. 351, 396 (1948); *Anheuser-Busch, Inc.*, 54 F.T.C. 277 (1957); *American Oil Co.*, 60 F.T.C. 1786, D.N. 8183 (1962); *Callaway Mills Co.*, 64 F.T.C. 732, D.N. 7634 (1964); *Purolator Products, Inc.*, 65 F.T.C. 8, D.N. 7850 (1964).

¹¹ *Bearings, Inc.*, 64 F.T.C. 373, D.N. 7134 (1964); *Sperry-Rand, Inc.*, 64 F.T.C. 842, D.N. 7559 (1964).

* * * we are dealing with an extremely difficult question arising under a singularly opaque and elusive statute * * *. I see no reason to foreclose development of the relevant facts in this proceeding. This case is one of far-reaching importance in the administration of the Robinson-Patman Act * * *. The Commission * * * has as much interest as the respondent in definitive answers to these perplexing problems.

To now dismiss the complaint upon such bases after so much time and effort would appear the height of futility. The majority opinion of the Supreme Court held: "If the [2(b)] defense is unavailable, there is no issue as to violation of Section 2(a) of the Clayton Act; respondent Sun does not dispute that the requisite elements of a price discrimination otherwise illegal under Section 2(a) have been shown." Accordingly, it is concluded and found that an order to cease and desist is warranted.

IV. The Order

The remand directed the reconsideration of the desirable scope, with respect to the products covered, of any order deemed warranted. The prior cease and desist order covered all of Sun's products. Since then, in several similar cases, the Commission has limited such orders to "gasoline."¹² There is no evidence in the record that Sun has discriminated in price, or is likely to, with respect to any of its other products. Accordingly, the order will be so modified.

ORDER

It is ordered, That respondent Sun Oil Company, a corporation, its officers, directors, agents, representatives and 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 gasoline of like grade and quality to any purchaser at net prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of respondent's gasoline.

DISSENTING STATEMENT

By MACINTYRE, *Commissioner*:

This is a case of "far-reaching importance in the administration of the Robinson-Patman Act."¹ The issues raised herein present ex-

¹² *American Oil Co.*, 60 F.T.C. 1786, D.N. 8183 (1962); *Sun Oil Co.*, 63 F.T.C. 1371, D.N. 6934 (1963); *Atlantic Refining Co.*, 63 F.T.C. 1407, D.N. 7471 (1963).

¹ See separate memorandum of Mr. Justice Harlan in which Mr. Justice Stewart joined *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505, 529 (1963).

tremely significant questions on the proper limits of the meeting of competition defense in gasoline marketing. The case has been before the Supreme Court once, it has been before the Fifth Circuit twice, and, of course, during the pendency of the proceeding before this Agency there have been two initial decisions and each has been appealed. Nevertheless, those Commissioners in the majority, with the exception of Commissioner Reilly, have, in this instance, again dismissed a gasoline pricing case with no apparent consideration of the substantive issues involved. The Majority cites, in support of its action, the dismissal without adjudication in *Pure Oil Company*, Docket No. 6640 [66 F.T.C. 1336], *The Texas Company*, Docket No. 6898 [66 F.T.C. 1336], *Standard Oil Company (Indiana)*, Docket No. 7567 [66 F.T.C. 1336], and *Shell Oil Company*, Docket No. 8537 (decided December 28, 1964) [66 F.T.C. 1336]. I have already made plain my opposition to that procedure. There is no need to restate it here,² but I do intend to state my views on the substantive issues raised on respondent's appeal from the initial decision on remand.

