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ATTORNEYS AND COUNSELORS AT LAW

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DAVID A. GROENKE
GREGORY A. RUEHLMANN
ANDREW M. SHOTT
ELIZABETH A. MCCORD
DOUGLAS E. DUCKETT

August 8, 1983

U.S. District Court
Eastern Div. of Kentucky
Pikeville Division
P. O. Box 131
Pikeville, KY 41501

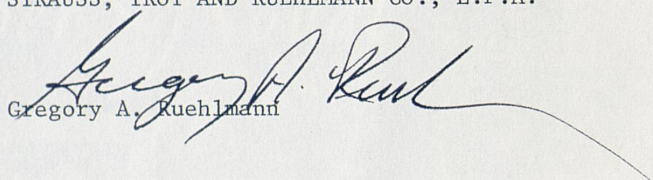
Re: Garland Lansaw d/b/a Paden Tire Service v.
The Goodyear Tire & Rubber Co.

Dear Judge Unthank:

Enclosed please find a copy of our Request For Extension Of Time
To Respond To Defendant's Motion For Summary Judgment which was mailed
August 8, 1983 to the clerk of your District Court for filing.

Sincerely,

STRAUSS, TROY AND RUEHLMANN CO., L.P.A.


Gregory A. Ruehlmann

GAR:sj

Enclosure

Judge's Copy

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

FILED AUG 11 1983

GARLAND LANSAW	:	
d/b/a PADEN TIRE SERVICE,	:	Civil Action No. 80-224
	:	
Plaintiff,	:	(Unthank, J.)
	:	
-vs-	:	
	:	
THE GOODYEAR TIRE & RUBBER CO.,	:	<u>REQUEST FOR EXTENSION OF TIME</u>
	:	<u>TO RESPOND TO DEFENDANT'S</u>
Defendant.	:	<u>MOTION FOR SUMMARY JUDGMENT</u>

Comes now plaintiff, Garland Lansaw, d/b/a Paden Tire Service, by and through counsel, and moves this Court pursuant to F. Rule Civ. P. 56(f) and the Court's standing order filed September 29, 1980 for an extension of time up to and including the 15th day of September, 1983 in which to respond to defendant's Motion for Summary Judgment served on counsel for plaintiff on or about July 1, 1983. The grounds in support of this motion are more fully set forth in the attached Memorandum in Support.

Charles G. Atkins

Charles G. Atkins
Attorney for Plaintiff
Strauss, Troy and Ruehlmann Co., L.P.A.
2100 Central Trust Center
Cincinnati, OH 45202
(513) 621-2120

MEMORANDUM IN SUPPORT

On or about July 1, 1983, counsel for plaintiff was served with a copy of the defendant's Motion for Summary Judgment along with supporting legal memorandum and affidavit of Lawrence A. Silverman on or about July 1, 1983. At the time of service, and subsequent thereto, counsel for plaintiff was vigorously engaged in efforts to conclude the necessary discovery prior to the September 1, 1983 discovery cut-off date imposed by the Court. At this time however, plaintiff's counsel has not yet had the benefit of full and complete discovery.

In light of the current status of the discovery process, the defendant's Motion for Summary Judgment must be viewed as premature. Until the September 1, 1983 discovery cut-off has passed, the defendant's assertions that plaintiff has not yet come forth with evidence to support its damage claims, must be viewed as illegitimate. This can be seen most dramatically from the current status of discovery with the non-party Falcon Coal Company. For months, plaintiff has been attempting to obtain certain information from Falcon, which information is uniquely in Falcon's possession. This Court has previously quashed plaintiff's subpoena duces tecum directed towards Falcon and, alternatively, ordered plaintiff to first take the depositions of Falcon representatives and then proceed with the production of documents if necessary (see order dated May 31, 1983 attached hereto as Exhibit A). At the present time, arrangements have been made for the taking of the depositions of the Falcon Coal representatives, however, these depositions will not go forward until Tuesday, August 16, 1983 (see letter from Gregory A. Ruehlmann to John R. Rhorer, Jr., dated

August 3, 1983, and confirming letter of John R. Rhorer to Gregory A. Ruehlmann dated August 3, 1983, attached hereto as Exhibits B and C, respectively.

F. Rule Civ. P. 56(f) specifically provides for just such a contingency. Rule 56(f) states, in relevant part:

Rule 56, Summary Judgment

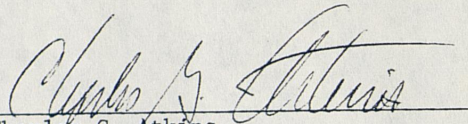
"(f) When Affidavits Are Unavailable.

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the Court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." (emphasis added)

Clearly, plaintiff cannot at this time fully and adequately present all of its arguments in opposition to the Motion for Summary Judgment for the simple reason that plaintiff has not yet had access to, potentially, extremely significant information. (See: Affidavit of Charles G. Atkins attached hereto as Exhibit D). Under the circumstances, the Court should either deny the defendant's Motion for Summary Judgment with leave to refile at a later date, or grant the plaintiff's request for additional time to respond. See: Management Investors v. United Mine Workers, 610 F. 2d 384 (6th Circuit 1979).

WHEREFORE, plaintiff's request that this Court deny the defendant's Motion for Summary Judgment at this time, with leave to refile at a later date, or at a minimum, grant plaintiff up to and including September 15, 1983 (or two weeks following discovery cut-off) to respond to the defendant's Motion for Summary Judgment.

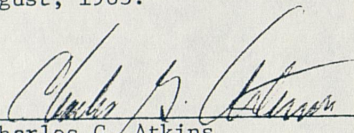
Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Charles G. Atkins", is written over a horizontal line.

Charles G. Atkins
Attorney for Plaintiff
Strauss, Troy and Ruehlmann Co., L.P.A.
2100 Central Trust Center
Cincinnati, OH 45202
(513) 621-2120

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent by ordinary U.S. Mail, postage prepaid, to Rufus Lisle, Esq., Stites & Harbison, 4th Floor, Bank of Lexington Building, 101 East Vine Street, Lexington, Kentucky 40507; Laurence A. Silverman, Esq., Cahill, Gordon & Reindel, 80 Pine Street, New York, New York 10005; and John R. Rhorer, Jr., Esq., Wyatt, Tarrant & Combs, 1100 Kincaid Tower, Lexington, Kentucky 40507, this 8th day of August, 1983.



Charles G. Atkins
Attorney for Plaintiff
Strauss, Troy and Ruehlmann Co., L.P.A.

5/31/83

Eastern District of Kentucky
FILED

MAY 31 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

AT PIKEVILLE
LESLIE G. WHITMER
CLERK, U. S. DISTRICT COURT

CIVIL ACTION NO. 80-224

GARLAND LANSAW,
d/b/a PADEN TIRE SERVICE,

PLAINTIFF,

VS.

ORDER

THE GOODYEAR TIRE
AND RUBBER COMPANY,

DEFENDANT.

* * * *

The plaintiff has moved the Court to reconsider its Order of May 5, 1983, quashing plaintiff's subpoena duces tecum. Per standing order of the Court, plaintiff has also filed a memorandum in support of his motion for reconsideration, and Falcon Coal Company, a non-party to this action, around whom the subpoena duces tecum centers, has responded to plaintiff's motion for reconsideration.

The Court is unpersuaded by plaintiff's memorandum that it should reconsider its order quashing said subpoena duces tecum. Accordingly, oral argument on this matter is unnecessary. Furthermore, the Court is of the opinion that the authority cited in Falcon Coal Company's memorandum controls this situation.

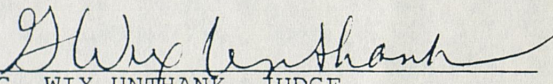
EXHIBIT A

At this juncture, the Court suggests that the deposition of Falcon Coal Company first be taken; thereafter, the necessity of a subpoena duces tecum may be more fully considered.

The Court being otherwise duly advised,

IT IS HEREBY ORDERED, that plaintiff's motion for reconsideration is DENIED.

This the 3rd day of May, 1983.


G. WIX UNTHANK, JUDGE

STRAUSS, TROY AND RUEHLMANN CO., L.P.A.

ATTORNEYS AND COUNSELORS AT LAW

2100 CENTRAL TRUST CENTER

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CABLE: STARCO

August 3, 1983

KENNETH D. TROY
EUGENE P. RUEHLMANN
SAMUEL M. ALLEN
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DOUGLAS G. COLE
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ANDREW M. SHOTT
ELIZABETH A. MCCORD
DOUGLAS E. DUCKETT

John R. Rhorer, Jr., Esq.
Wyatt, Tarrant & Combs
1100 Kincaid Towers
Lexington, KY 40507

Re: Garland Lansaw v. Goodyear Tire & Rubber Co.
(Eastern District Kentucky)
Civil Action No. 80-224

Dear John:

This letter will confirm our various telephone conversations of August 2 and 3, 1983, wherein we discussed the need for, and scheduling of, the deposition or depositions of Falcon Coal Company representatives.

It was the intention of our firm to take these depositions Monday, August 8, 1983, commencing at 10:00 a.m. in Lexington, Kentucky. Although we had drawn up the necessary subpoena and notice of deposition, we did not file these documents for the reasons you indicated to me, namely:

1. Falcon would not have anyone presently available to respond to the informational requests we had made;
2. You personally would be out of town on that date;
3. Counsel for the defendant, Larry Silverman, told you he would not be available on that date and had previously indicated to you the defendant's intention and desire to have access to whatever information Falcon Coal might make available to us (even if this required separate depositions); and
4. You would file for a protective order, if necessary, to prevent the deposition from going ahead as scheduled.

You acknowledged an awareness that Judge Unthank has set a September 1, 1983 discovery cut-off date. As I explained to you, our concern for immediate access to information solely in the possession of Falcon Coal is largely generated by the imminence of this cut-off date. You also acknowledged that we have, for some time, been

EXHIBIT B

STRAUSS, TROY AND RUEHLMANN CO., L. P. A.

John R. Rhorer, Jr., Esq.
August 3, 1983
Page Two

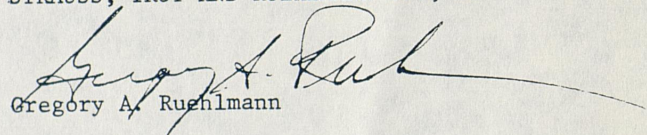
attempting to obtain this information and that, to date, such efforts have been marked by a spirit of cooperation. You indicated to me that it is Falcon's intention to continue to cooperate as completely as possible. However, we have not yet received any of this potentially vital information.

It was agreed between us that the necessary depositions would be postponed until Tuesday, August 16, 1983. You indicated that postponement until such a date would give Falcon adequate time and opportunity to prepare to respond to our informational requests set forth in Richard Boydston's letter to you of July 27, 1983. At a minimum, you indicated that such an extension would enable Falcon to determine whether or not it would ever be in a position to respond to such requests. You also indicated that the documents which Falcon has available to it which may be responsive to the informational requests would also be made available. I assured you of our intention to issue the necessary subpoenas and notices to take deposition. Please inform me at your early convenience of the number of Falcon representatives who will be made available for deposition.

If any of the statements contained in this letter do not accurately reflect the nature and content of our telephone conversations, please notify me so that we may correct whatever discrepancies are apparent to you. Otherwise, I look forward to seeing you on Tuesday, August 16, in Lexington.

Sincerely,

STRAUSS, TROY AND RUEHLMANN CO., L.P.A.


Gregory A. Ruehlmann

GAR:sj

cc: Mr. Garland Lansaw
Charles G. Atkins, Esq.
Richard Boydston, Esq.

