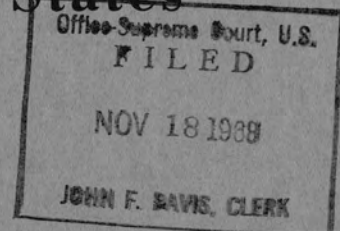


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THE COURT, U. S.

120/68

# Supreme Court of the United States



In the Matter of:

FEDERAL TRADE COMMISSION,

Petitioner;

VS.

TEXACO, INC, and the B. F. GOODRICH COMPANY

Respondents.

Docket No. 24

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Place Washington, D. C.

Date November 13, 1968

**ALDERSON REPORTING COMPANY, INC.**

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C O N T E N T S

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Daniel M. Friedman, Esq, on behalf of the Petitioners	2
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1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 - - - - -X  
4 FEDERAL TRADE COMMISSION, :

5 Petitioner; :

6 vs. : No. 24

7 TEXACO, INC. and the B. F. GOODRICH COMPANY, :

8 Respondents. :  
9 - - - - -X

10 Washington, D. C.

11 Wednesday, November 13, 1968

12 The above-entitled matter came on for argument at  
13 11:50 a.m.

14 BEFORE:

15 EARL WARREN, Chief Justice  
16 HUGO L. BLACK, Associate Justice  
17 WILLIAM O. DOUGLAS, Associate Justice  
18 JOHN M. HARLAN, Associate Justice  
19 WILLIAM J. BRENNAN, JR., Associate Justice  
20 POTTER STEWART, Associate Justice  
21 BYRON R. WHITE, Associate Justice  
22 ABE FORTAS, Associate Justice  
23 THURGOOD MARSHALL, Associate Justice

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 24, the Federal Trade Commission, petitioner, versus Texaco, Inc. and the B. F. Goodrich Company, respondents.

Mr. Friedman?

ORAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.

ON BEHALF OF THE PETITIONER

MR. FRIEDMAN: Mr. Chief Justice, may it please the Court:

The question in this case, which is on certiorari from the Court of Appeals of the District of Columbia Circuit, is whether the Federal Trade Commission correctly held that a sales commission plan by which the respondent Texaco distributed, promoted and sponsored the sale of tires and automotive accessories made by the respondent Goodrich Tire and Rubber Company, promoted and sponsored the sale through the Texaco service stations in return for a commission paid to Texaco by Goodrich -- whether the Commission properly held that this constituted an unfair method of competition in violation of section 5 of the Trade Commission Act.

The respondent Goodrich also had a similar sales commission plan with the Firestone Tire and Rubber Company, but I will focus primarily on their relationships with Goodrich.

This case is one of three companion cases that the Commission instituted in 1965 challenging the sales commission



1 method of distributing tires, batteries and accessories, and  
2 each of these cases named as a respondent a major oil company  
3 and a major tire company.

4 In each case, after protracted proceedings, the  
5 Trade Commission held that the sales commission plan was an  
6 unfair method of competition and ended a broad cease and desist  
7 order which prohibited each of these companies from engaging in  
8 this type of plan.

9 At the end of the 1964 term, this Court upheld the  
10 Commission's order directed against the plan involving Atlantic  
11 Refining Company, and the Goodyear Tire and Rubber Company.

12 Subsequent thereto, the Court of Appeals for the Fifth  
13 Circuit upheld the Commission's order directed against the  
14 plan involving the Shell Oil Company and Firestone.

15 Now, while those two cases were going through the  
16 courts, in the present case the Texaco-Goodrich case, the Court  
17 of Appeals for the District of Columbia Circuit, on a prior  
18 appeal, set aside the Commission's order. The Commission filed  
19 a petition for certiorari in that case, and a week after this  
20 Court decided the Atlantic case in favor of the Commission, it  
21 vacated the judgment of the Court of Appeals and, in effect,  
22 remanded the case to the Commission with directions to recon-  
23 sider it in the light of that.

24 Upon such reconsideration, the Commission issued a  
25 new opinion in which it again, in the light of the Atlantic

1 case, concluded that this sales commission system was an unfair  
2 method of competition and entered a cease and desist order the  
3 same as the order that had been upheld by this Court in Atlantic.

4 Once again the Court of Appeals set aside the Commis-  
5 sion's order and directed the Commission to dismiss the com-  
6 plaint.

7 Now, the economic relationship that exists between  
8 the respondent Texaco and its retail gasoline service station  
9 dealers is basically the same as that presented to this Court  
10 in the Atlantic case.

11 Q Except in the Atlantic case there was coercion.

12 A I am speaking of just the economic relationships,  
13 the first element, between the company and the dealers. I will  
14 come in a moment and explain the differences in the way in  
15 which the power was exercised.

16 Texaco is one of the largest petroleum dealers in  
17 the country. It distributes its products to 30,000 service  
18 stations, many more than involved in Atlantic, and, in fact,  
19 this represents about one-sixth of all of the service stations  
20 in the country.

21 These service stations operate on two bases: About  
22 40 percent of them are so-called lessee dealers who lease their  
23 station from Atlantic, and the remainder are so-called contract  
24 dealers who either lease their station from a third person or,  
25 in fact, own the station.

1           The way in which the stations are leased here is the  
2 same as basically in Atlantic. The dealers hold these stations  
3 under short-term leases, one-year leases, which permits termi-  
4 nation by either side upon 10 days' notice, and the lease has  
5 similar housekeeping clauses which provide for immediate can-  
6 cellation if the lessee fails to comply with these situations.

7           In addition, in each instance, of course, the dealer  
8 is completely dependent upon Texaco for its supply of gasoline,  
9 and there, too, you have a yearly contract which is terminable  
10 by the oil company on 30 days' notice.

11           The sales commission plan in this case was originally  
12 entered into in 1940, and it was renewed in 1943.

13           Under the plan, Goodrich agrees to pay Texaco a 10  
14 percent commission on all Goodrich goods sold through the  
15 Texaco gasoline stations or from wholesale outlets, and this  
16 payment, it is stated in the sales commission agreement, "is in  
17 consideration of the aid to be given and the services to be  
18 rendered by your sales organization in connection with promoting  
19 the sale of Goodrich products."

20           As I have indicated to Mr. Justice Stewart, I will  
21 shortly come to what they did in carrying out this obligation  
22 to promote the sale of parts.

23           Now, during the five-year period for which data is  
24 in the record, 1952 to 1956, Goodrich and Firestone together  
25 sold to Texaco \$245 million worth of TBA under the plan, and

1 these two companies paid to Texaco in this period approximately  
2 \$22 million in commissions for the services that Tecaco per-  
3 formed under the contract.

4 Now, in evaluating the Commission's decision in this  
5 case, and in analyzing this Court's decision in Atlantic, the  
6 parties have agreed that it may be appropriately broken down  
7 into three elements. Three elements are necessary to sustain  
8 the Commission's determination of violation.

9 First, did Texaco have controlling economic power  
10 over its dealers?

11 Secondly, in the performance of the sales commission  
12 contract, did Texaco exercise that power?

13 Third, was there an adverse effect upon competition?

14 MR. CHIEF JUSTICE WARREN: We will recess at this  
15 time.

16 (At 12:00 o'clock Noon the Court recessed, to recon-  
17 vene at 12:30 p.m. the same day.)

1 (The oral argument in the above-entitled matter was  
2 resumed at 12:30 p.m.)

3 MR. CHIEF JUSTICE WARREN: Mr. Friedman, you may con-  
4 tinue your argument.

5 FURTHER ORAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.

6 ON BEHALF OF THE PETITIONER

7 MR. FRIEDMAN: Mr. Chief Justice, may it please the  
8 Court:

9 The Court of Appeals in this case ruled that Texaco,  
10 just as Atlantic, did have economic power over its dealers. The  
11 record shows that in this case the dealers the dealers, no less  
12 in Atlantic, were completely dependent upon the oil company  
13 for their economic survival.

14 I would like to correct something that I said earlier  
15 on these leases. I apparently misspoke myself.

16 The precise terms of the lease are that they run  
17 from year to year, but they are automatically terminable 10  
18 days before the end of the year.

19 The gasoline contract similarly runs from year to  
20 year and is terminable 30 days before the end of the year.

21 I don't want to have any suggestion that they could  
22 be terminated within the period of the yearly term.

23 Q And they are terminable by either party?

24 A Yes.

25 Q As I understood the facts, many of these service



1 station operators are lessees of Texaco, and a great many, or  
2 some, are also lessees of other people, and some own their  
3 property?

4 A That is correct. Roughly 60 percent are either  
5 owners of the property or lessees of third persons, and roughly  
6 40 percent, about 13,000 out of 30,000, are lessees from Texaco.

7 Q I understand.

8 A In their fundamental characteristics, these  
9 agreements are the same. They are short term. They have the  
10 housekeeping provisions and, of course, as this Court has noted  
11 on several occasions, these gasoline station people are small  
12 businessmen in every sense of the word.

13 They have what to them is a very substantial invest-  
14 ment in their service station, and the service station itself  
15 is a relatively expensive proposition.

16 As this Court correctly pointed out, we think, in  
17 Atlantic, as a result of all these disparities, these people  
18 do not bargain as equals. There is a tremendous disparity in  
19 bargaining power. In these circumstances, understandably, the  
20 service station dealers are reluctant to do anything that might  
21 antagonize their relationship with the oil company dealers.

22 Since the Court of Appeals has found in this case  
23 and upheld the Commission's determination that the oil company  
24 has its economic power over its dealers, the two remaining  
25 issues in this case are whether the Trade Commission was

1 warranted in concluding in the light of the Atlantic decision  
2 that what they did, what Texaco did in this case, in performing  
3 the sales commission agreement, constituted an exercise of  
4 that power, and also that in the result of such exercise, it  
5 was an impediment to competition.

6 In approaching that problem, I think it is appropriate  
7 once again to stress the limited nature of judicial review of  
8 the Commission's determination that a particular practice is an  
9 unfair method of competition.

