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Complaint

It is further ordered, That the charges of Count I of the complaint with respect to the Carter, Brown, Independent Metals, and Hyde acquisitions and the charges of Count II of the complaint be, and they hereby are, dismissed.

IN THE MATTER OF

HUMBLE OIL & REFINING COMPANY

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

Docket 8544. Complaint, Nov. 5, 1962—Decision, May 28, 1965

Order dismissing complaint charging a Texas oil and refining company with illegally discriminating in price between competing resellers of its gasoline in certain areas of New York and South Carolina.

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, Section 13), as amended, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Humble Oil & Refining Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 1216 Main Street, Houston, Texas.

PAR. 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 various other petroleum products throughout some forty-five States of the United States and the District of Columbia.

PAR. 3. The Respondent Humble Oil & Refining Company, in the marketing of its gasoline and other petroleum products, operates through Central, Eastern Esso, Southwest and Southeast Esso Regions and sells within each of the areas of said regions gasoline under brand names carrying the designation "Esso," "Humble" or "Enco." Specifically, for example, in the eastern parts of the country, the respondent operates through the Eastern Esso Region and Southeast Esso Region and sells its gasoline under the brand designated "Esso." Respondent markets its gasoline and other petroleum prod-

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ucts in the aforementioned forty-five State area and the District of Columbia through its own company-owned and operated stations, as well as under contracts with independent dealers and independent lessee—dealer stations. In the latter two categories, respondent has entered into dealer contracts now in force and effect with service station dealers, pursuant to the provisions of which respondent sells and delivers to such dealers their respective requirements of respondent's brands of gasoline during the terms of such contracts.

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, located in various States across State lines to bulk stations and other distributing points within the forty-five State area, and the District of Columbia, in which it does business, from which said gasolines thence are sold and distributed to dealers selling the gasolines at retail under the Esso, Humble or Enco brand names. 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 retail dealers purchasing said gasoline in the forty-five States and the District of Columbia. All of said purchases by said 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 forty-five State area and the District of Columbia, are then offered for resale to motorists and others in the aforementioned area.

PAR. 5. In the course and conduct of its said business in commerce, respondent Humble Oil & Refining Company has sold, and now sells, its gasolines and various other petroleum products to purchasers thereof, some of whom have been and now are in competition with each other in the resale and distribution of such products.

PAR. 6. Respondent, in the course and conduct of its business, has discriminated in price between different purchasers of its gasoline 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 May 1960, respondent has sold and is continuing to sell gasolines to certain dealers located within the area of the Southeast Esso Region, among others, 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. For example, certain dealers located in Morven and Rockingham, North Carolina; Chesterfield, Ruby, and Pageland, South Carolina,

within the Southeast Esso Region, were charged a lower price by the respondent than was charged to competing purchasers of gasolines of the same grade and quality.

PAR. 7. The effect of the aforesaid discriminations, or any appreciable part thereof, has been or may be substantially to lessen competition or to destroy or prevent competition with those retail dealers of respondent's gasolines who received the lower prices, in the resale of such gasolines at retail in the States of North Carolina and South Carolina 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. Anthony Zabiegalski, Jr., Mr. Harold Brandt, and Mr. John F. Reilly supporting the complaint.

Mr. William Simon, Mr. J. Wallace Adair, and Mr. A. Duncan Whitaker, of Howrey, Simon, Baker & Murchison, Washington, D.C., Mr. Carleton H. Endemann and Mr. Robert T. Tate, New York, N.Y., and Mr. Robert B. Jennings, New Orleans, La., for the respondent.

INITIAL DECISION BY HARRY R. HINKES, HEARING EXAMINER

FILED MARCH 31, 1965

STATEMENT OF THE CASE

The complaint in this proceeding, issued November 5, 1962, charged that respondent sold gasoline to certain dealers located within the area of the Southeast Esso Region, among others, beginning on or about May 1960, at prices lower than it charged other competing retail purchasers in violation of Section 2(a) of the amended Clayton Act (15 U.S.C. Section 13(a)). In the months that followed the issuance of the complaint, pretrial procedures resulted in the disclosure of specific incidents of alleged price discrimination in five separate areas, three in the Carolinas and two in New York.

Hearings were held in New York City and Charlotte, North Carolina, and concluded on November 2, 1964. Briefs were submitted by the parties, as well as proposed findings. To the extent that the findings below are inconsistent with those proposed by counsel, such proposed findings are deemed rejected as not supported by the record, or immaterial. Both parties have moved to strike certain evidence and/or reinstate rejected evidence. These motions are denied.

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During the trial of the case, the five areas of alleged price discrimination were reduced to four. The State Line Grocery-Pageland case involved alleged price discrimination at various times in 1961 between "favored" State Line Grocery, purchasing gasoline not from respondent but from a jobber-customer of respondent, and two "disfavored" Esso stations in Pageland, South Carolina. Respondent moved to strike evidence offered by complaint counsel in support of this portion of the price discrimination suit on the ground that State Line Grocery was not a purchaser from respondent within the meaning of Section 2(a) of the Robinson-Patman Act. The hearing examiner's Opinion and Order of October 3, 1963, upheld the position of the respondent in this respect.¹ Consequently, the four price discrimination cases for disposition at this time are:

1. The Cheraw-Bennettsville case, alleging price discrimination during the last half of 1961 between certain "favored" Esso dealers in Chesterfield and Cheraw, South Carolina, and certain "disfavored" Esso dealers in Bennettsville, South Carolina.

2. The Rock Hill-York case, alleging price discrimination during the same period between certain "favored" Esso dealers in Rock Hill, South Carolina, and certain "disfavored" Esso dealers in York, Hickory Grove, and Blacksburg, South Carolina.

3. The Fromberg case, alleging price discrimination during 1960 and 1961 between "favored" Esso dealer Fromberg and certain "disfavored" Esso dealers on Long Island, New York.

4. The Merry Twins case, alleging price discrimination between May 1960 and June 1962 between "favored" Esso dealer Merry Twins and certain "disfavored" Esso dealers in Queens, New York City.

FINDINGS OF FACT

I. The Respondent

1. Respondent Humble Oil & Refining Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 800 Bell Avenue, Houston, Texas (Admitted in Answer at p. 1).

2. From January 1, 1960, to the date of the complaint, respondent engaged in the distribution, offering for sale, and sale of gasoline in the District of Columbia and various States of the United States.

¹ Complaint counsel's request for reconsideration of the hearing examiner's ruling on this issue is denied.

With the opening in 1960 of service stations in Ohio, Oklahoma, Utah, Nevada, and California, respondent was marketing its gasoline in 40 States (CX 3, at pp. 15, 16). In 1961, respondent entered the five southeastern States of Georgia, Alabama, Mississippi, Florida, and Kentucky (CX 4, at p. 3; Stipulation, Tr. 36) and thus expanded its gasoline retail marketing operations into 45 States of the United States and the District of Columbia (CX 4, p. 7; CX 5, p. 8).

3. Respondent, in the marketing of its gasoline and other petroleum products, operates through Eastern Esso, Southeast Esso, Central, and Southwest regions and sells within each of the areas of said regions gasoline under the Esso or Enco brand names. In addition to selling its gasoline under the Esso and Enco brand names, respondent sold gasoline in certain States of the United States under the Humble, Carter, Oklahoma, and Pate brand names (Stipulation, Tr. 36, 37).

4. Service stations selling products of respondent have identification signs using the word Humble (Answer to Complaint, p. 2).

5. Respondent markets its gasoline and other petroleum products in the aforementioned forty-five State area and the District of Columbia through company-owned and operated stations (Admitted, not denied in Answer) as well as dealers and lessee-dealers. Respondent utilizes various types of agreements with its customers including equipment leases (CX 9 A, B; CX 18 A, B), motor fuel sales contracts (CX 10), and leases (CX 11 A, B, C, D; CX 12 A, B, C, D; CX 19 A, B, C; CX 281 A-E; and CX 283 A, B, C).

6. Respondent sells motor fuel of like grade and quality to its customers in the areas where it markets its motor fuels (Answer, p. 4; Response to Request for Admissions, dated June 10, 1963, pp. 1-3; Respondent's Response to Request for Admissions, dated August 5, 1963, pp. 1-2).

7. Respondent produces motor gasoline at its refineries located in Baton Rouge, Louisiana; Everett, Massachusetts; Billings, Montana; Bayway, New Jersey; and Baytown, Texas (Stipulation, Tr. 36). Respondent ships or otherwise transports, or causes to be shipped or otherwise transported, gasoline from its refineries across State lines to terminals, bulk stations, and other distributing points (Answer to Complaint, p. 3). From its terminals, bulk stations, and other distributing points located in the States within which it does business, including New York, North Carolina, and South Carolina, respondent distributes and sells said gasolines at retail under the Esso brand along the eastern seaboard and the southeast, including the States of New York, North Carolina, and South Carolina (Answer to Complaint, p. 3; Stipulation, Tr. 36-37). Said gasolines, after transporta-

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tion and delivery into the forty-five State area and the District of Columbia, are offered for resale to motorists and others in the forty-five State area and the District of Columbia (CX 5, p. 8) including the States of New York, North Carolina, and South Carolina (Answer to Complaint, p. 3).