JOHN E. TARRANT
ROBERT L. SLOSS
BERT T. COMBS
THOMAS W. BULLITT
C. KILMER COMBS
JOHN S. OSBORN, JR.
ROBERT L. MADDOX
EDGAR A. ZINGMAN
GORDON B. DAVIDSON
LAWRENCE L. JONES, III
RICHARD W. ILER
CLAY L. MORTON
RUSSELL H. RIGGS
RICHARD C. WARD
ROBERT C. EWALD
LAWRENCE E. FORGY, JR.
A. WALLACE GRAFTON, JR.
SAMUEL G. BRIDGE, JR.
H. ALEXANDER CAMPBELL
STEWART E. CONNER
R. LAWRENCE BAIRD
J. LARRY CASHEN
PARKER W. DUNCAN
JAMES N. WILLIAMS, JR.
ROBERT I. CUSICK, JR.
CHARLES R. SIMONS
EDWIN S. HOPSON
GROVER C. POTTS, JR.
JON L. FLEISCHAKER
K. GREGORY HAYNES
M. STEPHEN PITT
SHERYL G. SNYDER
DONALD H. VISH
DAVID C. FANNIN
THOMAS H. MEEKER
FRANCIS J. MELLER, JR.
ANN B. OLDFATHER

MERRILL S. SCHELL
STEPHEN D. BERGER
R. KATHRYN JUDE
JO ANN DALE
MARTIN P. DUFFY
JOHN F. GLEASON
MICHAEL B. VINCENTI
JEFF A. WOODS
THOMAS J. LUBER
RICHARD NORTHERN
STEWART L. PRATHER
KEVIN J. HABLE
JANET G. MARCUM
A. GEORGE MASON, JR.
JAMES R. HIGGINS, JR.
SUSAN TURNER BARNETT
PAUL J. COX
KIMBERLY K. GREENE
ANDREW S. GOOD
G. ALEXANDER HAMILTON
PATRICK W. MATTINGLY
CHAUNCEY S. R. CURTZ
PARKER W. EADS
RANDALL L. GARDNER
KEVIN L. MURPHY
JAMES A. NITSCHKE
JOHN S. OSBORN, III
JOHN R. RHORER, JR.
VIRGINIA HAMILTON SNELL
SHARON CONYER SPIEGEL
JAY JAFFE
COLLEEN MCKINLEY
LYNN N. MEYER
ARTHUR A. ROUSE
GORDON B. WRIGHT
CYNTHIA W. YOUNG

WYATT, TARRANT & COMBS

1100 KINCAID TOWERS

LEXINGTON, KENTUCKY 40507

AREA CODE 606
233-2012

WILSON W. WYATT, SR.
STUART E. LAMPE
ARTHUR W. GRAFTON
THOMAS P. LEWIS
EDWARD F. PRICHARD, JR.
COUNSEL

LOUISVILLE OFFICE
CITIZENS PLAZA
LOUISVILLE, KENTUCKY 40202
AREA CODE 502 589-5235
TELEX: 213331

August 4, 1983

Gregory A. Ruehlmann, Esq.
Strauss, Troy and Ruehlmann Co., L.P.A.
2100 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202

Re: Garland Lansaw v.
Goodyear Tire & Rubber Co.

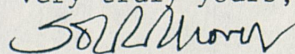
Dear Greg:

I am in receipt of your letter dated August 3, 1983, wherein you set forth the series of events leading up to our agreement to the scheduling of the deposition(s) of representative(s) of Falcon Coal Company on August 16, 1983. I am in basic agreement with the statements made in your letter but wish to point out that it is likely that the persons designated by Falcon to appear for the deposition will be from the Jackson, Kentucky area and it may be best to hold the depositions in Jackson. On the other hand, Falcon may want the depositions held in Lexington. I should know more about this next week. This can be worked out informally.

As I mentioned to you, I will be on vacation next week and if you need to discuss this matter with someone from Falcon you should call George Brooks at (606) 231-5300. Mr. Brooks is Assistant General Counsel with Falcon and is knowledgeable of this matter.

I look forward to seeing you on the 16th.

Very truly yours,



John R. Rhorer, Jr.

JRR/clc

cc: George Brooks, Esq.

EXHIBIT C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

GARLAND LANSAW	:	
d/b/a PADEN TIRE SERVICE,	:	Civil Action No. 80-224
	:	
Plaintiff,	:	(Unthank, J.)
	:	
-vs-	:	
	:	
THE GOODYEAR TIRE & RUBBER CO.,	:	<u>AFFIDAVIT OF CHARLES G. ATKINS</u>
	:	
Defendant.	:	

Comes now Charles G. Atkins, being first duly sworn, and deposes
and states as follows:

1. I am a partner in the firm of Strauss, Troy and Ruehlmann Co.,
L.P.A. and am currently serving as counsel for the plaintiff in the
above-captioned matter.

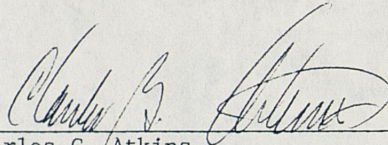
2. At the present time, our firm has made arrangements to take the
deposition or depositions of representatives of the Falcon Coal Company.
The purpose of these depositions is to obtain certain information which
we believe could be vital to the comprehensive prosecution of our client's
case.

3. We have been actively seeking to obtain this information from
Falcon Coal Company for months, however, we have only recently been able
to come to an agreement with counsel for Falcon Coal as to a date and
time at which Falcon Coal representatives will be available to provide
this information.

EXHIBIT D

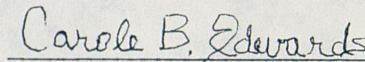
4. It is my belief that such information could have a significant bearing on our ability to fully and completely address the defendant's Motion for Summary Judgment.

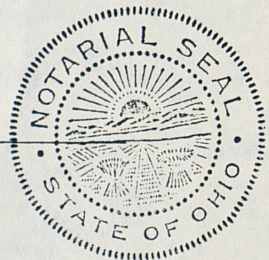
Further affiant saith naught.



Charles G. Atkins
Attorney for Plaintiff
Strauss, Troy and Ruehlmann Co., L.P.A.
2100 Central Trust Center
Cincinnati, OH 45202
(513) 621-2120

Sworn to before me and subscribed in my presence this 8th day
of August, 1983.


NOTARY PUBLIC



CAROLE B. EDWARDS
Notary Public, State of Ohio
My Commission Expires Jan. 7, 1987

Judge's Copy

FILED AUG 11 1983

UNITED STATES DISTRICT COURT
FOR
THE EASTERN DISTRICT OF KENTUCKY
PIKEVILLE, KENTUCKY
FILE NO. 83-232

TOM SALYERS, ET AL.,

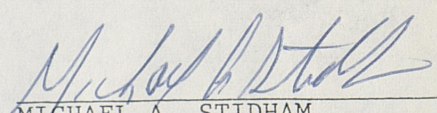
PLAINTIFFS.

VS:

DEFENDANTS' MEMORANDUM IN
SUPPORT OF THEIR MOTION TO DISMISS

NIM HENSON, ET AL.,

DEFENDANTS.


MICHAEL A. STIDHAM
P.O. BOX 732
JACKSON, KENTUCKY 41339
BREATHITT COUNTY ATTORNEY
ATTORNEY FOR DEFENDANTS

I N D E X

PAGE

STATEMENT OF FACTS..... 1-2

ISSUES

1. DOES THE COMPLAINT STATE A CAUSE OF ACTION
UPON WHICH RELIEF CAN BE GRANTED AS AGAINST
THESE DEFENDANTS?..... 2

ARGUMENT 2-4

A. GAMBRELL V. UNITED MINE WORKERS OF AMERICA,
ET AL., 249 SW 2d 158 (1952), Pages 159-160

2-3

B. GREER V. NATIONAL CARBIDE COMPANY,
186 F Supp. 18, (1960)..... 3-4-

C. ELDER V. NEW YORK CENT. R. CO., 152 F 2d 361,
304 (1945)..... 4

CONCLUSIONS..... 4

UNITED STATES DISTRICT COURT
FOR
THE EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION
FILE NO. 83-232

TOM SALYERS, ET AL.,

PLAINTIFFS.

VS:

DEFENDANTS' MEMORANDUM IN
SUPPORT OF THEIR MOTION TO DISMISS

NIM HENSON, ET AL.,

DEFENDANTS.

** **** **

Pursuant to standing orders of the Court, the defendants submit the following memorandum in support of their motion to dismiss the complaint.

STATEMENT OF FACTS

All of the plaintiffs were hired by the Fiscal Court of Breathitt County, Kentucky, upon the recommendation of the County Judge/Executive. They were not hired for any specific period of time.

No merit system exists for county employees in Breathitt County, Kentucky. Either the employee or the Fiscal Court may terminate employment at its own will. After a general county-wide "lay-off" of all road crew employees in June of 1983, because of a lack of money with which to pay salaries, the plaintiffs were not recalled to work.

No seniority rights were bestowed upon county employees.

ISSUES

1. Does the complaint state a cause of action upon which relief can be granted as against these defendants?

ARGUMENT

When the plaintiffs were hired by the Breathitt County Fiscal Court it was for an indefinite period of time and they were not bound to serve their employer for a definite fixed term. The plaintiffs themselves, either singularly or jointly, could terminate their own employment at any time without cause or reason and without notice to the defendants. The same right was bestowed upon the defendants.

The Kentucky Court of Appeals in the case of GAMBRELL V. UNITED MINE WORKERS OF AMERICA, ET AL, 249 SW2d 158 (1952), at Pages 159-160, has stated the law dealing with employees at will as follows:

Appellants' failure to allege a contract with the mining company for a definite period of time was fatal as may be noted by reference to a number of cases in which we have held that in a suit for breach of contract for labor, "it should be shown that such contract was entered into for a definite period of time", and likewise should show deligation on the part of the employee to render service for a fixed period and reciprocal obligation on the employer's part to retain the employee's service." When the term of service is left to the discretion of either party or when not for a definite period "either party has the right to terminate it at any time, and no cause therefore need be alleged or proven....

GAMBRELL V. UNITED MINE WORKERS OF
AMERICA, ET AL., 249 SW2d 158, 159,
160, (1952).

The same principle has been recognized by the Federal Courts of this jurisdiction. The United States District Court for the Western District of Kentucky at Paducah cited the holding of the GAMBRELL CASE, supra, as set out above, in dismissing an action filed against an employer in the case of GREER V. NATIONAL CARBIDE COMPANY, 186 F Supp. 18, (1960).

The plaintiffs have admitted in their complaint that they are not merit system employees and that there is no employees' association to deal with the Fiscal Court in hiring and firing of employees. They further admit that "State law, likewise, provides no relief in that the common law rule has never been derogated and the law in the Commonwealth is still that the Fiscal Court would have the unmitigated power to hire and fire without regard to standards such as are contained in KRS CHAPTER 18, cited above." Nor do the employees-plaintiffs enjoy seniority rights. Such rights are not inherent. The Sixth Circuit Court of Appeals in a case from the Eastern District of Kentucky, has held in regards to seniority rights:

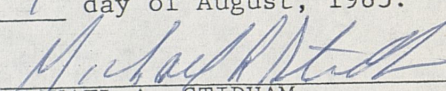
"... The right, however, is not inherent! It must stem either from a statute or a lawful administrative regulation made pursuant thereto or from a contract between employer and employee, or from a collective bargaining agreement between employees and their employer. In the absence of statute, mere employment independent of the contractual conferring of specific benefits upon those who have longest service records with the individual employer creates no rights of seniority in retention in service or in re-

employment...
ELDER V. NEW YORK CENT. R. CO.,
152 F2d 361, 304 (1945).

C O N C L U S I O N S

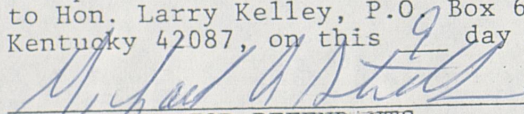
The plaintiffs being employees at will were subject to being discharged without cause at anytime by the Fiscal Court. Since there is no contractual obligation creating seniority rights, the plaintiffs have none. The complaint should be dismissed as failing to state a cause of action upon which relief can be granted as against these defendants.

Respectfully submitted, this 9 day of August, 1983.


MICHAEL A. STIDHAM
BREATHITT COUNTY ATTORNEY
ATTORNEY FOR DEFENDANTS
P.O. BOX 732
JACKSON, KENTUCKY 41339
Telephone: (606) 666-2436

CERTIFICATE:

This is to certify that a true copy of the above Defendants' Memorandum in Support of their Motion to Dismiss has been served upon the plaintiffs herein by mailing a copy of same to Hon. Larry Kelley, P.O. Box 627, Wickliff, Kentucky 42087, on this 9 day of August, 1983.


OF COUNSEL FOR DEFENDANTS.

with the statutory regulations. KRS 118-060. But a failure to provide the booths is not fatal to the election if the requirement of secrecy of the ballot was accomplished. *Felts v. Edwards*, 181 Ky. 287, 204 S.W. 145; *Muncy v. Duff*, 194 Ky. 303, 239 S.W. 49; *Jones v. Steele*, 210 Ky. 205, 275 S.W. 790; *Revis v. Duff*, 275 Ky. 626, 122 S.W.2d 518; *Holley v. Burke*, 300 Ky. 571, 189 S.W.2d 862.