10 This Court, in Atlantic, pointed out that where the  
11 Congress has provided that an administrative agency initially  
12 apply a broad statutory term to a particular situation, our  
13 function is limited to determining whether the Commission's de-  
14 cision was warranted on the record on a reasonable basis, and  
15 it went on to say that while the final word is left to the  
16 Courts, necessarily you give great discretion to the Commission's  
17 determination.

18 Q Mr. Friedman, may I ask you at this point: Is  
19 there evidence in the record as to whether any of these sta-  
20 tions handled TBA of other manufacturers?

21 A Yes.

22 Q Is there evidence as to how substantial that was?

23 A It is difficult to say. There is no question  
24 that they did. In fact, the Examiner found that all of them  
25 handled some TBA that was so-called non-sponsored, but the

1 evidence indicates that much of this handling of so-called non-  
2 sponsor production was, in fact, a so-called occasional pick-up  
3 business.

4 If a customer came in and needed a couple of spark  
5 plugs or tires, something of that sort, they filled it. There  
6 is no qualitative data in this record as to precisely what  
7 percentage of the dealers or what percentage of total TBA  
8 was sponsored.

9 But we do have the fact that over a 5-year period,  
10 as I indicated, they sold a total of \$245 million worth of  
11 TBA through the Texaco outlets.

12 I would like at the very outset to point out that this  
13 case in a number of respects is significantly different than  
14 Atlantic insofar as the exercise of the powers concerned and  
15 insofar as what the effects upon competition were.

16 In the first place, we made no claim in this case  
17 now that there was any coercion by Texaco of its dealers; that  
18 is, the dealers were not threatened that they would have their  
19 leases cancelled if they should handle competing products.

20 Secondly, we don't have here what we had in Atlantic --  
21 the policing by the oil company of its dealers. They did not,  
22 for example, receive information from the tire company as to  
23 dealers to whom the tire company couldn't sell. They didn't  
24 have these so-called phantom inspectors going around and check-  
25 ing in that sense.

1           There is nothing here to show that Texaco pulled down  
2 signs advertising competing products. In addition to that,  
3 unlike Atlantic, we don't have here a dramatic shift in busi-  
4 ness following the initiation of the sales commission.

5           In Atlantic, you will recall the tremendous shift in  
6 business over a period of the year when the sales commission  
7 plan was initiated. We don't have that here.

8           On the impact on competition, in Atlantic there was  
9 an impact of three levels. In this case, there is only an im-  
10 pact at one. In Atlantic, what happened was that Atlantic  
11 divided its operating territories between Goodyear on the one  
12 hand and Firestone on the other, and thus eliminated all inter-  
13 brand competition between the two tire companies. We did not  
14 have that here.

15           Secondly, in Atlantic, the arrangement was that each  
16 dealer was assigned to a special supply point. He had to pur-  
17 chase from one source of Goodyear or Firestone. That had the  
18 effect, of course, of eliminating all intra-brand competition  
19 between dealers in the particular rubber company, such as Good-  
20 year in competing for the customer of a single dealer.

21           But what we do have here, and what the Commission  
22 pitches its case on, is the impact on competition upon the com-  
23 peting suppliers of TBA; that is, the people who are competing  
24 with Goodrich and Firestone to sell to the Texaco stations.

25           The Commission pointedly ruled that the differences,

1 the factual differences, between this case and Atlantic were  
2 immaterial, because it said that the Texaco sales commission  
3 agreement, the words it used, in its fundamental operation and  
4 effect, is indistinguishable from the one held unlawful in  
5 Atlantic.

6 The Commission interpreted this Court's Atlantic  
7 decision, in effect, as follows: It said that this Court ruled  
8 that while coercive practices aggravate the restraint imposed  
9 by the sales commission plan, it is the oil company's power over  
10 its dealers, derived from the contractual relationship between  
11 them, and the utilization of that power through the performance  
12 of the promotional services required by the sales commission  
13 agreement, which renders the sales commission plan unlawful.

14 In other words, the Commission held here, as this  
15 Court, we think, recognized in Atlantic, that the basic vice of  
16 the sales commission plan was the utilization of economic power  
17 in one line, the gasoline market, to restrain competition in  
18 another market, the TBA market.

19 We think that the Commission properly drew that con-  
20 clusion here because Texaco no less than Atlantic, we think,  
21 brought its economic power over its dealers to bear in a way  
22 that gave the Goodrich Company and the Firestone Company a com-  
23 petitive advantage over other sellers of TBA in selling to the  
24 important segment of the TBA market that was represented by  
25 these numerous Texaco service stations which are located



1 basically throughout most of the country.

2 The Commission summarized at considerable length  
3 how Texaco had used its economic power in the performance of  
4 the sales commission contract. I will refer to six instances.

5 The first thing is that even before the dealer was  
6 signed up as a dealer, the Texaco people stressed to him the  
7 importance of carrying an adequate stock of TBA, and also urged  
8 upon him to select either Goodrich or Firestone. If he does  
9 select one of these two sponsored brands, Texaco takes the  
10 initiative and introduces him to the representative of the  
11 rubber company.

12 Before the station is actually opened, Texaco fre-  
13 quently informs either or both Goodrich and Firestone of the  
14 opening of such station, although the record does also indi-  
15 cate that in many instances the rubber companies were aware of  
16 this themselves and made the first sales pitch.

17 Texaco actively participates in the promotion campaigns  
18 of Firestone and Goodrich. They have various dealer meetings,  
19 they have training courses. At those courses, the sponsored  
20 products are frequently used for training and display purposes  
21 and, in addition to that, representatives of the rubber com-  
22 panies frequently attend these meetings.

23 Q What form does that advertising take, Mr. Fried-  
24 man?

25 A It varies again. They frequently do advertise

1 the sponsored products.

2 Let me say, Mr. Chief Justice, we don't claim that  
3 this is the only thing in the record. There is evidence in the  
4 record, of course, that they do advertise non-sponsored pro-  
5 ducts. But we think, as I shall show, that this is really im-  
6 material.

7 The critical thing is that they did play a very active  
8 role in promoting the sale of the sponsored products to their  
9 dealers.

10 Finally, the Commission said, perhaps most effective  
11 of all, the Texaco salesman continually carries the message in  
12 his day-to-day contacts with the dealers. In this regard, it  
13 is important to remember that these Texaco salesmen who are  
14 most directly involved in pushing the sponsored TBA products  
15 also play a critical role in the annual dealer valuations and  
16 in the determination of whether the dealer's lease and con-  
17 tractual relations with Texaco are to be renewed.

18 The Commission concluded that the consequence of  
19 these promotional efforts by Texaco was to impress upon Texaco  
20 dealers through constant repetition and in a variety of ways  
21 that Texaco, whose favor the dealer must court, has a strong  
22 interest in their purchase of the sponsored products.

23 The record in this case indicates that although  
24 Texaco did inform its dealers that they were independent busi-  
25 nessmen who had the freedom to select whatever brand of TBA

1 they wanted, in fact the performance of this contract, its  
2 recommendation, its promotion, its sponsorship of the Goodrich  
3 and Firestone products, did put competing distributors of TBA at  
4 a very definite disadvantage in selling to Texaco outlets.

5 The Commission called 31 witnesses who were represen-  
6 tatives of competing wholesale sellers of TBA. These witnesses  
7 testified basically as to the difficulties they had in selling  
8 to Texaco outlets. They testified that in some instances there  
9 were outlets to whom they couldn't sell at all.

10 They testified as to other Texaco outlets where they  
11 would sell them an occasional item, but they couldn't get them  
12 to stock the parts. They testified as to numerous instances  
13 where they even stopped calling upon the Texaco outlets because  
14 they just found it was a waste of time; they couldn't sell to  
15 them.

16 Then they testified to some instances, not too many  
17 admittedly, but a substantial number, in which the Texaco dealer  
18 explained that they were unwilling to purchase the competing  
19 products because of the fact that they were told they had to  
20 carry a sponsored brand.

21 I think the Commission fairly summarized this evi-  
22 dence when it said at page 91 of Volume 6 of this little docu-  
23 ment that we have here which contains most of the things, that  
24 as a result, many Texaco dealers -- as a result of Texaco's  
25 vigorous sales campaign to its dealers -- were left with the

1 impression that Texaco would look with disfavor upon their pur-  
2 chase of non-sponsored TBA products and that they were required  
3 to purchase the sponsored TBA.

4       The practical effect of this program, I think, is  
5 well brought out in the testimony of a man named Richard Tidwell,  
6 which is set forth in Volume 2 of the record. Mr. Tidwell was  
7 an airline pilot who went into the service station business.  
8 He was a lease dealer for two years and then left because he  
9 wanted to go back into flying.

10       He testified that when he was interviewed, they ex-  
11 plained to him the advantages of TBA and recommended Goodrich  
12 or Firestone, and he selected Firestone.

13       At a later point, he considered the possibility of  
14 taking on a cheaper brand of tires. At page 1211 of the record,  
15 at the top of the page, he explained what happened. He said:

16       "I was thinking seriously about putting in a line of  
17 the second cheaper brand of tires, and I explain this to  
18 Mr. Fitz."

19       Parenthetically, he was a Texaco representative.

20       "He told me at that time, and I will say as much in  
21 his words as possible, 'Dick, we cannot tell you not to  
22 handle these tires, but we attempt to be more lenient and  
23 look with favor on our dealers who are more loyal to us.'  
24 As a consequence, I told him that I would not handle the  
25 tires."

1 Then down at the bottom of the page, Mr. Tidwell was  
2 asked:

3 "Mr. Tidwell, why didn't you ever carry any other  
4 brand of TBA in your station other than Firestone?"

5 At the top of page 1212 he said:

6 "When I found out that the Texas Company desired me  
7 to carry only one line, I endeavored to work with them."

8 The same thought was repeated toward the latter part  
9 of page 1217 when Mr. Tidwell was asked why he asked for Mr.  
10 Fitz's advice about handling these competing tires, and he said:

11 "I asked for two reasons. One, I had confidence in  
12 his judgment. The other is if he had any objections, be-  
13 cause I wanted to stay on good standing with the Texaco  
14 Company."

15 Q Who was that employee?

16 A The employee was a Mr. Fitz, who had the posi-  
17 tion of being manager of the Texaco bulk refinery in the area  
18 where he was working. He was a Texaco official with whom he had  
19 dealt in negotiating his lease.