The Majority also relies on *American Oil Company v. Federal Trade Commission*, 325 F. 2d 101 (7th Cir. 1964), *cert. denied*, 377 U.S. 954 (1964). It is not clear for precisely what proposition the case is cited. I can only assume that the citation of this decision constitutes a tacit holding that the injury criteria of Section 2(a) have not been met in this proceeding. If that is, in fact, the position of two members of the Commission, then I can only say that this issue is not properly before us at this time.³ It is interesting that Commissioner Reilly, who concurs in the order of dismissal, and I seem to be in agreement on that point.⁴

Moreover, although the question of injury was not directly before the Supreme Court, I can only infer from its opinion an implicit holding that under the circumstances of the record the injury criteria requisite to Section 2(a) have been met. In this connection, the Court held that:

² See my dissenting statement to the orders of dismissal in *Pure Oil Company*, Docket No. 6640 [66 F.T.C. 1336, 1485], *The Texas Company*, Docket No. 6898 [66 F.T.C. 1336, 1485], *Standard Oil Company (Indiana)*, Docket No. 7567 [66 F.T.C. 1336, 1485], and *Shell Oil Company*, Docket No. 8537 (December 28, 1964) [66 F.T.C. 1336, 1485].

³ The Supreme Court, in its consideration of this matter in *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505, 511 (1963), expressly stated that the issues at this stage of the proceeding were confined to the scope of the meeting of competition defense under the circumstances documented by the record.

⁴ In fact, Commissioner Reilly informs us, "* * * Of course, we are not applying that case to this, particularly to the extent that it was concerned with the question of competitive effect. On the contrary, competitive effect is not being questioned here. * * *" (Separate statement of Commissioner Reilly, p. 3 [p. 363 herein].)

* * * to allow Sun to pursue its discriminatory pricing policy will, as has been indicated, harm other Sun dealers who compete with McLean [the favored customer]; * * * .⁵

The Court recognized that, although not inevitable, prohibiting assistance by way of price discrimination might injure McLean, it held nevertheless that the statute precludes a balancing of the comparative degree of individual injury between McLean and the nonfavored customers in each instance, since that is "foreclosed by the determination in the statute itself in favor of equality of treatment."⁶ In a broader context, the Court held that denying Sun the right to reduce its prices as it did would not impair price flexibility and promote price rigidity. On the contrary, the Court stated:

* * * While allowance of the discriminatory price cut here may produce localized and temporary flexibility, it inevitably encourages maintenance of the long-range and generalized price rigidity which the discrimination in fact protests * * * .⁷

Moreover, the Court held:

* * * the large supplier's ability to "spot price" will discourage the enterprising and resourceful retailer from seeking to initiate price reductions on his own. Such reasoning may be particularly applicable in the oligopolistic environment of the oil industry.⁸

The Court further noted that "* * * Super Test's challenge as an 'independent' may be the only meaningful source of price competition offered the 'major' oil companies of which Sun is one."⁹ There is no need to belabor the point.

At any rate, in the present posture of the case, it is clear that the issues are confined to the applicability of the meeting of competition defense under the facts of this record. According to my understanding, the issues on remand are the following:

1. We are to determine whether Super Test was an integrated supplier-retailer of gasoline and whether it received any price concessions from its suppliers in the relevant period in 1955 and 1956.
2. Whether the 2(b) defense is available to Sun on the evidence adduced on remand and whether an order to cease and desist is warranted.
3. The question of the scope of the order, if an order to cease and desist is warranted.

Before turning to these issues, a brief review of the facts and the history of this proceeding may be helpful in putting my views in con-

⁵ *Federal Trade Commission v. Sun Oil Co.*, *supra* n. 3, at 519.

⁶ *Ibid.*

⁷ *Id.*, at 523.

⁸ *Ibid.*

⁹ *Ibid.*

text. As the Supreme Court noted, this case grew out of a gasoline price war in Jacksonville, Florida, involving a discriminatory price reduction granted in the period December 1955-February 1956 by Sun to McLean, a lessee operator of a Sunoco service station in the area, to enable that dealer to meet the price of a competing private brand retailer (Super Test).

The Commission, on January 5, 1959, issued its order and decision, finding respondent had violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, by virtue of the price differential and holding further that the Section 2(b) defense was unavailable when the discriminatory lower price was given by the seller to its customer to enable the latter to meet his competitor's price. On July 24, 1961, the United States Court of Appeals for the Fifth Circuit reversed, ruling the Section 2(b) defense applicable and dismissing the price fixing charge.