The judgment is affirmed.



of employee to render
rion and reciprocal ob
part to retain employ

3. Master and Servant

When term of service of either employee or employer is not for a definite period, the party has right to terminate at any time without cause.

4. Labor Relations

Employee's and employer for damage to employee to work, with that action was brought between a certain union and a union, was to allege that de working under the and for failure to al employee and emplo of time.

Ben Gambrel, employee, brought action for damages against the United Mine Workers of America and the Southern Mining Company, employer, for employer's refusal to permit employee to work and for union's failure to attempt to adjust matter with employer. The Bell Circuit Court, R. L. Maddox, J., sustained defendants' general demurrers to amended petition, and dismissed the petition, and the plaintiff appealed. The Court of Appeals, Morris, C., held that petition was

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(c) Plaintiff's failure to allege duty to act as plaintiff's discharge from employment with company and carry it to board of arbitration was demurrable for failure to allege that plaintiff was member of or affiliated with union and hence failure to allege duty on part of union to take up plaintiff's complaint.

2. Master and Servant 40(1)

In suit for breach of contract for labor, it should be shown that contract was entered into for definite period of time and should likewise be shown obligation on part

Floyd Taylor, Pine
Lay & Knuckles are
all of Pineville, for a

MORRIS, Commis

Appellant institute
Southern Mining C
Mine Workers of A
19, Abe Vales, Presid
Emmanuel Edwards, c

to work on account he reported for work defendant refused to and denied his request.

His cause against the state was thus stated: After the state failed to allow appellant to produce the requested Edwards and Edwards, it was to make earnest effort to settle the matter with the Com-

of employee to render service for fixed period and reciprocal obligation on employer's part to retain employee's services.

Master and Servant ⇨20, 21

When term of service is left to discretion of either employee or employer, or when term is not for definite period, either party has right to terminate relationship at any time without cause.

Labor Relations ⇨777

Employee's amended petition against employer for damages for refusal to permit employee to work, wherein employee stated that action was brought under wage agreement between a certain operator's association and a union, was demurrable for failure to allege that defendant employer was working under the mentioned agreement, and for failure to allege contract between employee and employer for definite period of time.

Floyd Taylor, Pineville, for appellant.

Lay & Knuckles and Patterson & Wilson, all of Pineville, for appellees.

MORRIS, Commissioner.

Appellant instituted action against the Southern Mining Company, the United Mine Workers of America of District No. 19, Abe Vales, President of District 19, and Emanuel Edwards, representative of U. M. W. His appeal is from a judgment dismissing his petition as amended.

In his petition his cause against the Mining Company was thus stated: "That on March 8, 1950, he was illegally discharged; that he had worked for the company for several years, and had prior to March 8, 1950, been off for several days and unable to work on account of illness; that when he reported for work on said date the defendant refused to permit him to work," and denied his request for reinstatement.

His cause against the other defendants was stated: After the company's refusal to allow appellant to resume work "he requested Edwards and Vales, whose duty it was to make earnest effort to adjust this matter with the Company, and carry it to

the Board of Arbitration, if necessary; they failed and refused to do so, and by reason thereof plaintiff lost his job, and has been unable to secure a job since, and by reason thereof he has been damaged in the loss of wages of about \$3,000." He alleged that he was fifty-six years of age, with life expectancy of seventeen years; that he would be able to work for at least ten years longer, which would result in wages to the amount of \$30,000. His prayer was for judgments against defendants for \$33,000.

The court, ostensibly on the ground that the petition did not sufficiently allege a contract for a definite period of time, sustained defendants' general demurrers, with leave to amend. The plaintiff then amended his petition, reiterating substantially the cause as against the Mining Company, and undertaking to strengthen his cause against the other defendants. He stated that "his action was brought under the wage agreement between the Harlan County Operators Association and District No. 19 of the United Mine Workers of America," in effect at the time of his alleged discharge. At this point it is noted that there is no allegation that the defendant Mining Company was working under the Harlan agreement. The amended petition then sets out certain provisions of the Harlan agreement, showing the rights of aggrieved parties and duties of officers and representatives of the Union.

[1] His petition as amended was and is vulnerable for another reason: Appellant does not allege that he was a member of or affiliated with the local Mine Workers Union or any Union, hence he had no recourse to that body, therefore, the alleged representatives did not owe him the duty to take up his complaint.

[2, 3] Appellant's failure to allege a contract with the Mining Company for a definite period of time was fatal, as may be noted by reference to a number of cases in which we have held that in a suit for breach of contract for labor, "it should be shown that such contract was entered into for a definite period of time; and likewise should show obligation on the part of the employee to render service for a fixed period and reciprocal obligation on the employer's

part to retain the employee's services." *Clark v. Cincinnati N. O. & T. P. R. Co.*, 258 Ky. 197, 79 S.W.2d 704, 706. When the term of service is left to the discretion of either party or when not for a definite period "either party has the right to terminate it at any time," and no cause therefor need be alleged or proven. *Louisville & N. R. Co. v. Offutt*, 99 Ky. 427, 36 S.W. 181, 183. The same rule has been adhered to in *Edwards v. Kentucky Utilities Co.*, 286 Ky. 341, 150 S.W.2d 916, 135 A.L.R. 642; *Clay v. Louisville & N. R. Co.*, 254 Ky. 271, 71 S.W.2d 617; *Hudson v. Cincinnati N. O. & T. P. R. Co.*, 152 Ky. 711, 154 S.W. 47, 45 L.R.A.,N.S., 184; *Louisville & N. R. Co. v. Wells*, 289 Ky. 700, 160 S.W.2d 16.

[4] Under authority of these cases we are compelled to hold that the court correctly sustained demurrer to the petition as amended, and properly dismissed it upon appellant's refusal to further amend.

Judgment affirmed.



CHESAPEAKE & O. RY. CO. v. MILES.

Court of Appeals of Kentucky.
May 23, 1952.

Action by Jack D. Miles against the Chesapeake & Ohio Railway Company for personal injuries sustained while in the employ of defendant. The Circuit Court, Johnson County, James W. Turner, J., rendered a judgment in favor of plaintiff, and defendant appealed. The Court of Appeals, Cullen, C., held that the action was barred by the three year limitation provision of the Federal Employers' Liability Act.

Judgment reversed with directions.

1. Commerce ⇨27(5)

Where evidence on trial clearly established that employment was in interstate commerce, cause of action of employee, if any, for injuries received while replacing rails on spur track was necessarily under the Federal Employers' Liability Act not-

withstanding petition purported to state a cause of action at common law arising out of negligent failure to provide safe place of employment or to warn of dangers incident to work. Federal Employers' Liability Act, § 6, 45 U.S.C.A. § 56.

2. Limitation of Actions ⇨180(3), 182(2)

In railroad employee's action under petition purporting to state cause of action at common law arising out of negligent failure to provide safe place of employment and failure to warn of dangers incident to work, which did not allege facts showing that parties were engaged in interstate commerce at time of accident, railroad could not raise by demurrer the question of limitations under the Federal Employers' Liability Act, but properly raised that question by answer. Federal Employers' Liability Act, § 6, 45 U.S.C.A. § 56.

3. Limitation of Actions ⇨2(4)

Federal Employers' Liability Act is exclusive on question of limitations, and state statutes have no application to action brought thereunder. Federal Employers' Liability Act, § 6, 45 U.S.C.A. § 56.

4. Limitation of Actions ⇨72(1)

Limitation of the Federal Employers' Liability Act is not tolled by infancy. Federal Employers' Liability Act, § 6, 45 U.S.C.A. § 56.

5. Limitation of Actions ⇨2(4)

Where railroad employee sought to escape three year limitation provision of the Federal Employers' Liability Act by alleging that he was an infant at time of accident and became of age less than one year before action was commenced hence bringing himself within provisions of state statute which suspended running of limitations during infancy, action was barred since federal statute was exclusive on question of limitations. KRS 413.170; Federal Employers' Liability Act, § 6, 45 U.S.C.A. § 56.

Browning & Gray, Ashland, Wells & Wells, Paintsville, for appellant.
Jasper H. Preece, Inez, for appellee.

CULLEN

The Court from a cause of action of Jack D. Miles against the Chesapeake & Ohio Railway Company.

[1] The cause of action of the plaintiff, Jack D. Miles, against the Chesapeake & Ohio Railway Company, was for personal injuries sustained while in the employ of defendant. The Circuit Court, Johnson County, James W. Turner, J., rendered a judgment in favor of plaintiff, and defendant appealed. The Court of Appeals, Cullen, C., held that the action was barred by the three year limitation provision of the Federal Employers' Liability Act, but properly raised that question by answer. Federal Employers' Liability Act, § 6, 45 U.S.C.A. § 56.

The Court provides, "No order shall be entered within the cause of action."

The action was barred by the three year limitation provision of the Federal Employers' Liability Act, but properly raised that question by answer. Federal Employers' Liability Act, § 6, 45 U.S.C.A. § 56.

[2] The Court held that the action was barred by the three year limitation provision of the Federal Employers' Liability Act, but properly raised that question by answer. Federal Employers' Liability Act, § 6, 45 U.S.C.A. § 56.

Case No. 6820, by Mrs. Thelma S. Sindle, individually and as administratrix of the estate of Argus A. Sindle, and as mother and next friend of certain minor plaintiffs, against Stasi Motor Freight, Inc., M. E. Daniels, d/b/a Rogers Oil Company, and Richard F. Pitts; (2) that the plaintiff is under no duty to defend any action which may be brought against M. E. Daniels to recover damages arising out of the accident which occurred on July 8, 1958, and in which the 1954 model International Tractor, Serial Number (Motor Number RD45037950, was involved; and (3) that the accident involved herein, and as alleged in the suit in the Crawford County Circuit Court, was not covered by the policy of insurance issued by plaintiff on May 26, 1959, to the defendant M. E. Daniels, d/b/a Rogers Oil Company.

Also, judgment denying the motion of the defendants, Richard F. Pitts, and M. E. Daniels, d/b/a Rogers Oil Company, for summary judgment is being entered today.

No costs are allowed to any party, and all parties shall pay the costs incurred by them.



John A. GREER and Johnny H. Anderson,
Plaintiffs,

v.

NATIONAL CARBIDE COMPANY, Division of Air Reduction Company,
Inc., Defendant.
Civ. A. No. 1090.

United States District Court
W. D. Kentucky,
at Paducah.
May 17, 1960.

Action against employer which had dismissed employees, wherein employer filed motion to dismiss, or in alternative, for summary judgment. The District

Court, Shelbourne, Chief Judge, held that where contract neither obligated employer to employ employees for any definite period of time nor obligated employees to work for any definite period of time, employment was terminable at will of either employer or employees.

Motion to dismiss sustained.

Master and Servant — 20

Where contract neither obligated employer to employ employees for any definite period of time nor obligated employees to work for any definite period of time, employment was terminable at will of either employer or employees.

Andrew J. Palmer, Paducah, Ky., for plaintiffs.

John C. Lovett, Benton, Ky., for defendant.

SHELBOURNE, Chief Judge.

On December 29, 1959, this Court passed to a later date the final decision on defendant's motion to dismiss or, in the alternative, to enter a summary judgment for the defendant. The passing of this case was to enable the defendant to disclose to the Court information said to be of such nature as, if known generally, to jeopardize peaceful labor relations at defendant's plant. After viewing the information, the Court is of opinion that at this time it is not important, relevant or material to a proper decision of this case.

As indicated in the order of December 29, 1959, the Court was then, and is now, of the opinion that the defendant's motion to dismiss should be sustained. This is because the complaint does not allege and the contract of employment does not contain a clause obligating the defendant to employ the plaintiffs or other members of the union for any specified period of time and, likewise, does not obligate the employees to work for the defendant for any specified period of time.

In the Case of Louisville & N. R. Co. v. Wells, 289 Ky. 700, 160 S.W.2d 16, the contract provided that the conductors would not be demerited, disciplined or discharged without just cause. The court there held that the contract, failing to provide for a definite period of employment, was terminable at the will of the employer or at the will of the employee.

Citing the Wells case with approval in 1952 in Gambrel v. United Mine Workers of America et al., 249 S.W.2d 158, 159, the Court of Appeals of Kentucky said:

"Appellant's failure to allege a contract with the Mining Company for a definite period of time was fatal, as may be noted by reference to a number of cases in which we have held that in a suit for breach of contract for labor, 'it should be shown that such contract was entered into for a definite period of time; and likewise should show obligation on the part of the employee to render service for a fixed period and reciprocal obligation on the employer's part to retain the employee's services.' Clark v. Cincinnati N. O. & T. P. R. Co., 258 Ky. 197, 79 S.W.2d 704, 706. When the term of service is left to the discretion of either party or when not for a definite period 'either party has the right to terminate it at any time,' and no cause therefor need be alleged or proven." (Emphasis added.)

