

IN THE MATTER OF
DIERKS FORESTS, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
SEC. 8 OF THE CLAYTON ACT

Docket 8113. Complaint, Sept. 14, 1960—Decision, Mar. 8, 1961

Order dismissing—after resignation of the two directors concerned from the Board of Directors of Pickering Lumber Corp.—charges that two competing lumber companies illegally permitted two individuals to serve as their common directors.

Mr. Lynn C. Paulson for the Commission.

Watson, Ess, Marshall & Enggas, by *Mr. Elton L. Marshall*, and *Mr. George T. Morton, Jr.*, of Kansas City, Mo., for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

The complaint herein was issued on September 14, 1960, charging Respondents with violation of §8 of the Clayton Act (15 U.S.C., §19, 38 Stat. 732, as amended by 49 Stat. 718), by permitting the individual Respondents to serve as directors at the same time, of both corporate Respondents, which ship and sell in interstate commerce some of the same classes of products, and are in competition between themselves in the offering for sale, sale and distribution of some of such products.

Thereafter, on January 11, 1961, counsel for the Respondents submitted a Motion To Dismiss, accompanied by a Certificate of Robert I. Donnellan, Secretary of Respondent Pickering Lumber Corporation, showing that, on December 2, 1960, Respondents Frederick H. Dierks and Henry N. Ess submitted their resignations as members of the Board of Directors of Pickering Lumber Corporation to be effective December 31, 1960; that their resignations were accepted; and that they ceased to be directors of Pickering Lumber Corporation on December 31, 1960. Also on January 11, 1961, counsel supporting the complaint submitted his Answer To Motion To Dismiss, stating that he does not oppose said motion, since the interlock of Directors alleged in the complaint has been removed as evidenced by the Certificate filed with Respondents' Motion To Dismiss, and there is no reason to believe a repetition of the condition alleged will occur.

In *Docket No. 7333, Booth-Kelly Lumber Company, et al.*, which presented a similar problem, the Commission held that upon the filing of a motion to dismiss supported by affidavit showing that the Respondents upon whose employment as directors the charge of

an interlocking directorate was based had resigned, no further proceedings in the matter were warranted, and the complaint should be dismissed without prejudice to the right of the Commission to reopen the proceeding should future circumstances so warrant.

In view of this precedent, we are of the opinion that similar action is warranted in the instant proceeding. Accordingly,

It is ordered, That the complaint herein, be, and the same hereby is, dismissed without prejudice to the right of the Commission to reopen the proceeding should future circumstances so warrant.

DECISION OF THE COMMISSION

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 8th day of March, 1961, become the decision of the Commission.

 IN THE MATTER OF

THE WARREN WOOLEN CO. ET AL.

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

Docket 8167. Complaint, Nov. 8, 1960—Decision, Mar. 8, 1961

Consent order requiring distributors of woolen fabrics in Stafford Springs, Conn., to cease furnishing to garment manufacturers for attachment to clothing made from its fabrics containing no llama fleece whatsoever, cloth labels bearing the statements "53% Llama, 47% wool" and "Llama-Lure".

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 The Warren Woolen Co., a corporation, and Richard Valentine, William Sorenson and Richard Rugen, 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 The Warren Woolen Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its principal office and place of business located in the City of Stafford Springs, State of Connecticut.

Respondents Richard Valentine, William Sorenson and Richard Rugen are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of woolen fabrics to manufacturers of clothing.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said product, when sold, to be shipped from their place of business in the State of Connecticut to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the sale of certain of their fabrics, and garments made from said fabrics, respondents have furnished cloth labels to garment manufacturers for attachment by them to garments made from respondents' fabrics, which labels bear the statements, among others, "53% Llama, 47% wool" and "Llama-Lure".

PAR. 5. Through the use of the aforesaid statements, the respondents represented and caused to be represented that said fabric and garments made therefrom contained the fleece of the Llama.

PAR. 6. Said statements and representations were false, misleading and deceptive. In truth and in fact, respondents' said fabric and the garments made therefrom did not contain any of the fleece of the Llama.

PAR. 7. By the aforesaid act and practice respondents placed means and instrumentalities in the hands of others by and through which they may mislead the public as to the fibers contained in garments manufactured from respondents' said fabrics.

PAR. 8. There is a preference on the part of a substantial portion of the purchasing public for garments made of or containing the fleece of the Llama.

PAR. 9. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of woolen fabrics of the same general kind and nature as that sold by respondents.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive statements and representations and practices has

had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' product by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondents from their competitors and substantial injury has thereby been, and is being, done to competition in commerce.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

DeWitt T. Puckett, Esq., supporting the complaint.

Maxwell M. Merritt, Esq., of *Shepherd, Murtha & Merritt*, of Hartford, Conn., and *James T. Welch, Esq.*, of *Davies, Richberg, Tydings, Landa & Duff*, of Washington, D.C., for respondents.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

On November 8, 1960, the Federal Trade Commission issued a complaint against the above-named respondents, in which they were charged with violating the Federal Trade Commission Act by misrepresenting the type of fiber contained in a fabric or in garments manufactured from their fabrics and sold in interstate commerce. A true copy of said complaint was served upon respondents as required by law. After being served with said complaint, respondents appeared by counsel and entered into an agreement dated December 23, 1960, which purports to dispose of all of this proceeding as to all parties without the necessity of conducting a hearing. The agreement has been signed by all of the respondents, their counsel, and by counsel supporting the complaint; and has been approved by the Director, Associate Director and the Assistant Director of the Commission's Bureau of Litigation. Said agreement contains the form of a consent cease and desist order which the parties have agreed is dispositive of the issues involved in this proceeding. On January 9, 1961, the said agreement was submitted to the undersigned hearing examiner for his consideration, in accordance with §3.25 of the Commission's Rules of Practice for Adjudicative Proceedings.

Respondents, pursuant to the aforesaid agreement, have admitted all the jurisdictional facts alleged in the complaint and agreed that the record may be taken as if findings of jurisdictional facts had

been duly made in accordance with such allegations. Said agreement further provides that respondents waive any further procedural steps before the hearing examiner and the Commission, the making of findings of fact or conclusions of law, and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with such agreement. It has been agreed that the order to cease and desist issued in accordance with said agreement shall have the same force and effect as if entered after a full hearing and that the complaint may be used in construing the terms of said order. It has also been agreed that the record herein shall consist solely of the complaint and said agreement, and that said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing consent order, and it appearing that the order provided for in said agreement covers all of the allegations of the complaint and provides for an appropriate disposition of this proceeding as to all parties, said agreement is hereby accepted and is ordered filed upon this decision's becoming the decision of the Commission pursuant to §§3.21 and 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and the hearing examiner, accordingly, makes the following jurisdictional findings and order:

1. The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding;
2. Respondent The Warren Woolen Co. is a corporation existing and doing business under and by virtue of the laws of the State of Connecticut, with its office and principal place of business located at Stafford Springs, in the State of Connecticut;
3. Respondents Richard Valentine, William Sorenson and Richard Rugen are officers of the corporate respondent. They formulate, direct and control the policies, acts and practices of the corporate respondent;
4. Respondents are engaged in commerce as "commerce" is defined in the Federal Trade Commission Act;
5. The complaint filed herein states a cause of action against the respondents under the Federal Trade Commission Act; and this proceeding is in the public interest. Now, therefore,

It is ordered, That respondents, The Warren Woolen Co., a corporation, and its officers, and Richard Valentine, William Sorenson and Richard Rugen, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering

for sale, sale or distribution of fabrics in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the term "Llama-Lure," or any other term, word or expression of the same import in connection with fabrics that do not contain the fleece of the Llama; or misrepresenting in any manner the type of fiber contained in the fabric;

2. Furnishing any means or instrumentality to others by and through which they may misrepresent the type of fiber contained in garments manufactured from their fabrics.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPROMISE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 8th day of March 1961, become the decision of the Commission; and, accordingly:

It is ordered. That the above-named respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

THE GOODYEAR TIRE & RUBBER COMPANY ET AL.

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

Docket 6486. Complaint, Jan. 11, 1956—Decision, Mar. 9, 1961

Order requiring the nation's largest manufacturer of rubber goods, including tires and inner tubes, engaged also in the purchase and resale of batteries, automotive parts and accessories, with net sales in 1954 in excess of one billion dollars, and a large integrated producer and distributor of petroleum products selling such products to over 10,000 service stations and with sales in 1954 totaling more than one-half billion dollars, to cease entering into such contracts as those under which Goodyear paid Atlantic an "override" commission ranging from 7½% to 10% on the net sales of TBA products (tires, batteries, and accessories) to service stations and distributors selling its petroleum products in return for Atlantic's influence and aid in promoting such sales.

Mr. James S. Kelaher and Mr. Peter J. Dias for the Commission. Cahill, Gordon, Reindel & Ohl, of New York, N. Y., by Mr.

Decision

58 F.T.C.

Thomas C. Mason and Mr. Mathias F. Correa, for respondents The Goodyear Tire & Rubber Company and The Goodyear Tire & Rubber Company, Inc.

Ballard, Spahr, Andrews & Ingersoll, of Philadelphia, Pa., by *Mr. Frederic L. Ballard, Jr.*, for respondent The Atlantic Refining Company.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

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

This proceeding is now before the hearing examiner for final consideration upon the amended complaint, answers thereto, testimony and other evidence, proposed findings of fact and conclusions filed by all parties and briefs in support thereof, and reply briefs. The hearing examiner has given consideration to the proposed findings of fact and conclusions submitted by the parties, and their briefs in support thereof, and all findings of fact and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded are herewith rejected, and the hearing examiner having considered the record herein, and being now duly advised in the premises, makes the following findings of fact, conclusions drawn therefrom and order:

1. Respondent The Goodyear Tire & Rubber Company is a corporation organized, existing and doing business under the laws of the State of Ohio with its principal office and place of business located at 1144 East Market Street, Akron, Ohio. The Goodyear Tire & Rubber Company is engaged in the manufacture and in the sale and distribution of rubber products including tires and inner tubes, directly and through several wholly-owned and controlled subsidi-

aries, including The Goodyear Tire & Rubber Company, Inc., which is primarily a marketing subsidiary.

2. Respondent The Goodyear Tire & Rubber Company, Inc., (hereinafter sometimes referred to as "Goodyear") is a wholly-owned subsidiary corporation of The Goodyear Tire & Rubber Company, organized under the laws of the State of Delaware with its office and principal place of business located at 1144 East Market Street, Akron, Ohio. The Goodyear Tire & Rubber Company, Inc., is engaged in the sale and distribution in interstate commerce of tires, inner tubes, batteries, automotive parts and accessories which are known to the trade as TBA products and will be hereinafter so referred to.

3. Respondent The Atlantic Refining Company (hereinafter sometimes referred to as "Atlantic") is a corporation organized, existing and doing business under the laws of the State of Pennsylvania with its principal office and place of business located at 260 South Broad Street, Philadelphia, Pennsylvania. Said respondent is engaged in the production and in the sale and distribution in interstate commerce of petroleum products, including gasoline and lubricants sold to petroleum wholesalers (hereinafter referred to as "distributors") and to service stations.

4. Respondent Atlantic markets its petroleum products in the Middle Atlantic States (including parts of Ohio and West Virginia), New England (not including Maine) and the Southern Atlantic States. This marketing territory is divided into six marketing regions which are, in turn, subdivided into twenty-nine districts, consisting of a city or other marketing center and the surrounding territory. The marketing regions and districts are as follows:

Region:	District
New England	Providence, R.I. Springfield, Mass. Hartford, Conn. Boston, Mass. New Haven, Conn.
New York	Syracuse, N.Y. Southern Tier, N.Y. Albany, N.Y. Rochester, N.Y. Watertown, N.Y. Buffalo, N.Y.
Philadelphia-New Jersey	Philadelphia-Suburban, Pa. South Jersey Newark (or North Jersey)

Decision

58 F.T.C.

Region:	District
Eastern Pennsylvania.....	Reading, Pa. Allentown, Pa. Wilkes-Barre, Pa. Harrisburg, Pa. Williamsport, Pa. Wilmington, Del.
Western Pennsylvania.....	Pittsburgh, Pa. Altoona, Pa. Greensburg, Pa. Erie, Pa.
Southern.....	Charlotte, N.C. Baltimore, Md. Richmond, Va. Jacksonville, Fla. Miami, Fla.

5. As of April 30, 1956, there were approximately 394 salesmen calling on dealers and distributors of gasoline and lubricants, including service stations. These salesmen are divided into various classifications, dependent upon the functions which they perform as follows:

Type	Approximate number	Function
Promotable dealer salesman.....	133	Sells Atlantic products and promotes recommended TBA to "promotable dealers", which term includes lessee dealers and contract dealers interested in complete service station operation.
Dealer salesman.....	25	Sells Atlantic products and promotes recommended TBA to dealers not covered by promotable dealer salesmen (usually in areas of sparse distribution) or to special groups such as car dealers in other areas.
General salesman.....	54	Sells Atlantic products and promotes recommended TBA to dealers not covered by promotable dealer salesmen or dealer salesmen, and also sells Atlantic products to smaller Commercial accounts.
Service salesman.....	147	Teaches dealers and their employees merchandising techniques and how to perform the services normally performed by first class service station operators. This teaching involves both petroleum products and TBA. For teaching purposes the salesman uses the TBA on hand at the station.
Wholesale salesman.....	35	Sells Atlantic products and promotes recommended TBA to distributors and wholesale dealers.

6. All of respondent Atlantic's salesmen are paid on a salary basis. Promotable dealer salesmen also receive extra compensation based upon percentage gains in purchases of gasoline, motor oil and recommended TBA (and also for over-all gains) by those of their assigned dealers who have been in operation for a minimum of twelve months.

7. Respondent Atlantic sells its petroleum products to more than 5,500 retail dealers, a substantial number of whom operate service stations (as distinguished from grocery stores, garages, and other

like outlets), and to more than 200 distributors who, in turn, sell said products to more than 2,800 retail outlets, a substantial number of whom operate service stations. These retail dealers and distributors are divided into the following classifications:

Present designation	Percentage of total regional gasoline sales by each customer class	
	1951 percent	1955 percent
1. Company-operated station.....	1	0.1
2. Lessee dealer.....	32	39.1
3. Contract dealer.....	23	18.1
4. Commercial account.....	15	16.6
5. Wholesale dealer.....	3	1.1
6. Distributor.....	24	24.0
7. Jobber.....	2	1.0
Total.....	100	100.0

8. The usual form of lease entered into by respondent Atlantic and its lessee dealers was for a term of one year, with automatic renewal from year to year unless written notice was given prior to the expiration of any term. Rental provided by any lease was usually a flat rental plus a cents-per-gallon charge, dependent upon location of station, financial condition of lessee and potential income. Such lease contained provisions relating to the use, maintenance and general appearance of the station. In the event of breach of any of the terms, conditions or covenants of the lease by the lessee, it was provided that Atlantic may, at its option, terminate the lease.

9. On April 1, 1953, respondent Atlantic adopted a long-term dealer lease policy under which any lessee dealer who has established a record of two years of satisfactory operation became eligible for a three-year lease with rental remaining the same during the entire period.

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

11. Prior to March 1951 (except as to three districts in which the Sales Commission Plan was tested beginning in 1950) respondent

Atlantic purchased TBA for resale either directly or indirectly to Atlantic dealers. This purchase for resale arrangement was first begun in 1932 when respondent Atlantic began the sale and distribution of tires manufactured by the Lee Rubber & Tire Corporation. In 1937 a contract was executed with the Electric Storage Battery Company for the purchase and resale of Exide batteries in the Philadelphia region which was expanded to all marketing regions in 1945. Accessory items were added from time to time, including DuPont polishes, Thermoid fan belts, American Chain and Cable Company's weed chains and Fram oil filters. Distribution of such products to Atlantic dealers and distributors was made by respondent Atlantic either directly or through about forty-five warehouses located throughout its marketing area or through Atlantic supply dealers who distributed such products to other Atlantic dealers.

12. During the period that respondent Atlantic continued on the purchase and resale plan, Atlantic service stations were identified as sellers of such sponsored TBA products as Lee tires and Exide batteries, and to some extent of other TBA handled.