On January 14, 1963, the Supreme Court reversed the Court of Appeals, affirming the Commission's holding on the Section 2(b) defense. The court held that the record did not show, as the Fifth Circuit had assumed, that Super Test was an "integrated supplier-retailer of gasoline," finding that on the basis of the record as then constituted, the availability of the defense had to be determined on the assumption that Super Test was engaged solely in retailing operations. The Court's opinion, however, did contain the caveat that if Super Test were an integrated supplier-retailer or if it had received a price cut from its own supplier, presumably a competitor of Sun, that would be a different case.

In light of the Supreme Court's observation, subsequently, on October 9, 1963, the case was in fact remanded by order of the Court of Appeals upon the request of the Commission and Sun. The scope of the remand was narrow and, as noted above, was essentially limited to the meeting of competition defense and the scope of the order should one be warranted. All the other issues raised by the complaint have already been settled.

Turning to the initial decision, which is the subject of this appeal, I am gratified to see that Commissioner Reilly is "in complete agreement with the hearing examiner's findings of fact on remand that Sun failed to show either of these preconditions [to the 2(b) defense]," namely, that Super Test is an integrated wholesaler-retailer or that it has received price concessions from its supplier.¹⁰ Since the Majority has decided to set aside the initial decision of the hearing examiner on

¹⁰ Separate statement of Commissioner Reilly, p. 5 [p. 364 herein].

remand, a brief resume of his essential findings on the disputed issues is in order.

The examiner found that Super Test, which operates a chain of some sixty-five retail service stations selling private brand gasoline was not an integrated supplier-retailer. The examiner found that an integrated company in the oil industry is one performing the functions of production, refining, transportation, and marketing. He further found that Super Test purchased all its gasoline requirements from others and the gasoline sold to Super Test by its supplier, Cities Service, a major oil company, was unbranded and had lower octane ratings than the latter's branded regular gasoline.

The examiner found that Super Test sold only a small part of its over-all gasoline volume (approximately 10 percent) at "wholesale" to other retailers. Going to the heart of the matter, the examiner held that Cities Service, as a major oil company, operated on the same competitive level as Sun and that Super Test was the customer of the former. Under the circumstances, the examiner found that Super Test was not in competition with Sun but that Super Test, Cities Service's customer, was in competition with McLean, Sun's customer. The examiner further found that Super Test's price to the public was as much dependent on Cities Service's price to it as McLean's price was on Sun's price to him. The examiner concluded and found that the fact that Super Test made some sales to other retailers did not make it an integrated supplier-retailer in competition with Sun.

With respect to the question of whether Super Test received a price break, the examiner made the following crucial finding, namely, that "Super Test purchased its gasoline from Cities Service pursuant to a written contract establishing a variable price formula based upon the current, published low Gulf Coast price for unbranded gasoline plus certain added variable cost factors such as freight and handling." He found that while the price per gallon varied by fractions of a cent, it was always in the neighborhood of twelve cents per gallon delivered at the Jacksonville terminal of Cities Service. As of July 1, 1955, according to the examiner, the price to Super Test at the Jacksonville terminal was .11691; the cost of delivery by Super Test from the terminal to its station was approximately a quarter of a cent per gallon. In addition, he found that Super Test also paid the Florida State inspection fee of one-eighth of a cent per gallon. The tank wagon price of the majors, including Sun, according to the examiner, was 15.1 cents per gallon for regular branded gasoline in the relevant period. He also found that Super Test's unbranded gasoline of lower quality

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normally sold at wholesale for several cents less than the tank wagon price of major brand regular gasoline.