II. The Chesterfield-Cheraw-Bennettsville Case

8. From May 10, 1960, to July 14, 1961, the respondent charged the same prices and granted the same allowances to its dealers located in Chesterfield, Cheraw, and Bennettsville, South Carolina. During the last half of 1961, the Esso dealers in Chesterfield and Cheraw purchased gasoline from respondent at lower prices than the respondent's dealers in Bennettsville.

The following table shows the allowances in effect to respondent's dealers in these towns. To arrive at the dealer's cost, the specified allowance in effect at a particular date is deducted from his tank-wagon cost of 15.8 cent per gallon, exclusive of taxes.

TABLE I.—*Allowances in effect to respondent's dealers in named towns*

Period	Days	Chesterfield	Cheraw	Bennettsville	Chesterfield dealers favored over Bennettsville dealers	Cheraw dealers favored over Bennettsville dealers
June 15-19, 1961.....	5	1.6	1.6	0	1.6	1.6
June 20-21, 1961.....	2	3.3	3.3	1.6	1.7	1.7
June 30, 1961.....	1	1.6	0	0	1.6	0
July 1-3, 1961.....	3	1.6	1.6	0	1.6	1.6
July 4-19, 1961.....	16	5.3	3.3	1.6	3.7	1.7
Oct. 3-4, 1961.....	2	5.3	5.3	0	5.3	5.3
Nov. 18-24, 1961.....	7	2.4	0	0	2.4	0
Nov. 25-27, 1961.....	3	3.3	1.6	1.6	1.7	0
Nov. 28, 1961.....	1	3.3	7.1	1.6	1.7	5.5
Nov. 29-30, 1961.....	2	8.0	8.0	1.6	6.4	6.4
Dec. 1, 1961.....	1	8.9	10.9	1.6	7.3	9.3
Dec. 2-5, 1961.....	4	8.9	10.9	7.1	1.8	3.8
Dec. 6-27, 1961.....	22	9.9	10.9	7.1	2.8	3.8
Total.....	69					

(CX 1)

9. Generally speaking, when the gasoline dealers in Chesterfield, Cheraw, and Bennettsville received an allowance they would drop their "posted" (retail) price at their pumps. Thus, with a 3.3 cent

allowance, the dealer would usually reduce his pump price by four cents (Tr. 424-25, 453, 482, 510-11, 576).

10. Chesterfield, Cheraw, and Bennettsville are located on State Highway SC 9. Bennettsville is approximately 15 miles east of Cheraw. Chesterfield is approximately 12 miles west of Cheraw. SC 9 originates in the western part of South Carolina, travels east to Bennettsville, then southeast to the Atlantic coast (CX 21, 1464 B; Tr. 435, 454, 483).

11. According to the United States Census for 1960, the population of Cheraw is 5,171; of Chesterfield, 1,532; and of Bennettsville, 6,963.

12. The J. P. Stevens Company's Delta Finishing Plant in Cheraw employs about a thousand people, several hundred of which live in or around Bennettsville and Chesterfield. This plant is located two or three miles northeast of Cheraw, at the intersection of US 1 and SC 9. The Esso stations in the Cheraw area are located in downtown Cheraw or west of town, at least three miles from the Delta plant and in the opposite direction from Bennettsville. Commuters from Bennettsville to the Delta plant would not pass any "favored" Esso station in Cheraw unless they went out of their way (Tr. 515). There were a number of stations selling other brands of gasoline along the normal commuting route of such travelers (Tr. 4285, 4287, 4553, 4558). It was unlikely for such commuters to drive from the plant to downtown Cheraw before or after work for the sole purpose of buying gasoline because of the congested traffic crossing the only bridge connecting the two areas (Tr. 4755).

13. The only other large employer in Cheraw was the James Fabrics plant employing about 500 people in 1961 (Tr. 480). This plant was located west of Cheraw on SC 9. Bennettsville commuters would pass the Hurst and Kimrey Esso stations (Tr. 451, 481).

14. Cheppell Hurst, a "favored" dealer in Cheraw, testified that 70 percent of his business was transient, originating from Bennettsville, Chesterfield, Pageland, New York, and "on up there in the North" (Tr. 451). Similarly, Leon Chestnut, another "favored" dealer in Cheraw, testified that 50 percent of his business is transient (Tr. 421). B. B. Sanders III, a "disfavored" dealer in Bennettsville, testified that 25 percent of his business is transient, but that during the summer 40 percent is transient. B. B. Sanders, Jr., the other "disfavored" Esso dealer in Bennettsville, stated that 35 to 40 percent of his business was with transients (Tr. 502, 558).

15. According to Mr. Hurst, if Bennettsville dealers posted retail prices of four cents below his price in Cheraw, it would "be beginning

to tell on us" (Tr. 471). But his posted prices were lower than those of Bennettsville dealers. He admitted that he noted no difference in the number of his Bennettsville customers when *his* posted prices were lower than the Bennettsville prices (Tr. 457). Mr. Chestnut testified that a four-cent differential would necessitate assistance (Tr. 448). Robert Kimrey, another "favored" dealer in Cheraw, thought that a three-cent differential, fifteen miles away in Bennettsville, would have "very little" effect, that "Maybe five cents, maybe we'd have some reflection, but certainly smaller I don't believe" (Tr. 496).

16. The "iffy," "maybe" testimony of the "favored" dealers has little probative value in determining whether Bennettsville dealers were hurt by the lower prices in Cheraw.

17. Turning to the two "disfavored" dealers in Bennettsville, Sanders III stated that a price differential of more than three cents affected his business (Tr. 510); Sanders Jr. lost gas sales if the difference was more than two cents (Tr. 562). Both claimed to have lost business to Cheraw dealers because of the low price in Cheraw (Tr. 505-07, 560). But between June 15 and November 28, 1961, respondent's allowances to dealers in Cheraw did not exceed those given Bennettsville dealers by more than 1.7 cents, except for two days in October. Between November 28 and December 26, the wholesale price differences between Bennettsville and Cheraw exceeded 3.8 cents on only four days (See Table I, *supra*). Sanders III stated quite positively that he did not know of losing any gasoline sales to *Esso* dealers in Cheraw in 1961 because of lower price (Tr. 505). In fact, he could name only two customers who told him they had *ever* bought *any* brand of gasoline in the *vicinity* of Cheraw because of lower prices. Neither the station nor the year of purchase was identified (Tr. 505). Nor did Sanders Jr. know of a single customer who had purchased gasoline at *any* station in Cheraw because of price in 1961, but only that they "could have" (Tr. 561, 571, 588). Sanders Jr. testified that a Mr. Herndon had bought gasoline in a neighboring town at a lower price. He had shown Sanders his *Esso* credit card of purchase (Tr. 564). This testimony was contradicted by Mr. Herndon himself who stated that he once bought at an American Oil station and then only 9.5 gallons of gasoline (Tr. 4114). Sanders Jr. also testified that two school teachers bought *some* brand of gasoline from a *nearby* town instead of from him because of lower prices there (Tr. 567). The teachers themselves, however, testified that they

never bought gasoline from any one other than Sanders Jr. except when about to run dry (Tr. 4119-22).

18. The Sanders' testimony of loss of business is further watered down. A witness for the respondent testified that Sanders III bought an average of 8,000 gallons per month during the first 11 months of 1961, but 20,000 gallons in December 1961 (Tr. 4208). Similarly, the average monthly purchases of Sanders Jr. was 3,400 gallons, but during December he purchased 5,899 gallons (Tr. 4208). This testimony was not contradicted.

19. The testimony of these witnesses as to their alleged injury is not strengthened by the rest of their testimony which exhibits a certain unreliability. Thus, Sanders III disclosed that he purchased his gasoline from respondent and two other oil companies. His gasoline sales, however, from an Esso pump, were made without disclosing the fact that the gasoline might not be the Esso brand (Tr. 533). Sanders Jr. stated that he purchased both Esso and Pure gasoline but claimed that his 1961 purchases of Pure gasoline were less than 4,000 gallons (Tr. 612). Pure Oil Company records, however, indicate that his 1961 purchases of Pure gasoline totaled 323,091 gallons (RX 77).

20. The only other evidence possibly indicative of the effect of price differentials upon sales volumes of Cheraw dealers vis-a-vis the Bennettsville dealers is the statement of Mr. Hurst of Cheraw to the effect that his average monthly sales of gasoline in 1961 were only 32,500 gallons (Tr. 458), but his December 1961 purchases were over 50,000 gallons (CX 1). In view of the apparent increase in gallonage experienced by Sanders III and Sanders Jr. in December 1961, it is not reasonable to conclude that the increase experienced by Hurst was at the expense of the "disfavored" dealers in Bennettsville.