13. In 1951 after a test of the Sales Commission Plan of Goodyear and Firestone in three districts, Atlantic adopted the complete Sales Commission Plan of these companies in all six of its marketing regions. Atlantic assigned the entire marketing area by allocating the New York, New England and Philadelphia-New Jersey regions to Goodyear and the three remaining regions to Firestone.

14. The sales commission agreement entered into between The Atlantic Refining Company and The Goodyear Tire & Rubber Company, effective March 1, 1951, provided for the payment of commissions to Atlantic on the sales by Goodyear of its tires, batteries and accessories to Atlantic outlets, including service stations, distributors and consignees. The consideration of this agreement was the services to be rendered by the Atlantic sales organization in promoting the sale of Goodyear TBA products as outlined in said agreement. This agreement provided, among other things, for the payment of a commission of 10 percent on all sales of TBA to Atlantic dealer outlets, and 7½ percent on all sales of TBA to Atlantic franchise petroleum distributors. The Atlantic Refining Company also entered into a similar sales commission agreement with The Firestone Tire & Rubber Company, effective as of March 1, 1951.

15. The services which were performed by The Atlantic Refining Company pursuant to its contract with Goodyear and Firestone in promoting the sale of TBA products consisted principally of the following:

(a) Atlantic personnel, when interviewing prospective dealers for new or established service stations, advised them of the importance of TBA and recommended the TBA products of Goodyear or Firestone, and when dealers were selected would at times give advance notice of station openings or changes to Goodyear or Firestone and introduce the new dealers to the sales representative of Goodyear or Firestone, permitting such salesmen to complete any unfinished business with the outgoing dealer and enabling them to anticipate and to move promptly in handling the requirements of the new dealers.

(b) Atlantic gave assistance to dealers in arranging Goodyear or Firestone TBA supplies; took TBA orders from Atlantic dealers for either Goodyear or Firestone; and recommended the minimum Goodyear or Firestone inventory to be carried by the Atlantic dealer.

(c) Atlantic frequently conducted dealer meetings at which the sale of TBA was discussed, in some instances with the active participation of Goodyear or Firestone.

(d) Atlantic operated training schools for dealers and prospective dealers which included suggestions for displaying and merchandising TBA. In the discussion of TBA, Goodyear or Firestone products were used exclusively during the training school course.

(e) Atlantic incorporated suggestions on merchandising TBA in its dealer magazines and arranged for advertising and promotions, which included TBA products of Goodyear or Firestone, and participated in promotions instituted by either Goodyear or Firestone.

(f) Atlantic also conducted tire clinics jointly with the personnel of Goodyear or Firestone which were important in familiarizing dealers in the care and repair of Goodyear or Firestone tires.

(g) Atlantic made TBA products available to credit card holders including merchandise sold on deferred payments without carrying charge, which served to augment the sale of Goodyear or Firestone TBA.

16. The sales of Goodyear TBA and commissions paid thereon under the Atlantic-Goodyear Sales Commission Plan were substantial as is shown by the following tabulation:

	Total sales	Total com- missions
1951.....	\$2,445,808	\$239,250
1952.....	4,175,890	411,743
1953.....	5,067,565	509,437
1954.....	5,284,743	523,048
1955.....	5,700,121	557,599
1/56-6/56.....	3,133,005	296,988
Total.....	25,808,032	2,529,065

17. The substantiality of the sales and commissions under the Atlantic-Firestone TBA Sales Commission Plan is shown by the following tabulation for the years 1951 to 1956:

	Total sales	Total commissions
1951.....	\$3, 243, 350	\$299, 524
1952.....	4, 349, 616	404, 948
1953.....	5, 050, 381	469, 784
1954.....	4, 867, 689	452, 083
1955.....	5, 562, 936	506, 199
1/56-6/56.....	2, 545, 798	234, 317
Total.....	25, 619, 770	2, 366, 855

18. Under date of March 1, 1951, Atlantic sent a form letter to all Atlantic dealers entitled "A Statement of Atlantic's TBA Policy". This letter announced the adoption of the TBA Sales Commission Plan and included therein the statement that "Your acceptance or rejection of the program is a matter of your own choice". Under date of August 28, 1952, respondent Atlantic addressed a similar form letter to all its dealers entitled, "A Restatement of Atlantic's TBA Policy". Under date of June 24, 1955, a similar letter entitled "No Forcing" was sent to all Atlantic dealers, and since that time has been given to new Atlantic dealers.

19. It is the contention of counsel supporting the complaint that because of the relationship, contractual and otherwise, between Atlantic and its station operators, consignees and distributors, the adoption of the Sales Commission Plan of selling and promoting the sale of TBA entered into by Atlantic with Goodyear and Firestone has a tendency to lessen, restrain, prevent or eliminate competition in the sale of TBA, and has deprived other suppliers of TBA of a substantial portion of the TBA business of the Atlantic petroleum outlets.

20. In support of the charges of the complaint, sixteen former Atlantic dealers were called to testify in this proceeding. With the exception of three of these dealers, they testified to various forms of coercion, adopted by Atlantic salesmen in an effort to induce them to purchase sponsored TBA. Some of these witnesses testified that they had received the so-called non-forcing letter, but that they were told by Atlantic salesmen that these letters were not controlling insofar as purchases of non-sponsored TBA was concerned. The testimony of the witnesses called to support the complaint pertaining to coercion is as follows:

(a) John Chambers, an Atlantic lessee from November 1952 to November 1954, purchased the bulk of his TBA from the Goodyear supplier. Atlantic salesmen were always reminding him, that when

his lease expired or was cancelled Atlantic would only accept sponsored merchandise, and that outside merchandise would not be accepted at all. This witness also testified that it was pointed out to him on a number of occasions that the acceptance or rejection of the Goodyear plan was up to the dealers.

(b) James Matthews, an Atlantic lessee from 1947 to 1957, was told at a meeting that dealers were free to buy wherever they saw fit, but whenever salesmen called they told him differently. At the time of the change-over from Lee to Goodyear, his Lee signs were removed from his station, and he was told to get rid of Lee tires and Auto-Lite batteries and handle Goodyear. Matthews testified that he discontinued the Lee tires because he did not want his lease cancelled because of non-sponsored TBA. He was requested by Atlantic salesmen in 1953 to sign a mutual cancellation, but he promised to follow the line and went 100 percent with Goodyear. He took ten Auto-Lite batteries in trade, to which objection was made. Atlantic also objected to his handling DuPont anti-freeze. Matthews left the station in May 1957 due to bad health. He recalled receiving non-forcing letter dated March 1, 1951.

(c) Aniello L. Jacono, an Atlantic lessee from 1952 to 1954, had difficulty with Parris, the authorized TBA supplier, and began buying non-sponsored tires and batteries. He was asked by Atlantic salesmen to get rid of the tires and batteries and when he refused, the salesman made an inspection of his place and claimed he was using untrained personnel, improper uniform, improper display, and maintaining a dirty station. His lease was not renewed.

(d) Isidore Jack Pollock, an Atlantic lessee from 1940 to 1953, testified that Atlantic salesmen objected to his purchase of a number of Lee tires at a special price, however, the sales supervisor stated that this would be satisfactory because of the number of years that Pollock had been with Atlantic, and he continued to purchase Lee tires thereafter. He purchased some Bowers batteries, and salesmen told him he was going to have his lease cancelled. Pollock left the station to take over a tavern.

(e) Francis J. Ballaron, an Atlantic lessee from 1953 to 1957, carried Goodyear tires and batteries purchased through Miller, an authorized distributor. He kept non-sponsored tires on oil rack where Atlantic would not see them. Ballaron testified that he left the station because of pressure every month for not buying TBA where he should.

(f) James M. Meyers, Jr., an Atlantic dealer from 1950 to 1951, testified that he discussed non-forcing letter with Atlantic salesmen who told him to try buying other merchandise and find out what the letter meant.

Decision

58 F.T.C.

(g) Norris Stein, was an Atlantic lessee, beginning July 26, 1954. About six months later he discontinued exclusive purchase of Firestone and was told by Atlantic salesman that he would not long be an Atlantic operator. He stated that he had received no-forcing letter of June 22, 1955. Terminated his lease for reasons not involving TBA.

(h) Thomas J. Sullivan, Jr., an Atlantic lessee from 1953 to 1954, was told that Atlantic would like him to obtain all his products from Firestone. He bought some Bowers batteries and also Exide and was told by Atlantic salesman not to sell batteries as they were not as good as Firestone and that he didn't want them displayed in the station. He removed the batteries from display. Sullivan further testified that he returned the Exide batteries and discontinued the Bowers batteries as he felt that if he rubbed Atlantic he wrong way that he would be in their disfavor, and that his lease might not be renewed. He stated that the Atlantic representative made no direct threats, but always left the impression that if he did not operate the way Atlantic wanted him to, the chances were that his lease would not be renewed. The Atlantic salesman always questioned him when he bought non-sponsored items and give him the impression that he was expected to buy Firestone products. The salesman would ask him from time to time why he did not buy Firestone, and he got the point where he bought all items from Firestone because he was afraid of no lease renewal. It was put to him that he would not be forced to buy Firestone products, but Atlantic more or less expected him to do so. Sullivan sent in cancellation of lease because of price controversy.

(i) John Galle, an Atlantic lessee from 1954 to 1956, discussed with Atlantic salesman an offer of batteries and tires at prices lower than Firestone, and salesman informed him that he had signed an agreement to purchase TBA from Firestone and should not go against this agreement, and in addition Atlantic would not like to see competitive brands to Firestone in the station. He did not purchase these items, but continued to purchase Firestone tires and batteries. He received the non-forcing letter on June 22, 1955, but did not discuss it with the Atlantic salesman.

(j) Harry N. Hawes, an Atlantic lessee beginning in 1945, had three stations. In the first station he bought only Firestone TBA. In the second station carried Lee tires, and Atlantic salesman wanted to know what they were doing there, but he continued to handle them. In the third station he sold only Lee tires and some accessories from Firestone without much comment from Atlantic. Lease was not renewed on the second station, and the third station lease was

cancelled at his request. Atlantic salesman refused to let the new dealer take over the Lee tires and batteries on hand.

(k) Richard Brown, Atlantic lessee from October 1955 to April 1957, because of dissatisfaction with Firestone, began to purchase Goodrich tires. Atlantic salesman told him he did not like the purchase of non-sponsored items, as it was affecting his salary.

(l) James Parag, an Atlantic lessee from August 1, 1955, to March 1956, became dissatisfied with Firestone and began purchasing Goodyear tires and accessories from different sources. When Atlantic salesman saw the merchandise on his shelves he told him that he could not handle them, that if he did not handle what Atlantic handled he would lose his lease, and also because it also affected the salesman's commission.

(m) James R. Kelly, an Atlantic lessee from September 1952 to March 1953, began with Firestone TBA. Later sold whatever tires customers wanted. Atlantic salesman would not let him change window valances, he was told to leave them alone to keep the station uniform. Had some Goodyear and Goodrich tires which he kept in the back room. He felt he would get in trouble if he did not.

21. Certain representatives of suppliers of TBA who were selling in competition with respondent Goodyear, were called as witnesses in this proceeding. This testimony was taken in three areas—Philadelphia, Pennsylvania, Wilmington, Delaware, and Baltimore, Maryland. These parties testified generally that they had difficulty in selling TBA to Atlantic stations and testified specifically as to reasons given by certain Atlantic dealers for not buying or selling their TBA items. This testimony as to reasons given by Atlantic dealers for not purchasing competitive TBA was allowed under the authority of *Lawlor vs. Loewe*, 235 U.S. 522. This latter testimony was received not as proof of the truth of the facts recited, but for the purpose of showing the state of mind of the dealer. This testimony, however, is competent to show that dealers did not purchase a substantial amount of competitive non-sponsored TBA because of the feeling that they were required to purchase Goodyear or Firestone.

22. In the course of its defense in this proceeding, The Atlantic Refining Company introduced the testimony of thirty-six Atlantic dealers and two ex-dealers. Substantially all of these witnesses testified to selling non-sponsored TBA in varying amounts without objection by Atlantic. Most of them testified to having received the non-forcing letter issued by Atlantic similar to the letter of March 1, 1951, which this record shows was delivered to all its dealers and prospective dealers.

23. The hearing examiner recognized that present dealers appearing to testify were under considerable pressure because they were naturally interested in not jeopardizing the renewal of their leases. The record as a whole shows that there were no exclusive dealers in the sense that they confined themselves entirely to sponsored TBA, as all dealers carried some non-sponsored TBA to satisfy demands of their customers either in varying amounts or on a pick-up basis. Many of the stations do not have the space or finances to stock a complete line of tires and batteries, but instead purchase non-sponsored as well as sponsored items on a pick-up basis to satisfy customer demand. There was also in some instances evidence of confusion as to the definition of accessories among the dealers, as some included as accessories items generally considered as repair parts, as distinguished from accessories, and some dealers testified to carrying non-sponsored items which were, in fact, not supplied by Firestone or Goodyear. Many of the dealers called maintained a high sales volume in gasoline gallonage and also oil, and Atlantic would not jeopardize this gallonage by pressure tactics sufficient to irritate or alienate such dealers.

24. It is clear from the record in this proceeding that the Atlantic dealers did not consider the non-forcing letter as giving to them free and unhampered authority and the blessing of Atlantic to handle whatever TBA they might see fit. Both the dealers and the Atlantic salesmen accepted this letter for what it said; namely, that the dealer at the time of the change-over and prospective dealers thereafter had the right to select or reject the TBA sales program offered by Atlantic. The prospective dealer making application for an Atlantic station would not likely reject offhand the program submitted by Atlantic, and such rejection could very well affect his selection as an Atlantic dealers. After a dealer selected a TBA program, the Atlantic salesmen insisted, and saw to it, that the dealer hewed to the line, insofar as the more important items of TBA were concerned. The salesman would be expected to insist upon the purchase of sponsored TBA, as such purchases were reflected in the commission which the salesman received.

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

CONCLUSIONS

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

2. There is no evidence that The Goodyear Tire & Rubber Company, or The Goodyear Tire & Rubber Company, Inc., engaged in, or participated in, any facts or practices designed to force dealers and distributors of The Atlantic Refining Company to purchase Goodyear TBA products.

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

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

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

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

7. The evidence in this proceeding shows that leases have, on occasion, been cancelled because of TBA practices involving the purchase or display of non-sponsored TBA products.

8. It is further concluded that for the purpose of inducing the purchase of sponsored TBA by Atlantic dealers, Atlantic representatives did, in fact, coerce, and attempt to coerce, and force Atlantic dealers to purchase substantial quantities of Goodyear and Firestone TBA, and Atlantic accepted the benefits of such acts and practices. These acts of coercion consisted of demands that dealers discontinue the purchasing and displaying of non-sponsored TBA under threat of lease cancellation, non-renewal of lease or other corrective action. Such coercion need not be 100 percent effective

Order

58 F.T.C.

in order to constitute an unfair method of competition or unfair act or practice in violation of the Federal Trade Commission Act.

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

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

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

ORDER

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

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

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

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

4. The performance of any acts of intimidation or coercion, either through statements, oral or written, made directly to dealers or by representatives of respondent, which are designed to, or have, the purpose or effect of intimidating or coercing respondent's dealers or other customers to purchase TBA products sold by any designated supplier sponsored, recommended or approved by respondent.

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

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

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

OPINION OF THE COMMISSION

By KINTNER, *Chairman*:

This proceeding is based upon an amended complaint charging The Goodyear Tire & Rubber Company and its wholly-owned selling subsidiary, The Goodyear Tire & Rubber Company, Inc., (hereinafter collectively referred to as "Goodyear"), and The Atlantic Refining Company with acts, practices and agreements constituting a violation of Section 5 of the Federal Trade Commission Act. 15 U.S.C. § 45 (1958). Respondents answered admitting in part the allegations of the complaint but denying that Section 5 had been contravened.

The principal issue framed by the pleadings is the legality of a contract between these respondents calling for the payment of Goodyear of a sales commission to Atlantic in return for sales assistance in promoting automotive tires, batteries, and accessories (hereinafter referred to as "TBA" or "TBA products") of Goodyear to retail and wholesale petroleum outlets of Atlantic. In addition, Atlantic is charged with having entered into a substantially identical agreement with The Firestone Tire and Rubber Company, and Goodyear is charged with having entered into such agreements with a number of oil companies other than Atlantic, including Shell Oil Company.¹ Although Atlantic and Goodyear are the only respondents in the instant case, Shell and Firestone are joined as respondents in a companion case, Docket 6487, and in another companion case, Docket 6485, The Texas Company and The B. F. Goodrich Company are paired as respondents.