He further found that Super Test did not receive a price "cut" as such from its supplier in the relevant period but that the price to Super Test remained fixed by the contract with its supplier, Cities Service. The examiner held that, although Cities Service did not give a price cut to Super Test, its price to Super Test was lower than Sun's price to McLean, the net difference per gallon prior to Sun's price reduction to McLean being approximately three cents.¹¹

The examiner made the finding that Sun was not conversant with the contract between Super Test and Cities Service and, hence, had no knowledge of the actual price Cities Service was charging Super Test. The examiner noted that Sun did know that Cities Service's posted terminal wholesale price for unbranded gasoline was 12.9 cents per gallon and that Sun knew that Super Test gasoline was of a lower octane than its own gasoline. He found further that Sun knew that unbranded gasoline of the kind sold by Super Test normally sold at wholesale for several cents less than the tank wagon price of major brand regular gasoline.

The examiner concluded it became necessary to determine whether Sun's price reduction to McLean was made in good faith to meet an equally low price of its competitor (Cities Service). The examiner found that the element of good faith was lacking, since Sun's lower and discriminatory price to McLean had no connection with Cities Service's price to Super Test. In this connection, the examiner found that Sun did not know what Cities Service's actual price to Super Test was or have any reason to believe that Sun's reduced price would, in fact, meet it, but that, on the contrary, Sun's price was set to enable McLean to post the price he selected and was thus dictated by Sun's policy concerning dealers' minimum gross margins.¹²

Further, the examiner made the finding that Sun's lower price to McLean, taking into consideration the normal price spread between Sun's 92½ octane gasoline and Super Test's unbranded 87½ octane gasoline, was undercutting the price of Cities Service to Super Test. This, the examiner found, enabled a corresponding reduction in price

¹¹ Taking into consideration the costs to Super Test of delivery from the terminal and the payment of the State inspection fee.

¹² The examiner found:

"* * * Because Sun's tank wagon price was 24.1 cents and McLean intended to post 25.9, a 1.7 cent discount was arithmetically required to enable him to gross 3.5 cents. Without exception Sun's witnesses all stated that that was the reason that the discount Sun gave McLean totalled 1.7 cents (Tr. 185, 363, 371-2, 388, 621-24, 630-31). In accordance with his stated intention (CX 26), McLean did post the price of 25.9 cents." (Initial decision, p. 8 [p. 349 herein].)

at the retail level which reduced the competitively necessary differential between branded and unbranded gasoline which would cause a "major competitive repercussion." He, therefore, concluded that for this reason also the prices granted McLean did not meet the good faith test required by the Section 2(b) proviso.

On the basis of my review of the record, it is my opinion that the factual findings in the hearing examiner's initial decision, with perhaps very minor changes, should have been adopted by the Commission. It remains only for me to outline my position on the issues raised by the appeal on the basis of my evaluation of the record.

I agree with the examiner that Super Test, which has no production facilities, is not integrated to the point where as a practical matter it competes with Sun. The record shows that essentially Super Test is an independent chain retailer making occasional sales of gasoline to other retailers in the order of approximately 10 percent.¹³ Under the circumstances, to hold that Super Test is an integrated supplier-retailer would be wholly unrealistic. Nor can I find that Super Test's status is changed by the fact that it acquired certain minimal storage and transportation facilities (that is, a tugboat, two barges, two storage tanks and three tank trucks). These facilities, while they may increase the efficiency of Super Test's essentially retailing operations, do not, according to my reading of the record, change its fundamental character in that respect.

Super Test's financial position is a most persuasive indication that this distributor of unbranded gasoline, no matter how it is labeled, is not in competition on the wholesale level with major oil companies such as Sun. Super Test simply lacks the capital resources to do so. Mike Hughey, Super Test's president, testified that at one point "I went 37-some thousand dollars into the hole one month and it scared me to death, because if it would have stayed at that, they [Cities Service] would have owned the company at the end of the year because I couldn't pay it off."¹⁴ This testimony is most persuasive. There could be no more graphic depiction of Super Test's niche in hierarchy of the oil industry or one which is more inconsistent with the hypothesis that Super Test was an integrated concern competitive with the majors.