20 Indeed, it is rather difficult to understand why  
21 these two large companies would pay \$22 million to the Texaco  
22 Company if they didn't think that in return for this they were  
23 getting some advantage that they could not have gotten through  
24 their own sales efforts.

25 This Court in Atlantic pointed this out when it stated



1 that it is difficult to escape the conclusion that there would  
2 have been little point in paying substantial commissions to oil  
3 companies were it not for their ability to exert power over  
4 their wholesalers and dealers, an ability adequately demon-  
5 strated on this record.

6 The Court of Appeals, however, rejected the Commis-  
7 sion's finding that Texaco had exercised economic power basic-  
8 ally on two grounds.

9 First, the Court said at page 112 of this little sixth  
10 volume of the appendix, a finding of coercion is a threshold  
11 requirement of a determination of exercise of dominant economic  
12 power. It read this Court's Atlantic decision as so holding.  
13 Since it set aside the Commission's finding that there had been  
14 coercion, it concluded as a first ground that the finding of  
15 exercised economic power could not stand.

16 Q If you had the same record, and there was no  
17 coercion, what would you say to that?

18 A I would say the Commission decision plays a  
19 crucial role in this. I don't know what the Commission would  
20 do, but it seems to me it is a very different case when the  
21 oil company makes a judgment and says "We recommend one pro-  
22 duct rather than another, " and where it is being paid to do this.

23 I think, Mr. Justice, the impact upon competition  
24 presumably would be the same, if you don't have this other  
25 element. I want to say that the Commission, of course, has not

1 undertaken to decide this question.

2 Q Do you think it would be a different case?  
3 Wouldn't you be making the same argument?

4 A I might be, Mr. Justice. I don't know what the  
5 Commission would do.

6 Q What is the significance of the Commission? From  
7 that, you draw an inference that they did?

8 A That there are two things about it.

9 Q It is simply to benefit the suppliers?

10 A I put it the other way, if I may: that the fact  
11 that the suppliers were willing to pay the substantial amount,  
12 it seems to us, is a pretty clear indication that the suppliers  
13 felt that in the performance of these agreements, Texaco was  
14 giving something that they could not obtain themselves through  
15 its economic power.

16 Q You don't infer that they actually did do some-  
17 thing, or only that the suppliers felt they did?

18 A I am sorry; they did all the things I have indi-  
19 cated in performance of the contract, which apparently was  
20 satisfactory to both Goodrich and Firestone.

21 Q And you think the Atlantic decision appendix  
22 covers this case?

23 A We think the basic rationale does. The facts  
24 here are different.

25 Q Do you think the position you have presented

1 here in Atlantic covers this case? These are really two dif-  
2 ferent cases.

3 A These are two different cases. I tried, and I  
4 think I successfully urged upon the Court in Atlantic, at least  
5 it was my submission, that the Atlantic case involved only the  
6 facts of Atlantic and didn't have to go beyond the facts in  
7 Atlantic.

8 Q That involved coercion?

9 A Yes.

10 Q Does the opinion in Atlantic go quite far on  
11 coercion?

12 A We think the opinion in Atlantic covered the  
13 coercion, but coercion was merely a symptom, a form in which  
14 the oil company exercised its powers.

15 Q Maybe the Atlantic Company holds something.

16 A I am not suggesting that Atlantic covers this  
17 case in the sense that the decision in Atlantic controls this  
18 case. What I do suggest is the basic reasoning and rationale  
19 of Atlantic covers this case.

20 I would like to also add, Mr. Justice, that in the  
21 Firestone case, the Fifth Circuit held that the absence of  
22 coercion was not there. In other words, the Fifth Circuit did  
23 not hold this Court's opinion in Atlantic that even without  
24 coercion, nevertheless the Commission might condemn this system.

25 Q Would you agree, however, that they have to show

1 something more than the mere existence of economic power?

2 A You have to show some exercise of the power.

3 Q You have to show the use of economic power to  
4 favor Firestone and Goodrich in this case.

5 A Yes.

6 Q And you believe that that is evidence in the  
7 findings below?

8 A The findings of the Commission; yes. We think  
9 what they have done here, while not as much obviously as they  
10 did in Atlantic, nevertheless is enough to warrant the Commis-  
11 sion in concluding that this had a sufficiently significant  
12 impact on competition.

13 Q Certainly if you showed nothing more than the  
14 lease arrangement between Texaco and the stations, the mere  
15 fact that Texaco receives a commission from the tire companies  
16 would not be enough, would it, if that is all the record shows?

17 A That may be, Mr. Justice, if that were all the  
18 record shows. We think the record here shows a good bit more.  
19 Here we think they did fully perform their obligation under  
20 the sales commission contract to promote the sales of TBA.

21 As I say, they performed the obligation in a suffi-  
22 ciently satisfactory manner to the oil companies that they  
23 were willing to pay a substantial amount.

24 Q You think that promotional activity with the  
25 stations standing alone would be enough to constitute the

1 necessary use of dominating economic power?

2 A Yes, the promotional activities would be. That  
3 is basically what the Commission held.

4 Q And that is all there is in this case?

5 A That is right. It is the promotional activities  
6 plus, of course, the effect on competition.

7 Q I mean, that is all Texaco did?

8 A That is right. They promoted the contract in  
9 the context of their economic relationship.

10 Q And you say that is the exercise of power?

11 A Yes.

12 Q What kind of power is this?

13 A It is the dominant economic power, the power  
14 Texaco had.

15 Q So if you exercise the dominant power, you have  
16 done what?

17 A I am sorry; I don't understand you.

18 Q You have effected some consequence, apparently,  
19 when you exercise this dominant power.

20 A When you exercise the dominant power over the  
21 dealers, the result of which is --

22 Q Do they have to do something that they can't  
23 help doing?

24 A They don't feel free. They don't have a free  
25 choice.



1 Q Is that coercion?

2 A I think it may depend on how you use the term.  
3 It is not overt coercion. It is not coercion --

4 Q The use of the dominant economic power to make  
5 somebody do something he didn't want to, what is that?

6 A It is not so much something they don't want to  
7 do.

8 Q He may not want to do.

9 A It is coercion in that sense, but coercion has  
10 been used in this case to refer primarily to so-called overt  
11 coercion. A real clubbing as distinguished from the gentle  
12 touch.

13 Another aspect of the Court of Appeals decision is  
14 that the Court of Appeals seems to think, and we, of course,  
15 disagree, that this Court in its Atlantic decision defined the  
16 precise limits of the Commission's power to condemn sales com-  
17 mission plans.

18 Then they reviewed all of the acts that Texaco had  
19 done, lined them up against the acts that Atlantic had done,  
20 and said "These are significantly different," and, therefore,  
21 concluded that the Commission could not treat this as an exer-  
22 cise of the economic power of Texaco.

23 Again, we think that is not what Atlantic held.  
24 Atlantic merely decided on the facts before it that the Commis-  
25 sion was justified, and we think the Court of Appeals here has

1 approached to review the Commission's order in the wrong way.  
2 It seems that what the Court of Appeals should have done is  
3 not to look and say "Is this case on all fours with Atlantic?"  
4 It should have said that despite the differences between this  
5 case and Atlantic, was the Commission justified in concluding  
6 that, nevertheless, this sales commission system did constitute  
7 a sufficient exercise of power and did have a significant im-  
8 pact on competition to warrant condemning it?

9 This brings me to the third element of the equation,  
10 if you will, the effect of this plan on competition.

11 In the Atlantic case, this Court recognized that the  
12 basic impact of the sales commission plan upon competition  
13 was comparable to a time arrangement; that is, in each case the  
14 person who is doing the purchasing felt constrained to exercise  
15 to make his choice, not on a completely free basis, but upon  
16 some feeling that he had to satisfy the oil company.

17 It, therefore, concluded that in determining the im-  
18 pact on competition, it was appropriate to apply in this area  
19 the standards that had been developed in earlier cases; that is,  
20 it is enough to show that a not insubstantial amount of com-  
21 merce was affected and it was unnecessary for the Commission  
22 to make a lengthy, protracted analysis of the market.

23 In the Atlantic case, the total amount of sponsored  
24 TBA that was sold over a 5-year period under the sales commis-  
25 sion agreements between Atlantic and Goodyear and Firestone was

1 slightly over \$50 million over a 5-year period. In this case,  
2 in one year, last year, 1956, total sales were approximately  
3 \$58 million. Over the 5-year period, the total sales involved  
4 in this case were almost five times Atlantic; that is, \$245  
5 million as against \$50 million in Atlantic.

6 And, of course, when a not insubstantial volume of  
7 commerce is tied up this way, the effect on competition is  
8 enough even though not all the dealers were tied up, even  
9 though many of the dealers handled competing products, and  
10 even though many of them didn't handle sponsored products at  
11 all.

12 The critical thing, we think, from this record, is  
13 that the effect of the Texaco sales commission plan had been  
14 effectively to fence off from a substantial segment of the TBA  
15 market represented by Texaco dealers competing sellers of TBA.

16 There are two other factors involved in considering  
17 the impact on competition that I think are appropriate to men-  
18 tion.

19 When the Commission decided this case on remand, it  
20 already had decided the two other TBA cases. In the course of  
21 studying these three cases, it had learned a great deal about the  
22 TBA industry. One of the things that had been disclosed in the  
23 course of these three cases was that only the very large tire  
24 companies are able to have these sales commission plans.

25 It also is clear that the service stations, by their

1 nature, are becoming increasingly important outlets for the  
2 distribution of TBA. Thus, it becomes more and more important  
3 to the competing manufacturers of TBA, the smaller manufacturers  
4 who are not able to enjoy these sales commission plans, that  
5 we eliminate the restraints on access to the market that these  
6 plans represent.

7 In the Atlantic case, this Court referred to the de-  
8 structive effect on commerce that would result from the wide-  
9 spread use of these contracts by major oil companies and sup-  
10 pliers.

11 This is not wholly theoretical, because we do have in  
12 this case the evidence that a small battery manufacturer in Tex-  
13 as had great difficulty in selling to the Texaco outlets.