The complaint charges, in substance, that the success enjoyed by Goodyear and Firestone in selling to Atlantic outlets has been pur-

¹ Other oil companies having sales commission arrangements with Goodyear include Anderson-Pritchard Oil Corp., Ashland Oil and Refining Co., The Carter Oil Co., D-X Sunray Oil Co., Quaker State Refining Co., Richfield Oil Co. (accessories only), The Shamrock Oil and Gas Corp., Shell Oil Co., and Sinclair Refining Co. (accessories only).

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

Respondents deny these allegations and assert that their sales commission contract is a legitimate and competitive method of distributing TBA which benefits suppliers of TBA products, oil companies, dealers and distributors of petroleum products and the consuming public.

After hearings extending from the latter part of 1956 into November 1958, the hearing examiner filed his initial decision on October 23, 1959, dismissing the complaint as to Goodyear but holding that Atlantic, by forcing a substantial number of its dealers to purchase sponsored TBA through threats of lease cancellation or other retaliatory action, has engaged in unfair methods of competition and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act. He further held that the charges of the complaint are sufficiently broad to sustain an order prohibiting overt acts of coercion on the part of Atlantic even though the sales commission contracts themselves are not illegal. An order was entered against Atlantic prohibiting future acts of coercion or intimidation

designed to force Atlantic dealers to purchase TBA products sponsored by Atlantic.

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

Reply briefs were filed by Atlantic and Goodyear to the appeal brief of counsel supporting the complaint, and by counsel supporting the complaint to the appeal brief of Atlantic. Oral argument was heard by the Commission on June 23, 1960, and the matter is now before the Commission for decision. We find that Atlantic has in fact coerced a substantial number of its dealers to purchase substantial amounts of sponsored TBA through threats of lease cancellation or other retaliatory action. We further find that Atlantic has sufficient economic power over its wholesale and retail distributors to cause them to purchase substantial amounts of sponsored TBA even without the use of overt coercive tactics. For reasons set forth hereinafter, we conclude that the exercise of this power by Atlantic through the use of the sales commission plan in favor of Goodyear constitutes an unfair method of competition and an unfair act or practice in commerce within the meaning of Section 5 of the Federal Trade Commission Act.

CHARACTERISTICS OF THE SALES COMMISSION PLAN

Motorists may purchase replacement TBA items from several major classes of distributors. Manufacturers of these items, for example, Goodyear and Firestone, maintain either company-owned or franchised wholesale and retail distribution outlets in all of the marketing areas for TBA products considered in the course of the hearings in this case. Gasoline service stations constitute a second major class of outlets for TBA products. According to a 1947 market survey relied upon by Goodyear in implementing its sales commission program with The Shamrock Oil and Gas Corporation of Amarillo, Texas, motorists purchase approximately 37 percent of

their replacement tires and tubes, 44 percent of their replacement batteries, and 20 percent of their automotive accessories from gasoline service stations.²

The complaint in this case alleges that "service stations by the nature of their business, are particularly well adapted to be outlets for the sale of TBA products to the motorist consumer. They constitute a large and increasingly important market for TBA products." The truth of this allegation is conceded by both Goodyear and Atlantic, and Goodyear also admits that it ". . . sells TBA products directly and through wholesalers to many customers, including service stations who purchase for resale to consumers for replacement use in their automobiles."

Service station operators may purchase their requirements of TBA from two principal sources: (1) Local wholesale TBA dealers, representing Firestone, or Goodyear, or some other refining and distributing petroleum products which also purchase TBA products from manufacturers of these items, for resale along with the refinery products such oil companies distribute through their respective marketing organizations. TBA purchased by oil companies for resale may either be branded with a particular oil company's principal brand, for example, "Gulf," or with a private brand controlled by an oil company but used exclusively for TBA and not for refinery products, for example "Atlas," or with the supplying manufacturer's own brand, for example, "Lee" (tires) or "Exide" (batteries).

No particular term is used in the industry to describe the marketing technique whereby service station operators purchase TBA from independent local wholesalers, but the term "purchase-resale" is customarily used to characterize the marketing technique whereby oil companies purchase and resell TBA to their respective service station dealers. The sales commission method of distributing TBA is a hybrid deriving certain of its attributes from the first and other attributes from the second of these marketing techniques. Both the purchase-resale plan and the sales commission plan make use of the marketing facilities of marketing oil companies, but in different ways and with differing competitive effects. This may be illustrated by contrasting the purchase-resale method of distributing TBA used by Atlantic prior to 1951 with the sales commission method adopted by Atlantic in 1951 and used by the company since that time.

² Atlantic estimated in 1948 that approximately 21 percent of all replacement passenger tires are sold by service stations. Although Atlantic's estimate is considerably lower than Goodyear's, it is nevertheless clear that service stations account for a substantial percentage of total TBA replacement items sold to motorists.

Atlantic's Purchase and Resale Plan. Sometime in 1932, Atlantic commenced to purchase "Lee" tires from the Lee Rubber and Tire Corporation and to resell such tires to its wholesale and retail petroleum distributors. Later, in 1937, Atlantic commenced to purchase "Exide" batteries from the Electric Storage Battery Company (hereinafter referred to as "Exide") and resell such batteries, along with "Lee" tires, to Atlantic dealers. Thereafter, Atlantic began to purchase and resell the following automative accessories:

<i>Products</i>	<i>Supplier</i>
DuPont polishes and chemicals-----	E. I. du Pont de Nemours and Company Wilmington, Del.
Thermoid fan belts and radiator hose-----	Thermoid Corporation Trenton, N.J.
Fram oil filters-----	Fram Corporation Providence, R.I.
Schrader valves-----	A. Schrader Sons Brooklyn, N.Y.
Weed chains-----	American Chain and Cable Com- pany York, Pa.

Among the duties undertaken by Atlantic in connection with this program were the purchasing, financing, shipping, warehousing and selling of TBA items to its various classes of retail and wholesale petroleum dealers. Commenting on his company's TBA program in 1950, Mr. S. J. Heideman, TBA Manager for Atlantic, commented that "We receive a good gross margin in keeping with the duties left to us" Moreover, the overall satisfaction of Atlantic's dealers with the Lee-Exide arrangement was evidenced by the results of a TBA brand preference survey undertaken by Atlantic's Sales Research Section in 1948 and 1949. More than 1,000 service station dealers representing seven major oil companies, including Atlantic, located in 47 cities from Massachusetts to Florida were interviewed during the course of this survey. Of the Atlantic dealers interviewed, 67 percent preferred Lee tires and 79 percent preferred Exide batteries over competing brands of tires and batteries. Eleven percent of Atlantic's dealers stated a preference for Goodyear tires, 4 percent for Firestone tires, and the remainder announced a preference for various other tire brands. No preference for any particular brands of accessory items was found to exist, although "A definitely unsatisfactory supplier-dealer relationship" on accessories was observed. Sixty-seven percent of the Atlantic dealers contacted indicated that they would rather obtain their TBA requirements from several sources rather than a

single source, the principal reasons given therefor being price advantages and the variety of brands. Of the remaining 33 percent of Atlantic dealers, who preferred a single source of supply for TBA products, less than 4 percent gave as a reason the fact that the single supplier could provide them with a complete line of TBA—better service was given as a reason by 35 percent of the Atlantic dealers preferring a single source of supply, and price was given as a reason by an additional 32 percent.

Atlantic's Changeover to the Sales Commission Plan. Contemporaneously with the TBA brand preference survey of service station dealers described above, Atlantic management was actively considering possible alternatives to their purchase-resale arrangement with Lee. On January 19, 1948, exploratory letters were sent to five major tire manufacturers, The Goodyear Tire & Rubber Company, United States Rubber Company, The B. F. Goodrich Company, The Firestone Tire & Rubber Company, and General Tire & Rubber Company, inquiring “. . . what interest you may have in the sale of your tires and tubes through ATLANTIC outlets.” The tire companies were informed of Atlantic's desire “. . . to consider your propositions on first line, second line, and private brand, or as many of these lines as you merchandise.”

To assist the tire companies in preparing their quotations, Atlantic estimated it would require approximately 300,000 passenger tires and 40,000 truck tires annually, with tube requirements approximating 70 percent of tire requirements. Proposals were requested not only as to principal brands of the tire companies (“Goodyear,” “Firestone,” etc.) but also as to secondary brands controlled by these companies (Kelly-Springfield,” “Fisk,” “Federal,” “Miller” and “Hood”) and as to private brands as well. Mansfield Tire and Rubber Company and Lee were also contacted and requested to submit proposals on a private brand tire.

A detailed analysis of responses received from the various tire companies was presented to Mr. D. T. Colley, Vice President in Charge of Domestic Sales of Atlantic, in a memorandum of June 22, 1948, from the company's TBA Manager, Mr. Heideman. This memorandum concluded with the statement:

This presentation and Atlantic's benefits with the several companies has been discussed at length with the members of the T.B.A. Products Committee. It was their unanimous opinion that Lee appeared to be the best choice for our company. To their approval, I would like to add my own, since it is my opinion after careful analysis that the Lee franchise is the best available at the present time for Atlantic.

In a subsequent memorandum of August 24, 1948, Mr. Heideman set forth several reasons why a proposed experiment then under consideration involving the sale of Firestone tires in one sales district of Atlantic should *not* be adopted:

It is apparent . . . that it would be unreasonable to expect too great an expansion of our present sales by the addition of a better known tire. As a matter of fact, it is our opinion that there is a very real possibility of a smaller market with Firestone due to their presently established company stores and distributors. Volume purchase requirements would leave a great number of our dealers in a poor competitive position.

. . . neither Firestone batteries nor accessories have the national acceptance of the lines we presently handle . . . [T]here is certainly an indication that consumer acceptance of the Firestone brand in batteries is very limited.

Nevertheless, negotiations with the tire companies continued throughout the remainder of 1948, and in May 1949, Goodyear expressed its willingness to offer a TBA program to Atlantic. However, it was Firestone which was selected for Atlantic's first experiment with the sales commission plan. In a letter of January 10, 1950, to the Regional Manager of its New York Region, an Atlantic official explained:

As you know, for the past year we have been studying T.B.A. as to its profitability to the Company. Our most recent findings indicate that it is questionable whether this venture is paying us to the degree that the effort expended warrants.

In our approaches to the subject, we have had discussions with various major tire manufacturers who, as you know, are interested in handling the entire T.B.A. line, paying us a commission.

* * * * *

The proposition that seems most acceptable to us is one offered by Firestone. I will not attempt to go into detail covering this proposition, but when you come to Philadelphia for the Regional Manager's Meeting next week, Mr. Heidemann (sic) plans to sit down with you and go over the proposition with thought in mind that you will elect to have your Region be the guinea pig.

As it turned out, however, the Firestone plan was not introduced into the New York area. Instead, operations under the Firestone commission plan began in Atlantic's Erie, Pennsylvania, district on March 30, 1950, and in the Wilmington, Delaware, district on April 4, 1950. Operations under a sales commission plan with Goodyear commenced on an experimental basis in Atlantic's Newark, New Jersey, sales district on June 12, 1950. After these programs were instituted, Atlantic's Sales Research Section conducted a secret poll in July and August, 1950 among 600 of the 750 Atlantic dealers and distributors in the three TBA test districts. The purpose of this poll was to determine the preference of Atlantic dealers as between the Lee-Exide program and the sales commission program. Of the

123 dealers responding to the poll, 45 percent preferred the new sales commission plan, 40 percent preferred the former Lee-Exide arrangement, and 15 percent showed no preference for either plan.

In December, 1950, Atlantic contacted seven manufacturers of batteries, including Exide and Gould-National Batteries, Inc., ". . . in an attempt to discover whether they had at present or contemplated in the future a battery program for direct dealer merchandising similar to the commission plan offered by certain tire companies." This suggests that Atlantic was considering limiting the sales commission contracts with Firestone and Goodyear to tires and tubes only, or perhaps to tires, tubes and automotive accessories only, with a separate sales commission arrangement for batteries with a supplier who could furnish a more widely-known battery than the "Firestone" and "Goodyear" brands. (Actually, Goodyear does not manufacture batteries, but instead purchases batteries marked with the "Goodyear" label from Electric Auto-Lite Company and Gould-National Batteries, Inc.)

Favorable replies were received from several of the battery manufacturers, with Exide showing particular interest in such a program. This company's manager for automotive replacement sales responded to the Atlantic inquiry on December 22, 1950:

Currently all Exide automotive replacement battery sales to dealers are made through our Wholesale Distributors, thus affording prompt delivery through many warehouses.

Your letter of December 15 inquires as to our plans for a commission arrangement to be offered national oil accounts on direct sales to dealers. We believe that our experience with this type of operation in past years should be of great value to you. Therefore, I suggest that immediately after the first of January you arrange for a meeting with interested members of your organization for a complete discussion of the many phases of this subject.

Negotiations between Atlantic and Exide were never consummated, however, and on February 14, 1951 a sales official of Exide reported to his superior as follows:

Mr. S. J. Heidman (sic), T.B.A. manager of the Atlantic Refining Company called today to give me advance confidential information regarding a decision made this morning by top management of the Atlantic Refining Company regarding future handling of T.B.A. sales to Atlantic dealers.

Effective as quickly as the changeover can be made, all T.B.A. sales to Atlantic dealers will be handled on a commission arrangement.

* * * * *

. . . Both Firestone and Goodyear had previously been approached regarding a plan whereby they would sell tires only to the Atlantic Refining Company accounts on a commission arrangement and had flatly refused such a plan insisting that either the complete program or none be sold by them.

TBA Manager Heideman submitted a memorandum entitled "T.B.A. Conversion to Firestone & Goodyear Programs" to Vice President Colley of Atlantic on March 21, 1951, summarizing the changeover to the sales commission program:

On February 14th, the decision was made to swing over to the Commission Plan of T.B.A. marketing effective March 1st. It was arranged for three regions (Philadelphia-New Jersey, New England and New York) to market the program of the Goodyear Tire and Rubber Company, and the other three (Eastern Pennsylvania, Western Pennsylvania, and the South) were to market the program of the Firestone Tire and Rubber Company. *The split was largely a matter of regional selection, decided upon by local advantages enjoyed by the respective rubber companies but influenced by staff determinations to have the two rubber companies competing in different localities for an equal share in the development of the Atlantic dealer's T.B.A. business.* Although this move was sudden, events leading up to it were developed in an orderly fashion over a period of years.

* * * * *

It will be interesting to review some of the advantages that we enjoy under the Commission Plan. We are relieved of the purchasing function . . . We do not warehouse or deliver any merchandise; we are not involved in the handling of accounts, such as invoicing or credit and collection work; we do not issue catalogs or price books nor do we have to provide point-of-sale promotional helps. All of these responsibilities as well as sales training help are assumed by the rubber manufacturers. We assist in the selling job as well as in the dealer training and merchandising task, and for this effort receive a commission which varies according to class of account and type of merchandise, but has been averaging well over 9%.

. . . We are indeed fortunate in having these two companies competing against one another for a more secure or favorable position with Atlantic. We stand to gain from this arrangement whether we are in a buyer's or seller's market.

We have tried to estimate how our 1950 actual experience on T.B.A. would have compared with the same volume of performance if it were accomplished under the Commission Plan. Our T.B.A. volume *excluding the three test districts* amounted to seven and a half million dollars. Our gross profit ranging from 20 to 30% on the different products amounted to approximately \$1,664,000. Estimated expenses chargeable to this operation total \$2,071,000. This would indicate a loss of about \$407,000.³ [Emphasis added.]

MAP I, below, shows the manner in which Atlantic's marketing area was finally divided between Goodyear and Firestone. Although

³ Whether Atlantic's purchase-resale program was as unprofitable in reality as appeared from the accounting procedures used by the oil company was questioned in a memorandum from the sales manager of Exide to the vice-president of this company in February, 1951:

"The accounting procedure set up by the Atlantic Refining Company was such that expenses charged against T.B.A. sales appeared to make this operation unprofitable. As a result of this and because the top management of the Atlantic Refining Company believed that their own men should participate only in the sales of petroleum products, it was decided early in 1950 to try out the Firestone and Goodyear sales commission plan . . ."