¹³ Super Test's president displayed some uncertainty about his estimates on this subject, according to the record, but the hearing examiner who heard him credited his testimony on this point. I see no reason for going behind that finding. Clearly, the transfers of gasoline to Super Test's Georgia affiliate, also wholly owned by Super Test's principal, must be, in spite of respondent's contentions to the contrary, considered part of this independent's over-all retail operation.

¹⁴ Tr. 1016.

Finally, the evidence on remand is clear that Super Test, which purchased its gasoline from Orange State, a subsidiary of Cities Service, was not the beneficiary of a price break on the part of the seller. On the contrary, the record shows, as the examiner found, that Super Test purchased unbranded gasoline at a price fixed by a contract establishing a variable price formula based upon the current published low Gulf Coast price for unbranded gasoline with certain added factors such as freight and handling. The record indicates that Super Test clearly was not receiving a special or "lower" price insofar as distributors of unbranded gasoline similarly situated were concerned. Under these circumstances, Super Test was clearly not receiving a special price or discriminatory price for its gasoline, which, as has been noted, was five octanes lower than Sun's product. The examiner's finding that the gasoline purchased by Super Test is unbranded and of lower quality and inevitably sold for several cents less at the wholesale level than the tank wagon price for major brand gasoline is not disputed. Although McLean paid Sun approximately three cents more than Super Test was charged by Cities Service, because of the inherent differences in the two fuels their prices cannot be compared, purely arithmetical considerations apart, for the purpose of determining whether one of them is a "lower price" contemplated by Section 2(b).

Furthermore, while the Supreme Court opinion at first glance seems to use the terms "lower price" and "price cut" interchangeably, it would be unrealistic to hold that a seller may discriminate in price so his customer may lower prices to compete with another retailer who apparently is paying his supplier a nondiscriminatory price and, for all practical purposes, the usual price for those purchasers similarly situated for products of an inferior grade and quality. Here there was no enabling price cut by Cities Service to enable Super Test to lower its prices. It would seem axiomatic in situations of the kind with which we are confronted here that unless the other supplier *cuts* prices to enable his customer to charge lower prices, the kind of competition contemplated by the Section 2(b) defense is simply nonexistent.

The final issue, then, is whether the complaint should be dismissed on administrative grounds despite the violation of law documented by the record. In my view, on this point we should defer to the Commission's decision in 1959 [55 F.T.C. 955], issuing an order to cease and desist on the basis of the violation then documented in the record, which has been affirmed by the Supreme Court. Certainly, none of the evidence brought out on remand, in which Sun failed to establish the meeting of competition defense, justifies the reversal of those Commissioners then sitting, who in 1959 decided that the public interest re-

quired the issuance of an order to cease and desist. While I support the Commission's broad inquiry into the marketing problems of gasoline, the scope of that inquiry has yet to be fully defined and there is no assurance that the Commission will in fact be in command of data giving us a clearer insight into the problems of the industry than that information which is now embodied in the records of the litigated cases.

On the last question presented on this remand, I agree with the examiner that the scope of the order should be limited to the sale of gasoline, since the record does not indicate a likelihood of illegal pricing activity on the part of the respondent with respect to other products.

Finally, the Fifth Circuit has already given considerable time and attention to this proceeding. It would have been appropriate, therefore, it seems to me, to have advised the Court of our findings on the issues giving rise to the remand.

SEPARATE STATEMENT

BY REILLY, *Commissioner*:

I join with the majority of the Commission in setting aside the initial decision and dismissing the complaint; however, because of the importance of this case, I find it necessary to make my position as clear as possible.

This matter has been before the Supreme Court and remanded to us in circumstances suggesting that the reviewing courts would not question the propriety of an order based on appropriate findings. This being so, the question why the Commission should dismiss this complaint on administrative grounds requires a carefully considered answer.

Let me state at the outset, that to accuse the Commission of avoiding a difficult legal and policy problem here by seizing upon a procedural or administrative escape hatch is captious and overly simplistic.