21. Nor is complaint counsel's case helped much by Mr. Smith. That witness, called by complaint counsel in rebuttal, was an Esso dealer in Chesterfield. He testified that if he were receiving an allowance of eight cents per gallon as against Bennettsville dealers, 27 miles away, getting 1.6 cents per gallon, he "thought I had an advantage over them . . . that people that was going somewhere, *maybe* they would be looking at prices along the road; *maybe* where they would turn, well, naturally, it would be convenient to pull up at one place where the gas was lower . . . I think I would; *probably* in a small way you would probably have some advantage" (Tr. 4876).

22. Motorists and other retail gasoline customers are price conscious and will take advantage of lower gasoline prices. That, however, is not their only consideration—station facilities, station location, service, and the accident of emergency also contribute to their choice (Tr. 4252-56).

23. It is, therefore, concluded and found that the price differentials imposed upon the respondent's dealers in Cheraw and Bennettsville were intermittent and brief when they were meaningful; that the record is deficient in demonstrating a loss of business on the part of the alleged "disfavored" dealers of Bennettsville, and that the dealers of Cheraw were not in significant competition with the dealers of Bennettsville because of the distance between them, which made trips from Bennettsville to Cheraw solely for the purpose of buying the cheaper gasoline uneconomical and because of the spasmodic nature of the price differentials which made it unlikely that motorists visiting Cheraw for other reasons would purchase gasoline while there. Even Bennettsville residents working in Cheraw did not necessarily find it convenient to deal with the Esso dealers in Cheraw. The traffic between these towns on the part of the motorists going to the beach during the summer, which might account for some significant price shopping, as argued by complaint counsel, carries little weight here since significant price differentials did not develop until November 1961 when obviously there was little beach traffic. Thus, the record is deficient in showing that motorists generally did shift their business to the Cheraw Esso dealers during periods of substantial price differences. The record is similarly deficient in proving that they would have done so.

III. The Rock Hill-Hickory Grove-York case

24. During the period beginning May 10, 1960, through June 15, 1961, the respondent's dealer-customers located in York, Hickory Grove, and Rock Hill, South Carolina, were charged the same prices by the respondent (CX 1465). From July 4, 1961, through December 1961 Humble sold its gasoline to Esso dealers in York and Hickory Grove at substantially higher prices than those charged respondent's customers in Rock Hill.

25. The following table shows the allowances in effect to respondent's dealers in these towns. To arrive at the dealers' cost, the specified allowance in effect at a particular time is deducted from the tankwagon cost of 15.8 cents per gallon, exclusive of taxes.

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TABLE II.—Price allowances (TVA's) in effect during part of 1961 in cities of Rock Hill, York, and Hickory Grove, S.C.

Period	Days	Rock Hill	York	Hickory Grove	Rock Hill favored over York and Hickory Grove
		<i>Cents</i>	<i>Cents</i>	<i>Cents</i>	<i>Cents</i>
July 4-7, 1961.....	3	9.3	7.3	7.3	2.0
July 7-13, 1961.....	6	9.3	9.3	9.3	0
July 13-18, 1961.....	5	11.3	9.3	9.3	2.0
July 18-19, 1961.....	2	11.3	11.3	11.3	0
July 27-Aug. 3, 1961.....	8	2.4	0	0	2.4
Aug. 3-8, 1961.....	5	2.4	2.4	2.4	0
Aug. 19-22, 1961.....	4	3.3	0	0	3.3
Aug. 26-30, 1961.....	4	3.3	0	0	3.3
Aug. 30, 1961.....	1	3.3	0	0	3.3
Aug. 31-Sept. 6, 1961.....	7	5.3	0	0	5.3
Sept. 13-Oct. 4, 1961.....	22	3.3	0	0	3.3
Oct. 13-24, 1961.....	12	3.3	0	0	3.3
Nov. 25-28, 1961.....	3	*2.4	3.3	3.3	1.0
		†4.3			
Nov. 28-30, 1961.....	2	8.9	3.3	3.3	5.6
Nov. 30-Dec. 7, 1961.....	8	8.9	4.3	4.3	4.6
Dec. 7-27, 1961.....	20	8.9	5.3	5.3	3.6
Total.....	112				

*City.

†Outside.

No TVA's in effect in above areas during balance December 1961.

[All information taken from CX 1.]

26. Generally speaking, when the gasoline dealers in York, Rock Hill, and Hickory Grove received an allowance they would drop their "posted" (retail) price at their pumps. Thus, with a 3.3 cent allowance the dealer would usually reduce his pump price by four cents (Tr. 79, 127, 150, 1115).

27. Rock Hill, South Carolina, is an industrial city with a population of more than 29,000 (RX 49). The largest single employer there is Rock Hill Printing and Finishing Co., employing three to four thousand persons during 1961 (Tr. 41, 103, 4270). Many residents of York and Hickory Grove are employed in Rock Hill (Tr. 116, 1109, 4901).

28. York, South Carolina, is thirteen miles west of Rock Hill via State Highway 5 (Tr. 64, 104, 1103, CX 21). Its population in 1961 was 4,700 (RX 49).

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29. Hickory Grove, South Carolina, is 25 miles west of Rock Hill, via State Highways 5, 49, and 211 (Tr. 115). Its population in 1961 was between two and three hundred persons (Tr. 130; RX 49).

30. Sewell Brown was an Esso station operator in York during the last half of 1961 (Tr. 1087). His employee, Carl M. Green, testified that customers of that station worked and shopped in Rock Hill during 1961 (Tr. 4901). Mr. Green also stated that travelers from York to Rock Hill "would naturally buy their gas there in Rock Hill" (Tr. 4902). At no point, however, did he indicate that such customers patronized any Esso station in Rock Hill. In fact, the stations in Rock Hill most frequently patronized by Green's customers working at the printing plant were Sinclair and Texaco stations which customarily posted prices below the prevailing Rock Hill retail prices (Tr. 4919-22). Moreover, Esso prices were usually last to go down and first to go up (Tr. 4923). Mr. Brown himself was not asked whether he lost gasoline customers in 1961 because of lower prices in Rock Hill. He could not recall whether any customer even told him that his prices were higher (Tr. 1111). When asked specifically about 1961, he "was not paying attention to the prices of gasoline then" (Tr. 1135); he "might" have requested price assistance once during the last half of 1961, and if he did, he received it within a day or two (Tr. 1112, 1115). Nor did Mr. Brown notice any decline in his gasoline sales during the last half of 1961 other than the normal fluctuation from month to month (Tr. 1111).

31. In sum, therefore, it cannot be found that Brown's station in York suffered competitive injury by the loss of business to Rock Hill Esso stations purchasing gasoline at a lower cost from the respondent.

32. Leon Bratton, an allegedly "disfavored" Esso dealer in Hickory Grove, testified that about 100 of his regular customers worked in Rock Hill and that some of them complained to him during 1961 because his prices were substantially higher than those in Rock Hill (Tr. 116, 138); some of his customers would be attracted to Rock Hill if the price differential were four cents or over (Tr. 125); some of his customers would be attracted to grocery stores selling gasoline and located between York and Rock Hill if the differential were only two cents (Tr. 147). Nevertheless, his gallonage throughout 1961 remained fairly constant at about 11,000 gallons per month—an increase of 500 gallons per month over the last half of 1960 (Tr. 130). He could not, however, identify any customer whose purchases he

lost to Rock Hill Esso dealers in 1961 (Tr. 133), nor did he know that they actually purchased in Rock Hill (Tr. 117, 122, 138), let alone at any Esso station. As he explained, "It could have been many other brands as well" (Tr. 117).

33. Three "favored" dealers in Rock Hill testified. One of them, Clarence E. Treadway, testified that people from York who worked at the printing company stopped at his station and bought gasoline (Tr. 42, 43, 54). He further testified that his lower prices during 1961 were the reason for much of his sales (Tr. 57). His monthly gallonage in 1961, however, averaged between 8 and 9 thousand gallons which he described as a "small volume" (Tr. 50).

34. Specifically, however, Mr. Treadway could not answer whether he attracted gasoline business from York dealers because of his lower prices (Tr. 40, 41). He could recall only one customer from York in all of 1961 even mentioning a retail price difference between York and Rock Hill (Tr. 47).

35. Another "favored" Esso dealer in Rock Hill, Herbert R. Boyd, testified that he could remember "a few" people from York who bought his gasoline because the prices were lower in Rock Hill (Tr. 105). He was not asked about the volume of his gasoline sales in 1961. Eighty percent of his business came from local people living in Rock Hill (Tr. 102, 103). The transient business involved in the other 20 percent included tourists and salesmen who bought from him primarily because they needed gasoline while in his area (Tr. 107).