To the same effect is the subsequent case of Production Oil Co. v. Johnson, Ky., 313 S.W.2d 411, decided in May, 1958.

The complaint here, therefore, did not state a claim upon which relief could have been granted to the plaintiffs. The complaint could not have been amended so as to constitute such a claim because the contract of employment neither obligated the employer to employ the plaintiffs for any definite period of time nor did it obligate the plaintiffs to work for any definite period of time.

This question is decisive of the case and it is unnecessary for the Court to determine whether the claims of the plaintiffs constitute individual grievances which should be determined under the provisions of the contract relating to grievances (including arbitration), or whether their claims could be asserted in a suit against the defendant, as they are here attempting to assert. However, the Court is of the opinion that the plaintiffs were required to exhaust their administrative remedies as provided in the contract for presenting grievances. See Smith v. Hillerich & Bradsby Co., Ky., 253 S.W.2d 629; Norman v. Southern Bell Tel. & Tel. Co., Ky., 322 S.W.2d 95.

The motion to dismiss is sustained and an order is this day entered so providing.



SECURITIES AND EXCHANGE COMMISSION, Plaintiff,

v.

C. H. ABRAHAM & CO., Inc., and Carl Henry Abraham, Defendants.

United States District Court
S. D. New York.
July 20, 1960.

Proceeding to enjoin alleged violation of Securities Exchange Act. The District Court, Ryan, Chief Judge, held that evidence, including evidence that defendant-brokers operated while insolvent, established that Act had been violated.

Order accordingly.

1. Licenses $\Rightarrow$ 18½ (54)

Rules of the Securities and Exchange Commission relating to use of mails for interstate commerce for manip-

rection of the preceding section which provides that the basis shall be adjusted as under the Regulations for 1933 and this figure taken for 1934. The figure for 1933 would certainly not reflect the losses taken advantage of. The Jordahl case is squarely in point on that."

In concluding its opinion, the tax tribunal swept aside the Commissioner's dependence upon G. C. M. 7765, C. B. IX-1, p. 223, G. C. M. 11676, C. B. XII-1, p. 75, and G. C. M. 12581, C. B. XIII-1, p. 142. It was asserted that, in all these directions, the rule was recognized as applicable to a situation "where the subsidiary is either liquidated or its stock sold by the parent to some outsider."

[2] After careful consideration, we find that the holdings in the following listed cases and in others cited by the Commissioner pertaining to "double deduction" do not indicate that the decision of the Tax Court was "not in accordance with law," or that, separating the elements of its decision, a clear-cut mistake of law is identifiable: *Ilfeld Co. v. Hernandez*, 292 U.S. 62, 68, 54 S.Ct. 596, 78 L.Ed. 1127; *McLaughlin v. Pacific Lumber Co.*, 293 U.S. 351, 355, 55 S.Ct. 219, 79 L.Ed. 423; *United States v. Lakewood Engineering Co.*, 6 Cir., 70 F.2d 887, 888, 889; *Greif Cooperative Corporation v. Commissioner of Internal Revenue*, 3 Cir., 85 F.2d 365, 366; *Commissioner of Internal Revenue v. National Casket Co.*, 3 Cir., 78 F.2d 940. The per curiam opinion of this court in *Weil v. Commissioner of Internal Revenue*, 6 Cir., 92 F.2d 1022, affirming the decision of the Board of Tax Appeals, has no bearing upon the present controversy.

[3] In our judgment, the decision of the Tax Court undoubtedly has warrant in the record and a reasonable basis in the law. Having so concluded, our judicial function is exhausted. *Dobson v. Commissioner*, 320 U.S. 489, 501, 64 S.Ct. 239, 88 L.Ed. 248.

We do not find in the later decisions of the Supreme Court that the binding authority of the *Dobson* case has been weakened. Indeed, the expressions in *Com'r v. Scottish American Co.*, 323 U.S. 119, 124, 125, 65 S.Ct. 169, would seem to expand the original rationalization in the *Dobson* case. The opinion in *McDonald v. Commissioner*, 323 U.S. 57, 64, 65, 65 S.Ct. 96, 153 A.L.R. 119, also adhered to its under-

lying rationale. In *Trust u/w of Bingham v. Com'r of Internal Revenue*, 325 U.S. 365, 65 S.Ct. 1232, the Supreme Court merely made it plain that the *Dobson* case did not nullify the intent of the Federal Statute, Int.Rev.Code, Sec. 1141(c) (1), 26 U.S.C.A. Int.Rev.Code § 1141(c) (1), to subject to appellate review any decision of the Tax Court for determination of whether or not it is "in accordance with law." It should be observed, moreover, that no error of law was found in the judgment of the tax tribunal and the Court of Appeals was reversed for reversing the decision of the Tax Court.

Boehm v. Commissioner of Internal Revenue, 1945, 66 S.Ct. 120, 124, reiterated that the Tax Court is a basic fact-finding and inference-making body and is entitled to draw whatever inferences and conclusions it deems reasonable from the facts found by it. The unanimous opinion in that most recent case declares that an appellate court is limited to a consideration of whether the decision of the Tax Court under review is "in accordance with law"; and, if so, "it is immaterial that different inferences and conclusions might fairly be drawn from the undisputed facts."

The decision of the Tax Court is affirmed.



ELDER v. NEW YORK CENT. R. CO.

No. 10020.

Circuit Court of Appeals, Sixth Circuit.

Dec. 3, 1945.

1. Master and servant ⇌ 3(2)

Employee's seniority right, of which he may not be unlawfully deprived, is not inherent but must stem from statute, administrative regulation, contract with employer, or collective bargaining agreement.

2. Master and servant ⇌ 3(2)

Railroad employee's seniority rights were both created and limited by union's agreement with railroad, although he did not belong to union.

Where railroad employee's seniority rights depended on agreement between employer and union to which employee did not belong, employee could be discharged without regard to seniority pursuant to supplemental agreement modifying and construing such agreement.

4. Master and servant 37

A collective bargaining agreement does not create a permanent status, give an indefinite tenure, or extend rights created and arising under the agreement beyond its life, when it has been terminated in accordance with its provisions.

5. Master and servant 34

Michigan law governed railroad employee's action for wrongful discharge, where he was employed in Michigan for work therein, collective bargaining agreement on which employee relied was executed in Michigan, and breach, if any, occurred in Michigan.

Appeal from the District Court of the United States for the Eastern District of Kentucky; Mac Swinford, Judge.

Action by Richard Elder against the New York Central Railroad Company for wrongful discharge from employment. From a judgment for defendant, plaintiff appeals.

Affirmed.

John W. Cowell, of Cincinnati, Ohio (Blakely & Blakely, of Covington, Ky., on the brief), for appellant.

Lewis Levy, of Cincinnati, Ohio (Henry B. Street, Charles P. Stewart, Galvin, Tracy, Geoghegan, Levy & Milliken, and Harmon, Colston, Goldsmith & Hoadly, all of Cincinnati, Ohio, on the brief), for appellee.

Before HICKS, ALLEN, and MARTIN, Circuit Judges.

MARTIN, Circuit Judge.

The appellant, Richard Elder, sought unsuccessfully in the district court to recover from the appellee railroad company \$6,360 in wages lost by him in consequence of its refusal to reinstate him as clerk, from which position he was furloughed by the company when its office personnel was reduced on April 1, 1936. He contends that the railroad company had no right to dis-

miss him, without cause and without his consent, through a bargaining agreement entered into between the company and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, of which he was not a member. He concedes, however, that the labor organization was the duly authorized bargaining agent of all freight office employees of the railroad company.

The question to be answered is whether in the circumstances of the case, the employee has been deprived *unlawfully* of a legally constituted "seniority right."

On April 14, 1924, appellant became a rate revision clerk, at Cincinnati, Ohio, in the office of the auditor of freight accounts of the "Big Four" railroad company, a subsidiary of appellee. He worked continuously in that capacity until February 1, 1930, when the Big Four was leased to the New York Central, which thereafter operated the leased line. He then entered the service of the latter, performed the same duties as clerk, and continued to work in the Cincinnati office until August, 1931, when he was transferred to the New York Central's office of local freight accounts at Detroit, Michigan, in pursuance of an agreement entered into between that railroad and the Brotherhood consequent upon mediation proceedings before the Railway Labor Board.

Throughout the full period of Elder's employment by each of the railroad companies, the Brotherhood has been the collective bargaining agent for their clerical employees. As declared by the district court, such rights as appellant has to seniority "flow from and exist solely by virtue of the agreement or agreements, as modified at various times, made between the defendant and the Brotherhood."

A controversy arose concerning the rights of clerks employed by the several roads affected in the reorganization and consolidation of the various offices in the New York Central System. Mediation, pursuant to the Railway Labor Act, resulted in the execution of an agreement, dated October 4, 1928, between the Brotherhood and the railroads involved, determining the rights of all employees represented by the union labor organization. Certain offices were to be suspended and new offices created to take over the duties and functions of discontinued offices. The number of new positions available in the new

created offices was stated, and proration of these positions among the clerks was provided for. The names and seniority dates of employees were to appear on the roster of the new or consolidated office. Express provision was made that: "Employees from other system lines accepting positions in the new or consolidated office will relinquish their rights on their home road." The clerical staff, including appellant, in the office of the auditor of freight accounts of the Big Four continued to operate under agreement between that railroad and the Brotherhood until October 1, 1931, at which time the reorganization was completed. The office at Cincinnati, Ohio, was then abolished and two accounting offices were set up by the New York Central to take over the auditing and accounting of freight charges for the various railroads. One of these offices was to be located at Detroit, Michigan, and the other at Cleveland, Ohio. The Detroit office was to be entitled the office of the Auditor of Local Freight Accounts, and the Cleveland office was to be known as the office of the Auditor of Interline Freight Accounts. Each was to be a separate, distinct and independent office from the other, constituting a separate seniority district with a seniority roster containing only the names of those employed in it. There were to be no interchangeable seniority rights between the two offices.

The appellant employee was assigned to and accepted employment in the office of the Auditor of Local Freight Accounts at Detroit, Michigan, and worked there continuously for approximately five years, until he was furloughed on April 1, 1936, because of a reduction in the office force.

The district court found that under the mediation agreement when appellant accepted employment in the Detroit office, his only right of seniority was in that office; that he lost all seniority rights with the Big Four; but that his seniority status, instead of beginning at the time he entered the Detroit office, dated back to April 14, 1924, when he entered the service of the Big Four.

While appellant was on furlough, the New York Central again consolidated the work of its accounting forces. The plan of the railroad company to this end caused a controversy between it and the Brotherhood, which was settled by an agreement

agreement provided for the establishment of a consolidated office at Detroit, to take over the functions and duties formerly performed in five offices, which were abolished. The five offices put out of existence and merged into the new Detroit office were those of three departmental accounting offices located, respectively, at Cleveland, Indianapolis, and Detroit, the office of the Auditor of Interline Freight Accounts at Cleveland, and the office of Auditor of Local Freight Accounts at Detroit.

Though, under the terms of the agreement of March 19, 1937, between the New York Central and the Brotherhood, provision was made for as many employees as possible, there were insufficient positions in the new office to take care of the employees in all the offices affected. All *active employees* in the Interline Freight Accounts office at Cleveland and those in the Local Freight Accounts Office at Detroit, who desired employment in the new office, were given positions therein. Because he was not actively employed, the appellant was not included in the list. The positions and rate of pay of the retained employees were provided for in the agreement.

Immediately after the establishment of the new office at Detroit, a seniority roster was published. Neither this roster nor any subsequent one included the name of appellant. The district court found as a fact that the intent of the agreement of March 19, 1937, was that only those employees in the office of the Auditor of Local Freight Accounts, Detroit, "who were at the time of the establishment of the consolidated office employed and working in the Detroit office were to be given positions in the new office."