On the contrary, to dispose of this case on any but an administrative basis when the Commission now has reason to believe that it is symptomatic of problems characterizing the entire gasoline distribution system would be an abdication of the Commission's duty " * * to develop that enforcement policy best calculated to achieve the ends contemplated by Congress * * *" (*Moog Industries v. F.T.C.*, 355 U.S. 411, 413). Uncritical and mechanical enforcement of the Robinson-Patman Act in an individual case is not always the most desirable

course in achieving these ends, particularly when the underlying economic problem is industry-wide.

This is especially true of the gasoline industry where product distribution has distinctive aspects setting it apart from the systems of distribution prevailing in other industries. It goes without saying that the Robinson-Patman Act, designed though it is for plenary application, lends itself more readily to certain historic forms of distribution than to others.

In product distribution, generally the competitive conflict emerges at various levels of distribution, distributor versus distributor, jobber versus jobber, retailer versus retailer. In the marketing of gasoline however, competition is joined at the retail level and its impact as well as its fruits are transmitted back up the distribution ladder. Seldom does distributor compete with distributor for retailers or manufacturers for distributors. There is no easy and casual switching back and forth. Investment and brand commitment insure that competing brands move through their own channels of distribution in isolation from one another until they reach the retailer where they compete for the consumer dollar. This tends to inject the manufacturer and distributor into the retail fight giving them a stake both in the retail price and in the retailer's prosperity. This unusual character makes it more difficult to apply the Robinson-Patman Act to this industry.

I want to repeat that this Commission is not unaware that the Robinson-Patman Act was designed for general application without regard to the eccentricities of individual industries; but I do feel that the Act lends itself to more facile application in some areas than in others and that the Commission can most effectively protect the public interest in certain instances by resorting to remedial instruments available to it more precisely applicable to the peculiarities of the industry.

Moreover, just as the Commission's responsibilities are best discharged by a rational selection of an appropriate remedy so also it is best discharged when the Commission acts in particular instances not *in vacuo* but after the most careful deliberation as to the best course to pursue.

Sometimes the necessity for alternative approaches emerges prior to issuance of complaint. At others, the Commission only latterly has been made aware that the adjudicative approach is not necessarily the best one.

The competitive problems confronting the Commission in this case, that is, the anomalies arising out of the peculiar system of distribu-

tion in the gasoline industry, have found expression in an industry-wide clamor for a broad administrative approach. These problems have taken on a degree of urgency which may not have been apparent when the complaint was originally issued in this case. And the reaction of the industry finds its counterpart in reactions of the Commission and the courts.

On December 28, 1964, the Commission dismissed the complaints in four matters involving large oil companies¹ on the ground that orders in those cases could not provide complete or effective solution to the competitive problems of the gasoline industry.²

In *The American Oil Company v. F.T.C.*, 325 F. 2d 101, *cert. denied*, 6/1/64, the Court of Appeals for the 7th Circuit dwelt at some length upon the competitive problems in this industry. Of course, we are not applying that case to this, particularly to the extent that it was concerned with the question of competitive effect. On the contrary, competitive effect is not being questioned here. Here, the Court of Appeals for the 5th Circuit and the Supreme Court in addressing themselves to propriety of the 2(b) defense implicitly accepted as sufficient the finding of the Commission that a *prima facie* case had been made out with the requisite showing of competitive effect. Nonetheless, the problem presented in *American* is symptomatic of the competitive aberrations arising out of the peculiar distribution system in the oil industry.

As pointed out in our final order in the four oil cases,¹ the Commission has undertaken a broad inquiry into the problems of competition in the marketing of gasoline. This inquiry has been undertaken not only in response to the Commission's conviction that this is the best approach to resolution of the problems plaguing this industry but also in response to the insistent requests of many and various groups in the industry itself as well as Members of Congress and of the consuming public. I, of course, share the Commission's concern with this problem and feel that an industry-wide inquiry is the best method for attempting to resolve these problems.