36. The third "favored" Rock Hill dealer, Harold Elliott, was the one identified by Mr. Green as the station to which he lost gasoline sales during 1961 (Tr. 4915). Mr. Elliott knew that "a lot" of his gasoline customers lived in York and worked in Rock Hill and that he attracted sales from York dealers during 1961 because of his lower prices (Tr. 66, 82). His gallonage which had been declining theretofore continued to decline in 1961. He could not, however, equate the level of his sales with the level of gasoline prices (Tr. 93). During 1961, his gallonage was adversely affected by the termination of his trading stamp program, as well as by the elimination of personal-credit customers who formerly accounted for 25 percent of his business (Tr. 85, 87). The record does not enable one to determine how much, if any, of his sales decline in 1961 could reasonably be considered offset by increased sales due to his lower prices.

37. Mr. Elliott was able to name only one customer (a Mr. Posey) who lived in York and who allegedly bought from Elliott because of Elliott's lower prices. Mr. Elliott did not know, however, whether Mr. Posey bought gasoline at another Esso station. He thought that Mr. Posey traded with a Gulf Oil station (Tr. 67, 71). Mr. Posey, however, stated that he bought gasoline in Rock Hill only if he needed gasoline while there, and did not know whether Elliott's prices were higher or lower (Tr. 4201).

38. It is, therefore, concluded that the record evidence is inadequate to prove that the price difference imposed by the respondent upon the dealers in Rock Hill, as against those dealers in York and Hickory Grove, resulted in competitive injury to the "disfavored" dealers of York and Hickory Grove or competitive advantage of any significance to the allegedly "favored" dealers of Rock Hill. Nor does the record permit a finding of probable competitive injury to the "disfavored" dealers, neither of whom experienced a loss of gallonage during the price war or even exhibited much concern about it.

39. Complaint counsel also offered evidence with respect to price discrimination between respondent's Rock Hill dealers and respondent's dealer in Blacksburg, South Carolina. The Blacksburg dealer, Paul Gaffney, testified that his gasoline sales during 1961 remained constant (Tr. 194). He knew of no customer who purchased gasoline at any Esso station in Rock Hill in 1961 (Tr. 173). Customers, complaining of lower prices "down the road," were referring not to major brands, of which Esso is one, but "They were mostly independents, * * *" (Tr. 173-79). Complaint counsel has not submitted proposed findings with respect to price discrimination practiced against Mr. Gaffney.

IV. The Fromberg Case

40. Leo Fromberg operated a retail gasoline service station at 225-02 Jamaica Avenue on the southeast corner of 225th Street and Jamaica Avenue in Nassau County, New York, just over the county line between Queens and Nassau Counties (Tr. 894-99). Jamaica Avenue becomes Jericho Turnpike as it goes through Nassau County. Between May 1 and November 1, 1960, and between March 1 and December 31, 1961, Fromberg paid the following prices per gallon for gasoline purchased from respondent:

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TABLE III

Period	Esso	Extra	Golden
1960:			
May 1-May 17.....	13. 6	16. 1	18. 1
May 18-May 26.....	12. 9	15. 4	17. 4
May 27-May 31.....	11. 9	14. 4	16. 4
June 1-July 26.....	14. 9	17. 4	19. 4
July 27-Aug. 18.....	15. 6	18. 1	20. 1
Aug. 19-Oct. 5.....	13. 9	16. 4	18. 4
Oct. 6-Oct. 31.....	16. 5	19. 0	21. 0
1961:			
Mar. 1-Apr. 11.....	13. 9	16. 4	18. 4
Apr. 12-June 1.....	12. 9	15. 4	17. 4
June 2-July 5.....	15. 9	18. 4	20. 4
July 6-July 27.....	14. 9	17. 4	19. 4
July 28-Aug. 8.....	15. 6	18. 1	20. 1
Aug. 4-Aug. 15.....	14. 9	17. 4	19. 4
Aug. 16-Sept. 25.....	13. 9	16. 4	18. 4
Sept. 26-Oct. 3.....	15. 9	18. 4	20. 4
Oct. 4-Oct. 16.....	12. 9	15. 4	17. 4
Oct. 17-Oct. 18.....	13. 9	16. 4	18. 4
Oct. 19-Nov. 9.....	15. 9	18. 4	20. 4
Nov. 10-Nov. 18.....	14. 9	17. 4	19. 4
Nov. 19-Dec. 26.....	13. 9	16. 4	18. 4
Dec. 27-Dec. 31.....	15. 9	18. 4	20. 4

(Excluding taxes.)
CX 242.

41. During the same 16 months of 1960 and 1961, respondent sold Esso gasoline to three of its dealers in Queens County at 16.2 cents per gallon for regular, 18.7 cents per gallon for Extra, and 20.7 cents per gallon for Golden, all exclusive of taxes (Respondent's Response to Request for Admissions, dated August 5, 1963, page 2). These three dealers, allegedly "disfavored," were the Dellacona station, located at 241-15 Hillside Avenue, less than a mile from Fromberg; the Cohen station, at Hillside Avenue and 218th Street, also less than a mile from Fromberg, and the Haggerty station, at Hillside Avenue and 203d Street, about two miles from Fromberg (Complaint counsel's Second More Definite Statement, dated March 1, 1963; CX 242, 251-54; RX 11).

42. During 1960 and 1961, New York City, which includes Queens County, had in effect a three percent sales tax covering retail gasoline sales. Nassau County had no such tax (Tr. 923-24, 941). The

effect of such tax was to raise the price of gasoline in Queens County by approximately one cent per gallon, everything else being equal.

43. Queens and Nassau Counties are similar in that they both contain some of the most densely populated areas in the United States. The bulk of traffic, which is very heavy, flows from east and west on the main arteries and expressways leading in and out of Manhattan (Tr. 1959-66, 2296, 2301-05, 2317, 2381). In an area approximately seven miles by ten miles there are about 625 service stations (RX 11).

44. Queens dealers' price signs are limited in size by law and are not discernible from even across the street. In many areas of Nassau County, however, signs as large as 10 feet by 12 feet in size advertise the prices at the station (Tr. 947, 968, 973, 1987, 3974, 4012). Moreover, a strong dealer organization exists in Queens, with a stabilizing effect on prices. As a result, the retail prices of gasoline are stabilized relatively high in Queens, with 70 percent of the stations charging between 29.9 and 31.9 cents per gallon (RX 41 A). In Nassau County, 79 percent of the stations posted prices ranging between 27.9 and 29.9 cents per gallon (RX 42 A).

45. According to Mr. Fromberg, low prices originate at four stations, none of them Esso stations, along Lakeville Road just north of the Jericho Turnpike, more than two miles from the Fromberg station (Tr. 927-30). A Sinclair station, a little more than a mile east of Fromberg on the Jericho Turnpike, would also be among the first to lower price. These lower prices would extend west along Jericho Turnpike to Tulip Avenue (Tr. 962, 3977). Only when these lower prices moved west of Tulip Avenue did Fromberg feel any competitive effect (Tr. 963).

46. Fromberg testified that he drew more than 90 percent of his business from an area stretching about seven blocks east and west along Jamaica Avenue, and three to five blocks north and south on the side streets (Tr. 938, 4040). Complaint counsel disputes this statement, citing Tr. 956 where Fromberg stated that lube customers of his bought gasoline at a station $2\frac{1}{2}$ miles away. This testimony, however, is not necessarily evidence that motorists travel long distances to take advantage of low gasoline prices. For all we know, these customers may have lived near the station from which they bought their gasoline and traveled $2\frac{1}{2}$ miles to have the lube work done on their cars by Fromberg.

47. Fromberg considered himself competitive with the gasoline stations on Jamaica Avenue between his station and Tulip Avenue (Tr. 926). He denied that he was in competition with Dellacona (Tr. 940, 972). The two stations are on different arterial highways. There is no main route that connects the Dellacona station directly with the Fromberg station (Tr. 982-84). Dellacona's business is mainly repair work—gasoline is secondary (Tr. 1031, 2244). His 1960 gasoline sales averaged about 30,000 gallons per month, and his average monthly sales in 1961 were about the same as in 1960. During 1961, he closed his station on Sundays, losing about 5,000 gallons per month as a result (Tr. 1026). His sales did not decline until 1962, a year after the relevant time period (Tr. 1016).

48. Moreover, there is considerable doubt of any causal connection between deliveries to Fromberg and Dellacona and their respective purchase prices. Thus, Fromberg's purchase price declined from 13.6 cents in May 1960 to 11.9 cents by June 1960, while Dellacona's deliveries increased, and when Fromberg's purchase price increased during the month of August 1960 to 15.6 cents, Dellacona's deliveries declined (CX 242, 251, 254). Deliveries, in any event, are not a reliable indicator of sales by the station. Deliveries made at the end of one month would exaggerate the sales for that month, since the gasoline delivered would presumably have been sold the following month rather than in the month of deliveries.