Opinion

58 F.T.C.

the three regions assigned to Firestone constitute a much greater geographical area than do the regions assigned to Goodyear, the TBA sales volume by the two rubber companies to Atlantic dealers and distributors within their respective assigned areas has generally been very nearly the same in every year since 1951, as indicated by TABLE I, below. This table shows that during the first 6 years of Atlantic's operation under the sales commission plan, Firestone's sales volume to Atlantic accounts totalled \$26,078,095 and exceeded the sales volume of Goodyear by only \$105,000.

TABLE I.—TBA sales volume by Firestone and Goodyear to Atlantic accounts, and commissions paid thereon, June 1950 through June 1956

	Goodyear sales volume	Firestone sales volume	Goodyear commissions	Firestone commissions
6-50/12-50.....	\$165, 578	¹ \$458, 325	\$15, 447	¹ \$43, 894
1951.....	2, 445, 808	3, 243, 350	239, 250	299, 524
1952.....	4, 175, 890	4, 349, 616	411, 743	404, 948
1953.....	5, 067, 565	5, 050, 381	500, 437	469, 784
1954.....	5, 284, 743	4, 867, 689	523, 048	452, 083
1955.....	5, 700, 121	5, 562, 936	557, 599	506, 199
1-56/6-56.....	3, 133, 905	2, 545, 798	296, 988	234, 317
Total.....	25, 973, 610	26, 078, 095	2, 544, 512	2, 410, 749

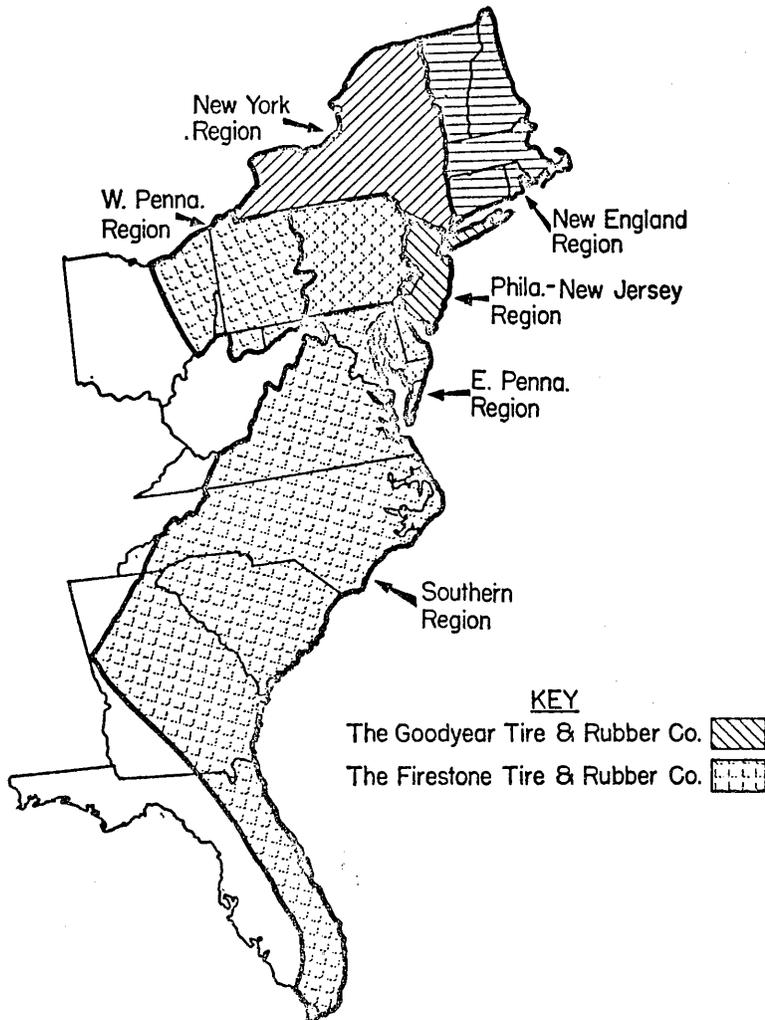
¹ Includes period from April 1950 through December 1950.

NOTE: In 1950, the sales commission plan was used in only 3 of Atlantic's 34 sales districts. The sales commission plan was not introduced in all 34 Atlantic sales districts until Mar. 1, 1951.

In 1952, the first full year in which the sales commission plan was operative in all Atlantic sales districts, combined sales of Goodyear and Firestone TBA to Atlantic dealers and distributors amounted to \$8,525,506, and the two rubber companies paid a total of \$816,691 in sales commissions to Atlantic. The success with which Atlantic transferred its own former TBA sales volume under the purchase-resale plan to Goodyear and Firestone under the sales commission plan may be gauged from the fact that Atlantic's TBA sales volume in 1949, the last full year of operation under the purchase-resale plan, amounted to \$6,697,471. In 1950 Atlantic continued the purchase-resale plan in all except 3 of its 29 sales districts, and in that year the oil company's TBA sales volume was \$7,581,760.

The sales gains accruing to Goodyear and Firestone as a consequence of their sales commission contracts with Atlantic were accompanied by a corresponding loss in sales by Lee and Exide even though both companies made vigorous efforts to retain the business of Atlantic dealers and distributors after Atlantic switched to the sales commission plan. Lee opened new factory branches in Hartford, Connecticut; Providence, Rhode Island; and Syracuse, New York for this specific purpose. All branches of Exide were instructed to make it "their number one job" to solicit the business of Atlantic

MAP I
THE ATLANTIC REFINING CO.
DIVISION OF MARKETING REGIONS
BY TBA SALES COMMISSION PLANS
EFFECTIVE MARCH 1, 1951



dealers and distributors. Nevertheless, within nine months after Atlantic began sponsoring Goodyear TBA on March 1, 1951, Lee concluded that "approximately 25% of the Atlantic Refining Company business will be salvaged this year." Seven months after the changeover, Exide found that it had retained all or part of the business of 22.5 percent of the better Atlantic accounts and all or part of the business of 24.7 percent of the total number of Atlantic accounts. Thus, some 75 percent of Lee-Exide sales to Atlantic distributors and dealers were lost within a nine-month period in 1951, even though a market survey conducted by the Atlantic Sales Research Section in 1949 had shown that 67 percent of Atlantic dealers and distributors preferred Lee tires and 79 percent preferred Exide batteries.

Lee's Vice President in Charge of Sales, Mr. W. F. Hinderscheid, complained bitterly to Atlantic about the wholesale replacement of Lee advertising signs at Atlantic stations with Goodyear advertising signs shortly after the sales commission plan was undertaken on a test basis by Atlantic in 1950:

I was under the impression, also, where dealers wanted to continue to handle Lee Tires through us it would be allright for them to do so and we could still have our identification on those locations, however, I find that even though the dealers continue to handle our tires their stations are identified with competitive signs. For instance, in the Newark District our identification is being taken down and Goodyear will be erected even though the dealer still wants to handle Lee Tires.

TBA sales by Firestone and Goodyear to Atlantic outlets continued to grow, and by 1955, the last full year for which data are available, combined sales of the two rubber companies under their sales commission contracts with Atlantic amounted to \$11,263,057. In order to fully understand the devastating competitive effects on manufacturers and wholesalers of TBA products competing with Firestone and Goodyear which have resulted from the latter two companies' sales commission contracts with Atlantic, however, some further understanding of the functioning of the sales commission system is necessary.

Mechanics of the Sales Commission System.—Goodyear and Firestone maintain either company-owned or franchised wholesale outlets in most of the principal cities and in many smaller communities throughout the entire marketing area of Atlantic Refining Company. Atlantic markets its petroleum products in the Middle Atlantic States (including parts of Ohio and West Virginia), New England (not including Maine) and the Southern Atlantic States. As has been shown, this marketing territory is subdivided

into six sales regions, three of which have been assigned to Goodyear and three to Firestone. (See MAPI, supra.)

In cities and towns where Atlantic retail stations are located, such stations are assigned to a local Goodyear distributor (if in Atlantic's New England, New York or Philadelphia-New Jersey sales regions) or to a local Firestone distributor (if in Atlantic's Eastern Pennsylvania, Western Pennsylvania or Southern sales regions). The assigned TBA distributor is intended to be the supply point from which the Atlantic dealer will purchase a substantial percentage of his requirements of TBA.

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

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

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

⁴ Atlantic has some 236 wholesale distributors, and is entitled to a commission of 7½ percent on purchases of sponsored TBA by these jobbers, compared with 10 percent on purchases by Atlantic's retail dealers.

plied and has received sales commissions from Goodyear and Firestone over the years equivalent to more than 9 percent of the net sales value of all TBA products sold by these rubber companies to Atlantic dealers and distributors.⁵

Tires and tubes comprise the most important of the three companies of the TBA line, accounting for about 70 percent of total TBA sales to Atlantic outlets, with batteries and accessories representing about 15 percent each. Goodyear produces its own tires and tubes, and the more important categories of automotive accessories, including tire retread and repair materials, fan belts and radiator hose. Batteries marked with the "Goodyear" label are purchased for resale from Electric Auto-Lite Company and Gould-National Batteries, Inc., while the following accessories are purchased by Goodyear for resale under the original manufacturer's own brands:

<i>Accessory</i>	<i>Brand</i>	<i>Manufacturer</i>
Spark plugs.....	AC.....	AC Spark Plug Div., General Motors Corp.
Oil filters.....	AC.....	Do.
Do.....	Purolator.....	Purolator Products, Inc.
Cleaners, polishes, and waxes..	du Pont.....	E. I. du Pont de Nemours & Co., Inc.
Cleaners, polishes.....	Johnson.....	S. C. Johnson & Son, Inc.
Cleaners, polishes and waxes..	Simoniz.....	Simoniz Co.
Do.....	Mac's.....	Mac's Super Gloss, Inc.
Radiator chemicals.....	du Pont.....	E. I. du Pont de Nemours & Co., Inc.
Do.....	Warner.....	Warner-Patterson Co.
Auto lamps and bulbs.....	Westinghouse..	Lamp Division, Westinghouse Electric Corp.
Wiper blades.....	Anco.....	The Anderson Co.

⁵ Goodyear's reasons for entering into its sales commission agreement with Atlantic were set forth in a "Confidential" memorandum of February, 1951, written by Mr. S. A. Gaylord, Goodyear's Manager of Sales to oil company outlets:

"... As you know we have recognized the desirability of Atlantic distribution for many years and the need for more oil company distribution in the new territory now assigned to us, which represents more than 50% of the Atlantic T.B.A. sales and potential.

"Early last year when supplies were plentiful and signs for the future pointed to over-production and increased competition, we mutually agreed on the marketing experiment with Atlantic in our respective Newark District territories with a commitment for expanded territory if the Goodyear Commission Plan proved successful—which it did.

"It is true that even at a late date we could have withdrawn from our commitment to Atlantic, however, we would have been out of the account for keeps and our competition [Firestone], which placed no restrictions on moving in, would have the account 100 percent.

"... The decision of our Management was made after consideration of all factors and particularly because it gave Goodyear the opportunity of entering into a long-term relationship with Atlantic providing our performance is satisfactory."

The sales commission method of distributing TBA products thus affects competitive relationships among producers and distributors of various products, all linked by but one common factor: the motor vehicle. As a consequence, in order to show the network of unlawful trade restraints and inhibitions permeating the sales commission system of distributing TBA, it is necessary first to describe the marketing structure of Atlantic and to define the manner in which this company exercises control over its wholesale and retail petroleum distributors, and next to describe how the sales commission plan enables Goodyear to integrate such market control into its own system of distribution.

DISTRIBUTION SYSTEM OF ATLANTIC REFINING COMPANY

Atlantic is a major integrated producer, refiner, and distributor of petroleum products. The company was organized in 1860, and was acquired by Standard Oil Company in 1874. Since the dissolution of the Standard Oil Trust in 1911, Atlantic has been operated as a separate corporate entity.

In 1948, Mr. S. J. Heideman of Atlantic stated that "Atlantic's percentage of the *national* gasoline market is 2½% . . ."; and since the oil company markets its gasoline along the Atlantic Coast states and in parts of Ohio and West Virginia only, it may be inferred that Atlantic's share of gasoline sales in its own marketing area is substantially in excess of 2½ percent. Sales and operating revenue of this oil company totalled more than one-half billion dollars in 1954.

Atlantic markets its refinery products to three major classes of customers: (1) wholesale distributors; (2) retailers (chiefly service stations but including also garages, grocery stores, restaurants with outside gasoline pumps, etc.); and (3) commercial accounts. This opinion is not concerned with the last-named group, which accounted for 16.6 percent of total gasoline sales by Atlantic in 1954, as these accounts are customers who purchase for their own consumption and not for resale.

Atlantic sold gasoline and other petroleum products directly to some 5,537 retail customers in 1956, and these direct retail dealers accounted for 57.2 percent of total gasoline sales by Atlantic in 1955. Atlantic's direct dealers are of two classes: (1) Lessee dealers, who accounted for 39.1 percent of total Atlantic gasoline sales in 1955; and (2) Contract dealers, who accounted for 18.1 percent of gasoline sales by Atlantic in the same year. Shown below in TABLE II are the numbers of lessee and contract dealers pur-

chasing petroleum products directly from Atlantic in each of its marketing regions in June, 1956:

TABLE II.—Numbers of direct lessee and contract dealers of Atlantic Refining Co. in June 1956, by marketing regions

Region	Lessee dealers	Contract dealers
New England.....	495	220
New York.....	321	263
Philadelphia-New Jersey.....	481	640
Eastern Pennsylvania.....	480	1,075
Western Pennsylvania.....	317	725
Southern.....	399	121
Grand total.....	2,493	3,044

Lessee Dealer. The principal characteristic distinguishing lessee dealers from contract dealers is that the former do not own their own business properties, but instead lease them from Atlantic. Lease terms range from three months to three years; most lessee-dealers operate under one-year leases, however. The leasehold instrument does not require the lessee to handle Atlantic products, but does provide that the premises shall be used for the operation of a "first-class automotive service station retailing petroleum products and TBA merchandise normally handled at competitive service station outlets." Rental payments by lessees are based on specified percentages of gross monthly sales of all types of merchandise, including TBA. These percentages are as follows:

0 percent.....	First \$500 monthly.
6 percent.....	Next \$2,000 monthly.
5 percent.....	Next \$2,000 monthly.
4 percent.....	Next \$2,000 monthly.
3 percent.....	Over \$6,500 monthly.

At the time he executes his lease with Atlantic, each lessee-dealer is required to sign a separate document known as an "Eleven Point Lease Letter". This letter defines standards of operation for Atlantic lessee-dealers. Illustrative of these is the standard for "Housekeeping":

"1. Housekeeping—Clean, sanitary premises, inside and out." Other standards set forth in the "Eleven Point Lease Letter" are "Use and Upkeep", "Display", "Illumination", "Personnel", "Hours of Operation" ("Uniform daily operating schedule based on buying habits of potential trade in the area"), "Services", "Adequate Inventory", "Sales Promotion", "Prices", and "Accounting". These standards of operation are implemented by Atlantic not only through the

surveillance of its sales force, but also by the employment of "Phantom Customer Inspectors".⁶

Since its adoption on April 1, 1953, the "Eleven Point Lease Letter" has been used by Atlantic to interpret and enforce Paragraph Three of dealer leases which, as noted, provides that "... the sole purpose and use of the leased premises shall be the lawful, diligent and businesslike operation of a first-class automotive service station . . .", thus the "Lease Letter" is an integral part of the lease itself. This is shown by the regularity with which Atlantic warns lessee-dealers in writing that their leases will be terminated if stated defaults with respect to the provisions of the "Eleven Point Lease Letter" are not remedied within fifteen days.⁷

Prior to about August 1953, Atlantic's written agreements with its lessee-Dealers also included an "Atlantic Franchise Agreement", providing for their purchase of motor fuels and automotive lubricants from their oil company lessor under stated terms and conditions. In recent years, only automotive lubricants have been covered by written purchase agreements between Atlantic and its lessees. Nevertheless, the facts of record clearly establish that Atlantic lessees purchase and resell Atlantic motor fuels exclusively.