14 In addition, there is a further anomaly in this situa-  
15 tion. If this sales commission plan is permitted to go for-  
16 ward, what it amounts to is that even though Texaco is two or  
17 three times larger than Atlantic, Texaco is permitted to engage  
18 in the basic kind of arrangement that is prohibited to Atlantic  
19 and some of the other companies.

20 Finally, I think it is important to stress the basic  
21 prophylactic role that Congress intended section 5 of the Trade  
22 Commission Act to promote. I refer to Justice Brandeis' notable  
23 dissent in the Gratz case, which this Court only two or three  
24 years ago recognized is now the proper approach; that is, under  
25 section 5, it is not necessary to wait until the point that a

1 restraint of trade turns into a full-blown violation of the  
2 Sherman Act or the Clayton Act. The Commission can step in  
3 even at a preliminary stage because of the dangerous tendencies  
4 which the practice has.

5 We think that this practice has a demonstrated anti-  
6 competitive effect. In any event, there are the possible  
7 potential dangers if these plans continue, as this Court recog-  
8 nized in Atlantic, for both the competing manufacturers of TBA  
9 and the wholesale distributors in those commodities.

10 ORAL ARGUMENT OF MILTON HANDLER, ESQ.

11 ON BEHALF OF THE RESPONDENTS

12 MR. HANDLER: Mr. Chief Justice, may it please the  
13 Court:

14 When in 1965, following the Court's decision in  
15 Atlantic, Your Honors remanded this case to the Commission for  
16 reconsideration in the light of the principles laid down in  
17 Atlantic, it was perfectly plain that, as it is now, Texaco  
18 is a large company engaged in the sale of petroleum products  
19 to its dealers; that Goodrich is a large tire company in the  
20 business of selling TBA items; that Texaco's leases and sales  
21 agreements with its dealers are of short duration; and that  
22 Texaco's dealers purchased substantial quantities of the  
23 sponsored Goodrich TBA.

24 If it had been Your Honors intention, therefore, in  
25 Atlantic, to hold that the sales commission agreement in these



1 circumstances is, per se, unlawful, there would have been no  
2 point in remanding our case for application of Atlantic to the  
3 facts of record here.

4 Q Unless, Mr. Handler, we thought the Commission  
5 had not articulated a sufficient basis for any such decision.

6 A That may be, Your Honor, but the order of the  
7 Court says "remand for application of the principles of Atlantic."

8 If it was, per se, illegality, all that was necessary  
9 was to enter a final order reinstating the Commission's order.  
10 We do not read Atlantic as adopting the rule of per se illegality.  
11 This was not the ground upon which my good friend and former  
12 student Mr. Friedman argued Atlantic.

13 On oral argument, he emphatically declared "The  
14 Government does not suggest that there may not be commission  
15 sales agreements which would satisfy section 5." He squarely  
16 recognized "that there may very well be situation where elimi-  
17 nating some of the things they" -- namely, Atlantic and Good-  
18 year -- "did in this case would not have the same adverse effect  
19 on the competition as the plan the Commission condemned."

20 He repeatedly, in response to questions from the  
21 Court, disclaimed a per se theory of the illegality, and no  
22 claim of per se unlawfulness was made in the Government's brief  
23 in Atlantic.

24 More importantly, Mr. Justice Clark's opinion does  
25 not hold that the mere existence of superior economic power in

1 the oil company, vis-a-vis its dealers, results in illegality.  
2 The opinion makes clear that the gravamen of the violation con-  
3 sists of the misuse of that power with concomitant anti-competi-  
4 tive results.

5 In a nutshell, the Commission's order in Atlantic  
6 was upheld because the oil company, and I am quoting now from  
7 Mr. Justice Clark, "marshaled its full economic power in a  
8 continuing campaign to force its dealers and wholesalers to  
9 buy Goodyear products," and that rationale was precisely the  
10 one that the Government advanced in its brief to this Court.

11 Again I quote: "In sum, Atlantic marshaled the full  
12 measure of its economic power over its dealers to carry out a  
13 pressure campaign designed to get them to handle Goodyear and  
14 Firestone products, and because of the extent of that power, the  
15 campaign was highly successful."

16 Q I don't know what this argument proves or dis-  
17 proves. It doesn't help the Court, as I understand it, to de-  
18 cide the merits of this case.

19 A I am going to go into that, Your Honor. I wanted  
20 to clear away that Your Honors did not hold that sales commis-  
21 sion was, per se, unlawful. Therefore, its validity depends  
22 upon the facts. I want to go into the facts to show that the  
23 facts here do not warrant the application of Atlantic because  
24 the facts are totally different.

25 Q Maybe they warrant the application of some other

1 rule. We are not captives of Atlantic. We didn't decide  
2 everything in Atlantic. We are not a first-year class in law  
3 school.

4 A What was that?

5 Q That is all right.

6 A Your Honors remanded the case for the application  
7 of Atlantic to the facts of this case. That is what your man-  
8 date said.

9 Mr. Friedman has acknowledged, in response to a ques-  
10 tion, that Atlantic does not control. The Court of Appeals held  
11 that Atlantic was not controlling because the facts were dif-  
12 ferent. That is one of the reasons why it set aside the order  
13 of the Commission.

14 Why is this case, Your Honors, different from the  
15 other two? This case is different because Texaco, unlike  
16 Atlantic and Shell, did not wield its economic power to inter-  
17 fere with the freedom of choice of its dealers. Twice has the  
18 Court of Appeals so found after careful review of this healthy  
19 six volume record.

20 Applying the same principles as those established in  
21 Atlantic, and enforced in Shell by the Fifth Circuit, the  
22 Court below found that the Texaco dealers were entirely free to  
23 handle the TBA of their own choice, without any interference  
24 whatsoever on the part of Texaco. It found that it has been  
25 Texaco's policy to respect the independence of its dealers

1 and that its practices have matched that policy.

2 This was the testimony of literally scores of wit-  
3 nesses, many called to the stand by the Commission itself.

4 It is our submission, Your Honors, that a plan which  
5 leaves dealers entirely free to accept or to reject sponsored  
6 products cannot produce any anti-competitive effect, and unless  
7 the Court adopts a document of per se illegality, cannot be  
8 found to be unlawful. That was why I started my argument by  
9 trying to point out that the Court had not, in the prior case,  
10 reached any conclusions as to per se illegality.

11 Q Professor Handler, I asked Mr. Friedman some  
12 questions about the record with respect to evidence as to  
13 handling by the service stations of the products of others.

14 A I am delighted to answer that, Your Honor.

15 The Commission asked Texaco to compile certain infor-  
16 mation, which it did. The Commission offered this evidence it-  
17 self. This evidence showed that less than one-third of Texaco  
18 dealers handled any of the sponsored tires, and only about one-  
19 fifth handled the sponsored batteries.

20 This means that 80 percent of the batteries that they  
21 handled were non-sponsored, and about 70 percent of the tires  
22 were non-sponsored, and they handled a great variety of other  
23 products. This record is replete with the advertisements of  
24 250 different TBA items which the Texaco dealers handled and  
25 advertised.

1           The curious thing that we find about the Government's  
2 argument here is that it neither contends for a rule of per se  
3 illegality, nor does it make a frontal attack on the findings  
4 of the Court of Appeals upholding the freedom of Texaco dealers  
5 to handle TBA of their own choice.

6           Instead, in its brief, the Solicitor General appears  
7 to be propounding a brand new theory of liability. I might  
8 say this case has been before this Court twice, before the  
9 Court of Appeals twice, before the Commission three times, and  
10 each time that I have appeared I have been confronted with a  
11 new theory of illegality.

12           Before I address myself to the new theory, I would  
13 like to, with Your Honors' permission, underscore what is not  
14 involved in this case.

15           As Mr. Friedman pointed out, we are not confronted  
16 here with coercion. That is out of the case. Nor does the  
17 case involve any claim of a tie-in. That argument was made  
18 before the Court of Appeals on the first round and was rejected  
19 because it was unsupported by the facts and it has never been  
20 revived.

21           Q     I thought what Mr. Friedman said was we are not  
22 involved here with a case of overt coercion, not that we were  
23 not involved with a case of coercion. Am I wrong?

24           MR. HANDLER: I will accept that, Your Honor, for  
25 purposes of the argument.



1           The two provisions of the coercion order have been  
2 stricken and the Government has agreed to have them stricken.  
3 I will point out that there is nothing that resembles any kind  
4 of coercion, whether it be overt or implied, or covert. There  
5 is just nothing in this record that will support any such con-  
6 clusion.

7           Q     I suppose you would say, then, that Texaco  
8 didn't have any kind of dominant power?

9           A     No. The Court of Appeals held that Texaco had  
10 dominant power. We disagree, but that issue is not before you.

11          Q     Let's assume that they had dominant power. What  
12 does that mean? What does it mean to have dominant power?

13          A     We think that dominant power means the power to  
14 force some people to do something against their wills.

15          Q     And the Court of Appeals said that Texaco had  
16 not attempted to exercise that power?

17          A     That is right; and this record establishes the  
18 correctness of that conclusion.

19          Q     Apparently, though, there was some promotion  
20 by Texaco.

21          A     That is correct.

22          Q     And that, in your book, and apparently in the  
23 Court of Appeals' book, is not exercised as dominant power?

24          A     That is right.

25          Q     A man with dominant power can recommend TBA

1 without exercising its dominant power?

2 A That is right.

3 Q And otherwise you lose the case?

4 A That is our submission, Your Honor; that power  
5 plus salesmanship does not add up to illegality.

6 Q What should I have understood Mr. Friedman to  
7 say when he said, "Well, we may not have a club here, but we  
8 have the gentler touch"?

9 A I would deny that we have any kind of a touch.  
10 I deny it emphatically. And I don't think this record will  
11 establish that we have any touch. I will now explain why.

12 I was trying to put aside the things that are not  
13 involved in the case. There is no claim here that we agreed  
14 with Goodrich that we would require our dealers to handle their  
15 products.