49. Although Dellacona knew of Fromberg's lower prices, there is doubt that he believed himself competitively affected. He testified that the great majority of his business came from a five-block radius of his station (Tr. 1009-12), which did not impinge upon the area from which Fromberg drew his business. Moreover, the fact that Dellacona was closed on Sunday would render the calculation of gallonage loss due to competition with Fromberg exceedingly speculative (Tr. 1026, 2244). Dellacona did not claim to have lost any business to Fromberg. Actually, it appears that Dellacona was not too interested in gasoline prices, but was more concerned with his repair business (Tr. 1031, 2243). He was not aware that another Esso dealer in Queens, Haggerty, about two miles west on Hillside Avenue, was posting a price one cent below his and that another, Uneeda, about one mile west of Haggerty but on Jamaica Avenue, was two cents under his price (Tr. 1023-28). The price assistance that Dellacona requested from the respondent in 1960 and 1961 was for the purpose of "boosting" his gallonage in order to "make a better

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deal on a new gas contract" and to meet competition from Nassau County stations, but no specific station (Tr. 1008-14).

50. It, therefore, cannot be concluded that Dellacona suffered a loss in gallonage attributable to respondent's lower prices charged Fromberg, or that there was even any significant competition between these two stations.

51. Mr. Cohen, who operated the Esso station at Hillside and 218th Street, testified that his customers told him that prices were lower at Fromberg's (Tr. 1044, 1048-49), and that if his cost were as low as Fromberg's, he could have lowered his retail price and increased his business (Tr. 1051-52). He also testified, however, that Nassau County stations "don't mean anything to us because they are not competition to us" (Tr. 1063), that 75 percent of his gasoline business comes from the "neighborhood" of his station (Tr. 1047-48, 1065-66), and that he did not compete with at least three other stations on Braddock Avenue which were between his station and Fromberg's and which posted lower prices than he (Tr. 1058). Nor did he know of a single customer who ever left his station to go to Fromberg's (Tr. 1055). Although Cohen was one mile closer to the Haggerty and Uneeda stations than Dellacona was, he paid "no attention" to them (Tr. 1054, 1061).

52. Cohen's deliveries between May and October 1960 were 169,319 gallons: for the same period in 1961, his deliveries increased to 193,254 (CX 253). In fact, his sales have increased every year since 1959 (Tr. 1053). Fromberg's gallonage decreased during this period, dropping more than 51,000 gallons in 1961 below that of 1960 for the same six-month period (C-251).

53. It is impossible to conclude from this state of the record that Cohen and Fromberg were in competition with each other, or that, if they were in competition, Cohen suffered competitive injury due to the lower prices charged Fromberg by the respondent.

54. Haggerty, the third "disfavored" dealer in Queens County, did not testify. Commission Exhibit 252 indicates that between March and December 1961, the period of alleged discrimination, Haggerty's deliveries increased from 15,000 gallons to 32,000 gallons per month. Moreover, the Haggerty station is more than two miles from Fromberg, on a different east-west artery, and separated by more than 12 gasoline stations (RX 11, 14). A customer witness, Mr. Rothberg, called by complaint counsel, testified that he had been a regular gasoline customer of Fromberg for many years and that when Haggerty's station opened in 1961, he began purchasing grease and

oil from Haggerty but continued buying gasoline from Fromberg (Tr. 1068-70). Moreover, Mr. Rothberg testified that even if the gasoline prices were the same at Haggerty's and Fromberg's, he would buy from Fromberg because it was closer to him. (Tr. 1082).

55. Here, too, the state of the record does not permit a conclusion of a meaningful competition between Haggerty and Fromberg, or any competitive injury attributable to respondent's lower prices charged Fromberg.

56. It is, therefore, concluded and found that there is inadequate proof of competition between the allegedly "favored" and "disfavored" dealers in the Fromberg case, or of any competitive injury incurred or likely to be incurred by the "disfavored" dealers, or competitive advantage enjoyed or likely to be enjoyed by Fromberg by reason of the lower prices charged Fromberg by Humble. Since the lower prices charged Fromberg were accompanied by equivalent reductions in his selling price (Tr. 943-44), Fromberg's only competitive advantage would arise if his business increased in volume. This conclusion is effectively negated by his record of decreasing, not increasing, gallonage.

V. The Merry Twins Case

57. The Sussman brothers own a gasoline service station known as the Merry Twins, located at 173-12 Horace Harding Boulevard, Flushing, New York. This is in Queens County of New York City, at the corner of Fresh Meadow Lane. Horace Harding is the service road of the Long Island Expressway, and the station is located on the south side of that service road. The station was first opened in 1950, and has always sold products purchased from the respondent (Tr. 1153-55). The Merry Twins station had 24 pumps and storage for 13,000 gallons of gasoline (Tr. 1157). Since New York City limits the size of the gasoline delivery trucks to 3,000 gallons, the Merry Twins station received two to four deliveries of gasoline a day from the respondent during 1960-1962 (Tr. 1158).

58. William Sussman testified that the area from which he draws business is bound on the north by the Long Island Expressway, on the south by 73d Avenue, and on the east by Peck Avenue (Tr. 1164). Although some customers come from as far south as Union Turnpike and some as far west as 167th St., the majority of the customers come from the Fresh Meadows housing development (Tr. 1215). The Fresh Meadows housing development is a large residential

community, owned and operated by the New York Life Insurance Company, and became operational in 1949. It has a population of about 13,000 people, and has stores, banks, and a theater (Tr. 1564-65).

59. Competing with Merry Twins and serving the same trading area, are two Mobil stations, two Shell stations, two Sun stations, and a Chevron station, all clustered within a two block area (Tr. 1227). Sussman testified that these were the only stations with which he competes (Tr. 1228).

60. The closest Esso station to Merry Twins is the Van Poll station at 184th Street and Horace Harding Boulevard (RX 11; Tr. 1167). Although that 184th Street station was named as a "disfavored" dealer in the original More Definite Statement of complaint counsel, no evidence, documentary or otherwise, was offered to show any adverse effect upon it.

61. The next closest Esso station was the Fischler station on Union Turnpike, just east of Utopia Parkway (RX11). Here, too, there is no evidence of any adverse effect.

62. Eight service stations were specified as "disfavored" vis-a-vis Merry Twins in the Second More Definite Statement filed by complaint counsel. Four of these showed increased average monthly gallonage from 1959 through 1962, despite retail prices two to four cents per gallon higher than Merry Twins (RX 44; Tr. 1996-7).

TABLE IV

Dealer	Annual monthly gallonage			
	1959	1960	1961	1962
1. Esposito-----	24,331	25,560	27,425	27,915
2. Rocchi-----	22,950	25,694	27,288	30,887
3. Brettler*-----		36,172	50,113	55,462
4. Bayside**-----	5,700	10,650	20,193	23,029

*Brettler from February 1960 when he became a customer.

**Bayside from April through July 1959 only, and April 1960 through 1962 (RX 44).

63. As to the fifth of these eight "disfavored" stations, the Bernuzo station at 77-02 Parsons Boulevard, complaint counsel alleged the discriminatory period to be May-September 1960 (More Definite Statement). Commission Exhibit 1506 B, however, shows its average monthly gallonage to have been more than 25,000 for that period compared to an average of less than 24,000 for January

through April 1960. No inference of adverse competitive effect can be drawn simply from this evidence concerning the five stations enumerated above.

64. The sixth of the eight allegedly "disfavored" dealers was the Selzer station at 161-01 Union Turnpike. The only evidence in the record concerning Selzer's experience is in the form of gallonage records which show a maintained increase in gallonage from 1960 through 1963, despite a retail price two cents higher than Merry Twins (See Table V, below) (CX 1507 B; 245). In fact, the Fischler station, less than one mile east of Selzer on the same turnpike, posted a price of 34.9 cents per gallon, five cents higher than Selzer and seven cents higher than Merry Twins, yet its monthly sales averaged 10,000 gallons higher than Selzer's (Tr. 2123-25, 2221).

65. The seventh allegedly "disfavored" dealer was Jenik, operating a station at 42-05 Lawrence Avenue. Here, as in the case of Selzer, the only evidence is a tabulation of Jenik's deliveries (CX 246). Although Jenik posted a price two cents higher than Selzer and four cents higher than Merry Twins, his deliveries declined somewhat during the first half of 1961, but stabilized and rose thereafter in 1961 and 1962 (See Table V, below).