No question concerning the construction of the 1937 agreement arose until 1939; whereupon, the Brotherhood and the appellee railroad company entered into a written interpretation of their previous agreement confirming their original understanding as to the intent and meaning of the agreement of March 19, 1937. This interpretation was signed for the New York Central by its Auditor of Freight Accounts, and for the Brotherhood by a Protective Committee of five and by its General Chairman. The interpretative document reads as follows: "Memorandum of Understanding Relative to Furloughed Employees, Office of Auditor of Freight Accounts, Detroit, Michigan. At the time of

Freight Accounts, July 1, 1937, it was agreed between the Auditor of Freight Accounts and the protective committee of the clerks' organization representing the employees of the consolidated office of Auditor of Freight Accounts, that the seniority roster of employees as composed directly after the consolidation will be maintained with the full understanding that any employee who might have been laid off in reduction of force prior to the consolidation in either of the offices to be consolidated, will no longer be considered as employees of the New York Central Railroad Company. This agreement is hereby reconfirmed effective as of July 1, 1937."

In the last finding of fact of the district court, it was asserted that the 1937 agreement between the Brotherhood and the New York Central was not discriminatory against appellant, but affected all employees of the railroad company in the offices involved in the consolidation; and "was not entered into in bad faith or in fraud of the plaintiff's rights, but for the general welfare and benefit of all the employees employed by defendant who were represented by the Brotherhood."

The petition of Richard Elder was dismissed at his cost and final judgment entered in favor of the New York Central Railroad Company upon stated conclusions of law drawn by the district judge from the facts found. The court concluded that, under the agreements between the Brotherhood and the railroad company, appellant had seniority rights in no other office than that of the Auditor of Local Freight Accounts at Detroit. This office was abolished and a new one created, namely: the office of Auditor of Freight Accounts, in which, under the terms and according to the intent and purpose of the March 19, 1937, agreement, Elder had no seniority rights.

It was concluded also that the railroad company and the Brotherhood had the right, without violation of the lawful rights of Elder, to modify the agreement of March 19, 1937, and especially to interpret its meaning; and that "the written interpretation made in 1939 is binding upon the plaintiff and all other employees of the defendant represented by the Brotherhood."

The conclusion was stated that this interpretation "confirms and reaffirms" the intent of the original agreement, under which

and no seniority rights in the office of the Auditor of Freight Accounts. As a further conclusion, the district court reiterated, in substance, its last numbered finding of fact to which reference has been made.

The findings of fact of the district court, all supported by substantial evidence, could not be reasonably considered clearly erroneous. Therefore, we accept them. The court's conclusions of law are soundly rationalized; and, in our judgment, are correct.

[1-3] The seniority right of the man who toils, indoors or out, in a shop or in an office, is a most valuable economic security, of which he may not be unlawfully deprived. The right, however, is not inherent. It must stem either from a statute or a lawful administrative regulation made pursuant thereto, or from a contract between employer and employee, or from a collective bargaining agreement between employees and their employer. In the absence of statute, mere employment independent of the contractual conferring of special benefits upon those who have longest service records with the individual employer, creates no rights of seniority in retention in service or in reemployment. In the instant case, the appellant rests upon no right created by statute, but solely upon a collective bargaining agreement, made between the chosen representative of the workers and the employer. The fact that he was not a member of the union labor organization which lawfully bargained for him and for all other employees of the company neither strengthens nor weakens his position. His individual seniority rights were both created and limited by the bargain which was made for and was binding upon all employees for whom it was made. See *Norfolk & W. R. Co. v. Harris*, 260 Ky. 132, 136, 84 S.W.2d 69, and cases there cited; *Cannon v. Brotherhood of Railroad Trainmen*, 262 Ky. 113, 89 S.W.2d 620.

[4] As was pointed out in *System Federation No. 59 of Railway Employees Department of American Federation of Labor v. Louisiana & A. R. Co.*, 5 Cir., 119 F.2d 509, 515, the authorities are uniform to the effect that collective bargaining agreements do not create a permanent status, give an indefinite tenure, or extend rights created and arising under the contract beyond its life, when it has been terminated in accordance with its provisions.

[5] The law of Michigan is important, if not, indeed, controlling; inasmuch as Elder was employed in Michigan, his services were to be performed there, the agreement between the Brotherhood and the New York Central was made and to be performed in that state; and, if the contract was breached as to Elder the breach occurred in Michigan. In *Hartley v. Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees*, 283 Mich. 201, 206, 207, 277 N.W. 885, a married woman, by long service, had acquired seniority rights under an agreement between her employer railroad company and the same labor union which made the collective bargaining agreement with which we are concerned in the instant case. Her employment was terminated by the company in consequence of the action of the bargaining agent in requiring dismissal of married female employees.

She brought an action for damages against the Brotherhood on the theory that the labor organization, having created her seniority rights by an earlier agreement, "could not subsequently enter into another agreement whereby such rights were altered or ceased to exist." A judgment of no cause of action was affirmed. The State Supreme Court said: "The seniority rights acquired by her did not arise by virtue of her contract of employment with her employer, but existed by reason of the agreement of 1921 between the railway and the brotherhood. *Ryan v. [New York Cent.] Railroad Co.*, 267 Mich. 202, 255 N.W. 365. This agreement was executed for the benefit of all the members of the brotherhood and not for the individual benefit of plaintiff. When, by reason of changed economic circumstances, it became apparent that the earlier agreement should be modified in the general interest of all members of the brotherhood it was within the power of the latter to do so, notwithstanding the result thereof to plaintiff. The brotherhood had the power by agreement with the railway to create the seniority rights of plaintiff, and it likewise by the same method had the power to modify or destroy these rights in the interest of all the members." Compare *Coley et al. v. Atlantic Coastline, etc.*, 221 N.C. 66, 19 S.E.2d 124.

Appellant places much dependence upon

322. That case is quite distinguishable, in that, there, no attempt was made, as here, to modify a collective bargaining agreement affecting employees generally. The court merely protected the seniority right of a railway conductor to a desirable run established by contract between the company and the employees' union in which the conductor held membership. The opinion stated: "The action taken by the company at the instance of the Order of Railroad Conductors merely affects this run and the assignment of conductors thereon, and does not appear to have been considered either by the company or the Order of Railroad Conductors as being a general change or modification of the contract."

Steele v. Louisville & N. R. Co., 323 U.S. 192, 65 S.Ct. 226, cited by appellant, does not support his position; for, there, the right asserted by the petitioner to a remedy for breach of the statutory duty of the bargaining representative to represent and act for the members of a craft, without discrimination because of race, rested upon the Federal Constitution and a statute of the United States.

The judgment of the district court is affirmed.



McCURRACH et al. v. CHENEY BROS.
No. 20.

Circuit Court of Appeals, Second Circuit.
Nov. 19, 1945.

1. Patents ⇨ 328

Patent No. 2,178,893, relating to four-in-hand neckties, held invalid for lack of invention over prior art.

2. Patents ⇨ 127

Where plaintiff's patent was held invalid for want of invention, his cause of action for interference was required to be dismissed upon the merits.

3. Action ⇨ 6

Where defendant at trial expressly disclaimed any claim that plaintiff had infringed its patent, declaratory judgment as

Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

FILED SEP 28 1983

GARLAND LANSAW

Plaintiff

v.

THE GOODYEAR TIRE & RUBBER COMPANY

Defendant

:
:
:
:
:
:
:
:

Civil Action 80-224
(Unthank, J.)

PLAINTIFF'S RESPONSE TO DEFENDANT'S
PRETRIAL MEMORANDUM

Defendant's statement of proposed stipulated facts submitted with defendant's pretrial memorandum contains certain mischaracterizations and misstatements of facts which plaintiff wishes to bring to the Court's attention. Plaintiff's responses to defendant's proposed stipulated facts is set forth below by reference to the same paragraph numbers used by defendant in its pretrial memorandum.

1. Defendant contends that it operated no service stores in Breathitt and Perry Counties and that its service store derived little or no revenues from sales to customers in Breathitt or Perry Counties. The issue in this action is not the percentage of defendant's sales which were made in this area but what percentage of all sales in this area are attributable to defendant. A monopolist's control of a geographic area may represent only a small percentage of the monopolist's business, yet that fact alone does not negate the existence of a monopoly in that particular geographic area. Furthermore, defendant's conclusory statement that it derived little or no revenue from sales to customers in Breathitt and Perry Counties indicates that defendant does have statistics available to summarize its sales contrary to defendant's prior representations to plaintiff during the discovery process.

3. Defendant admits that it was involved with certain oil companies in the marketing of its products. Defendant states that these companies "may have resold Goodyear tires to retailers of tires located in Breathitt and Perry Counties." Defendant well knows to whom the oil companies resold tires because defendant and not the oil companies delivered the tires to the retailer of defendant's products. Defendant has produced some reports to this effect which bear defendant's code identification B-138. For defendant to maintain it is ignorant of the extent of the sales of its products to retailers in Breathitt and Perry Counties through the oil companies is simply a gross mischaracterization of evidence already of record in this action. Defendant also claims it has no control over the arrangements between the oil companies and the retailers. Defendant's former district manager, George Stewart, testified on August 25, 1983 that Sunmark Industries, Inc. is obliged to pass on certain discounts to Breathitt County Tire Service, Incorporated, effectively plaintiff's successor in the sale of coal hauling tires in Jackson, Kentucky. The extent to which defendant controls the arrangements between the oil companies and retailers of defendant's products is yet to be fully investigated pending the completion of plaintiff's oft-frustrated deposition of Breathitt Tire and its deposition of Sunmark now in progress.

4. Defendant claims that it made exceptions to its regular prices through the use of AN numbers in order to meet a competitor's price to defendant's customers. The evidence produced by defendant in this action indicates that defendant issued an AN number to plaintiff effective during the second half of the year 1975 when plaintiff first became an authorized dealer of defendant. No competitive situation has been suggested by defendant to justify the issuance of that AN number. Furthermore, as set forth in the affidavit of Jerry Pickett,

submitted with plaintiff's pretrial statement, the AN number system was utilized merely as a channel for price cutting by defendant and not to meet any specific competition.

6. Defendant summarizes the written agreement between it and plaintiff without reference to paragraph 4 of that agreement by which defendant guaranteed price protection to plaintiff. Defendant has thus omitted reference to the key provision which sets forth the grounds upon which plaintiff's claim of breach rests. Defendant also summarizes the authorized dealer agreement as containing a provision which gave defendant discretion as to whether to supply plaintiff with tires in cases of shortages. In his August 25 deposition, Mr. Stewart was unable to articulate any rules or procedures regarding defendant's allocation of coal hauling tires. In addition, as plaintiff has pointed out in his pretrial memorandum, certain large customers of defendant were favored over plaintiff in the allocation. Charles Roberts, defendant's territorial sales manager, instructed plaintiff not to even attempt to back order tires from defendant.

7. Defendant astutely claims plaintiff was "eligible for identical discounts on equal tires". As plaintiff has pointed out in his pretrial memorandum, that eligibility may have existed on paper but did not exist in reality due to defendant's failure to advise plaintiff of his eligibility. Mr. Stewart, in his August 25 deposition, stated that he offered plaintiff a 7-1.2% discount on certain tires regardless of whether plaintiff met the required purchases in the minimum amount of \$175,000. This testimony demonstrates that defendant's pricing policies were ad hoc and not in accordance with any published price list. Furthermore, Stewart in that deposition testified that plaintiff would be obliged to purchase tires at the Goodyear truck tire center and in cash in order to obtain the 7-1/2%

discount. Stewart admitted that purchasing through this channel would preclude plaintiff from obtaining the rubber bonus. Mr. Stewart states at page 103 of his deposition that plaintiff could not be buying cheaper in 1978, yet Stewart's 7-1/2% solution to plaintiff 's complaints did not even include coal hauling tires, the product at issue in this action.

8. Defendant contends that on July 16, 1975 Mr. Stewart informed plaintiff of all available discounts. At page 92 of his deposition, Mr. Stewart explicitly stated he did not recall so advising plaintiff nor is there any evidence in the record that plaintiff at any time was provided with a copy of the confidential dealer discount card, apparently defendant's only published description of its complicated discount schedules. At pages 188-194 of his deposition, Mr. Stewart stated that defendant made policy exceptions to pricing for a variety of reasons using prefixes such as "A, X, Z, Y, N, P, and E". No evidence is set forth in the record as to what these exceptions were or that they were made known to plaintiff.

10. Defendant's protestations that plaintiff was adjusting more tires than he was purchasing from defendant simply supports plaintiff's contention that he was "set up" as a dealer to accommodate Goodyear's favored customer Brad Ragan, Inc. Mr. Stewart testified that plaintiff's credit limits was never sufficient for plaintiff to engage in the selling of coal hauling tires despite the fact that sale of this product was the acknowledged inducement for plaintiff to locate his business in Jackson and to become defendant's dealer.