16 Finally, there is no longer any claim here that  
17 Texaco, in fact, required its dealers to handle the sponsored  
18 TBA. That was the basis upon which all of the prior decisions  
19 rest, the requirement. Indeed, in its petition for certiorari,  
20 the Government said that the Court of Appeals' conclusion  
21 that the Texaco dealers were free to choose non-sponsored TBA  
22 is irrelevant. Our submission is that that fact, of dealer  
23 freedom of choice, is not only relevant; it is decisive.

24 Q Mr. Handler, what about the one Mr. Friedman  
25 read to us where they went to the dealer and the dealer said,

1 "I would like to buy a cheaper tire," and Texaco's representative  
2 said, "You are free to do whatever you want to, but we tend to  
3 be nicer to the people who are loyal"?

4 How would you characterize that? As a little push?

5 A Your Honor, I will answer that specific incident  
6 and then I am going to review other incidents in this record  
7 which led the Court of Appeals to say that this finding of the  
8 Commission with respect to the supplier testimony was not sup-  
9 ported by the record.

10 Q The witness did testify to that, you agree?

11 A Yes. I am going to answer that.

12 Mr. Tidwell, as my friend pointed out, had the con-  
13 versation with the salesman, in which he asked for the sales-  
14 man's advice. The record shows that Tidwell continued to sell  
15 these non-sponsored tires, as well as non-sponsored batteries.  
16 He told the Examiner that he was handling Firestone because he  
17 preferred to handle Firestone.

18 So we have dangling in the air a conversation which  
19 apparently has no effect, because he continues to handle the  
20 other products after the conversation, exactly as he did before.

21 What is left to this case? The Government, in its  
22 brief, says that even if the dealers were not constrained, they  
23 felt that they were constrained. This, I think, Your Honors,  
24 is not relevant.

25 The argument is made that the Texaco dealer, although

1 not, in fact, required to buy a sponsored product, nevertheless  
2 does not exercise the freedom that is his of selecting TBA brands  
3 solely on the basis of the comparative merits of the competing  
4 suppliers. The suggestion is that the dealer may be concerned,  
5 albeit erroneously, that Texaco would disapprove of the purchase  
6 of non-sponsored TBA so that in the absence of strong counter-  
7 vailing factors, the dealer is most likely to acquiesce in  
8 Texaco's recommendation to purchase the sponsored products.

9 I believe we have the right to ask where in this  
10 record is the proof that the Texaco dealers do not purchase  
11 TBA on the basis of the relative merits of the particular brand?  
12 Where is the proof that there must be strong countervailing  
13 factors before Texaco dealers buy non-sponsored products?

14 Where is the proof that Texaco dealers are constrained  
15 to acquiesce in Texaco's recommendations?

16 I should have thought, Your Honors, that since the  
17 Government's argument depends on psychoanalyzing a body of  
18 dealers, it would have favored us with some words from the  
19 patients themselves.

20 But the most amazing part of this new theory is that  
21 it is invoked in the case where the Government failed to call  
22 a single Texaco dealer, and Texaco has 38,000 of them, to  
23 testify as a witness; not one. Why should the Government, on  
24 appeal after 13 years of litigation, now speculate or make  
25 assumptions concerning the attitude or feelings of the dealers?

1           The dealers were at all times available as witnesses.

2 They could have testified as to what animated their TBA pur-  
3 chases. Texaco, in fact, produced many of these witnesses as  
4 part of its defense case. They made it perfectly plain, some  
5 54 of them, that they were not pressured into anything by  
6 Texaco, and that they felt no constraint.

7           The Government, on the other hand, avoided dealer  
8 witnesses like the plague. We don't have to look too hard for  
9 the reason. I refer Your Honors to Volume 5 of the appendix.  
10 You will see there a form letter which counsel to the Commission  
11 sent to Texaco dealers. The first paragraph of the letter reads:

12           "Complaints including one in the above-entitled  
13 matter currently pending before the Commission are in-  
14 tended to determine whether operators of major oil company  
15 petroleum outlets are independent businessmen with complete  
16 freedom of choice as to the products which they stock for  
17 re-sale, or are obliged to handle products chosen for them  
18 by the respective oil companies."

19           Then in connection with this issue, the question seeks  
20 information as to whether TBA is handled, and what is the prin-  
21 cipal line that is handled, when they took on the line, and  
22 similar matters. In short, in this questionnaire, the Govern-  
23 ment, the Commission, correctly stated the issue, which was  
24 the issue which was tried: whether the dealers had freedom of  
25 choice or whether they were obliged to buy the sponsored products.



1 After getting the facts elicited by this questionnaire,  
2 what did the Commission do? It decided not to call any Texaco  
3 dealers as witnesses. The plain implication is that the  
4 responses to the questionnaire did not support the charges  
5 against the respondents. Indeed, the one response which Texaco  
6 was able to obtain, and which is set out as JAX 428 of the  
7 record, illustrates very clearly why the dealers were not put  
8 on the stand, because the witness indicated that he was totally  
9 free.

10 Having in its possession facts which negate its theory  
11 and supported the defense, the Commission not only did not  
12 introduce these facts; it suppressed them. It refused even to  
13 disclose to Texaco the names of the persons that it had inter-  
14 viewed. After withholding evidence that the Texaco dealers do  
15 not feel constrained to buy the sponsored TBA, I submit that  
16 the Government is hardly in a position to ask this Court now to  
17 make the assumptions upon which its present argument rests.

18 Mr. Justice Douglas, in Barbee against Maryland,  
19 quotes from a former Solicitor General, in an address which he  
20 made, in which he said: "My client's chief business is not to  
21 achieve victory, but to establish justice."

22 I must regretfully state to this Court the motto of  
23 the Commission is precisely the reverse, as this sordid and  
24 squalid record demonstrates, and as does the history of this  
25 litigation.

1 Certainly the hearsay testimony of a few wholesalers  
2 does not remedy the deficiency of the Government case. These  
3 wholesalers' testify they were told by some particular Texaco  
4 dealer who declined to buy non-sponsored TBA from them that he  
5 couldn't do so because Texaco might disapprove. Quite apart  
6 from the inherently unreliable nature of this hearsay, the  
7 wholesalers themselves, on this record, acknowledge that poten-  
8 tial customers make convenient excuses for not buying.

9 The testimony was overwhelmingly rebutted, as the  
10 Court below found, by the record as a whole.

11 Q Mr. Handler, would you tell us precisely what  
12 the contract between Texaco on the one hand and Goodyear and  
13 Firestone provides with respect to the promotional services to  
14 be performed by Texaco?

15 A The contract is very brief. The record estab-  
16 lishes that it has 38,000 dealers, that it is acting as a sales  
17 representative. Goodrich did not have enough salesmen to visit  
18 all of the 38,000 accounts. It cost Texaco 70 percent of the  
19 commissions received. The dealers are versed in the art of  
20 pumping gasoline out of the pumps. TBA is a difficult, tech-  
21 nical business. They have to be trained. Inventory control is  
22 very difficult. There are all kinds of sizes, all kinds of pro-  
23 ducts. They have to be trained on installation.

24 Texaco had to build facilities to store the TBA.  
25 Texaco permits its credit cards to be used, guaranteeing payment,

1 and the dealer is not charged for any of these services. Texaco  
2 was performing the service as a sales representative in exchange  
3 for receiving commissions.

4 Q Let's retrace that a minute. I gather from what  
5 you say that the same persons who sell Texaco gas, in effect,  
6 to the stations, also act as salesmen for the products of Good-  
7 year and Firestone?

8 A They engage in salesmanship and promotion of  
9 these products.

10 Q They sell to the stations. They sell Goodyear  
11 and Firestone products to the stations.

12 Second, they instruct the service station operator  
13 with respect to the problems involved in the choice of TBA and  
14 customer service, and that sort of thing. Is that what you are  
15 telling us?

16 A There may be an ambiguity when Your Honor speaks  
17 of selling. They are not selling in the normal sense of taking  
18 a line and trying to get the dealer. The selling is done by  
19 Goodrich. But they will instruct the dealer on how to merchan-  
20 dise this product. There is no doubt about it, that they recom-  
21 mended the dealer handle the sponsored lines if he wants to.

22 Q To take another subject, with respect to the use  
23 of the Texaco credit card, that is available, even if it is  
24 not a Goodyear or Firestone product, is it not?

25 A It is available for any kind of TBA.

1 Q How about the distribution of promotional  
2 materials, such as signs to be erected in the service station?

3 A The dealers have signs of all kinds. They have  
4 the signs of Firestone and Goodrich.

5 Q Does the Texaco representative distribute to the  
6 service stations promotional material such as signs of Goodyear  
7 and Firestone?

8 A No. That is done by Goodrich or Firestone itself.

9 Q So what this comes down to, briefly and roughly,  
10 is that Texaco, Texaco representatives, do not actually sell in  
11 the sense of actually taking orders; is that correct?

12 A That is correct.

13 Q What you are telling us is that the Texaco  
14 representatives do, in fact, promote the sale in the sense of  
15 suggesting that the dealer buy products of these two companies;  
16 that the Texaco representative instructs the service station  
17 operator in the problems attendant upon the use, the inventory,  
18 et cetera, the sale techniques, of the TBA.

19 A That is correct.

20 Q I suppose, to put this in the narrowest pos-  
21 sible focus, as you are presenting the case to us, the question  
22 is whether those activities which you say cost Texaco 70 percent  
23 of its total commissions that it receives, whether those activi-  
24 ties, coupled with its possession of dominant economic power  
25 over its stations, constitutes a violation of section 5, or

1 whether the Commission could properly conclude that it con-  
2 stitutes a violation of section 5. Is that about it, as you  
3 see it?

4 A With one amendment, you have stated the issue,  
5 Your Honor. You have to add, without any proof of any anti-  
6 competitive effects, such as were found in Atlantic and in Shell.  
7 Bear in mind that these three cases were decided by the Commis-  
8 sion at the same time, on the same day. It is not only the  
9 Court of Appeals which has twice found that this record would  
10 not support an order. The first Commission simultaneously with  
11 the issuance of orders against Atlantic and Shell, held that  
12 this record was not sufficient to warrant an order against  
13 Texaco, and remanded the case to the Hearing Examiner to go  
14 into the question of anti-competitive effect, a critical factor  
15 which was lacking.