66. The last of the eight allegedly "disfavored" dealers was the Burke & Piras station on 164th Street, just north of the Union Turnpike. Mr. Burke complained about losing business to the Merry Twins station and requested allowances from the respondent during 1960, 1961, and 1962 (Tr. 1367-70, 1363). He described his business area as bounded on the west by Parsons Boulevard, on the east by Utopia Parkway, on the south by Grand Central Parkway and on the north by Long Island Expressway, and testified that 75 to 80 percent of his business came from that area, which would, of course, overlap some of the area from which Merry Twins drew business (Tr. 1370). Between 1959 and 1962, the average monthly gallonage at the Burke & Piras station dropped from 43,000 gallons to 28,000 gallons (RX 45; CX 247). During this time, its posted price for gasoline was 29.9 cents, or two cents higher than the price posted at Merry Twins (See Table V, below). Mr. Burke testified that he and his partner concentrated their efforts primarily on repair work, which accounted for approximately two-thirds of their profits (Tr. 1378). The station employed eight mechanics, but only one front man to pump gasoline (Tr. 1388).

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67. In a mailing list order form prepared by the Burke & Piras station, the area selected by that station for circularization of advertisements fell far short of the area of business described by Mr. Burke, extending only for some seven or eight blocks around the station (CX 1480).

68. Moreover, Mr. Burke testified that when his station opened in 1957 his posted price was 30.9 cents, compared to Merry Twins' posted price of 26.9 cents. Despite this four-cent differential at retail, the Burke & Piras gallonage increased significantly from 1958 to 1959 (RX 45, 1374-76), indicating that Merry Twins' lower prices were not hurting Burke & Piras then.

69. Although Burke testified that he lost business to Merry Twins because of the lower price at Merry Twins (*supra*), and his gallonage deliveries corroborate the alleged loss of business (See Table V, below), the loss of business attributable to the difference in price charged these two stations by the respondent (0.8 cent) is doubtful. Mr. Burke testified that now (1963) his price is 27.9 cents, while that of Merry Twins is 26.9 cents, and that "for all practical purposes" he would say that "that's the same" (Tr. 1422). Again, at Tr. 1392, Mr. Burke did not believe that a one-cent price difference between his station and Merry Twins would have any competitive significance on his business.

70. Mr. Burke identified four customers who switched from him to Merry Twins because of lower price (Tr. 1398, 1401). One of them, Mr. Apt, however, testified that he stopped doing business with Burke & Piras because of a dispute on service, not because of price (Tr. 1448). The second of the four customers, a Mr. Rosenblum, testified that he had not switched from Burke & Piras, but had, in fact, switched from Merry Twins to Burke & Piras (Tr. 1471). The third customer was an employee of the Super Glass Company. A tabulation of the Esso credit card purchases by the company shows, however, that this customer did not switch to Merry Twins but to a third station, Selzer, whose prices were the same as Burke & Piras (RX 43). According to Burke the fourth customer, Schneider, was lost in 1959 or 1960 (Tr. 1403). It is doubtful, therefore, that this took place within the period of the complaint. Schneider's credit card purchases do not strengthen Burke's testimony for they show only two \$3 purchases in 1960 and none thereafter (RX 55).

71. In addition to the eight allegedly "disfavored" service stations, complaint counsel introduced evidence concerning the business

experiences of Esso gasoline outlets within the Fresh Meadows housing development. Three of these outlets were storage garages owned and operated by the New York Life Insurance Company. The fourth was a garage subleased to a Mr. Nixon. The posted price for gasoline at all four outlets was 31.9 cents—four cents higher than the Merry Twins price.

72. Mr. Nixon testified that his customers told him they purchased gasoline at Merry Twins because the price was lower there (Tr. 1271). The gallonage records corroborate the claimed loss of business between 1958 and 1962 (See Table V, below). The three garages owned and operated by the New York Life Insurance Company ceased selling gasoline in March 1961. Nixon stopped by the end of 1962 (Tr. 1263, 1572). Nixon's business, however, declined from 1961 to 1962 (See Table V, below) even though the business of the three other Esso outlets at Fresh Meadows who were his immediate competitors might logically have been expected to flow to him.

73. When questioned about the effect of a price differential upon his business, Mr. Nixon stated that a reduction by him of one cent per gallon would not bring him more business (Tr. 1293). Mr. Nixon named five customers who complained to him of lower retail prices at Merry Twins. The first, Mr. Warantz, was a customer of Nixon's only rarely: about once a year. His regular supplier was not an Esso station, but a Sonoco station (Tr. 1484). Nor did Mr. Warantz know whether the price at Merry Twins was higher or lower than at other Esso stations (Tr. 1486). Mr. Nixon admitted that the second, Mr. Stern, stopped buying from him because of an outstanding bill (Tr. 1352). Mr. Nixon testified that the third, a Mr. Kahn, became his customer in 1957 when Nixon used him as an insurance broker. No specific time was mentioned when Mr. Kahn bought from Merry Twins. It cannot be inferred from this that Mr. Kahn switched to Merry Twins (Tr. 1349). As to the fourth, a Mr. Sepler, Nixon did not know that Mr. Sepler had bought any gasoline from Merry Twins, or for that matter where Mr. Sepler bought gasoline (Tr. 1350). Finally, the fifth customer, a Mr. Speyer, was not a regular customer of Nixon, and his complaint about lower prices at Merry Twins was years before the complaint period involved here, May 1960–June 1962 (Tr. 1342). Not one of these five customers would have bought more gasoline from Nixon if he had reduced his price by one cent a gallon (Tr. 1345).

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74. Shown below are the Esso stations discussed above, with their costs, prices, and gallonage where known (CX 243-50) :

TABLE V

	Cost ¹	Price per gallon	Year	Gallonage (in thousands)	
				Average monthly	Total for half year
Merry					
Twins...	25.4	27.9	1958	96	-----
			1959	132	-----
			1960	248	-----
			1961	313	-----
			1962	323	-----
Burke & Piras....	26.2	² 29.9	1958	40	-----
			1959	43	-----
			1960	38	-----
			1961	32	-----
			1962	28	-----
Nixon.....	26.2	31.9	1958	19.6	-----
			1959	17.3	-----
			1960	14.6	88
			1961	14.2	+88
					+81
			1962	12.8	77
Selzer.....	26.2	29.9	1960	40	-----
			1961	42	246
					247
			1962	43	260
Jenik.....	26.2	31.9	1960	34	-----
			1961	30	-----
				31	-----
			1962	32	-----
Monthly gallonage					
1960					
			May	June	July
			Aug.	Sept.	Oct.
			Nov.	Dec.	Jan.
			Feb.		
Fresh	26.2	31.9	6.0	3.9	3.8
Meadows	26.2	31.9	5.2	3.4	4.0
(3 sta- tions).	26.2	31.9	6.6	4.6	4.1
			1.0	2.6	5.8
			2.4	2.1	3.2
			1.7		

¹ Exclusive of month-end allowances.

² Except for 1958, when the price per gallon was 30.9

Information from CX 1507 B, 245, 246, 247, 244, 248, 249, 250, 1527 B, 243, 1498 B; Rx 45.

As well be seen from the table above, the price charged Merry Twins by the respondent was .8 cent lower than the price charged other Esso dealers. The price charged by Merry Twins, however, was two to four cents per gallon below the price charged by the other Esso dealers. Merry Twins gallonage increased sharply from 96,000 gallons monthly to 323,000 gallons. The Burke & Piras gallonage, as well as the Nixon and Fresh Meadows gallonage decreased. What is lacking in the record of this proceeding, however, is evidence that such decrease in gallonage was due to the .8 cent lower price charged Merry Twins by the respondent. That the decrease in gallonage was due in part to the two to four cent lower prices charged by Merry Twins is possible and perhaps probable. The record, however, does not show the respondent's responsibility for the two or four cent differential in posted retail price. The only responsibility it would appear resting upon the respondent was that which could reasonably be attributed to the .8 cent per gallon allowance given Merry Twins, which in turn would presumably enable Merry Twins to post a price lower than those other stations by one cent per gallon. Such a difference of one cent per gallon in retail posted price, however, was of no significance to the dealers questioned concerning it (Tr. 1292, 1392, 1422).

75. It is concluded and found, therefore, that the difference in price charged Merry Twins by respondent, amounting to .8 cent per gallon, in effect from 1959 to 1962, was not, and could not be, reasonably causative of any significant or substantial competitive injury to the Esso stations allegedly competitive with Merry Twins in Queens County, New York.

VI. Affirmative Defenses

76. Respondent offered considerable testimony and documentary evidence on several affirmative defenses. Inasmuch as my disposition of this case, based upon complaint counsel's failure to develop *prima facie* evidence of violation of the Robinson-Patman Act, makes a detailed analysis of the affirmative defenses unnecessary, no conclusions will be reached on them in this decision. It is, nevertheless, desirable that some comment be made inasmuch as the issue of affirmative defense is not free from doubt.