11. Defendant contends that its pricing variations were warranted to meet the price of competitors or to allow for lower costs to defendant. Defendant having

admitted a violation of the Robinson Patman Act cannot defend by simply repeating the statutory defenses without supporting facts.

13. Defendant claims it did not sell truck tires to Bettis Oil Company during the time it was selling tires to plaintiff. Mr. Stewart at page 90 of his August deposition admitted that Bettis was selling truck tires in Breathitt County. The mechanics of the acquisition by Bettis of defendant's product may be shrouded in the mystery of its "oil company - purchase resale" program, but the fact remains defendant through Stewart knew full and well that Bettis was distributing in competition with plaintiff.

14. Defendant claims Homer Johnson never sold truck tires in competition with plaintiff. In his deposition, Mr. Johnson listed numerous coal hauling truckers from Breathitt County that he supplied with tires through the Texaco arrangement put together by defendant. Whether it was actually Johnson or defendant that sold the tires is a contested issue of fact. It cannot be denied, however, that the effect of that arrangement was to rob plaintiff of customers and potential customers.

20. In his August 25 deposition Mr. Stewart testified at pages 5-18 to the effect that Jackson and Breathitt Counties were a territory and a market recognized by defendant and that defendant made calculations to analyze its sales in that specific market.

22. Mr. Stewart states at pages 107-108 of his August 25 deposition that defendant did not need to discount its coal hauling tires to sell them. There could be no better evidence of the absence of competition. Notwithstanding this fact, Mr. Stewart testified at pages 137-138 that defendant made a general price reduction on its coal hauling tires in January 1977. Plaintiff's contention that there was keen competition in the relevant geographic area was solely with respect to the distributors of defendant's product for a portion of the relevant

time period and not to the portion of the market those tires occupied.

23. Mr. Stewart testified in August at pages 142-144 of his deposition that Sunmark must pass defendant's rubber bonus through to Breathitt Tire. The testimony to date indicates Sunmark has no freedom in the pricing of defendant's products to Breathitt Tire. In light of this evidence defendant can hardly contend it has not contracted or combined with other entities to restrain trade in the sale of coal hauling tires. Furthermore, the evidence is that defendant extended credit to plaintiff in an amount sufficient only for plaintiff to enter the tire business. That fact further supports plaintiff's contention that defendant chose to market its coal hauling tires through its company or Brad Ragan, Inc. in order to control distribution in the geographic market.

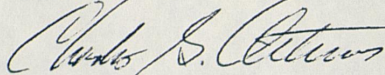
24. At pages 238-239 of his August 25 deposition Mr. Stewart has admitted that Brad Ragan, Inc. is the largest volume dealer of defendant's product in the geographic area. There is more to the relationship between defendant and Brad Ragan according to Mr. Stewart. For example, Mr. Stewart stated defendant knew the prices at which plaintiff was purchasing from Brad Ragan because defendant's salesmen had access to Ragan's records. A credible explanation of this relationship is that defendant was simply choosing to favor Ragan over Lansaw. This favoritism was shown, for example, by Mr. Roberts' direction to plaintiff that he make all coal hauling tire purchases from Ragan rather than directly from defendant.

33. Plaintiff disputes the amount stated by defendant as due by him to certain of his former suppliers. If the Court determines these alleged debts are in any way relevant to the trial of this action, plaintiff intends to call witnesses from plaintiff's alleged creditors to testify that the amounts listed

by defendant are incorrect and that plaintiff was in all respects a good customer and a good businessman insofar as those creditors are concerned.

Respectfully submitted,

STRAUSS, TROY AND RUEHLMANN CO., L.P.A.

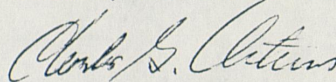


Charles G. Atkins
Trial Attorney for Plaintiff
2100 Central Trust Center
Cincinnati, Ohio 45202
(513) 621-2121

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Plaintiff's Response To Defendant's Pretrial Memorandum was served by hand on Marshall Cox and Laurence A. Silverman, Cahill, Gordon & Reindel, 80 Pine Street, New York, New York 10005 and Charles J. Lisle, Stites & Harbison, 101 East Vine Street, Lexington, Kentucky 40507, attorneys for The Goodyear Tire & Rubber Company on the 27th day of September, 1983.

STRAUSS, TROY AND RUEHLMANN CO., L.P.A.



Charles G. Atkins

Good year sold to
injured Competitors of Seller - Primary Line
injured Competitors of former Customers - Secondary Line
Customers of Seller's
Customers of Customers - 3rd Line

Price discrimination is only
prohibited that has an injurious effect
on Competition.

(1) Substantial lessening of
Competition

(2) tendency to create a monopoly
(3)

(a) injury to Competition w/ ^{the} person
(b) prevention of Competition w/ ^{the} person
(c) destruction of Competition w/ ^{the} person

~~Cost~~ reasonable possibility or
probability of injury

Morton Salt
334 U.S. 37

Injury is established prima
facie by substantial price discrimination
over time.

On standing and damaged

① must prove more than a violation

(1)

- ① Two sales by same seller
 - ② different prices
 - ③ Commodities of like grade and quality
 - ④ One sale being in ICC
 - ⑤ Effect on Competition
 - ⑥ Injury to TT.
- ~~511~~ 511 F² 668

① Bruce Juice
330 U.S. 743
408 7^{2d} 793

② Hint Note
246 F² 368

③ Honey-well
191 F^{2d} 786

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

CIVIL ACTION NO. 80-224

GARLAND LANSAW,
d/b/a PADEN TIRE SERVICE,

PLAINTIFF,

VS.

ORDER

THE GOODYEAR TIRE
AND RUBBER COMPANY,

DEFENDANT.

* * * *

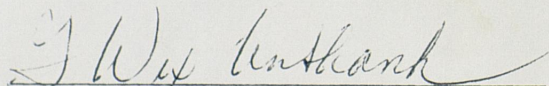
The record reflects that the defendant has filed a satisfaction and that the parties hereto have filed a stipulation of dismissal, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure.

The Court being so advised,

IT IS HEREBY ORDERED, as follows:

1. This action is DISMISSED and STRICKEN from the active docket of the Court.
2. Each party is to bear his or its respective costs.

This the 7th day of March, 1984.


G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

GARLAND LANSAW

Plaintiff

v.

THE GOODYEAR TIRE AND RUBBER
COMPANY

Defendant

:
:
: Civil Action 80-224
: Judge Unthank
:
:
: MEMORANDUM IN SUPPORT OF
: PLAINTIFF'S MOTION FOR CONTINUANCE
:
:
:
:

Plaintiff moves the Court for an order continuing the trial of this action now scheduled to commence April 11, 1983. Plaintiff requests the Court to continue the trial for six to eight weeks and to schedule the trial to commence and take place in June, 1983 or as soon thereafter as is convenient for this Court.

This is a jury trial. Plaintiff believes he will be able to present his case within three days following the selection of the jury.

The case will be tried on behalf of plaintiff by the undersigned, Charles G. Atkins, of the firm of Strauss, Troy and Ruehlmann Co., L.P.A. The undersigned has supervised the preparation of plaintiff's case from its inception and is the primary partner in the firm experienced in the trial of antitrust claims.

A continuance is necessary for plaintiff because it has recently become apparent that the undersigned will not be able to participate in the trial as now scheduled to begin on April 11, 1983 because he is required to try two other cases during that period of time. The first case is pending in the Court of Common Pleas, Rohlfs v. Belwood Golf Club, Inc., et al. There has been a final pretrial conference but the matter was continued once before at the request of the opposing party. The Court has assured the undersigned that the case will proceed to trial on April 4 and the expert witnesses, all of whom are from outside the Cincinnati

area as well as the three defense counsel have assured the Court that there will be no further continuances and the case will proceed at that time. The aforesaid case begins April 4 and will continue for one week to ten days before a jury.

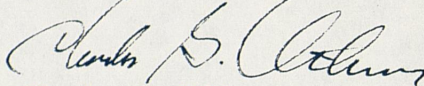
Following that the undersigned is counsel in the case of E. J. Marvin Company v. The City of Cincinnati, et al., which has been consolidated with a similar case, Painter v. The City of Cincinnati. These cases were originally scheduled for trial on October 15, 1982 and all parties were prepared to proceed at that time when on the day of trial the Court was unable to proceed because of a pendency of a jury matter then before it. The Court therefore rescheduled the consolidated cases for trial beginning April 18. The matter involves a lead plaintiff's counsel for each case and the undersigned is one of said counsel. There are four defense counsel for the various defendants. The Court has specifically reserved this time as have all the defendants and the plaintiffs and the witnesses. The cause of action arose in 1973 and the undersigned tried the federal claims to a successful conclusion before a jury in 1976. It was with the Court's strict admonition in October of 1982 that the new trial begin April 18, 1983. It has taken almost five years to bring the non-federal matters to the point of trial and any further delay because of the great length of time already passed would severely prejudice the plaintiffs.

The undersigned is mindful that this Court's docket is as important as the dockets of the two courts which have been above mentioned. However, because the aforesaid cases have been pending an inordinate length of time and all parties are not only required but anxious to proceed to trial we respectfully request that it is beyond the capabilities of the undersigned to prepare to proceed

before this honorable Court simultaneously with these earlier scheduled cases. We therefore respectfully request the Court to grant relief and to continue the case until sometime in the month of June, 1983 or such subsequent date as this Court may determine is convenient for its calendar. If the Court is inclined to grant this motion we would respectfully declare that there are only two cases now which the undersigned has firmly scheduled for trial in 1983 after the month of May: Senex v. Brown, United States District Court, Eastern District of Kentucky before the Honorable Henry R. Wilhoit (September 7, 1983); and Rosenberg v. University of Cincinnati, United States District Court, Southern District of Ohio, Western Division, before the Honorable Walter R. Rice (November 28, 1983). The Courts in both cases have permitted two and one half weeks for trial.

Respectfully submitted,

STRAUSS, TROY AND RUEHLMANN CO., L.P.A.

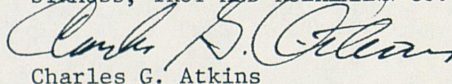


Charles G. Atkins
Trial Attorney for Plaintiff Garland Lansaw
2100 Central Trust Center
Cincinnati, Ohio 45202
(513) 621-2121

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Plaintiff's Motion for Continuance and Memorandum In Support Of Plaintiff's Motion For Continuance was served on Laurence A. Silverman, Esq., Cahill, Gordon & Reindel, 80 Pine Street, New York, New York 10005, and on Rufus Lisle, Esq., Stites & Harbison, Fourth Floor, Bank of Lexington Building, 101 East Vine Street, Lexington, Kentucky 40507 by ordinary United States Mail, postage prepaid, this 18th day of January, 1983.

STRAUSS, TROY AND RUEHLMANN CO., L.P.A.



Charles G. Atkins

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 80-224

GARLAND LANSAW D/B/A
PADEN TIRE SERVICE

PLAINTIFF

V.

O R D E R

THE GOODYEAR TIRE AND RUBBER COMPANY

DEFENDANT

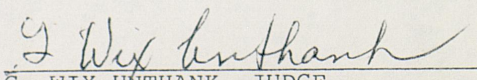
* * * * *

The defendant has moved, pursuant to 28 U.S.C. §1404(a), for transfer of this action to the Lexington division of this court. The defendant cites convenience to witnesses and parties, air service, location of documentation, and other factors favoring the requested transfer.

The plaintiff has objected to the transfer, and has countered the factors relied upon by defendant. Specifically, the plaintiff states that former customers and competitors reside in the area of the Pikeville division, that this is the area in which the claim arose, and points out alternative means of transportation into the area.

The Court recognizes the validity of each party's statements as they pertain to each respectively. However, in light of Gulf Oil v. Gilbert, 330 U.S. 501 (1947), the court cannot find that the balance of factors is strongly in favor of transfer. At best, there is a mutual accommodation between the two divisions. Such is not sufficient to compel transfer. Furthermore, no evidence of intentional hardship can be shown by the plaintiff's choice of the Pikeville division. Accordingly, IT IS ORDERED that the defendant's motion to transfer is DENIED.

This the 11th day of March, 1981.


G. WIX UNTHANK, JUDGE

Judge's copy

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY

PIKEVILLE DIVISION

FILED MAR 06 1984

GARLAND LANSAW,
d/b/a PADEN TIRE SERVICE,

Plaintiff,

-against-

THE GOODYEAR TIRE & RUBBER
COMPANY,

Defendant.