Notwithstanding the economic power possessed by an oil company as a consequence of being both landlord and supplier to its lessee-dealer customers, the powers and responsibilities of an oil company's lessee-dealer "... satisf[y] all the requirements of an independent enterprise." *United States v. Richfield Oil Corp.*, 99 F. Supp. 280, 288 (1951) *aff'd*, 337 U.S. 922 (1952). Judge Yankwich's comments in the *Richfield* case as to the relationship of an oil company to its lessee-dealers apply with equal force to the instant case:

Implicit in the contract is the lessee's assumption of obligation and responsibility for his own acts upon the premises and those of his employees in their

⁶ Witness John Chambers, former Atlantic lessee-dealer who testified in support of the complaint in this proceeding, received the following letter from his former Atlantic District Sales Manager on October 14, 1954:

"Dear John: Our Phantom Customer Inspector has just reported to us that you received a 290 out of a possible 300 on a recent inspection.

"This is the kind of job which makes us all very happy and certainly is an important factor in running a profitable service station."

Witness Chambers' lease was subsequently terminated because he refused to go along with Atlantic's pricing policy and because he did not purchase sufficient quantities of sponsored TBA.

⁷ Here, for example, is a letter dated December 8, 1953 to dealer Michael J. Clifford, Baltimore, Maryland:

"1. From observations, we note that your regular hours of operation are such that we believe your market area is not being properly supplied.

"2. We also note from observations that inventories maintained in your station are not adequate to serve normal customer needs without delay."

(This dealer's lease was terminated January 4, 1954, for noncompliance with the above defaults.)

relation to the public, who come in contact with them during the time of his dominion. The lessee is not the employee of Richfield. Richfield pays him no wages or other remuneration. He must carry his own workmen's compensation. He is not carried on their books as an employee for the purpose of social security taxes or any of the withholding taxes, state or federal, incidental to the employer-employee relationship. Richfield is not required to withhold any moneys from him for income tax purposes. Neither are they required to perform any of the duties just mentioned as to any of the employees who may assist the lessee in the conduct of the station or of any auxiliary responsible for his own conduct and that of his employees which may cause damage to the persons or property of others. [99 F. Supp. at 288]

Contract Dealers. There were 3,044 contract dealers of Atlantic as of June 1956, and of this number about 50 percent operated service stations (as distinguished from grocery stores, garages, and similar outlets with gasoline pumps on the premises). Non-service station outlets generally do not purchase and resell TBA products; all service station outlets, however, are regarded as potential purchasers of TBA under Atlantic's agreements with Goodyear and Firestone.

Although contract dealers either own their own service station properties, or lease them from parties other than Atlantic, these dealers are subject to the control of Atlantic as a consequence of various contractual agreements between such dealers and Atlantic. Chief among these is an agreement having the following principal provisions:

1. EQUIPMENT LOAN. ATLANTIC, reserving the right of addition, change, substitution, and maintenance, lends to BUYER [the contract dealer] for the purpose of storage and sale of motor fuel purchased solely from ATLANTIC and for no other purpose, equipment that has been installed or which ATLANTIC may install, which shall remain personalty and the property of ATLANTIC, and which BUYER shall not remove, but shall repair and maintain as follows. [Lists equipment.]

2. SALE AND DELIVERY. Provides that the contract dealer shall buy a specified number of gallons of motor fuel annually from Atlantic; that deliveries will not exceed one-eighth of such gallonage monthly; that the contract dealer 'shall order and accept not less than one-twentieth of such annual gallonage in any calendar month'; and that the times, manner and quantities of delivery shall be in accordance with Atlantic's current practice.

The agreement further provides that all petroleum products delivered thereunder shall be paid for at prices established by Atlantic. The term of such agreement is generally for one year, and may be terminated by either party at the end of the original or any subsequent term by giving 60 days notice. Upon termination, Atlantic is entitled to repossess any equipment loaned to the dealer, with or without legal process. If the agreement is cancelled by Atlantic because of breach by the dealer, the dealer must pay a fixed sum to Atlantic as reimbursement for cost of installation and removal of

309

Opinion

the equipment or *at its option*, Atlantic may leave the equipment in place and require the dealer to pay a fixed sum for the value of the equipment and improvements. The equipment most frequently loaned (without charge) by Atlantic to contract dealers includes gasoline pumps, underground storage tanks, compressors, air towers, lifts, signs, outside lighting and poster frames.

Both lessee-dealers and contract dealers have agreements with Atlantic relating to annual purchases of specified quantities of automotive lubricants, and to the terms upon which credit may be extended by these dealers to the approximately 160,000 holders of Atlantic credit cards.

Wholesale Distributors. This class of customers purchases refinery products from Atlantic for resale under the oil company's brand names. Wholesale distributors maintain bulk storage tanks capable of receiving truck deliveries of gasoline from Atlantic, and maintain their own delivery equipment for transporting such gasoline from their bulk storage tanks to retail customers, including service stations. There were 236 wholesale distributors of Atlantic products in 1956, who resold to 2,897 service stations, as shown by TABLE III:

TABLE III.—Numbers of wholesale distributors of Atlantic Refining Co., and service stations supplied by them in June 1956, by marketing regions

Region	Distributors	Service stations
New England.....	8	151
New York.....	39	238
Philadelphia-New Jersey.....	0	0
Eastern Pennsylvania.....	77	925
Western Pennsylvania.....	26	410
Southern.....	77	1,173
Grand total.....	236	2,897

Atlantic had wholesale distributors in each of its six principal marketing regions in 1956, with the exception of the Philadelphia-New Jersey region. (There were 1,121 Atlantic service station outlets in the Philadelphia-New Jersey region in 1956, but all were supplied directly by the oil company.) These distributors accounted for 24 percent of total gasoline sales by Atlantic in each of the years 1951 and 1954. Eighty-seven percent of the 2,897 service stations supplied by wholesale distributors of Atlantic in 1956 were in the Eastern Pennsylvania, Western Pennsylvania, and Southern regions; the remaining 13 percent were in the New England and New York regions.

Wholesale distributors are parties to the same type of sales contracts for automotive fuels and lubricants with Atlantic as are

Atlantic's contract service station dealers. Moreover, Atlantic has the power to change the sources of supply for service station dealers from Atlantic itself to wholesale distributors. During the period from April 1950 to June 30, 1956, Atlantic reassigned 53 contract service station dealers in the Wilmington, Delaware and Baltimore, Maryland sales districts from itself to particular wholesale distributors in those districts. Atlantic's use of the power to expand a wholesale distributor's retail market by adding to the number of service stations supplied by such distributor in order to induce such distributor to purchase and resell sponsored TBA to his service station customers was described by witness Lingenfelter, a salesman for Reading Batteries, Inc. (now the Reading Battery Division of the Electric Auto-Lite Company), who testified in support of the complaint.

THE ISSUE OF COERCION

The complaint in this case charges that Atlantic has caused its various classes of dealers to purchase substantial quantities of Good-year or Firestone TBA through the use of threats to terminate either their tenure as lessees (if lessee-dealers) or their petroleum supply and equipment loan contracts (if contract dealers). It is conceded by counsel supporting the complaint that when Atlantic adopted the sales commission system on March 1, 1951, all its dealers were informed by letter entitled "A Statement of Atlantic's TBA Policy" as follows:

Our sales organization has been instructed to explain and demonstrate to you the many advantages of the new TBA plan. They will do so with enthusiasm and conviction because they are confident that it will be advantageous for you to accept it. *However, your acceptance or rejection of the program is a matter of your own choice.* [Emphasis added.]

Notwithstanding this initial statement of policy by Atlantic, repeated periodically thereafter in form letters sent to its dealers, counsel supporting the complaint contend that in practice this officially-proclaimed policy has been ignored by Atlantic and that in fact, Atlantic dealers have been orally advised by sales officials of the oil company that their continued status as Atlantic dealers and lessees will be in jeopardy if they do not purchase sufficient quantities of sponsored TBA. This contention is supported by the testimony of former Atlantic dealers who appeared as witnesses and further reinforced by the testimony of witnesses representing many suppliers of TBA engaged in competition with Firestone and Good-year, who testified that they encountered difficulty in selling TBA to Atlantic dealers because the latter group felt that they were required to purchase sponsored TBA and feared reprisal by Atlantic if they

purchased non-sponsored items. Testimony of the competing TBA suppliers as to reasons given by Atlantic dealers for not purchasing competitive TBA was allowed under the authority of *Lawlor v Loewe*, 235 U.S. 522 (1915). This testimony was received not as proof of the facts recited, but for the purpose of showing the state of mind of the Atlantic dealers. Such testimony is competent to show that Atlantic dealers did not purchase a substantial amount of competitive non-sponsored TBA because of their feeling that they were required to purchase Goodyear or Firestone TBA.

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

Typical of the former Atlantic dealers testifying in support of the complaint was witness John Chambers, who operated an Atlantic station in the Philadelphia area from 1945 until November 28, 1954. He gave this account of the events occurring when Atlantic changed over from the Lee-Exide program to the sales commission plan in 1951:

Q. Mr. Chambers, referring . . . to the dealer meeting when the switch-over to the Goodyear TBA line was announced, were you given any choice as to the brand of TBA that would be carried by Atlantic?

A. No, there was no choice; I mean the company said that they were going from one product which would be Lee and Exide, over to full Goodyear.

Thereafter, witness Chambers commenced purchasing Goodyear TBA from the local Goodyear distributor to whom he had been assigned, a Mr. Parris. From time to time, however, he also purchased TBA products from other suppliers in his area. Among these were the following.

Chester Auto Parts Chester, Pennsylvania	Waxes and other accessories
V. J. Auto Parts Sharon Hill, Pennsylvania	Accessories, including "Barsleak", a radiator sealer
C. A. Powers Chester, Pennsylvania (A Goodyear tire distributor)	Recapped tires, and also some new Goodyear tires and tubes

Witness Chambers testified that he was criticized by Atlantic salesmen for purchasing accessories from wholesalers other than Mr. Parris, his assigned supplier:

Q. Were any comments ever made by Atlantic representatives concerning your purchases of accessories from other than Ed Parris?

A. Yes.

Q. Would you please state some instances?

A. . . . the one that is greatest in my memory right now was the Barsleak, . . . Joe Connelly was Atlantic [salesman] at that time, and Joe would pick it up and say, "What are you doing with this," and he would set it back down.

* * * * *

Q. Were any comments other than the one referred to made by Atlantic representatives concerning the purchase of TBA from local jobbers other than Ed Parris?

A. Why yes, there was great criticism, shall I say, in reference to outside [i.e., non-sponsored] merchandise.

Q. Who made these criticisms?

THE WITNESS: Why salesmen who represented the company.

Q. Which company?

A. Atlantic.

* * * * *

Q. Where did these conversations take place between the Atlantic salesmen and you?

A. Many times over a cup of coffee and sometimes out in the driveway.

Q. Would it generally be a private conversation?

A. If it was to be of that private nature, yes.

Q. Well, when it was a criticism, was it generally of a private nature?

A. It was never done openly.

Subsequently, in November 1954, witness Chambers was notified that his lease would not be extended beyond December 31, 1954. He discussed this with Mr. Parris, his TBA supplier, who was also a former employer of witness Chambers:

Q. . . . what was the substance of your conversation with Mr. Parris?

A. I asked, "what in the world happened, what could I do." He said, "Jack, you have been turned in by three [Atlantic] . . . salesmen for buying outside merchandise." I said, "Who?" He said, "Connelly, Muldoon, and Petrisson" turned me in for buying outside merchandise.⁸

The above testimony must be assessed in the light of that given by Mr. Glenn L. Wetzel, President of Chester Auto Parts, Inc., of Chester, Pennsylvania. His company sells automotive parts, batteries and accessories (but no tires) at wholesale. Witness Wetzel gave this account of his conversation with witness Chambers:

Q. Do you recall any other conversations with other Atlantic dealers or Sinclair dealers, along similar lines?

A. Yes. John Chambers.

Q. Please state the time as nearly as you can, the place, and what was stated.

A. I would approximate the time as about 1953, possibly 1954. I wouldn't know exactly any more. But it was to the effect that he had to stop buying

⁸ Atlantic regarded witness Chambers as an excellent service station operator, as is shown by the letter to him of October 14, 1954, quoted supra, note 6. This letter of commendation was received by witness Chambers just one month before he received notification that his lease would be terminated.

from me. He was told that he was buying too much on the outside from outside distributors, meaning V. J. Auto Parts and myself, which were specifically named.

* * * * *

Q. Now will you please state what the conversation was?

A. Jack said to me: "Glen, I am going to have to stop buying from you. I have been warned that if I don't, I am going to be removed from this station. They are going to give me the ax." And two months later he got the ax.

Further testimony as to the state of mind of witness Chambers in 1953 and 1954 was given by witness Joseph Marabella, a partner in the firm of V. J. Auto Parts Company, Folcroft, Pennsylvania. Mr. Marabella testified as follows:

Q. And did you solicit Bars Leak (sic) business from Mr. Chambers when he was an Atlantic lessee-dealer?

A. Yes sir.

* * * * *

Q. And what was your experience with respect to the sale of Bars Leak to Mr. Chambers?

A. My, well, business relations and experience with Mr. Chambers had been the same as with other gentlemen I have mentioned, enjoying good business relations, good sales on Bars Leak, up until the time he was told to remove it from his shelf, . . .

Later, witness Marabella tried to sell Mansfield tires and tubes to witness Chambers and to another Atlantic dealer named Booz:

A. Well, in the latter part of 1954 with Mr. Booz, Elmer Booz, Wycombe Avenue and McDade Boulevard in Darby, I along with a Mansfield tire representative went in to solicit some of Mr. Booz' tire business. He said, "Joe, I'd be glad to buy them on a fill-in basis, but you know I cannot put anything in here but Goodyear tires and Goodyear tubes." And that was the extent of the conversation.

Q. Do you recall any other conversations with Atlantic dealers along similar lines?

A. Jack Chambers, we solicited him the same day at his station which was Clifton Avenue and Chester Pike in Sharon Hill, in his office, told us he was sorry to waste our time but more or less the same answer, that he couldn't put anything but Goodyear in there.

Documentary evidence taken from the files of Atlantic reveals the vigor with which Atlantic carried out its campaign to replace Lee tires and Exide batteries with Goodyear and Firestone TBA products. The minutes of a meeting of Atlantic's Regional TBA coordinators held on October 21, 1951, reveal that as of that date, "New England reported that approximately 98% of their accounts have been signed on a Goodyear program and that they are getting about 75% of the tire business they formerly enjoyed from these accounts. New York reported that they had about 96% of their accounts signed on a Goodyear program and that they were getting

about 65% of their former tire business" By December 24, 1951, an Atlantic report showed that virtually all Atlantic dealers in Goodyear's assigned territory who were potential purchasers of TBA had signed contracts agreeing to handle Goodyear products.

Accompanying the campaign to sign Atlantic dealers to Goodyear contracts was a drive to install Goodyear signs and advertising materials in Atlantic stations throughout Goodyear's assigned marketing areas. This is an excerpt from a letter of July 30, 1951, from Atlantic's TBA sales manager, Mr. Heideman, to another Atlantic official:

I asked Mr. O'Neill of the Goodyear Tire & Rubber Company to supply me with a list of the Atlantic dealers in the Philadelphia Region who refused to be identified on the Goodyear Program. Attached is a list of 46 dealers who, for reasons, indicated, have refused this service.

You will probably wish to review the respective portions of this list with the District Managers concerned. Undoubtedly, facilities for identification are not the best at some of these locations, but with the others it is apparent that the proprietors have not been sold to the Goodyear program. In such instances, I believe that additional sales effort is called for. In any event, would you be kind enough to advise me at your convenience what action you have taken with regard to this list.

Mr. Heideman followed this letter up himself on August 21, 1951, with a letter to Mr. S. A. Gaylord, Manager, Petroleum Sales Department, of Goodyear:

I wonder if you can furnish me promptly with a report on the progress of the subject program. I should like to have this information broken down by our regional territories. As I understand it, the signs are being erected by Goodyear crews, but the decals are being erected by outside agencies. Furthermore, at the present time when we locate an Atlantic dealer who is without any Goodyear identification or without one or the other signs or decals, we do not know whether an unsuccessful attempt has been made to complete the assignment or whether all or part of the job, whatever the case may be, is scheduled for attention.

We should like to interest ourselves in the cases where an unsuccessful attempt has been made to provide the Goodyear identification. Perhaps this information could be made available to us in simplest form by stating the Atlantic District areas that have been covered by either sign crews or agencies that are applying the decals, and by supplying us a list of the dealers where attempts to erect decals or signs were unsuccessful.