16 We tried to enjoin it in the courts because the very  
17 anti-competitive effects which the Commission found lacking  
18 were alleged in the complaint. So the counsel for the Commis-  
19 sion had ample opportunity, after several years of investigation,  
20 and several years of trial, to prove these facts if he had them.

21 We said he didn't have them; he couldn't prove them.  
22 We went into court to enjoin the hearing. The Commission  
23 representative solemnly told the District Court and the Court  
24 of Appeals that it had new evidence. We came back for a hearing.  
25 They offered nothing.



1           What they did was violative of the law of evidence.

2   They took judicial notice of facts that were in the other record.

3   The Commission then said this wasn't proper and it has excluded  
4   all of the remand evidence as improper.

5           So the record today is just as deficient now as it  
6   was the first time it came before the Commission.

7           Our submission, Justice Fortas, is that assuming we  
8   are a large company, assuming no anti-competitive effects,  
9   assuming that all that you have is that a large amount of TBA  
10   sponsored is sold, and assuming that we got a commission which  
11   adds up to a lot of money -- we are a big company -- 70 percent  
12   of which represented our cost, we say that this is not a vio-  
13   lation of the Federal Trade Commission case. That is our case  
14   in a nutshell.

15           Q     May I ask you, what is the principal service  
16   that Texaco renders for this commission?

17           A     I believe it is what I told Justice Fortas.

18           Q     I know, but you told him a lot of things. What  
19   is principal?

20           A     I don't know what would be the principal item.  
21   It is a variety.

22           Q     Isn't there some dominant service that they  
23   render?

24           A     I don't think so. It is an entire ball of wax.  
25   It is to make a good merchant out of the dealer, and the same

1 aid is given to him with respect to non-sponsored as to spon-  
2 sored. There is no discrimination.

3 If I may continue on this wholesaler testimony --

4 Q Do you mean they render the same service for  
5 nothing to the non-sponsored people?

6 A That is correct. They do everything on the non-  
7 sponsored that they do for the sponsored, to help the dealer  
8 be a good merchant.

9 Q Then why do they pay you an enormous commission,  
10 then?

11 A Because we are training the dealer to handle TBA  
12 and they are paying us for the recommendation and the services  
13 that we render.

14 Q If they can get it for nothing, why do they pay  
15 you?

16 Q They don't get the recommendation for nothing.

17 A They don't get the recommendation for nothing.

18 But the salesman is neutral and helps the dealer in  
19 the purchase of any kind of TBA that he may desire. This record  
20 establishes the total freedom of choice of the dealer.

21 Could I take a few minutes to review this testimony  
22 of the competing suppliers? The record references are cited in  
23 the Government's brief.

24 The salesman for a wholesaler testified that he was  
25 unable to sell non-sponsored tires to a particular Texaco station

1 and that the gist of the conversation was that he wouldn't dare  
2 to buy or display such tires. The dealer himself was called  
3 to the stand and gave the lie to this testimony, stating that  
4 he knew that he was free to buy non-sponsored TBA; that most of  
5 the TBA that he buys is, in fact, non-sponsored.

6 He went on to testify that he sought out the very  
7 wholesaler in question to deal with him, and that he has con-  
8 tinued to purchase non-sponsored TBA from him.

9 The Government also in its brief refers to the testi-  
10 mony of a wholesaler who reported that he lost a particular  
11 Texaco dealer as a customer and that the dealer told him he  
12 was going to have to handle Goodrich products. This ignores the  
13 reason for this shift, which occurred, incidentally, some 14  
14 years after Texaco sales commission plans went into effect.

15 The reason, as the wholesaler admitted on cross-  
16 examination, was that the dealer's brother had just become a  
17 Goodrich distributor at a location one and a half blocks from  
18 the dealer's station. In short, this Texaco dealer bought non-  
19 sponsored TBA continuously until his brother went into business.

20 The Court of Appeals, we submit, had the right, in  
21 Universal Camera, to take the record as a whole and to find  
22 that this evidence was not worthy of belief. It could have  
23 relied upon the fact that the witnesses were representatives of  
24 one small battery manufacturer and 19 wholesalers out of the  
25 thousands of suppliers in the country.

1 In Chicago alone, where many of them came, there were  
2 some 500 TBA distributors. The bulk of these competing suppliers  
3 operated at a competitive disadvantage wholly unrelated to  
4 Texaco's sales commission agreements. Several conceded that  
5 they were unable to match the price, brand, or credit offered  
6 by competitors. Most of them did not carry a full line of TBA,  
7 which is necessary for effective competition.

8 Even so, virtually all these witnesses had Texaco  
9 dealers among their customers, and in each territory to which  
10 their testimony related, there was overwhelming proof that the  
11 non-sponsored products handled by Texaco dealers were adver-  
12 tised and openly displayed at their stations.

13 This concept of open display and advertising of non-  
14 sponsored products by Texaco dealers was no basis for any dealer  
15 feeling constrained. In fact, the very dealers who were quoted  
16 as having described as the reason for not buying the supplier's  
17 products that they might be penalized by Texaco, all handled  
18 and displayed non-sponsored TBA.

19 Q Mr. Handler, is it admitted that Texaco "urged"  
20 its dealers to handle these products?

21 A I don't know what "urged" means. It recommended.

22 Q When you have a one-year contract subject to  
23 cancellation on 10 days' notice, with a company the size of  
24 Texaco, wouldn't its recommendation be a little more than just  
25 a recommendation?

1           A     I don't think so, Your Honor. There isn't any  
2 evidence in this record that anybody was ever cancelled for  
3 anything that remotely suggests --

4           Q     That could cut two ways.

5           A     Why?

6           Q     Maybe nobody disobeyed.

7           A     Well, we know, Your Honor, it can't cut two ways  
8 because we know that the preponderance of the TBA handled was  
9 non-sponsored. This is a fact in the record that cannot be  
10 denied.

11          Q     It cannot be denied, but there is also the point  
12 that when the dominant economic factor is present, recommenda-  
13 tion, urging, whatever word you want to use, can be that soft  
14 touch, could it not?

15          A     I don't think so. You would then say that an  
16 employer might not recommend to his workers that they remain  
17 non-union, and this Court has held to the contrary. Or you  
18 might say that an employer who has dominant economic power could  
19 not recommend to his employees that they patronize an employer-  
20 owned and -operated store.

21          Q     I would prefer to stay with antitrust. What did  
22 the independent dealer have equivalent to the recommendation of  
23 Texaco with its dominant economic power?

24          A     He had the fact that dealers are in very short  
25 supply; that there is great competition for good dealers, and



1 that there is great economic loss if a station is closed down  
2 because you can't get a dealer -- and this is a perennial situa-  
3 tion in this industry -- and the economic loss by having a sta-  
4 tion closed is much greater than any gain that you can get out  
5 of these commissions.

6 Bear in mind that Texaco, as this record indicates,  
7 was selling \$1-1/2 billion of petroleum products. This was its  
8 business. While these commissions loom up large in relation to  
9 the magnitude of the business that was done by Texaco, this was  
10 a rather insignificant part of its business.

11 So there was tremendous bargaining power on the part  
12 of the Texaco dealer. The fact of the matter is that an able  
13 court, twice reviewing this record, has been satisfied that  
14 this record establishes that there was no veiled threat, no  
15 velvet glove, but that the Texaco dealer was free and did exer-  
16 cise his own choice, and he exercised it to the extent of the  
17 preponderance of the selection that he made.

18 Q The Commission's finding to the contrary is just  
19 unsupportable and has to be set aside?

20 A Under Universal Camera, it was set aside by the  
21 Circuit Court of Appeals, and in opposing the grant of certiorari,  
22 we argued that this was essentially a fact case, the question  
23 of whether the Court of Appeals was right or whether the Commis-  
24 sion was right. We didn't think Your Honors wanted to take on  
25 that burden. The Court of Appeals twice has assessed this

1 record and we think properly.

2 In other words, we believe that illegality here must  
3 stem from a requirement that the dealer handle the sponsored  
4 TBA. This requirement may be inferred from the surrounding  
5 circumstances. It need not be expressed. The Seventh Circuit  
6 in Atlantic found such a requirement. The Fifth Circuit in  
7 Shell found such a requirement. This record will not support  
8 any such finding.

9 Q What are we searching for here? Wasn't this held  
10 to be an unfair method of competition? Isn't that what the  
11 Commission found it was, under section 5?

12 A The Commission said that sales commission, with  
13 dominant power, plus recommendation, is an unfair method of  
14 competition, and we say it is not.

15 Q Is that all they held? They didn't purport to  
16 say that they needed anything else?

17 A That is right.

18 Q Just the recommendation?

19 A We construe that as being a per se ruling.

20 Q What other standards does the Federal Trade Com-  
21 mission have to follow in determining what is an unfair method  
22 of competition or an unfair practice?

23 A I am delighted that Your Honor has asked that  
24 question. I think I was one of the earliest commentators to  
25 criticize a majority opinion and to urge that the minority

1 opinion become the law of the land.

2 The minority opinion permits great flexibility in  
3 the establishment of what is an unfair method of competition,  
4 but the arrangement must partake of something which is restric-  
5 tive, and this is not a restrictive arrangement, because the  
6 finding of fact, which has not been subverted, is that the  
7 dealer is not restrained. He is free to do anything he pleases.

8 Q What is the source of your requirement that there  
9 must be some restrictive effect on competition?

10 A I think the legislative history of the statute  
11 and, of course, the judicial construction.

12 Q What is the closest case in this Court describing  
13 the standards that the Federal Trade Commission has to follow  
14 in finding an unfair practice?

15 A I don't believe from memory I can pinpoint the  
16 exact case, but I am familiar with the line of cases. It has  
17 never been suggested that the Commission had a blank check.

18 Q That must be part of our problem in this case,  
19 then. May the Commission, within the framework of this Act,  
20 find "recommendation" to be an unfair practice?

21 A They may do it if you so hold. In other words,  
22 whatever Your Honors say represents unfair methods of competi-  
23 tion represents unfair methods of competition.

24 Q Is that it, or is it whether we can hold the  
25 Federal Trade Commission should determine what is an unfair

1 competition, and that our review of that determination of what  
2 is an unfair competition is a very limited one?