Civil Action No. 80-224
(Unthank, J.)

STIPULATION OF DISMISSAL

Plaintiff GARLAND LANSAW and defendant THE GOODYEAR TIRE & RUBBER COMPANY, by their respective attorneys, hereby stipulate pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure that this action and each of the claims and counterclaims asserted in the action by either of the parties against the other be finally dismissed with prejudice, each party to bear his or its own costs.

Dated: March 6, 1984.
~~February~~

STRAUS, TROY & RUEHLMANN CO., L.P.A.

By:

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Charles G. Atkins
2100 Central Trust Center
Cincinnati, Ohio 45202
(513) 621-2120

Attorneys for Plaintiff
GARLAND LANSAW

STITES & HARBISON

By:

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Charles J. Lisle
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Attorneys for Defendant
THE GOODYEAR TIRE & RUBBER COMPANY

3-7-84

STITES & HARBISON

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S. LLOYD CARDWELL

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(1897-1975)
CLINTON M. HARBISON
(1886-1980)
HENRY E. McELWAIN, JR.
(1891-1966)
BEN L. KESSINGER
(1896-1958)

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200 McCLURE BUILDING
FRANKFORT, KENTUCKY 40601
(502) 223-3477

March 6, 1984

Hon. G. Wix Unthank
United States District Court
P. O. Box 278
Pikeville, Kentucky 41501

RE: Garland Lansaw v. The Goodyear Tire and Rubber Company
Civil Action No. 80-224
Our File No: 14040

Dear Judge Unthank:

Enclosed are copies of a Stipulation of Dismissal and a Satisfaction of Judgment, which we are filing today with the clerk in Lexington. I believe you'll find these to be fairly standard settlement papers, but please let me know if you have any questions.

With best regards.

Yours very truly,

STITES & HARBISON

By Charles J. Lisle
Charles J. Lisle

CJL/mh

Enclosure

STRAUSS, TROY AND RUEHLMANN CO., L.P.A.
ATTORNEYS AND COUNSELORS AT LAW

2100 CENTRAL TRUST CENTER
201 EAST FIFTH STREET
CINCINNATI, OHIO 45202

TELEPHONE (513) 621-2120

TELEX: 214240

CABLE: STARCO

October 19, 1983

KENNETH D. TROY
EUGENE P. RUEHLMANN
SAMUEL M. ALLEN
MARK H. BERLIANT
DOUGLAS G. COLE
CHARLES G. ATKINS
WILLIAM V. STRAUSS
RICHARD D. HEISER
MITCHELL B. GOLDBERG
ERNEST A. EYNON, II
LARRY A. NEUMAN
C. FRANCIS BARRETT
ALAN C. ROSSER
THOMAS C. RINK
H. PATRICK WEBER
WILLIAM R. JACOBS

MICHAEL R. OESTREICHER
RICHARD BOYDSTON
EDWARD M. FRANKEL
JAMES G. HELDMAN
CHARLES J. POSTOW
CHARLES C. BISSINGER, JR.
M. MICHELE FLEMING
ANN W. GERWIN
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LARRY A. TEMIN
JEFFREY D. TROY
DAVID A. GROENKE
GREGORY A. RUEHLMANN
ANDREW M. SHOTT
ELIZABETH A. MCCORD
DOUGLAS E. DUCKETT

Hon. G. Wix Unthank, Judge
United States District Court
Eastern District of Kentucky
Federal Building - P.O. Box 278
Pikeville, Kentucky 41501

Re: Garland Lansaw v. The Goodyear Tire & Rubber Company
Civil Action No. 80-224

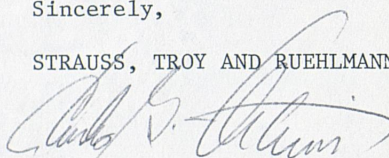
Dear Judge Unthank:

With reference to paragraphs 1 and 2 of the Court's Order dated September 28, 1983, I enclose a copy of our letter dated October 19, 1983 to A. Dale Bryant, counsel for Breathitt County Tire Service, Incorporated which sets forth our understanding of the agreement between plaintiff and his client regarding production of certain documents and or information and the proposed Agreed Order further reflecting that agreement.

Although we do not anticipate that the Agreed Order will be filed before October 24, we respectfully submit that it is no longer necessary to convene the hearing or require Dr. Gallo's attendance to testify on that date and have so informed Mr. Bryant and defendant's counsel.

Sincerely,

STRAUSS, TROY AND RUEHLMANN CO., L.P.A.



Charles G. Atkins

CGA/ame
Enclosures

cc: Marshall Cox, Esq.
Laurence A. Silverman, Esq.
Charles J. Lisle, Esq.

STRAUSS, TROY AND RUEHLMANN CO., L.P.A.
ATTORNEYS AND COUNSELORS AT LAW

2100 CENTRAL TRUST CENTER
201 EAST FIFTH STREET
CINCINNATI, OHIO 45202

TELEPHONE (513) 621-2120

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October 19, 1983

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CHARLES G. ATKINS
WILLIAM V. STRAUSS
RICHARD D. HEISER
MITCHELL B. GOLDBERG
ERNEST A. EYNON, II
LARRY A. NEUMAN
C. FRANCIS BARRETT
ALAN C. ROSSER
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H. PATRICK WEBER
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MICHAEL R. OESTREICHER
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EDWARD M. FRANKEL
JAMES G. HELDMAN
CHARLES J. POSTOW
CHARLES C. BISSINGER, JR.
M. MICHELE FLEMING
ANN W. GERWIN
PAUL B. CALICO
LARRY A. TEMIN
JEFFREY D. TROY
DAVID A. GROENKE
GREGORY A. RUEHLMANN
ANDREW M. SHOTT
ELIZABETH A. MCCORD
DOUGLAS E. DUCKETT

A. Dale Bryant, Esq.
Citizens Bank Building
Jackson, Kentucky 41339

Re: Garland Lansaw v. The Goodyear Tire & Rubber Company
Civil Action No. 80-224

Dear Mr. Bryant:

This letter is to confirm the agreement we reached on behalf of our respective clients by telephone conversation on October 18, 1983. I enclose the original of an Agreed Order which at numbered paragraphs 1, 2 and 3 sets forth the terms of that agreement. Although we did not set a deadline by which the information would be produced, I suggest December 2, 1983 and have therefore incorporated that in the enclosed Agreed Order. In response to my request for summaries or statements of gross profits, net profits and/or gross markup on products, you stated you were unaware whether such documents existed, but that you would undertake to inquire about this. If in fact such documents are available, it is my understanding that your client will produce them for plaintiff's copying. I have not therefore, felt it necessary to include these documents as a provision in the proposed Agreed Order.

Because of our agreement, I have advised the court by telephone and letter that in plaintiff's opinion the hearing set for October 24, 1983 is no longer necessary.

If the foregoing accurately reflects your understanding of our agreement, please sign the enclosed Agreed Order and return it to me for filing with the Court. If the above does not reflect your understanding, please contact me immediately so that we can attempt to make other arrangements.

A. Dale Bryant, Esq.
October 19, 1983
Page Two

Thank you for your courtesy and cooperation in attempting to resolve this matter.

Sincerely,

STRAUSS, TROY AND RUEHLMANN CO., L.P.A.

Gregory A. Ruehlmann by Richard Bugdator
Gregory A. Ruehlmann

GAR/ame
Enclosure

cc: ✓ Hon. G. Wix Unthank
Marshall Cox, Esq.
Laurence A. Silverman, Esq.
Charles J. Lisle, Esq.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT PIKEVILLE

GARLAND LANSAW,

Plaintiff

v.

THE GOODYEAR TIRE & RUBBER COMPANY,

Defendant

Civil Action No. 80-224
(Judge Unthank)

AGREED ORDER

The Court, by order dated September 28, 1983, having continued under advisement plaintiff's Motion to Compel Compliance by Breathitt County Tire Service, Incorporated ("Breathitt Tire"), and having tentatively scheduled the testimony of plaintiff's expert witness, Joseph C. Gallo, for Monday, October 24, 1983, at 10:00 A.M. at the United States District Court House, Pikeville, Kentucky, for the purpose of resolving the dispute between plaintiff and Breathitt Tire; and the Court having been advised that plaintiff and Breathitt Tire have reached an agreement as to production of the information sought by plaintiff from Breathitt Tire, the Court hereby orders the production of the following information:

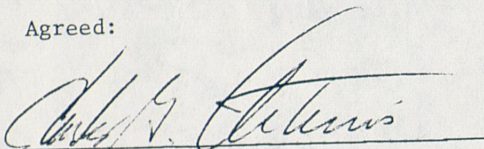
(1) Breathitt Tire shall provide to plaintiff by December 2, 1983 a written statement of all coal hauling tires sold by Breathitt Tire during the period from July, 1978 to December, 1982, inclusive, which clearly sets forth both the date on which each tire was sold and the price at which the tire was sold. For the purposes of this Agreed Order the term coal hauling tire shall mean all hard rock lug and extra duty rib tires manufactured and or distributed by The Goodyear Tire and Rubber Company of the sizes 1100x22 and 1100x24.

(2) Breathitt Tire shall provide to plaintiff by December 2, 1983 copies of all adding machine tapes in the possession of Breathitt Tire which set forth the daily gross receipts or revenue of Breathitt Tire, more specifically identified in the subpoenas previously served upon Breathitt Tire in this action and shall also include all other comparable tires manufactured and or distributed by entities other than The Goodyear Tire and Rubber Company including, by way of example, The General Tire Company.

(3). Plaintiff shall pay Breathitt Tire the sum of \$15.00 for each hour of time expended by Breathitt Tire in providing plaintiff with the information and documents set forth in numbered paragraphs 1 and 2 above.

G. Wix Unthank, Judge

Agreed:


Charles G. Atkins
Counsel for Plaintiff
Strauss, Troy and Ruehlmann Co., L.P.A.
2100 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202
(513) 621-2121
Date: October 19, 1983

A. Dale Bryant
Counsel for Breathitt County Tire
Service, Inc.
Citizens Bank Building
Jackson, Kentucky 41339
Date: _____

ASSIGNED FOR PRELIMINARY CONFERENCE AT PIKEVILLE, KENTUCKY

ON SEPTEMBER 27, 1983 AT 11:00 A.M.

DIST.	OFF.	YE.	DOCKET NUMBER	FILING DATE MO DAY YEAR	J	N/S	D	D FILED	R 23	\$ DEMAND	JUDGE/ MAG. NO.	COUNTY	JURY DEM.	DOCKET YE. NUMBER
643	7	83	101	3 16 83	4	370	2			Nearest \$1,000 9,999	J 4308 M	88888	P	83 101

PLAINTIFFS

ELSTER CHILDERS

DEFENDANTS

R. S. MILLER;
C. E. RYAN;
TRANSCONTINENTAL INTERNATIONAL, INC.

CAUSE

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE
IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

28 USC 1332 & 18:U.S.C.(1961-1968)Title (10) of the Organized Crime Control Act
of 1970- alleged breach of contract made with deception by intent. BE

ATTORNEYS

STEPHEN K. FRAZIER
232 SECOND STREET-
P. O. BOX 907
PAINTSVILLE, KENTUCKY 41240

(606)789-8251

PAUL D. DEATON
P. O. BOX 448
PAINTSVILLE, KY. 41240
(606)789-1200

DATE	NR.	ELSTER CHILDERS VS: PROCEEDINGS R. S. MILLER, et. al. 83-101
3/16	1	PETITION FOR REMOVAL of deft, R. S. Miller, C. E. RYAN, & TRANSCONTINENTAL INTER'L, INC. w/ cert. copies of pleadings from Circuit Court of Johnson County
	2	BOND FOR REMOVAL w/ R. S. Miller as principal and Flat Top Insurance Co. as surety
	3	NOTICE OF REMOVAL(COPY) to Johnson Circuit Court
4/4	4	BOND FOR REMOVAL, w/R.S. Miller as principal and Travelers Indemnity Company, as surety. Rf. #2 (The first bond was incorrect in that it had the wrong power of atty attach.).
7/19	5	ORDER:(GWU) Prelim. Conf. set for 9/27/83 at 11:00 A.M.; On or bef. 9/13/83 parties fil prelim. trial memo as set forth in std. order fil 9/22/80 a copy is attach. Copies as noted.
9/13	6	PRELIMINARY CONFERENCE MEMORANDUM, of plff
	7	MOTION, of plff to remand case to Johnson Circuit Court
9/14	8	MOTION of counsel for deft to w/draw as counsel of record
	9	PRELIMIANRY CONFERENCE MEMORANDUM, of deft.

relevant
Computer

5th Amendment -
What is Civil Liberties -
Rule 501 - State Law
Trade Secrets - Right of privacy

Your business records are relevant for
my expert to use as a yard stick
in determining damages &
suffered in my law suit.