I have already received a list of this type for the Philadelphia and South Jersey areas, and this has been referred to our District Managers for further attention. However, I do not know if this is a partial or complete list of the dealers in that territory who could not be identified with Goodyear signs.

Atlantic's "sales efforts" met with complete success, for the entire group of 46 recalcitrant dealers referred to in Mr. Heideman's letter of July 30 was thereafter signed to Goodyear contracts and

Goodyear advertising signs were installed at their stations. The letter of complaint from Lee Rubber and Tire Corporation to Atlantic over the question of removal of Lee advertising signs from Atlantic stations has already been referred to, *supra* at page 15. And on March 5, 1951, Mr. E. W. McCreery, another Lee vice president, stated in an intracompany memorandum referring to the Atlantic sales regions assigned to Firestone:

In analyzing salesmen's reports on their calls on Atlantic accounts and with other information that we have, we are doubtful that many of the #2 type stations will stay on Lee tires. Because these stations are leased from Atlantic, some on a month-to-month basis, others on 90 days or longer basis, they are not in a position to take an independent stand and as a result will probably find it expedient to handle Firestone tires.

In our opinion, the documentary evidence in this record—only a fraction of which is referred to above—and the testimony of the various representatives of suppliers of TBA competing with Goodyear and Firestone previously adverted to lend credence to the testimony of the ex-Atlantic dealers who gave evidence in support of the complaint in this proceeding. We affirm the hearing examiner's finding that agents of Atlantic have in fact coerced a substantial number of Atlantic dealers to purchase substantial quantities of Goodyear and Firestone TBA, and that Atlantic has accepted the benefits of such coercion in the form of sales commissions.

Respondent Atlantic cites *United States v. J. I. Case Co.*, 101 F. Supp. 856 (D.C. Minn. 1951) as authority for the proposition that the hearing examiner erred in concluding that Atlantic has coerced a substantial number of its dealers in violation of Section 5 of the Federal Trade Commission Act. This District Court opinion is commonly regarded as a notable exception to the trend of decisions dealing with the subject of exclusive dealing.⁹ But we need not dwell on the *Case* decision, since the subject of coercive practices has received careful scrutiny from the Seventh Circuit and from the Supreme Court in a line of cases in the field of automotive financing. In *United States v. General Motors Corp.*, 121 F. 2d 376 (7th Cir. 1941), General Motors and its affiliates, General Motors Sales Corporation, General Motors Acceptance Corporation, and General Motors Acceptance Corporation of Indiana, Inc., appealed from a conviction of criminal conspiracy in violation of the Sherman Act. The indictment charged that these defendants had conspired to coerce franchised dealers of General Motors Corporation to finance their purchases and sales of automobiles through General Motors Accept-

⁹ Robinson, *Providing for Orderly Marketing of Goods*, 15 A.B.A. Antitrust Sec. 282, 308 (1959).

Opinion

58 F.T.C.

ance Corporation. In affirming the criminal convictions, the court stated:

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

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

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

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

We turn, therefore, from an examination of the restrictive effects of the sales commission system upon service stations as buyers of TBA to an assessment of this system's impact upon wholesale and retail distributors of TBA engaged in competition with wholesale and retail distributors of Goodyear and Firestone. Preliminary to this inquiry, however, it will be helpful to have a more detailed understanding of the manner in which the sales commission plan enables Goodyear to integrate its own nationwide distribution system the economic power possessed by Atlantic over its wholesale and retail petroleum outlets.

THE SALES COMMISSION PLAN IN
GOODYEAR'S SYSTEM OF DISTRIBUTION

Goodyear is the largest manufacturer of rubber products in the United States, with net sales of more than one billion dollars in 1954. The company has tire and tube factories located respectively in

the states of Ohio, Alabama, Michigan, California and Kansas. There are 57 Goodyear warehouses across the land, and Goodyear tires, tubes and accessories are distributed to wholesale and retail distributors through these warehouses. Batteries, because of the weight factor, are not warehoused by Goodyear except for emergency needs; all Goodyear wholesalers order "Goodyear" batteries directly from the factories of the two companies which produce "Goodyear" batteries under contract: Electric Auto-Lite Company and Gould-National Batteries, Inc.

Goodyear has approximately 500 company-owned and operated retail stores throughout the United States, and these stores also sell at wholesale. Apart from such company stores, there are more than 12,000 independent franchised stores selling Goodyear products at wholesale and retail and an unknown but very substantial number of firms not franchised by Goodyear but which purchase and resell Goodyear merchandise in the same manner as franchised Goodyear dealers. Franchised dealers are sometimes referred to as "direct" accounts, and non-franchised dealers in Goodyear merchandise are sometimes referred to as "indirect" or "associate" accounts.

All direct Goodyear accounts, which include independent franchised Goodyear dealers, wholesale petroleum distributors of Atlantic, and some retail petroleum dealers of Atlantic, execute a franchise agreement with the Goodyear Company itself, and purchase Goodyear products from the nearest Goodyear District Sales Office. Indirect, or associate Goodyear dealers do *not* have contracts with the Goodyear Company and do *not* purchase Goodyear TBA from the Goodyear District Sales Office. Instead, they usually execute a "Goodyear Associate Dealer Agreement" with the particular Goodyear wholesaler to which they are assigned. Such wholesalers may be either a company-owned store, a franchised independent dealer of Goodyear, an Atlantic wholesale petroleum distributor, or an Atlantic retail petroleum dealer. Indirect, or associate, dealers normally purchase from the wholesaler to which they have been assigned, and normally pay higher prices for merchandise than do direct dealers of Goodyear.

Most service station customers, including Atlantic stations, are classified as indirect or associate dealers by Goodyear, although, as noted, some Atlantic stations are direct dealers of Goodyear and function as supply points to other Atlantic stations which are merely associate dealers. (The term "supply point" is used by respondents to refer to the local TBA supplier to which local Atlantic stations have been assigned.) A number of Atlantic wholesale distributors of petroleum products also function as supply points for Goodyear, and distribute TBA to the same retail stations which the wholesale

distributors supply with Atlantic petroleum products. A supply point, then, is a local wholesaler of Goodyear TBA, although it may also be a retail dealer of Goodyear, a retail detaler of Atlantic, or a wholesale distributor of Atlantic as well. In the three marketing regions of Atlantic assigned to Firestone, the same classification of Atlantic dealers into direct and indirect accounts of Firestone is found as is described above with respect to Goodyear, and in all other material respects the sales commission plan between Atlantic and Firestone functions in substantially the same manner as does the sales commission plan between Atlantic and Goodyear described herein.

An integral part of the Goodyear-Atlantic and Firestone-Atlantic sales commission plans is the assignment of allocation of each Atlantic retail outlet to a specific supply point designated by Goodyear or Firestone. When a new Atlantic station is opened, or when a new dealer replaces a retiring operator, Atlantic reports to Goodyear (or to Firestone, as the case may be) the name and address of the new Atlantic dealer or an appropriate Goodyear (or Firestone) form. The Goodyear (or Firestone) District Manager then assigns this outlet to a specific supply point and notifies the supply point and the Atlantic outlet of the assignment which has been made. No sales commission is paid to Atlantic unless Atlantic purchases from the designated supply point to which it has been assigned. In other words, even though an Atlantic dealer purchases Firestone or Goodyear TBA exclusively, unless he buys from his assigned supply point, Atlantic receives no sales commission. One reason why Goodyear does not pay a sales commission when TBA merchandise is purchased by an oil company dealer from someone other than his assigned supply point was set forth in a letter dated December 19, 1951, addressed to an official of Shell Oil Company, and signed by the Baltimore District Manager of Goodyear:

I am returning to you, unsigned, two G-1209's which request that G. D. Armstrong Co., Inc., of Laytonsville, Md., be approved as a supplying dealer for Laurel Park Servicenter at Laurel Park, Md., and Bowie Shell Service at Bowie, Md.

* * * * *

My reason for taking this attitude is the fact that we very definitely discourage our dealers from selling Goodyear tires outside of their authorized territory, and in servicing either Laurel or Bowie, the Armstrong Company are out of their territory.

A situation of this kind, of course, presents us with a serious problem for, naturally, we are not in a position to dictate to any good dealer exactly where he may sell the merchandise which he purchases from us—all we can do is ask that they remain within the boundaries which we establish. However, in the case of oil company stations where we have already authorized and

established an ample number of supply points, all with good service, we cannot pay the oil company in question a commission on merchandise delivered by a dealer who is operating outside of his territorial boundaries.

Although in some cases Atlantic dealers are assigned to more than one supply point of Goodyear, in none of Atlantic's marketing regions are Atlantic dealers assigned to supply points of both rubber companies. For, as has been shown, Atlantic's sales commission contract with Goodyear is confined to the company's New England, New York and Philadelphia-New Jersey sales regions, whereas Atlantic's sales commission contract with Firestone is operative only in the Eastern Pennsylvania, Western Pennsylvania and Southern sales regions of the oil company.

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

Once every month each Goodyear supply point submits a report to the Goodyear District Sales Office for his district, showing his sales of TBA during the past month to each Atlantic outlet assigned to him.¹⁰ The Goodyear District Sales Office then compiles these reports into a master list, showing TBA purchases by each individual Atlantic dealer from his assigned supply point during the past month, and sends copies of this list to Atlantic and to Goodyear's home office in Akron, Ohio. Although these forms provide the basis for computation of sales commission accruing to Atlantic each month, they also afford Atlantic a means of determining the volume of sponsored TBA purchases by individual Atlantic dealers during that time.

A different procedure is followed with respect to TBA purchases by wholesale distributors of Atlantic (including, as indicated by footnote 10, supra, Atlantic retail dealers functioning as supply points). Wholesale distributors purchase directly from the Goodyear or Firestone district offices, and then resell such TBA to their retail dealers. Some 2,897 Atlantic retail outlets were supplied by wholesale distributors in 1956. Atlantic receives a 7½ percent sales commission on the net sales value of all sponsored TBA *purchased by* wholesale distributors, but no additional sales commission is paid when such purchased TBA is resold to retail dealers supplied by the wholesale distributors.

¹⁰ One exception is Atlantic service stations acting as supply points. A 7-1/2 percent commission is paid by Goodyear to Atlantic on the net sales value of TBA *purchases* by these Atlantic supply point dealers, and, consequently, no further commission is paid by Goodyear on the resale of merchandise by such Atlantic supply points to other Atlantic stations supplied by them.

Goodyear has sales commission contracts with a number of other marketing oil companies, and these agreements are in all material respects identical with the Goodyear-Atlantic contract. Total sales by Goodyear under its sales commission contracts with such other oil companies, including Shell Oil Company and D-X Sunray Oil Company, increased from about \$16,700,000 in 1951 to about \$36,105,000 in 1955, with sales commissions paid thereon by Goodyear increasing from approximately \$1,600,000 in 1951 to approximately \$3,300,000 in 1955. The evidence of record in this case shows that oil companies other than Atlantic have employed coercive tactics in requiring their dealers to purchase Goodyear TBA. Witness S. K. Osborn, for example, was a Sinclair dealer for 20 years, from May 1936 until May 1956. He was also a distributor of Firestone tires, and could therefore purchase Firestone tires at lower prices than Goodyear tires. He testified that he stocked Firestone tires exclusively at his service station until 1948, at which time he was given a notice of lease cancellation:

A. It was a few days after I got the lease cancellation. I was disturbed about it, and I wanted to find out what it was all about. I called up the company and finally got an interview with Mr. Weller, and Mr. McCauley [Sinclair officials] . . . I asked them why I was getting a lease cancellation. They told me that I wasn't doing the right things by them, that Goodyear tires, batteries and accessories were just as much Sinclair products, just as important to the company, as Betholine gas, Sinclair Gas, whatever they were marketing, and Opaline oil. And I promised to go along with their wishes. I gave them an order for Goodyear merchandise. In a few days I had a new lease.

Q. You say you gave them an order for Goodyear TBA merchandise. Do you recall the approximate amount of the order?

A. A thousand or more dollars worth.¹¹

In order to keep his service station lease, therefore, this Firestone distributor was placed in the anomalous position of having to purchase Goodyear TBA, a competing brand, in order to maintain his status as lessee of a Sinclair service station.

Another former lessee-dealer, witness MacMasters, who operated a Sinclair station from 1944 until 1954, testified that he purchased Bowers batteries for resale at his station up to sometime in 1947 or 1948. At that time he was summoned to a conference with top-level Sinclair personnel at the oil company's offices:

A. We went into a conference room, some sort of conference room that had quite a large table. They put me on one side of the table, and the other three down the other side.

So, to make the conversation short, Mr. McCauley was in a hurry and he said, "We will make this brief, Mac. You are not buying batteries from us."

¹¹ In *Osborn v. Sinclair Refining Co.*, 286 F. 2d 832 (4th Cir. 1960), the Court of Appeals held that the facts recited above by witness Osborn constituted an unlawful tying contract violative of Section 1 of the Sherman Act.

I said, "No, Mac, I can't buy batteries from you. I owe an allegiance to Bowers because they took care of me during the war and immediately after the war, and I promised them if they would help me so I could remain in business satisfactorily, that I would see that they maintained and kept the business."

And his almost exact words were, "We don't give a good God damn who you think you owe, you are going to buy our [Goodyear] batteries or else."

And that was the end of the meeting."

Many other advantages accrue to Goodyear, and Firestone as well, as a consequence of their sales commission contracts with oil companies. A prime advantage is participation with each oil company's sales force in a number of joint merchandising programs. This advantage commences with the selection of persons to operate newly-opened service stations or to replace outgoing dealers in previously-operated stations. A continuing responsibility of Atlantic salesmen is to help newly-recruited dealers get established. Through these salesmen, the local Goodyear or Firestone supply points are notified of the names and addresses of new dealers *before* they actually take over operation of their stations and, as a result, before local competitors of Goodyear and Firestone in any community become aware of a new dealer's identity. This policy was implemented by a memorandum of April 25, 1952, by Atlantic's TBA Manager Heide-man to Atlantic personnel:

Station Openings. We ask that you instruct your District to establish, as a regular practice, *automatic* and *advance* notice to the Goodyear District Office, of the openings of any new stations, or of change in proprietorship at any dealer location. Such notice will be mutually beneficial to both Goodyear and ourselves. It will enable Goodyear to complete any unfinished business with the outgoing dealer and, further, will enable them to anticipate and to move promptly in handling the new dealer's requirements.

The importance of advance notification is indicated by the fact that the initial stocking order of TBA costs approximately \$1,000—for large stations the amount may be much greater. And Atlantic's turnover of dealers is high. During 1955, 720 lessees of Atlantic ceased operation and had to be replaced, representing a turnover of about 29 percent of the oil company's total number of lessee-dealers in that year. Moreover, during the period March 1950 to June 1956, 389 *new* Atlantic stations commenced operations. Frequently these new or replacement dealers have recently completed Atlantic training schools in which Goodyear and Firestone TBA were used in demonstrations, and have already formed biases in favor of one or the other brand. However, the new dealer has no choice as to which of the two brands he will purchase and display—if this station is located in the three Sales Regions of the company in which Goodyear is sponsored, then he must take Goodyear TBA, and if his station is

located in the three Sales Regions of Atlantic assigned to Firestone, then he must take the Firestone program.

Numerous other examples of joint merchandising programs favorable to the rubber companies having sales commission agreements with Atlantic could be cited. Although Atlantic officials stated in an intra-company memorandum shortly before the inception of the sales commission program that "Practically all sales promotional expenses [will be] assumed by supplier [Goodyear]," Atlantic aggressively assists in carrying out the Goodyear program in various ways. For example, Atlantic salesmen obtain TBA orders from dealers and send them to local Goodyear supply points, recommend minimum Goodyear TBA inventories to dealers, coordinate special Goodyear promotional programs with radio, television, and other forms of advertising by the Atlantic company and its dealers, and assist dealers in arranging Goodyear TBA displays. Atlantic credit card facilities are also available to motorists wishing to purchase Goodyear TBA products from Atlantic stations. Without doubt, however, the most effective joint merchandising tactic is dual solicitation, or "double-teaming." This refers to the practice of an Atlantic salesman accompanying a Goodyear or Firestone salesman in calls upon service station operators to urge them to purchase sponsored TBA.