I think it especially important to emphasize that the Commission's decision in this case and my views expressed herein should not in any way be taken as a determination to avoid the adjudication of specific cases. This after all is the Commission's ultimate deterrent and therefore absolutely necessary in discharging its statutory obligations. Furthermore, there are some areas wherein the Commission's choice of

¹ *Pure Oil Company*, D. 6640 [66 F.T.C. 1336], *The Texas Company*, D. 6898 [66 F.T.C. 1336], *Standard Oil Company (Indiana)*, D. 7567 [66 F.T.C. 1336], *Shell Oil Company*, D. 8537 [66 F.T.C. 1336].

² Order of dismissal December 28, 1964.

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remedies as between adjudication and administration is far less flexible, for example, in those areas of *per se* antitrust violations proscribed under the Sherman Act and the Federal Trade Commission Act.

In the area of price discrimination, however, I feel that flexibility is necessary and can be appropriately employed.

Having decided that the complaint should be dismissed for the reasons cited above, nevertheless, the Commission, it seems to me, is compelled by virtue of the Supreme Court's opinion and the remand order of the Court of Appeals to consider the substantive issues confronting it in this case. To do otherwise would, as Mr. Justice Harlan stated, "* * * leave unanswered as many questions as we have resolved."³

This case raises immensely important questions under the Robinson-Patman Act and the Commission's duty in administering that Act is not entirely discharged by a determination to seek an administrative solution leaving the business community and the public in the dark on the legal and factual issues involved.

Prescinding from the central rule of law in the Supreme Court's opinion that Sun cannot assist its dealer in meeting the dealer's competition, both the Supreme Court in a footnote to its opinion and the Court of Appeals in its remand order raised the question whether the 2(b) defense may not be available to Sun upon a showing that Super Test is an integrated wholesaler-retailer or, if exclusively a retailer, one who receives a price concession from its supplier.

Let me state at the outset that I am in complete agreement with the hearing examiner's findings of fact on remand that Sun has failed to show either of these preconditions. I do not believe however that the Commission should stop there and leave unanswered the central question whether, if the preconditions are met, a 2(b) defense is available. Since the rigorous effect upon competition resulting from the application of this question to the realities of gasoline distribution in part motivated my joining in the administrative disposition of this matter, I feel it necessary to say a word about it.

Sun can rebut a showing of price discrimination, according to Section 2(b), by "* * * showing that [its] lower price * * * was made in good faith to meet an equally low price of a competitor." Thus, *good faith meeting of a competitor's price* is the operative language for present purposes and it remains only to apply it to the preconditions of integration and price concession.

³ *F.T.C. v. Sun Oil Company*, 371 U.S. 505, 530.

If Super Test were integrated with its wholesaler-supplier, Sun would be confronted with an indivisible wholesaler-retailer competitor whose price it could meet through price concessions to its dealers. Since the only price existing in these circumstances would be the wholesaler-retailer's pump price, Sun need only show that price and the fact of integration to justify a price concession to its dealer which *at the dealer's election* would enable the latter to post a competitive price. Sun, in granting the concession to its dealer, would be *meeting* the price of its competitor, the wholesaler-retailer, at the only point of competitive encounter, the pump.

Sun could not of course directly set the actual pump price posted by *its* dealer for fear of being charged with price fixing, and, in granting the concessions, Sun would be relying on its dealer's desire for survival which would prompt the dealer to post a price competitive with his and Sun's competitor's posted pump price.

The amount of Sun's concession to its dealer would be determined by the difference between Sun's dealer's price and the lowered price of the wholesaler-retailer. The price break given to the dealer could not in any way reflect a narrowing of any historic differential occasioned by brand or octane differences.

A more difficult problem is presented in the question whether and to what extent Sun may meet a price break granted to an independent Super Test by its supplier by giving equivalent price concessions to its, Sun's, dealer.

Assuming no integration of Super Test and its supplier, Super Test's price is strictly a retailer's price and Sun cannot, as the Supreme Court has said, assist its dealer in meeting a lowered price posted by the dealer's competitor; in this case Super Test.