A. *The Meeting Competition Defense*

77. In connection with the Merry Twins case, Mr. Sussman, an owner of that station, testified that he was forced to lower his posted

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price to meet the lower price posted at a neighboring Shell station, operated by a Mr. Kaplan (Tr. 2180, 1204). Mr. Sussman thereupon requested an allowance from the respondent stating that Mr. Kaplan was receiving an allowance from his supplier, Shell (RX 18). Mr. Sussman further stated that Kaplan had told him that he (Kaplan) had received such an allowance from Shell. An official of the respondent testified that a salesman of the respondent, a Mr. Wilson, overheard Kaplan's conversation with Sussman (Tr. 3047-48) and that, having satisfied himself that Kaplan was in fact receiving such an allowance, the official negotiated the 0.8 cent allowance to Merry Twins (Tr. 2190-94, 2653, 3060).

78. Salesman Wilson did not testify, nor did Mr. Kaplan or any Shell representative, concerning the alleged allowance given Mr. Kaplan.

79. Absent such corroboration, there remains considerable doubt of respondent's claimed good faith in meeting Shell's competitive allowance to Kaplan. Kaplan's lower posted price, in and of itself, was not sufficient to justify such a conclusion since at least one other Humble dealer posted the same price as Kaplan without getting assistance from Humble (Tr. 2659).

80. In connection with the Fromberg case, Mr. Fromberg had complained to the respondent of price cutting in his area (Tr. 3991, 4057, 4093). An official of the respondent testified that it was company policy to obtain proof of assistance granted to a dealer's competitors from their respective suppliers before allowing any assistance to the complaining dealer (Tr. 3994). No documentary proof of such competitive price allowance affecting Fromberg was offered in evidence, nor did respondent call to the stand its salesmen who investigated the competitive situations affecting Fromberg and who were responsible for the conclusion that Fromberg's competitors were receiving assistance.

81. Here, too, the issue is not free from doubt without the corroborating proof that could have been offered.

B. *The Cost Justification Defense*

82. This particular affirmative defense is impossible of analysis and determination without an extensive discussion. The major part of the evidence in this case, both oral and documentary, involves this issue. The Appendix filed by complaint counsel, which details their position in this respect, is actually longer than the proposed findings, conclusions, order, and reply to respondent's proposed findings combined. In view of the limited time available to me for the writing of this decision, and in view of the superfluity of a determina-

tion of this defense, only a mention of certain doubts in connection with this cost justification defense will be made.

83. Mr. Field, a partner in the accounting firm of Price Waterhouse & Co., was retained by the respondent to make a cost study to determine the savings in cost incurred by the respondent in its sales to Merry Twins, as against the Burke & Piras station and eleven other Humble stations in the general area, which had been named by complaint counsel as "disfavored" customers (Tr. 1802, 3329). Three categories of expense were identified: (1) loaned delivery equipment expense, which includes depreciation as well as maintenance and repairs on delivery equipment; (2) district sales expense, which includes salaries and expenses of salesmen concerned with service station activities, and (3) area marketing expense which includes salaries and expenses of personnel at the area office level who supervise the activities of the District sales office. Respondent's Exhibit 56 A found these costs to be:

	Merry Twins	12 Dealers	Burke & Piras
	<i>Dollars per gallon</i>		
Loaned delivery equipment expense.....	\$0. 0010	\$0. 0042	\$0. 0048
District sales expense.....	. 0002	. 0021	. 0020
Area marketing expense.....	. 0001	. 0007	. 0007
Total.....	. 0013	. 0070	. 0075

84. Subsequently, RX 56 B was offered, supplanting RX 56 A by reducing the loaned delivery equipment expense for the 12 dealers from \$.0042 to \$.0041, thus lowering the total for such 12 dealers from \$.0070 to \$.0069 (Tr. 3906-08). Thereafter, respondent offered RX 56 C, supplanting RX 56 B. Respondent Exhibit 56 C was received in evidence, and RX 56 B was then rejected (Tr. 3909-10).

85. In RX 56 C, the total cost for Merry Twins, the 12 dealers, and Burke & Piras remain at \$.0013, \$.0069, and \$.0075, respectively, as stated in RX 56 B. The total Burke & Piras cost of \$.0075, however, is increased by \$.0040 for sales expense and by \$.0008 for delivery expense, for a total of \$.0123. The total 12-station cost of \$.0069 is increased by \$.0016 for delivery expense, for a total of \$.0085. These last additions in costs for the 12 stations, as well as for Burke & Piras, were added to RX 56 C by Mr. Field, based upon the testimony of Mr. Courtney concerning additional savings. These additional savings, however, were not reflected in the respondent's books and records. Mr. Courtney simply testified that such savings

accrued in their normal operations and because of the difference in effort and time expended with these stations in these respects (Tr. 3685-89). At another point, however, Mr. Field stated, "If I had no evidence of a cost differential from the original books and records, it would be my conclusion that they should not be inserted into this cost study as a differential" (Tr. 3881).

86. There is, therefore, considerable doubt that the cost differentials added to RX 56 C by Mr. Field and based upon the testimony of Mr. Courtney can be accepted.

87. There is also some doubt that RX 56 C, even exclusive of the Courtney-added differentials, is acceptable.

88. The 12 stations used in the cost study and whose costs were averaged in RX 56 C varied greatly in their sales volume, as well as their total expense. The sales volume ranged from a low of 13,320 gallons to a high of 1,148,000 gallons. The expenses ranged from a low of .43 cent per gallon to a high of 5.69 cents per gallon. Respondent Exhibit 56 C merely shows the total of 6,381,282 gallons, at an average cost of .69 cent per gallon (CX 971 A-1). Such averaging of gallonage and costs may be questionable when employed for dealers having such extreme differing experiences (See *U.S. v. Borden Co.*, 370 U.S. 460 (1962)).

89. Respondent Exhibit 56 C also mingles actual costs with average costs. The Burke & Piras equipment depreciation is actual since such company-owned station costs are maintained on that basis by Humble. The Merry Twins station and ten of the 12 stations in RX 56 C, however, are noncompany-owned stations. For such stations, Mr. Field used equipment depreciation calculated on an average unit cost of both new and used loaned delivery equipment. Mr. Field admitted this cost to be lower than the actual cost which was used for the company-owned stations (Tr. 3331-2, 3340-41, 3356, 3370, 3375, 3378-80, 3633, 3889, 3891). Since Merry Twins was not a company-owned station, but some of the 12 stations (including Burke & Piras) were, this would have the effect of raising depreciation costs for the 12.

90. Although the Merry Twins station was engaged in the sale of gasoline almost to the exclusion of all other business, the Burke & Piras station, as well as the 11 others in the study, differed in that they derived a substantial part of their business from activities other than the sale of gasoline. As a consequence, these stations had loaned equipment from respondent such as lifts, compressors, lube and kerosene outfits, and Flannery systems, on which equipment depreciation was charged which entered into respondent's cost of doing

business with such stations. The Merry Twins station had no such equipment, but was nevertheless an admittedly highly successful gas station. As the basic comparison between Merry Twins and the 12 "disfavored" stations concerns respondent's cost of selling gasoline to these stations (not oil, kerosene, or lubricating services), there may be some doubt that the equipment which Merry Twins found unnecessary to its successful sale of gasoline should be included in a comparison of costs. Eliminating the depreciation of such equipment which was charged to the 12 "disfavored" stations, would, of course, substantially minimize the higher cost of selling to them.

91. Included in the respondent's cost of doing business with the 12 "disfavored" stations was the cost of dismantling and removing equipment at the three Fresh Meadows garages which went out of business during the period of study involved. There is considerable doubt that such extraordinary and nonrecurring costs are properly includable for purposes of determining the respondent's cost of selling gasoline. Excluding such costs would have reduced the respondent's cost of doing business with these three stations by about 50 percent (CX 971 A-1, E, E-15, and E-17).

92. With respect to the district sales expense and area marketing expense categories of cost, it appears that certain allocations and assignments in arriving at the figures allocable to each of the stations involved were determined on the basis of a so-called Binn survey. Mr. Binn, an employee of the respondent, not otherwise identified, made a study of four of the seven salesmen involved and the time spent by them in their various activities in 1957. Whether these four were sufficiently representative of all is unknown. Mr. Binn did not testify, although he is still employed by the respondent. The basis for his selection is unknown. Without such background information, it is impossible to assess the validity of the Binn survey used by Mr. Field (Tr. 4968-73).

93. Finally, the period used by respondent for the cost study may be questionable. Mr. Field used the 24-month period starting July 1, 1960. The .8 cent allowance by the respondent to Merry Twins commenced nine months earlier, on October 1, 1959. Between October 1959 and July 1962, the gallonage at Burke & Piras declined significantly while that of Merry Twins skyrocketed dramatically (Table V, *supra*). Since the total cost of doing business with each of these stations was divided by its gallonage volume to arrive at a total cost per gallon for each, the net effect of using the 24-month period, ending July 1962, was to diminish the cost of doing business with Merry Twins. Thus, although the additional cost of doing busi-

ness with Burke & Piras during the selected 24-month period amounted to .62 cent per gallon according to RX 56 C, the difference would have been only .26 cent had only the year 1959 been used, or .464 cent per gallon had the 24-month period ending July 1961 been used (See Table XIII of Complaint Counsel's Proposed Findings). It could be argued that the use of the 24-month period ending July 1962 tends to justify the alleged discrimination by the fruits of the discrimination—that is, the change in gallonage brought about by the difference in price.