Goodyear's heavy reliance upon double-teaming to convert Atlantic dealers from the Lee-Exide program to Goodyear TBA was set forth in a "Confidential" memorandum of February 27, 1951, from Mr. S. A. Gaylord, manager of the rubber company's sales commission programs with oil companies, to Goodyear District Managers located within the three Atlantic Sales Regions assigned to Goodyear:

You have been advised of the Sales Organization Meetings [between Goodyear and Atlantic sales personnel]. Mr. McConky [Goodyear Northeast Division Manager] will keynote for his Division. He will welcome the opportunity and pledge strong support and cooperation. No doubt he will stress the importance of Atlantic and Goodyear personnel getting acquainted and teaming up together when presenting the Goodyear franchise to Atlantic dealers. Because the Atlantic salesman has the 'in', but cannot be expected to know the Goodyear story at the start, so by team work the Goodyear Sales Representative will make the presentation and also assist in training the Atlantic Representative.

Two purposes will be accomplished by this teaming activity—first the Atlantic salesman will learn the basic details of our Franchise Presentation and, secondly—our Goodyear salesman will be very favorably introduced to the account through the sales influence of the Atlantic Representative, also bring up this point with your men.

Thereafter, on August 7, 1951, a Goodyear official wrote to Atlantic's TBA Manager, Mr. Heideman:

Having reviewed your letter of July 30th, I am pleased to outline below for your consideration steps that I suggest be followed in the handling of a new Atlantic Dealer on the Goodyear T.B.A. Program:

1. Arrange for double team contact by the Goodyear and Atlantic salesman.

Nine additional steps were outlined in this letter of August 7, the fifth being to "Take stock order (Tires, Batteries and Accessories)" and the sixth being to "Furnish initial price lists, tires, batteries and accessories." Goodyear thus appeared confident that the presence of an Atlantic salesman together with the Goodyear representative would render unnecessary any higgling or haggling over price *before* obtaining an initial order for TBA from Atlantic dealers.

Similar confidence in the efficiency of double-teaming activity was expressed in a memorandum setting forth action to be taken to introduce the sales commission plan to Atlantic outlets in the three Sales Regions assigned to Firestone:

Double-teaming activity with Firestone and oil company salesmen in then scheduled in order to sell the oil company's dealers on the Commission Plan.

Atlantic's Vice President, Mr. D. T. Colley, inaugurated the sales commission program on March 1, 1951, with the following letter to the oil company's sales force:

I am sure that the new T.B.A. program which we have carefully selected has so many advantages that it will not be difficult to convince Atlantic dealers and distributors of its superior merit. This job is to be done with the use of all sales equipment and knowledge that we, or our suppliers, have at our respective commands. *I expect the results of our salesmanship to be highly successful.*

You can appreciate the fact that under no circumstances are our dealers to be made to feel that they must buy this new program just because they are Atlantic dealers. The sales you make must be made on the merits of the program and your ability to sell the dealer on its advantages to him. *Any evidence that coercion or misrepresentation were used in securing acceptance would be most embarrassing to our company.* This program is a challenge to your sales ability. I am confident that you will do a fine selling job. [Emphasis added.]

These quotations reflect the belief of Goodyear and Firestone, as well as Atlantic, that the presence of an Atlantic salesman is the almost indispensable ingredient needed to insure the success of the two rubber companies in selling their TBA products to Atlantic dealers under the sales commission plan. Perhaps one reason for this is that the annual evaluation by Atlantic salesmen of their respective lessee-dealers carries substantial weight with District Man-

agers of Atlantic when the latter group make decisions as to extensions of dealers' leases for another year. Although respondent Atlantic has made vigorous efforts to create a record image of the typical Atlantic lessee-dealer as a stoutly independent businessman, able to close up shop as an Atlantic lessee on Saturday night and reopen down the street in a Sinclair or an Esso station the following Monday morning, the record as a whole suggests that this is a romanticized picture of a small businessman who is more often than not, in a woefully weak bargaining position vis-a-vis his oil company lessor.

The typical lessee-dealer's dependence upon his lessor-supplier is explained by the following facts: The cost of constructing an average Atlantic service station is about \$50,000. Few men who become service station operators have this amount of money—many have as little as \$1,000, and very few have as much as \$15,000. Most marketing oil companies, therefore, build a substantial portion of their own stations and lease them to operators. The lessee-dealer uses his own capital to purchase an initial inventory of petroleum products, TBA, and tools and for other expenses incurred in commencing operations. It is frequently necessary for incoming dealers to borrow several thousand dollars from Atlantic in order to purchase these initial stocks of goods. Nor is the income of the typical lessee-dealer sufficient to enable him eventually to purchase his own station. Although an exceptional dealer with an unusually high-gallonage station may earn as much as \$20,000 per year, the average annual net income of Atlantic dealers is in the range of 6 to 10 thousand dollars. But no matter how long an operator may remain as lessee, and no matter how much he strives to establish goodwill in his community, the time may come when his lease is not renewed—for any one of a number of reasons or for no reason at all except that the lessor would prefer to have someone else operate that particular station.

Many of the control devices available to Atlantic in its relationship with lessee-dealers are also applicable to contract dealers. Many of the latter are indebted to Atlantic, and most of them lease storage tanks, gasoline pumps and other equipment from their oil company supplier. These equipment leases specify that such equipment may not be used for storage or sale of petroleum products purchased from any supplier other than Atlantic. And serious inconveniences would be caused for any contract dealer whose petroleum supply contract was not renewed from year to year.

Service station operators are understandably susceptible to the urgings and recommendations of their oil company suppliers and lessors in the matter of TBA. The Goodyear salesman encounters less buyer resistance on the part of such a customer when an oil company salesman is standing nearby adding his endorsement to the sales presentation of the Goodyear representative. The technique of dual solicitation ("double-teaming") thus symbolizes in microcosm the competitive effects of the sales commission method of distributing TBA when introduced throughout the entire marketing area of a major oil company. It is to these macrocosmic effects that we now turn.

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

A glance at MAP I, supra, suffices to show the competition between Firestone and Goodyear in selling to Atlantic oil company accounts has been wrecked by the operation of the sales commission system. But other evidence of record is available in abundance to illustrate the same point. The following is an exchange of correspondence between Atlantic and Goodyear concerning Republic Oil Company, a wholesale distributor of Atlantic products in Pittsburgh, Pennsylvania. (Atlantic's Western Pennsylvania sales region, it will be recalled, is assigned to Firestone.)

On August 2, 1951, Mr. E. C. Sauter, District Manager of Goodyear in Pittsburgh, addressed the following letter to Mr. F. W. McConky, Jr., Manager of Goodyear's Northeast Division:

Republic Oil Co.

This is a Pittsburgh concern who are acting as distributor of Atlantic products in parts of Pennsylvania and Northern West Virginia.

The retail division of this company operates about seventy-five (75) service stations. They have never gone into a TBA program and at present have no tire hook-ups. They are in process, however, of trying to get a deal with one of the major tire companies and would like to entertain a proposition from Goodyear whereby we would sell their stations direct or through supplying dealers at a price which would be in line with each outlet's volume with an override to the oil company.¹²

¹² Many service station operators and TBA dealers use the term "override commission" or "overriding commission" in referring to payments by a TBA manufacturer to an oil company such as those made by Goodyear and Firestone to Atlantic. However, as respondents and their witnesses usually use the term "sales commission" to refer to such payments, we are using "sales commission" in this opinion.

Possibly we could use this additional distribution in the Pittsburgh area, particularly on passenger tires and tubes, so if you are interested possibly we should take the matter up with Petroleum Sales for their comments.

Thereafter, on August 3, 1951, the matter was referred by Mr. McConky to Mr. S. A. Gaylord of Goodyear in Akron:

The attached from Eddie Sauter regarding Republic Oil and the possibility of their handling our products is a matter, in my opinion, for Akron decision, inasmuch as they [meaning Republic Oil] are distributors of Atlantic products.

I don't want to spend any time lining up with these people if for example Atlantic-Philadelphia would prefer they handle Firestone, since this is the tire being handled by Atlantic in that area.

Of course, I am not acquainted with the influence Atlantic might be able to bring to bear in forcing these people to a decision as to the line of tires that they—Atlantic—would like them to handle.

At any rate, will you explore this from a management standpoint and advise so we can proceed according to Atlantic's desires.

On August 9, 1951, Mr. Gaylord addressed the following letter to Atlantic's TBA Manager, Mr. Heideman:

Mr. Sauter, our District Manager at Pittsburgh, and Mr. McConky, advises that subject account is considering marketing T.B.A. products and have invited us to submit a proposal.

Before taking any action in the matter we felt that we should take the matter up with you for further guidance and your good counsel in the matter.

Will appreciate hearing from you on this as soon as possible.

On August 14, 1951, Mr. Heideman replied to Mr. Gaylord under the heading "Republic Oil Company":

Your note of August 9th has been received. Any overtures on your company's part to the subject could upset negotiations that we have underway at present. It was thoughtful of you to consult us and needless to say we appreciate it *as we will also appreciate your rejection of the invitation.* [Emphasis added.]

Not only has competition between Goodyear and Firestone been eliminated as a result of these companies' sales commission contracts with Atlantic, but even *within* Atlantic's sales regions assigned to Goodyear, competition among Goodyear wholesalers for the business of Atlantic accounts has been eliminated through the assignment of each Atlantic account to a designated supply point. There are 1,155 independent franchised Goodyear dealers in the Atlantic marketing territories assigned to Goodyear, but only 128 of these dealers, or *11 percent*, are supply points for Atlantic dealers. The remainder, representing 89 percent of all Goodyear dealers in the three Atlantic

sales regions are substantially foreclosed from access to Atlantic accounts.

Nor is this anticompetitive allocation of customers by Goodyear among its wholesale distributors confined to Atlantic accounts alone—nine other oil companies have sales commission contracts with Goodyear, and as shown by TABLE IV, below, only a minute fraction of the total number of Goodyear dealers in any of these oil companies' marketing areas have been nominated as supply points for local oil company outlets:

TABLE IV.—Goodyear dealers acting as supply points for oil company outlets compared with total number of Goodyear dealers in each oil company's marketing area

Name of oil company	Total number of Goodyear dealers in marketing area	Number of Goodyear supply points
Anderson-Pritchard.....	3,825	28
Ashland and subsidiaries.....	2,387	87
Carter.....	1,509	73
D-X Sunray.....	6,772	162
Quaker State.....	482	14
Richfield.....	1,691	3
Shamrock.....	1,717	25
Shell.....	10,756	679
Sinclair.....	10,963	10
Atlantic.....	1,155	128

The extent to which competition among Goodyear's own dealers at the wholesale level has been shattered by the operation of the sales commission plan may be inferred from the data in TABLE IV. In Shell's marketing area, for example, there are 10,756 Goodyear dealers; yet only 679 of these dealers have been appointed as supply points to Shell stations. In the marketing territory of D-X Sunray Oil Company there are 6,772 Goodyear dealers, but only 162 have been granted the privilege of becoming a supply point. And in Atlantic's New England, New York, and Philadelphia-New Jersey sales regions, only 128 out of 1,155 Goodyear distributors have been named as supply points.

To illustrate the elimination of competition among TBA wholesale dealers caused by the sales commission plan, evidence adduced in the course of hearings in Atlantic's Philadelphia-Suburban Sales District (one of several sales districts comprising Atlantic's Philadelphia-New Jersey Sales Region) may be considered. As of June 30, 1956, there were 226 lessee dealers and 291 contract dealers of Atlantic in this district. These dealers were assigned to three Good-

year company stores and six independent franchised Goodyear distributors in the Philadelphia metropolitan area as follows:

TABLE V.—Goodyear supply points in Atlantic's Philadelphia-suburban sales district and Atlantic dealers assigned to them, 1956

Supply points	1955 total sales	Number lessee dealers*	Numbr contract dealers*
Goodyear District Office.....	\$43,845	2	6
Harvey W. George.....	239,906	45	49
F. C. Glenn.....	300,723	52	42
E. F. Miller.....	239,900	39	19
Frank Hagan.....	130,682	(54 dealers)**	
Ellwood E. Kieser.....	420,788	40	116
Edward Parris.....	160,100	(61 dealers)**	
Goodyear Store (Jenkintown).....	None	2	4
Goodyear Store (Norristown).....	None	8	1
	\$1,535,944		

*Includes some duplication due to 11 lessee dealers and 5 contract dealers having two alternate sources of supply.

**No breakdown is available as to the numbers of lessee and contract dealers, respectively, supplied by these 2 supply points. Mr. Hagan was supply point to a total of 54 lessee and contract dealers of Atlantic, and Mr. Parris to a total of 61 lessee and contract dealers of the oil company.

Witness Elmer H. Booz, for example, an Atlantic lessee dealer from 1952 until 1956, testified that Mr. Edward Parris was the designated Goodyear TBA supply point for dealers in his area. He stated that although he could have purchased Goodyear tires from other dealers at lower prices than from Mr. Parris, that he nevertheless obtained about 85 percent of his TBA requirements from Mr. Parris. One competing Goodyear dealer offered tires to Mr. Booz at a discount from list price of 10 percent plus 5 percent, plus 2 percent whereas Mr. Parris gave only a 10 percent discount, plus 2 percent discount for cash.

As to competing brands of tires, Mr. Booz testified that he could make more profit on several such brands than he could on Goodyear tires. Lee tires were available at a discount from list price of 10 plus 10 plus 10 percent, plus 2 percent for cash. Moreover, the witness stated that he could never resell Goodyear tires at list price because "there is always someone from the Goodyear company or somebody else that is going to knock you down on it."¹³

Witness Francis J. Balloran commenced operating an Atlantic station in 1953 and was a contract dealer for Atlantic at the time he testified in this proceeding. He stated that after becoming an

¹³ When Atlantic was considering adopting the Goodyear TBA program an intra-company memorandum recognized that Atlantic dealers would face "... a maximum amount of competition from established dealers and company stores, because it is reported that every county, marketing town and shopping center now has a Goodyear store or distributor."

Atlantic dealer he purchased Goodyear TBA from his designated supplier, Mr. E. F. Miller (TABLE V, supra) :

Q. Now, you stated that the Goodyear TBA was furnished by Mr. Miller?

A. That's right.

Q. Why did you buy your Goodyear TBA from Mr. Miller?

A. Well, that was the setup by the Atlantic Refining Company when I first operated the business.

Q. Was it a matter of your own choice?

A. No, sir.

* * * * *

Q. Did you want to purchase TBA from Mr. Miller?

A. Not truthfully, no.

Q. Why didn't you?

A. Half the time when you called up you couldn't get it. Half the time you called up he didn't have it. If he did, you had to send a man with a truck and waste an hour and a half to go pick it up and bring it back.

Q. Could you have purchased Goodyear tires at a cheaper price in the area?

A. Yes, sir.

Q. What was the name of the supplier?

A. Hires and Kocher.

Witness Balloran also testified that he occasionally purchased brands of tires other than Goodyear, but did not display them openly:

Q. Did you purchase U.S tires from Harris and Leonard?

A. That's right.

Q. Were such tires advertised, U.S. tires?

A. Not out of my place they weren't.

Q. Where did you keep such tires?

A. Back on the racks, back on the oil racks where they couldn't be seen.

Q. Seen by whom?

A. Any of the Atlantic men that came in there, the bosses.

* * * * *

Q. Did you purchase Lee tires?

A. Yes, sir.

Q. And where did you keep them?

A. On the racks, sir . . .

Nineteen witnesses representing eleven TBA wholesale suppliers in the Philadelphia-Suburban District engaged in competition with one or more of the six Goodyear supply points named in TABLE V, supra, testified in support of the complaint. Without exception, these witnesses gave evidence that they were able to sell little or no TBA products to Atlantic dealers in their areas, and that such Atlantic dealers had stated that they must purchase their TBA needs from one or more of the designated Goodyear supply points listed in TABLE V.

Witness Michael T. Lanza, partner in the Philadelphia firm of Lanza Tire Service, stated that his company sells Goodyear and

Firestone tires and tubes, as well as other brands, and also Exide batteries. He further stated that there are from 45 to 60 Atlantic service stations in his sales area, and that all such stations stock and advertise Goodyear tires and batteries. Witness Lanza identified Messrs. Fred Glenn and Harvey George as Goodyear TBA suppliers to Atlantic service stations in the North Philadelphia marketing area of Lanza Tire Service.