To the extent however that Super Test's lowered pump price is made possible by a special price concession from its supplier, Sun can match that price concession by one of equivalent size to its dealer. In such a case Sun's price concession to its dealer is a competitive response at the wholesale level and it is at that level that Sun's competition is located.

Because such a response is so readily susceptible of the interpretation that it is a subsidy to assist its own dealer in meeting a retail price, Sun has an immense burden in these circumstances in establishing the good faith required by the statute. If the only fact available to Sun is a lower pump price posted by Super Test, Sun cannot in good faith grant a concession to its dealer since it does not know whether the lower competitive retail price reflects greater efficiency or lowered profit margin on the part of the retailer or historic octane

and brand differentials. Any one of these considerations would arise out of retail pricing and of course it is only wholesale pricing that Sun can meet.

Sun's difficulty is further compounded by the possibility that the lower posted pump price reflects some combination of the above factors plus a wholesale price concession. In such a case Sun, since it can only meet and not beat a competitor's, that is, wholesaler's, price, would have the obligation of determining what part of the lower posted price was accounted for by a wholesale price concession.

Moreover, in meeting a wholesaler-competitor's price concession to its dealer, Sun cannot attach strings to the price break given its own dealer. It can do no more than grant the concession, trusting that its dealer will meet his competitor by lowering his own pump price. Sun cannot engage in vertical price fixing by conditioning the price concession upon an agreement by its dealer to establish a specific price level.

Sun's burden in these circumstances is considerably heavier than in the ordinary 2(a) case, largely because the unique character of gasoline marketing makes for a somewhat anomalous application of the 2(b) defense.

In most industries price competition at the wholesale level is governed by a desire to retain one's own customers. Other things being equal, retailers will buy from the wholesaler with the lowest price. In gasoline marketing however the likelihood of such an event is remote owing to investment and brand commitment ties that tend to bind retailers to their suppliers. In this industry the wholesaler meets a lower competitive price in order to avoid loss of sales occasioned by decreased demand at the retail level owing to its dealers' higher priced product. Loss of retail sales will of course induce loss of wholesale sales. The ultimate purpose in both conventional as well as gasoline marketing is of course the same, viz., preservation of sales volume either through keeping one's customers or keeping them competitive. However, achieving this result is, as I have stated, much more complicated in the case of gasoline for here the wholesaler must tread a narrow path in order to avoid appearing to assist a retail dealer in meeting his competitor's price.

In fact, the burden upon the wholesaler in such a case is so great as to warrant consideration of this entire matter by the Commission in its projected hearings relating to the marketing of gasoline.

It is for this reason that I concur in the administrative dismissal of this complaint.

Complaint

FINAL ORDER

The Court of Appeals for the Fifth Circuit, on October 9, 1963, with the consent of the Commission, remanded this proceeding with directions that the Commission reopen the proceeding and determine, *inter alia*, "whether an order to cease and desist is warranted." The Commission has determined that entry of a cease and desist order at this time is not warranted. *Cf. Pure Oil Co.*, F.T.C. Docket 6640 [66 F.T.C. 1336], *The Texas Co.*, F.T.C. Docket 6898 [66 F.T.C. 1336], *Standard Oil Co. (Indiana)*, F.T.C. Docket 7567 [66 F.T.C. 1336], *Shell Oil Co.*, F.T.C. Docket 8537 (decided December 28, 1964) [66 F.T.C. 1336]; *American Oil Co. v. F.T.C.*, 325 F. 2d 101 (7th Cir. 1964).

It is ordered, That the initial decision of the hearing examiner filed June 9, 1964, be, and it hereby is, set aside and that the complaint be, and it hereby is, dismissed.

Commissioner Dixon not participating. Commissioner Reilly concurs and has filed a separate statement of his views. Commissioner MacIntyre dissented for the reasons set forth in his dissenting opinion.

IN THE MATTER OF

MARGO'S, INC., TRADING AS MARGO'S-LA MODE, ETC.