3 A Your Honors have held many times that whatever  
4 the Commission rules to be unlawful is entitled to great weight,  
5 but that in the final analysis what is unfair competition is  
6 a matter of law and Your Honors have the final word.

7 I don't think your scope of review is that if they  
8 felt it was an unfair method of competition, that is the end  
9 of it.

10 Q Then it is not exactly a factual question, is it?

11 A No. It is a question of law, as to what is an  
12 unfair method of competition. As Justice Cardoza pointed out,  
13 if you simply gave a blank check as to what may be held to be  
14 unfair without any standards --

15 Q If it is not a factual question, then what does  
16 Universal Camera have to do with it?

17 A No. What is an unfair method of competition is  
18 a legal question. Universal Camera has to do with the finding  
19 as to whether or not there was any collusion at the third level.  
20 That is where Universal Camera comes in.

21 Q But what is, as a matter of law, that foreclosure  
22 isn't essential to the unfair method of competition?

23 A If the foreclosure is not necessary, then you  
24 have a question of law. That was why I amended Justice Fortas'  
25 statement. The power, plus recommendation, is violative of the

1 Federal Trade Commission Act, absent any competitive fact.

2 If I may conclude our proposition with respect to  
3 one of the points made by my good friend, and also made by the  
4 Commission, that having one company free of restraint and having  
5 two other companies under the order of the Commission is dis-  
6 criminatory, we don't think so at all. When two companies have  
7 misbehaved and have violated the law and the third has not  
8 violated the law, we think the shoe is on the other foot.

9 It would be unfair to put one that has not violated  
10 the law subject to restraint. The Commission didn't think there  
11 was anything unfair in the first round. They didn't hold  
12 against us. They sent it back.

13 Finally, my good friend says that if you deal with  
14 the potentials, this may germinate into a full-blown restraint.  
15 That assumes that there was anything restrictive about this.  
16 But if you start with the bedrock fact, which is admitted here,  
17 that there was total freedom of choice on the part of the dealer,  
18 we say there was no restraint and, after all, the practice  
19 that has been in effect since 1940, for 30 years, has had ample  
20 time to germinate.

21 The Court of Appeals did not hold that coercion is  
22 necessary. It was a two-legged holding. They held if there was  
23 a misuse of the economic power, apart from coercion, the law  
24 could be violated. But they found no such finding.

25 Thank you very much.



1 MR. CHIEF JUSTICE WARREN: Mr. Barton, you may proceed.

2 REBUTTAL ORAL ARGUMENT OF EDGAR E. BARTON

3 ON BEHALF OF RESPONDENT THE B. F. GOODRICH COMPANY

4 MR. BARTON: Mr. Chief Justice, may it please the  
5 Court: I am Edgar E. Barton. I represent B. F. Goodrich,  
6 which has sales arrangements with Texaco as well as five other  
7 oil companies.

8 All of these arrangements, not only with Texaco but  
9 with the other five oil companies, would be prohibited under  
10 this order entered by the Commission. This is despite the fact  
11 that the agreements which were made by B. F. Goodrich with  
12 these oil companies were made because this was the way that the  
13 B. F. Goodrich thought that these products could be distributed  
14 the best.

15 In other words, the problem that the witness on the  
16 stand described is that there are a great number of dealers in  
17 the country who have to be contacted. The method of distribu-  
18 tion of this product is through supply points established by  
19 the tire company. But once the franchise is established by  
20 the tire company, there is a continuing relationship that exists  
21 in the way of getting promotional materials out to the dealers,  
22 in numerous mechanical means of this kind.

23 Mr. Hogan said it is a lot cheaper for us to hire  
24 Texaco, contacting those people day after day, to get those  
25 materials out, than for us, who have a limited number of salesmen,

1 to get the materials out. He said that is what we are paying  
2 the commission for.

3 Q Are these arrangements exclusive?

4 A They are not exclusive, Your Honor. As a matter  
5 of fact, Texaco has similar arrangements, at the time this case  
6 was tried 12 years ago, all over the country. I think I am the  
7 only one here who was in the case when it was tried. But they  
8 had at that time arrangements with Firestone and with U.S. Most  
9 of the oil companies have arrangements with a number of tire  
10 companies. There is nothing exclusive about this.

11 Q Is that broken up on a regional basis?

12 A No, Your Honor; it is not broken up on any  
13 regional basis. In this case, there is no similar situation  
14 that existed in the Atlantic situation, on that break-up geo-  
15 graphically.

16 Although counsel fails to state in so many words, it  
17 is clear the basis of the Commission's order can only be that  
18 there is a per se rule to strike down all TBA sales commission  
19 arrangements between all oil companies and all tire companies.  
20 On the record here, I submit, Your Honors, the Commission wants  
21 to say that merely because you have a large oil company and a  
22 large tire company, and that there has been quite a bit of money  
23 paid, that that constitutes illegality.

24 I submit to Your Honors that record is 2,500 pages  
25 long. We argued this case before the Court of Appeals, and the

1 Court of Appeals took a year, a full year, before the case was  
2 decided by the Court of Appeals.

3 I submit, Your Honors, that that record was gone  
4 over thoroughly by the Court of Appeals when it decided this  
5 case, the whole 2,500 pages of it. They searched to see whether  
6 there was any evidence in that record to support the proposi-  
7 tion that there had been a misuse of the power that Texaco  
8 Company had in connection with these contracts. It could not  
9 find, it did not find, a misuse of that power.

10 Q This case has gone to the Court of Appeals on two  
11 different occasions?

12 A Yes, sir.

13 Q The same panel?

14 A No. In the second panel, Judge Bazelon, sitting  
15 as the Chief Judge, was not in the first panel. On the second  
16 time, the decision was unanimous by the Court of Appeals.  
17 Judge Bazelon and the other two judges held with us.

18 So there has been a total of six Court of Appeals  
19 judges sit on this case, and the Court of Appeals has both  
20 times -- the first time by two to one, and the second time by  
21 three to nothing -- held there was no evidence of misuse of  
22 economic power by Texaco.

23 Q Who owns the Texaco Company stations?

24 A I think most of them are owned by people not  
25 connected, by third parties, and by the owners themselves.

1 Sixty percent of them, as Mr. Friedman says. Forty percent are  
2 owned or leased by Texaco and leased to the dealer.

3 Q They have Texaco signs to sell Texaco oil?

4 A Yes, Your Honor.

5 Q And the agent there, of course, is dependent on  
6 getting Texaco oil?

7 A That is right, Your Honor.

8 Q That is what he has to get to make his living.

9 A That is true, Your Honor.

10 Q Then how do you discount the statement that was  
11 read from by the Texaco agent of the big company, which has all  
12 the power, how do you discount that where he says, "We prefer  
13 you to deal with these"?

14 A Your Honor, my answer to you is this: that an  
15 experienced Examiner sat on the trial of this case. He heard  
16 all the witnesses testify. He was also the Examiner in the  
17 other cases that were heard.

18 At the end of that case, he held in his first, initial  
19 decision, that there was nothing wrong done by the people in  
20 this case.

21 Q Let me ask you this: Here is a company that  
22 has the life or death of this Texaco dealer in its hand. A  
23 representative of the company comes to him and tells him, "I  
24 want you to buy and sell these things."

25 What would you say about it as a person, with your

1 knowledge of what this amounts to in real life?

2 A Your Honor, if it was proved that the Texaco  
3 salesman went to the station and said, "I want you to handle  
4 this," that would be a different case than we have here.

5 Q Didn't you hear that statement read by Mr.  
6 Friedman?

7 A Yes.

8 Q Is that in the record?

9 A I submit to Your Honor --

10 Q Is it in the record?

11 A It is in the record. But, Your Honor, we have  
12 to realize this: that there were 38,000 Texaco dealers.

13 Q It is hard, of course, to get them to testify  
14 against the dominant company.

15 A I don't know that it is, because, as Mr. Handler  
16 pointed out, there was a questionnaire that went out to these  
17 dealers and the Commission got back that questionnaire and then  
18 didn't call one of the dealers to the stand to testify after  
19 they had seen the questionnaire, and they wouldn't show us the  
20 questionnaire which they sent out when we applied for it.

21 Q How did they get this dealer?

22 A This dealer was an ex-dealer.

23 Q He was an ex-dealer?

24 A That is right.

25 Q That is the easiest way to get them to testify



1 against Ttxaco.

2 A That is true, Your Honor. But I submit, Your  
3 Honor, in this case, where there has been a thorough review of  
4 the record by the Court of Appeals twice, and they found that  
5 there was no proof of the Commission's charge, that we have  
6 disproved a negative.

7 I submit, Your Honors, it is difficult to disprove  
8 a negative, but here it has been done. I submit that on all  
9 the bases, this case should, after 12 long years, be dismissed  
10 by this Court.

11 Q I notice that the court said something about the  
12 long time. Who is responsible for the delay?

13 A It is difficult to answer that question. Actually,  
14 the basic responsibility is the Commission, if you want the  
15 real answer. What they did, when they sent this case back to  
16 the Examiner and sent the other two cases out to the courts,  
17 was that they created the delay that has existed here.

18 Q The company is fighting the order. The company  
19 hasn't been wholly without any influence whatever in relation  
20 to the delay, has it?

21 A The companies have responded when they were  
22 attacked, Your Honor.

23 Q They fought vigorously, as they should.

24 A But when you say why has there been a delay,  
25 I think I have to tell you truthfully it is because the

1 Commission sent this case back to the Examiner and held it up  
2 by that time. I submit to Your Honors that on the basis of  
3 the facts in this record, as distinguished from the facts in  
4 the other records, this case should be finally dismissed.

5 Thank you.

6 MR. CHIEF JUSTICE WARREN: Mr. Friedman?

7 REBUTTAL ORAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.

8 ON BEHALF OF PETITIONER

9 MR. FRIEDMAN: Mr. Chief Justice, may it please the  
10 Court:

11 To answer something Mr. Barton said, the basic ques-  
12 tion here is whether there has been a misuse of economic power.  
13 No one is being punished here. The Commission is performing  
14 the prophylactic function of freeing our economy from improper  
15 restraint.