Witness Glenn L. Wetzel, President of Chester Auto Parts, Inc., of Chester, Pa., testified that his company sells Willard batteries, Dayton Rubber Co. fan belts and radiator hose, AC, Purolator and Fram oil filters, and a wide assortment of automotive waxes, polishes and cleaners in competition with other sellers of TBA in his company's marketing area, including Mr. Edward Parris. Witness Wetzel stated that it is "rather futile" to attempt to sell automotive batteries to Atlantic dealers, and "very difficult" to sell automotive accessories to them. On cross-examination he was asked this question:

Q. Did I understand you to say that you don't sell any TBA items to Atlantic stations now?

A. Selling and buying are two different categories. They buy from me one or two filters to carry them over until Ed Parris can deliver them a case. They buy six or eight cans of merchandise to carry them over until Ed Parris can deliver a case or two cases or five cases, whatever the deal may be.

Witness Myer Duboff is an outside salesman for Lancaster Auto Supply Company of Philadelphia. This firm competes with Goodyear dealers Frank Hagan, E. F. Miller and Ellwood Kieser, supra, TABLE V. Witness Duboff testified that he had solicited the business of about 35 Atlantic stations in his area, all of which advertise Goodyear products ". . . right down the line." He stated that he had been told by a number of Atlantic dealers that they were unable to buy TBA items from him because they "must buy from the company." On cross-examination he was queried as to statements made to him by one Atlantic dealer:

Q. You mentioned one person, Mr. I. Mann, of Haverford and Brookhaven Road?

A. That is right.

Q. As having said something to you about inability to buy from you. I am not clear as to what he said.

A. Do you want me to state what he said to me? He said to me, "I can't buy from you."

Q. Had he been buying from you?

A. He was buying odds and ends and every time I come into sell him, he would have to hide things, you would think it was the Gestapo or something. I would go in to see him and talk to him and he would say "Mike, I can't buy from you," and I said "Why not," and he says "They know what I am doing," and I didn't think that was right.

Many other examples of such testimony could be cited, not only by former Atlantic dealers and by TBA suppliers from the Philadelphia area, but from other marketing areas of Atlantic as well. These facts are clear: Atlantic has allocated three of its six marketing regions to Firestone and the other three to Goodyear. Firestone's sales to Atlantic outlets amounted to \$5,562,936 in 1955, the last full year for which data are available, and in the same year the rubber company paid commissions amounting to \$506,199 to Atlantic. Goodyear's sales to Atlantic outlets amounted to \$5,700,121 in 1955 and its sales commission payments to the oil company totalled \$557,559.

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

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

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

ments with Sinclair.¹⁴ As phrased by the court, quoting its own earlier decision in *McElhenny v. Western Auto Supply Co.*, 268 F. 2d 332, 338 (4th Cir. 1959):

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

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

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

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

Here we find that Atlantic, which describes itself as ". . . a large producer and distributor of petroleum products" whose operating revenue "totalled more than one half billion dollars" in 1954, distributes gasoline directly to more than 5,500 retail service stations and through wholesale distributors to more than 2,800 additional service stations in 17 states along the Atlantic Seaboard. Approximately 81 percent of Atlantic's total sales of gasoline in 1955 were accounted for by these approximately 8,300 retail service stations.

But we do not rest our decision on a mechanical application of the rule of the *Northern Pacific* and *Osborn* cases. The issue here is the legality of respondents' use of a *particular method* of distributing TBA products. Atlantic has sufficient economic power with respect to its wholesale and retail petroleum distributors to cause them to purchase substantial quantities of sponsored TBA

¹⁴ Sinclair did not have a sales commission plan in effect throughout its entire marketing area, but only in Maryland and, to some extent, in adjacent states. 286 F. 2d 832. Osborn, plaintiff in the case discussed above, testified in the instant proceeding as a witness in support of the complaint.

even without the use of overt coercive tactics or of written or oral tying agreements, and this power is a fact existing independently of the particular method of distributing or sponsoring TBA used by Atlantic. Determination of illegality in this context requires an evaluation of competitive effects resulting from the sales commission method of distributing TBA used by these respondents.

The record of this conclusively establishes, in our minds, that the sales commission contracts between Atlantic and Goodyear and Firestone have unlawfully injured competition in the distribution of TBA at the manufacturing, wholesale and retail levels. Firestone dealers are foreclosed from Atlantic outlets in regions assigned to Goodyear, and Goodyear dealers are foreclosed from Atlantic outlets in regions assigned to Firestone. Even within regions assigned to Goodyear, or to Firestone, only those Goodyear or Firestone dealers fortunate enough to be nominated as "supply points" have any prospect of sales to Atlantic dealers. Wholesale TBA dealers representing other tire manufacturers, for example United States Rubber Company, Lee Rubber and Tire Corporation, and Mansfield Tire and Rubber Company testified to their inability to sell tires to Atlantic service station dealers, except upon an occasional "pick-up" basis when a motorist demands a tire brand other than the locally-sponsored offering available at the station.

Battery manufacturers and certain accessory suppliers are, if possible, even more severely disadvantaged by the sales commission system than are tire companies competing with Firestone and Goodyear. Local wholesale distributors of Exide, Willard, Bowers and other brands of batteries testified to their inability to sell batteries to Atlantic stations except upon a pick-up basis. The most shocking feature of the sales commission system as to batteries, however, is the fact that the sales commission contracts with Atlantic enable Goodyear and Firestone to exclude *their own suppliers of batteries* from the wholesale and retail markets represented by Atlantic service station outlets. For the evidence of record indicates that Goodyear and Firestone both refused to execute sales agreements relating only to tires and tubes, but insisted that it include *all* TBA items sold by them or none. An analogous situation exists as to certain accessory products, for example, "Mac's" brand of polishes, waxes, and cleaners.

Moreover, as one of the chief characteristics of the sales commission plan is that it strengthens wholesale distributors of Goodyear and Firestone by pre-empting for their benefit a substantial segment of all of the various local wholesale TBA markets in Atlantic's marketing area, the sales commission system stands as a bar to the *expansion* of smaller TBA manufacturers of their own distributive

organizations. As respondents concede, a substantial proportion of all replacement TBA items sold to motorists are accounted for by service stations and "service stations, . . . constitute a large and increasingly important market" for TBA products. Thus, the competitive dislocations engendered by the sales commission plan at the wholesale level extend backward to the manufacturing level.

Finally, the unfair competition advantages resulting from the sales commission plan are not confined to the manufacturing and wholesale levels—they extend forward to the retail level as well. Many of the wholesalers who testified in this proceeding *also* sell at retail, directly to motorists. To the extent, therefore, that suppliers of TBA competing with distributors of Goodyear and Firestone at the wholesale level are weakened by the operation of the sales commission system, the dealers are also weakened at the retail level, in instances where they are engaged in retail as well as wholesale operations.

Counsel for Atlantic contend, however, that no competitive consequences attend the sales commission plan which did not characterize the purchase-resale program employed by Atlantic prior to 1951. This point deserves consideration since it implies that no useful purpose would be served by outlawing the sales commission plan between Goodyear and Atlantic as Atlantic would merely return to the purchase-resale method of distributing TBA, with the result that Goodyear and Firestone dealers would lose a substantial volume of sales, but without improving the lot of competing TBA suppliers as they would still be unable to sell TBA to Atlantic dealers. We believe this argument to be without merit for several reasons.

First of all, what course of action Atlantic may follow with respect to TBA if the sales commission plan is outlawed is entirely speculative. Assuming for the moment, however, that Atlantic will return to the purchase-resale plan and flout the antitrust laws by requiring its dealers to handle Atlantic TBA exclusively, or even substantially,¹⁵ it is obvious that local wholesalers of TBA competing with Firestone and Goodyear dealers in Atlantic's marketing area will at least no longer be laboring under the handicap of their competitors representing Firestone and Goodyear having already preempted a substantial share of the local wholesale TBA market. As the situation stands under the sales commission plan, local dealers representing Firestone and Goodyear are assured of a substantial chunk of the market before the competitive race at the wholesale level even begins. (See TABLE V., *supra*) Abolition of the sales commission system will at least terminate the unjust advantage pres-

¹⁵ Cf., *Standard Oil Co. v. United States*, 337 U.S. 293 (1949); *Northern Pac. Ry. Co. v. United States*, *supra*; *Osborn v. Sinclair Refining Co.*, *supra*; *United States v. Sun Oil Co.*, 176 F. Supp. 715 (E. D. Pa. 1959).

ently enjoyed by distributors of Firestone and Goodyear over local competitors representing other tire manufacturers and TBA suppliers.

Not only do the competitive effects of the sales commission plan differ from those of the purchase-resale plan at the wholesale level, but at the manufacturing level as well. When Atlantic was considering changing from the purchase and resale of Lee tires and Exide batteries to some other method of merchandising TBA, it contacted several of the larger tire and rubber companies, including Goodyear, Firestone, The B. F. Goodrich Company, United States Rubber Company and General Tire and Rubber Company inquiring ". . . what interest you may have in the sale of your tires and tubes through Atlantic accounts." Propositions were requested not only as to principal brands of these manufacturers, but as to secondary brands controlled by them and private brands as well. At the same time, Atlantic also contacted Mansfield Tire and Rubber Company and Lee Rubber and Tire Corporation soliciting proposals from them to furnish a private brand tire to Atlantic. This suggests that the smaller tire companies are able to compete with their smaller competitors in selling tires to oil company accounts on a purchase and resale basis. The evidence also shows, however, that the smaller tire companies are unable to compete with larger tire manufacturers for the business of oil companies using the sales commission plan *because the smaller tire companies lack distribution facilities which blanket the entire sales area of a major marketing oil company desiring to adopt the sales commission plan.* This was established by the testimony of Vice-President Colley of Atlantic, who appeared as a witness on behalf of this respondent.

A major oil company's decision to adopt the sales commission method of distributing TBA thus inaugurates a vicious cycle of injurious competitive effects: smaller tire and rubber companies are unable to compete in the first instance for the business of the oil company desiring to adopt a sales commission plan because they lack widespread distribution facilities at the wholesale and resale levels; and yet the operation of the sales commission plan stands as a bar to future expansion of the smaller tire companies' distributive systems since they are thereby foreclosed from a substantial segment of the wholesale and retail market *after* the oil company has adopted a sales commission plan offered by a larger tire company.

We believe that the sales commission method of distributing TBA presents a classic example of the use of economic power in one market (here, gasoline distribution) to destroy competition in another market (TBA distribution). Other anticompetitive effects of the sales commission system are so obvious that they require no detailed

consideration. The public suffers because it cannot rely upon competitive rivalry among local TBA wholesalers to insure that service station outlets will be able to obtain price savings which may be passed along to consumers. And, too, the system prevents the service station operator himself from using his buying power to further his own business advantage instead of that of his oil company supplier. As the Court of Appeals said in its recent *Osborn* decision, in a situation identical in its essentials with the present case, insofar as the service station dealer is concerned:

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

Several additional points are raised by Atlantic, but we believe only one of these requires detailed consideration in this opinion. Respondent contends that it was error, violative of due process of law, for the same hearing examiner to have presided over and rendered initial decisions in both this case and in Docket 6487, *The Firestone Tire & Rubber Company and Shell Oil Company*. The crux of the contention seems to be that the hearing examiner could not possibly have rendered his initial decision in this case solely upon the basis of the record of the instant proceeding, since he also heard testimony and received evidence involving Atlantic's sales commission plan with Firestone in Docket 6487. As respondent puts it, "while Atlantic has the utmost respect for the Hearing Examiner's integrity and ability, Atlantic submits that he could not humanly exclude from consideration his impression of the witnesses' demeanor and credibility in the Firestone-Shell proceedings and that his decision against Atlantic based on impressions gained in those other proceedings is a violation of due process."

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

Order

CONCLUSION

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

FINAL ORDER

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

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

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

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

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

1. Entering or continuing in operation or effect any contract, agreement or combination, express or implied, with The Goodyear Tire and Rubber Company, or The Goodyear Tire & Rubber Company, Inc., or with any other rubber company or tire manufacturer, or any other supplier of tires, batteries, and/or accessories, whereby The Atlantic Refining Company receives anything of value in connection with the sale of TBA products to any wholesaler or retailer of Atlantic petroleum products by any marketer or distributor of TBA products other than The Atlantic Refining Company;

2. Accepting or receiving anything of value from any manufac-

turer, distributor, wholesaler, or other vendor of TBA products, for acting as sales agent or for otherwise sponsoring, recommending, urging, inducing, or promoting the sale of TBA products, directly or indirectly, by any such vendor to any wholesaler or retailer of Atlantic petroleum products;

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

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

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

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

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

1. Entering into or continuing in operation or effect any contract, agreement or combination, express or implied with The Atlantic Refining Company or with any other marketing oil company whereby Goodyear, directly or indirectly, pays or contributes anything of value to any such marketing oil company in connection with the sale of TBA products by Goodyear or any distributor of Goodyear products to any wholesaler or retailer of petroleum products of such marketing oil company;

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

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

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

It is further ordered, That respondents The Atlantic Refining Company, The Goodyear Tire and Rubber Company, and The Goodyear Tire and Rubber Company, Inc., corporations, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the aforesaid order to cease and desist.

IN THE MATTER OF

THE FIRESTONE TIRE & RUBBER COMPANY ET AL.

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

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

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

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

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

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

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

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

This proceeding is now before the hearing examiner for final consideration upon the complaint; answers thereto; testimony and other evidence; proposed finding of fact, conclusions of law and briefs in support thereof filed by all parties; and reply filed by counsel supporting the complaint. The hearing examiner has given consideration to the proposed findings of fact and conclusions submitted by the parties, and their briefs in support thereof, and all findings of fact and conclusions of law proposed by the parties respectively, not hereinafter specifically found or concluded, are herewith rejected, and the hearing examiner having considered the record herein and being now duly advised in the premises makes the following findings as to the facts, conclusions drawn therefrom, and order:

1. Respondent, The Firestone Tire & Rubber Company (hereinafter sometimes referred to as "Firestone"), is a corporation organized, existing and doing business under the laws of the State of Ohio with its principal office and place of business located at 1200 Firestone Parkway, Akron, Ohio. Said respondent, among other things, is engaged in the sale and distribution in interstate commerce of tires, batteries, accessories and supplies (hereinafter referred to as "TBA").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Decision

58 F.T.C.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS

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

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

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

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

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

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

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

Order

58 F.T.C.

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

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

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

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

ORDER

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

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

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

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

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

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

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

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

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

OPINION OF THE COMMISSION

By Kintner, Chairman:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHARACTERISTICS OF THE SALES COMMISSION PLAN

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DISTRIBUTION SYSTEM OF SHELL OIL COMPANY

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

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

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

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

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

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

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

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

TABLE II.—Types of Shell direct dealers, 1955

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE ISSUE OF COERCION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE SALES COMMISSION PLAN IN FIRESTONE'S SYSTEM OF DISTRIBUTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Those companies which produce and sell only tires are:

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

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

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

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

371

Opinion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * * * *

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

MR. GOODHOPE: Do you have a further explanation?

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

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

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

MR. GOODHOPE: To the station?

MR. BROOKS: To the stations, yes.

MR. GOODHOPE: And that would cut you out?

MR. BROOKS: Yes sir.

* * * * *

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

MR. BROOKS: Yes, sir.

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

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

MR. GOODHOPE: Yes.

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

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

MR. BROOKS: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Order

58 F.T.C.

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

CONCLUSION

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

FINAL ORDER

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

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

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

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

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

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

371

Order

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

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

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

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

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

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

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

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

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

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

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

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

It is further ordered. That respondents Shell Oil Company and The Firestone Tire and Rubber Company, corporations, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the aforesaid order to cease and desist.

IN THE MATTER OF

COLGATE-PALMOLIVE COMPANY

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

Docket 7660. Complaint, Nov. 19, 1959—Decision, Mar. 9, 1961

Order requiring a manufacturer of a dentifrice, among other products, with headquarters in New York City, to cease representing falsely in advertisements and television commercials that its "Colgate Dental Cream with Gardol" formed a "protective shield" around teeth, thereby affording users complete protection against tooth decay or the development of cavities in their teeth.

Edward F. Downs, Esq. and *Anthony J. Kennedy, Esq.* supporting the complaint.