C. Commission Precedent

Perhaps the most persuasive “affirmative defense” argued by the respondent is the attitude of the Commission as publicly declared in *American Oil Company v. Federal Trade Commission*, 325 F. 2d 101 (7th Cir. 1963) *cert. den.* 377 U.S. 954 (1964), and the four oil cases, *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 [66 F.T.C. 1336]. In these four oil cases, the Commission dismissed the respective complaints that had been issued. Although the reasons for the dismissals are not necessarily apropos, the conclusion of the Commission in these four cases may be. The Commission held [66 F.T.C. 1488]:

The Commission has this date announced the initiation of a broad inquiry into the problems of competition in the marketing of gasoline. Orders to cease and desist entered against a few oil companies—orders which would probably not become final, if at all, until completion of lengthy review proceedings in the Federal Courts of Appeals and the Supreme Court—could not provide complete or effective solution to the competitive problems of the gasoline industry. It would appear to be more desirable, from the standpoint of effective administration of the law, that the Commission concentrate its necessarily limited resources on a comprehensive industry-wide approach to the problems of competition in the marketing of gasoline.

In the *American Oil Company* case, *supra*, the Commission had issued a cease and desist order, Commissioner Elman dissenting. On appeal, the 7th Circuit Court of Appeals reversed. The Commission then petitioned for a writ of certiorari. In the petition, the Commission listed the instant case as pending before the hearing examiner and as one of several cases “involving price discriminations growing out of retail gasoline price wars currently * * * a major part of the Commission's enforcement activities under Section 2(a) of the Clayton Act.” The Commission identified three such “formal cases,” one being the instant proceeding and the other two being the *Texas* and *Shell* cases referred to above. It declared that these

cases are "all based on the same theory of injury to competition that is involved in the present case [the *American Oil* case]." It pointed out that these "respondents * * * all do business in the Seventh Circuit," that "Review of any orders the Commission may enter in those cases is almost certain to be sought in the Seventh Circuit," that "that court, following its decision in the present case [*American Oil*], would undoubtedly set aside any orders," and that "The decision below, if allowed to stand, will become the definitive judicial ruling."

With the denial of the petition for writ of certiorari, it would appear that the Commission has confessed its inability to issue a cease and desist order in these cases. Indeed, as pointed out above, the two other cases, mentioned by name in the petition, have already been dismissed by the Commission.

The hearing examiner recognizes that a dismissal upon these grounds is more appropriately within the jurisdiction of the Commission than of the hearing examiner. No opinion, therefore, is expressed with respect to the propriety of such action here.

THE APPLICABLE LAW

The Robinson-Patman Act makes it unlawful for any person to discriminate in price between competing purchasers of like goods where the effect of such discrimination may be to lessen competition substantially or tend to create a monopoly in any line of commerce (15 U.S. Section 13(a)). To establish a *prima facie* violation of law in this proceeding, involving a secondary line (buyer) injury, it is necessary to prove: (1) sales by respondent of gasoline of like grade and quality to two or more competing dealer customers at different prices, (2) actual or probable substantial adverse effect upon competition, and (3) the price differences were the cause of the adverse competitive effect.

Complaint counsel stress the language of *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37 (1948):

It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a "reasonable possibility" that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition are adequately supported by evidence.

If, however, the *American Oil* decision, *supra*, is, as Commission counsel have stated, "the definitive judicial ruling," a reassessment

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of the *Morton Salt* language in the light of the *American Oil* decision is warranted. In the *American Oil* case the Court of Appeals quoted *Anheuser-Busch Inc. v. Federal Trade Commission*, 289 F. 2d 835 (7th Cir., 1961), where the court ruled that price discrimination does not, per se, constitute a violation of Section 2(a). The price discrimination, even if substantial, must be capable of raising a reasonable probability of substantially lessening the ability to compete. The court in the *American Oil* case went on to point out that the *Morton Salt* decision involved a discriminatory pricing system which gave buyers of large quantities a "built-in, routine and permanent price advantage over smaller rivals." The court concluded that "there must be something more than an essentially temporary minimal impact on competition and probative analysis must reveal a causal relation between the price discrimination and an actual or reasonably probable injury to competition in the context of the factual situation involved."

In the Carolinas, the price differences created by the respondent among its dealers, assuming they were competitive, were not part of a continuing discriminatory system, but were intermittent and usually of insignificant proportions. Under these circumstances, it was not sufficient to prove a *prima facie* violation of Section 2(a) to merely show that a price difference existed. Competitive injury could not be inferred from that fact alone. The additional facts brought out in connection with the Carolina dealers negated any reasonable probability of competitive injury.

In New York, the situation appears to be somewhat different. In the case of Fromberg, the price differentials were during much longer and uninterrupted periods of time than in the Carolinas. In the case of Merry Twins, the price differences were continuous for more than two years. For these New York stations, it appears reasonable to apply the rulings of *Morton Salt*. But even here, the bare price difference is insufficient. The court in that case found that the manufacturer's price discrimination resulted in "price differentials between competing purchasers *sufficient to influence their resale price*." In Merry Twins, however, the price difference of .8 cent per gallon was not shown to be the cause of the Merry Twins' resale price, which was two to four cents per gallon lower than their competitors. Indeed, the .8 cent cost difference could be, presumably, the cause of a one cent differential in retail price. But such a retail price differential was not deemed sufficient to affect competition, according to those very dealers who were allegedly hurt. Nor did the

difference in retail price divert business from the Merry Twins' competitors as far as this record indicates.

Similarly, in the Fromberg case, no anticompetitive effects were shown. In fact, the record established during the case-in-chief demonstrates the contrary, with Fromberg's sales declining and those of its competitors rising.

Nor can it be argued that the allegedly "favored" dealers profited by the price differences. Since the "favored" dealer received the preference in price only to enable him to lower his posted price, he was no better off with the receipt of such preferential price than he was without. In fact, his margin per gallon was usually less under the preferential price treatment since an .8 cent preference resulted in a one cent reduction in his posted price, and a 3.3 cent preference resulted in a four cent reduction in his posted price. The only benefit that the recipient of such preferential price treatment could possibly have would be as a result of increased gallonage due to his lowered posted price. This, however, did not occur in the Fromberg case. Although it did occur in the Merry Twins case, the evidence is lacking that it came at the expense of the "disfavored" Esso dealers, or that it was due to the .8 cent price preference as distinguished from the two to four cent pump price differential in effect.

ORDER

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

DECISION OF THE COMMISSION

The hearing examiner, on March 31, 1965, filed his initial decision and order dismissing the complaint. The effective date of the initial decision was stayed by the Commission's order of April 30, 1965. The Commission has now considered the matter and determined that the initial decision should be modified and adopted as amended.

Accordingly, *It is ordered*, That the initial decision be modified by striking therefrom that section on page 965 beginning with the phrase "As will be seen" and ending with the phrase "to the dealers questioned concerning it (Tr. 1292, 1392, 1422)" and that portion of the initial decision beginning on page 970 with the heading "C. Commission Precedent" and ending on page 973 with the phrase "differential in effect."

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

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IN THE MATTER OF

WEST COAST CLAIM ADJUSTERS ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-901. Complaint, June 1, 1965—Decision, June 1, 1965*

Consent order requiring a Los Angeles, Calif., corporation engaged in the business of purchasing waterless cookware, tools, radios, jewelry, watches, and other merchandise from manufacturers and suppliers and selling such merchandise at retail for their own account, to cease using the term "Claim Adjuster" as part of their corporate name, thereby misrepresenting that they are liquidators or authorized adjusters engaged in the sale of distress merchandise for the purpose of settling claims, and falsely representing the guarantee on certain watches.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that West Coast Claim Adjusters, a corporation, and Alan Grahm, Sam Stone and Ruth Grahm, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said 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, West Coast Claim Adjusters, is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its principal office and place of business located at 5176 Santa Monica Boulevard in the city of Los Angeles, State of California.

Respondents Alan Grahm, Sam Stone and Ruth Grahm are officers of said corporation. They formulate, direct and control the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporation.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, sale and distribution of waterless cookware, tools, radios, jewelry, watches, and other articles of merchandise to members of the purchasing public.

PAR. 3. In the course and conduct of their business respondents now cause and for some time last past have caused, their products, when sold, to be shipped from their place of business in the State of California to purchasers thereof located in various other States of