16 The question is whether the use of this power is  
17 enough to justify the Commission in concluding that it is an  
18 unfair method of competition.

19 There has been a lot of talk about the evidence in  
20 this case. I would like to go back to a couple of the items my  
21 opponents have referred to.

22 For example, this man, Mr. Tidwell, whom they say  
23 felt perfectly free to carry these products nonetheless, at  
24 page 1211, after the passage previously referred to, was asked,  
25 "Did you take on a cheaper line of tires?" and his answer was

1 "Not in stock, but I did sell some."

2 Then three or four lines thereafter, he was asked,  
3 "Did you ever display those tires in your station?" He said,  
4 "No, I never displayed any other products than Firestone."

5 It seems to us it is very clear from this that what  
6 he was saying was, because he wanted to remain in the good  
7 graces of Texaco, he would not take these competing products  
8 on as a display product that would be generally available for  
9 the public to see.

10 Sure, he would occasionally buy some of these  
11 products. That is fully consistent with the testimony of the  
12 wholesalers; that, yes, they could sell an occasional item to  
13 Texaco dealers, to many Texaco dealers. They could sell a few  
14 things that people wanted to stock up on, but basically there  
15 was substantial testimony in this record that these people did  
16 not have the same opportunity when they tried to penetrate the  
17 Texaco market as when they tried to penetrate some other mar-  
18 ket. What do these dealers do?

19 Q I gather, then, Mr. Friedman, that you feel that  
20 although the question may be whether the Commission could say  
21 power plus promotion is enough, that nevertheless, really the  
22 question is whether the Commission could rationally decide that  
23 promotion by one with power really may have some substantial  
24 consequences.

25 A Yes.

1 Q If that were wholly irrational, is that what this  
2 case is about?

3 A We think so, Mr. Justice, consistent with the  
4 long line of cases in this Court, which have reviewed Commis-  
5 sion decisions under section 5, as to what the Commission's  
6 authority was.

7 Q What if there was no evidence whatsoever in the  
8 record as to what consequences promotion by Texaco had? Could  
9 the Commission just rear back and say, "Look, in our own ex-  
10 pertise, we know that when somebody with Texaco's power says  
11 this, it is going to have this kind of a consequence"?

12 A I think they would have to have some basis for  
13 their expertise.

14 Q In the record?

15 A I don't know, Mr. Justice.

16 Q If there has to be something there, I suppose  
17 we have to look at the evidence on the other side, and then it  
18 does become a factual matter, doesn't it?

19 A It is a factual matter only in the sense that  
20 you have to see what the Commission had. But it seems to me  
21 that this is the area where the Commission has very great dis-  
22 cretion as to evaluating the impact of these practices.

23 Q You think they could just have said, "We don't  
24 need any evidence; we don't need any evidence at all; we just  
25 know that when Texaco says something like what they have been

1 saying, 'Please buy this,' it is going to be this consequence"?

2 A No.

3 Q There has to be some proof?

4 A There has to be some proof of the impact.

5 Q What if the proof is not challenged? What if  
6 the other side says there is no factual basis for this?

7 A The Court of Appeals did not say there was no  
8 factual basis for this. The Court of Appeals says that the  
9 kind --

10 Q They at least said there wasn't enough evidence  
11 to even make it a rational choice.

12 A No, Mr. Justice, we don't think they said that.  
13 What they said was, as they interpreted this Court's Atlantic  
14 decision, that Atlantic required the Commission to come up with  
15 a certain type of evidence, a certain quantum of evidence. Then  
16 they said, "We don't think that what the Commission had before it  
17 in this case is enough."

18 The Court of Appeals did not attempt to say, "We  
19 don't think there is any evidence here to show either that  
20 Texaco in performing this contract was engaging in these pro-  
21 motional activities, or that there was not any competitive  
22 effect."

23 They said, "Looking on what the Commission acted on,  
24 looking at what the Commission found happened here, what Texaco  
25 did, we don't think this is enough as a matter of law, basically,



1 to constitute an unfair method of competition."

2 Q How does the Commission explain that only 30  
3 percent -- is it 30 percent of the dealers or was it 30 percent  
4 of the total volume?

5 A Let me explain it. It was 30 percent of all the  
6 dealers who were service station dealers. But the Commission  
7 explained that that figure was distorted because a significant  
8 number of those dealers were so-called "contract dealers" who  
9 would not handle TBA. For example, the grocery store that  
10 had a couple of gasoline pumps. So the Commission indicated  
11 the figure was higher than that.

12 Q How do they explain, though, that apparently an  
13 awful lot of dealers who were promoted by Texaco exercised their  
14 choice to buy from someone else?

15 A I think the type of plan --

16 Q Did every dealer understand he had a free choice?

17 A I think the difference may be, Mr. Justice, that  
18 these plans are not always completely effective. This is true  
19 in Atlantic, too.

20 Q Why wouldn't it be effective if they were the  
21 dominant power and exercised the power? Why wouldn't it be  
22 effective?

23 A I suppose to some extent it may depend on the --

24 Q I suppose you have to say that it either wasn't  
25 dominant or it wasn't exercised, one or the other.

1           A     I take it, again, it may depend on what the  
2 reaction of the particular dealer is to the situation.

3           Q     May it not also depend on the reaction of the  
4 customer coming in, when he doesn't like a particular item,  
5 and he asks him to get him a certain brand? Would that have  
6 anything to do with it?

7           A     I would have to say, Mr. Justice, in all candor,  
8 that the record does indicate that where a customer wanted a  
9 particular, single tire, generally speaking most of the dealers  
10 would go out and buy the particular type of tire, even though  
11 they didn't stock it.

12          Q     That is what I meant. Why wouldn't that show?  
13 That was why they were doing it, because the customer wanted  
14 them to do it.

15               I have bought some tires myself.

16          A     The other thing, I suppose, Mr. Justice, is, of  
17 course, Goodrich and Firestone are popular products. Some of  
18 the dealers may have been well satisfied to take the products.

19          Q     You don't think it would have made any differ-  
20 ence in this case if Firestone or Texaco had given a good set  
21 of warnings to everybody that said, "You have a free choice  
22 and you are not bound to do anything. We are not coercing you.  
23 We just think these are good." and 30 percent of the dealers  
24 bought some of this and 70 percent didn't buy any. You don't  
25 think it would make any difference what the dealer felt?

1           A     No, I don't, Mr. Justice, because it seems to  
2 us that what we have here is (1) the relationship. We can see  
3 they did tell many dealers that they were free to buy what they  
4 wanted, but apparently the record strongly indicates that de-  
5 spite this statement, many of the dealers did not feel they  
6 had complete freedom.

7           These 31 wholesalers that Mr. Handler attempts to dis-  
8 tinguish, some of them can be distinguished. There were ex-  
9 planations. But there are a lot of them that just cannot be  
10 distinguished.

11          Q     Does the record show that they had knowledge  
12 that Texaco was getting anything like this amount of commission?

13          A     No, the record does not show that.

14          Q     Wouldn't that be a relevant piece of evidence?

15          A     That would make our case even stronger, I think,  
16 if, in fact, the dealers knew that Texaco was, in fact, getting  
17 a substantial amount on these sales. But the record does not  
18 show.

19          I would like to read to the Court from pages 552 and  
20 553 of the record an example of the wholesaler testimony. One  
21 of the witnesses was being asked why he stopped calling on the  
22 Texaco dealers. He said at the bottom of the page:

23                "When you make 100 calls and they show no signs of  
24 business and then maybe continue to make calls on another  
25 100 and still are told from time to time that they can't

1 buy your tires, that they have to buy Goodrich, I think  
2 it is time to give up on it."

3 He was questioned "By whom were you given such infor-  
4 mation as you just related?"

5 "Answer: By the Texaco stations that we called upon."

6 It seems to us that this record clearly supports the  
7 Commission's conclusion that a very large number of Texaco  
8 dealers felt constrained not to buy competing TBA products. I  
9 think the record fully supports the Commission.

10 It seems to us that it would be appropriate for the  
11 Court of Appeals to put the inquiry whether the Commission was  
12 justified in the light of these facts shown by the record in  
13 concluding that this particular practice had a sufficiently  
14 pernicious effect, actual and potential, on competition to  
15 warrant condemning it; not to have tried to wind this thing up  
16 and seeing had they done everything here that they did in  
17 Atlantic. The Court of Appeals said no, they haven't.

18 This is not that type of case. This entails basically  
19 of what the scope of review of Commission determinations is on  
20 unfair methods of competition and the Commission's discretion  
21 to define those terms.

22 So it seems to us in this case the Commission is fully  
23 warranted in concluding that this situation, no less than  
24 Atlantic, was an unfair method of competition, and that the  
25 same kind of order should be entered.

1 Q Suppose Texaco had had its own line of tires.

2 In your judgment, could the Commission find that it was an un-  
3 fair method of competition for Texaco to make recommendations  
4 to its service stations that they buy the Texaco tire?

5 A I would think, Mr. Justice, the Commission could  
6 so conclude. I do want to make it very explicit the Commission  
7 has not passed upon that issue.

8 Q I know that. But you think that Texaco, there-  
9 fore, even without a tie-in sale, with the facts as they are  
10 now, except that it is a Texaco product, do you think that  
11 would still be an unfair method of competition?

12 A I would thik the Commission could so conclude;  
13 yes.

14 Q Why can't it so conclude with respect to motor  
15 oil? Texaco sells gasoline and motor oil, I suppose, doesn't  
16 it?

17 A It does.

18 Q I suppose its dealers are at least encouraged to  
19 buy and stock Texaco motor oil.

20 What you are saying, really, is that Texaco is in the  
21 business of selling three major products and that something  
22 drastic is warranted just because the third product is added to  
23 the fundamental lines.

24 A I don't know, Mr. Justice. I think I said that  
25 as you begin to acquire a greater and greater line, you begin



1 to get into problems.

2 Q You sure get into problems. I suppose the answer  
3 is quite difficult.

4 A Fortunately, the Commission has not had to  
5 face up to this problem.

6 (Whereupon, at 2:18 p.m. the oral argument in the  
7 above-entitled argument was concluded.)  
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