- (1) ~~the~~ ^{relative} businesses involved the
same ^{relative} products -
- (2) ~~the~~ ^{relative} business involves the
same ^{relative} market
- (3) ~~the~~ ^{relative} business involve the
same ^{relative} time period

2 pay expense
Under conditions as would respect the
right of privacy -

ASSIGNED FOR STATUS CONFERENCE

AT PIKEVILLE

JUDGE UNTHANK

DATE SEPTEMBER 2, 1983

AT 11:00 A.M.

DIST.	OFF.	DOCKET YR. NUMBER	FILING DATE MO DAY YEAR	J	N/S	O	D PTF DEF	R 23	S DEMAND	JUDGE/ MAG. NO.	COUNTY	JURY DEM.	DOCKET YR. NUMBER
0643	7	80 188	10 17 80	3	440	1			Nearest \$1,000 9999	J 4308 M	21195	P	80 188

PLAINTIFFS

WILLIAM S. FIELDS, Administrator
of Estate of Sammy Ray Fields

PAUL PATTON

LOUISE VARNEY

PAUL CHANEY

KEN DAMRON

DEFENDANTS

MORRIS STRATTON - per Order 4/15/82
~~SID PHILLIPS~~, Ind. & in official
capacity as Pike County Jailor;
OTHER UNKNOWN DEPUTY JAILORS;
PIKE COUNTY FISCAL COURT;

~~WARNE T. RUTHERFORD~~, Ind. & in
official capacity as Pike County
Judge Executive; Per Order 4/15/82

~~BO-DAD VARNEY~~, Ind. & official
Order 4/15/82 capacities as Pike County Magistra
WADE JUSTICE, Ind. & in official
capacities as Pike County Magistra

LEE ROBERTS, Ind. & in official
Order 4/15/82 capacities as Pike County Magistra
and;

TAYLOR DOC JUSTICE, Ind. & in
Order 4/15/82 official capacities as Pike County
Magistrate

CAUSE

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE
IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

42 U.S.C. 1983: Deprivation of Civil Rights.

CBS

ATTORNEYS

William C. Hambley
John Mann

Michael C. Davis
ARDF of KY, Inc.
410 Third St.
Pikeville, KY 41501
606-432-2181

Henry D. Stratton
P. O. Drawer 851
Pikeville, KY 41501
(atty for Pike Fiscal Court, Wayne
T. Rutherford, Bo-Dad Varney,
Wade Justice, Lee Roberts &
Taylor Doc Justice)

John J. Davis
Kelsey E. Friend Law Firm
Pikeville, KY 41501

6/30/83

#27

MOTION, of plff for jury trial & schedul of discv.

6 months

2 Feb

Breathitt County tree
Ducem ticket

→ Record of value
Good for tree
1/75 - to date

☒ 1/78 - to date
1/72 - to date
5 or 6 boxes

☒ 77-

Beel Business

meabow
Seal - Record
Section - Boggy

Statute of Limitations

Action filed 10 Dec 1980

4 yrs
10 Dec 1976

What tires if any were
sold after 12/10/83?

In July 75 AT becomes Authorized
Fordway Dealer in Jackson,
Kentucky.

July 77. Hurst Shopping Center

In 75-76 TT from
all sources 273,120.19 from Fordway
44,674.89

TT is ordered to respond
to A motion for summary
judgment setting for the
specific reasons and grounds
that A has failed to make a
sufficient showing for a summary judgment

108 motion for judgment
N.O.V.
motion for New Trial

111. motion to amend
judgment

motion to ~~amend~~ set
aside the award of lost
future profits and set-off
the remainder of damages suffered
by May Heled by Damages suffered
by Mitchell in effecting cover
through D.T. Massey Coal Co. Inc

TO: Judge
FROM: Donald
DATE: 9-26-83
RE: Garland Lansaw v. Goodyear Tire & Rubber Company

PTC, Tuesday, 9-27-83, at 1:00

Synopsis: This is the anti-trust suit where plff is alleging that Goodyear is trying to run him out of business. As you know, this is also the case where depositions were taken by Court order, and the parties wound up in Court during those depositions.

Pending Motions:

1. #161 - Plff's motion to compel Breathitt County Tire Service to comply with the Court's Order of 9-6-83, and for an Order awarding plff expenses.
2. #165 - Def.'s motion to supplement its witness list.

Comments:

1. The parties have filed their PTC memos.
2. This could be a real barn burner, if it ever gets to trial!

STRAUSS, TROY AND RUEHLMANN CO., L.P.A.
ATTORNEYS AND COUNSELORS AT LAW

2100 CENTRAL TRUST CENTER
201 EAST FIFTH STREET
CINCINNATI, OHIO 45202

TELEPHONE (513) 621-2120

TELEX: 214240

CABLE: STARCO

September 27, 1983

KENNETH D. TROY
EUGENE P. RUEHLMANN
SAMUEL M. ALLEN
MARK H. BERLIANT
DOUGLAS G. COLE
CHARLES G. ATKINS
WILLIAM V. STRAUSS
RICHARD D. HEISER
MITCHELL B. GOLDBERG
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ANDREW M. SHOTT
ELIZABETH A. MCCORD
DOUGLAS E. DUCKETT

Hon. G. Wix Unthank
Judge, United States District Court
U.S. Courthouse
Pikeville, Kentucky

Re: Garland Lansaw v. The Goodyear Tire & Rubber Company
Civil Action 80-224

Your Honor:

I hope the Court will accept my apologies for being unable to attend the pretrial conference today. I am presently engaged in trial regarding matters of trade secret and unfair competition which involves multiple complex aspects of certain mechanical devices. At the close of the evidence today, the best estimation is the trial will continue for an additional 8 to 10 days, if we are able to proceed at the pace with which the evidence was covered today.

I also extend my apologies for Mr. Boydston, who is unable to attend. Mr. Boydston's wife gave birth one month prematurely to a son this Saturday. His wife and child are doing well, but because of the premature birth those persons with whom he had contracted to watch the other children and also assist his wife are not presently available. Mr. Boydston has had to divide his time between the office and home and will have to do so for some days until other suitable arrangements can be made.

As a consequence, we have asked our colleague Mr. Ruehlmann to appear in our behalf. We have the utmost confidence in him, taking into account his experience at the bar and the fact that he has been vitally involved in certain aspects of the case but generally not in the totality of all matters before the Court.

We will do our very best to accommodate all parties in light of the above, but I would ask that I be given a reasonable opportunity to confer with Mr.

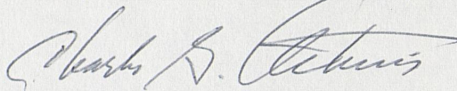
Page 2

Ruehlmann upon his return to the office after the pretrial so we can make some reasonable assessments concerning our present ability to follow the admonitions of the Court's earlier orders and how the present situations can be in some way melded with the requirements of our trial before your honor as it is presently scheduled.

Thank you for your courtesy and patience.

Respectfully,

STRAUSS, TROY AND RUEHLMANN CO., L.P.A.

A handwritten signature in cursive script, appearing to read "Charles G. Atkins".

Charles G. Atkins

mas



Frank R Roark
Assistant Chief Counsel

Sun Refining and
Marketing Company
Ten Penn Center
1801 Market Street
Philadelphia PA 19103-1699

September 21, 1983

VIA FEDERAL EXPRESS

Charles G. Atkins, Esquire
Strauss, Troy & Ruehlmann
2100 Central Trust Center
Cincinnati, Ohio 45202

Re: Lansaw v. The Goodyear Tire & Rubber Company
Subpoena to Sun Refining and Marketing Company

Dear Mr. Atkins:

The cost estimate to provide items 1 and 2 listed in my September 20 letter to you has been completed sooner than expected, and a copy is enclosed.

This morning, I witnessed a demonstration of the technique that will be employed to locate Breathitt invoices. Because I think it is appropriate for you to see such demonstration, as it will also give you the opportunity to see the type and detail of information which it will yield, I have asked Bill Tarrant, one of our records analysts, to make a brief presentation prior to the Chace deposition on September 26. This will take place at the court stenographer's office since the equipment is portable. Tarrant is referred to in the Guard affidavit attached to Sun's Rule 45 objections.

By this you will see actual invoices, though the ones shown may not necessarily be Breathitt invoices. These invoices show tires sold, the price for each, the total (extended price) and discounts. The equipment to be used in the demonstration will not produce hard copies, but merely shows what is on the microfilm. Additional equipment, which will not be at the demonstration, is required to make the copies that Sun has agreed to provide, subject to your payment of the cost estimate.

Very truly yours,

Frank R. Roark

FRR/tvl
Enclosure

cc: Rufus Lisle, Esquire (w/enclosure)
Stanley Shapiro, Esquire (w/enclosure)
W. J. Tarrant

ESTIMATED COST TO RETRIEVE COPIES
BREATHITT TBA INVOICES

Introduction

Based upon information provided by Charles B. Chace, this estimate is based upon the assumption that as many as 16,800 Breathitt Invoices relating to Goodyear will be located on microfiche and that 6,000 invoices will be located on paper. The costs involved will include part time labor at \$10.00 per hour and supervision by a Sun R&M Records Analyst (including benefits). The estimates of time required are based upon accepted industrial engineering tables. However, should the volume of Breathitt invoices vary from our base assumption, the costs will vary accordingly. In addition, the costs to rent microfilm readers and a reader/printer, as well as the cost to produce both prints from microfilm and photocopies is included.

Microfilm Labor Costs

Number of Microfiche (fiche) involved	5,000 fiche
Time to review one microfiche	.25 hours
Estimated number of prints/fiche	3.36 prints
Time to make 1 print	.017 hours
Total hours to review and produce prints	1,535.6 hours

Paper Labor Costs

Estimated time required to pull, review, copy appropriate invoices and return 175 boxes to their proper place	180 hours
---	-----------

Print/Copy Costs

Cost per print from microfiche	\$0.15
Cost per photocopy	\$0.05

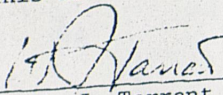
Equipment Cost

Rent microfilm equipment (3 month minimum)	
5 Readers at \$35 each/month	\$525.00
1 Reader/Printer at \$380/month	<u>1140.00</u>
	1665.00

Summary of Costs

Microfilm Labor Cost	\$15,000
7 part-time people for 5 1/2 weeks	
Paper Labor Cost	1,800
3 part-time people for 1 1/2 weeks	5,400
Supervision Cost (1 supervisor for 6 weeks)	2,520
Microfilm print cost	300
Photocopy Cost	<u>1,665</u>
Equipment Rental Cost	
Total Estimated Cost	\$26,685

This estimate prepared by:


W. J. Tarrant

September 21, 1983

W. J. Tarrant, Esquire (w/enclosure)
W. J. Tarrant



The most comfortable place...
under the Sun.®

Quality Inns

ROOM MAINTENANCE

Won't you please help us maintain our rooms in the best possible condition by reporting little things that are wrong and that may have been overlooked by the housekeeping or Maintenance Department?

Is there anything in the room that needs attention by our Maintenance Department or Housekeeper?

Room No. _____

Please leave at front desk for prompt action. Thank you for your time.

What overt act of the
D occurred w/c
the 5 statutory periods
Secondary Sense Injury

third line case

Fall City v. Vance

1035 Ct. 1202 (1983)

ASSIGNED FOR PRE-TRIAL CONF. AT PIKEVILLE JUDGE UNTHANK

DATE September 27, 1983 AT 1:00 P.M.
March 28, 1983 AT 10:00 A.M.

CIVIL ACTION NO. 80-224

GARLAND LANSAW d/b/a
PADEN TIRE SERVICE

Charles G. Atkins
Mitchell B. Goldberg
Henry D. Stratton
Richard Boydston

VS:

THE GOODYEAR TIRE &
RUBBER COMPANY

Marshall Cox
Nathan Elliott, Jr.
Patricia Ferren

Set for Jury Trial 10-11-83. 9:00 A.M.
Jury Demand. Plff -

PRE-TRIAL CONFERENCE

12/4/80	#1	COMPLAINT
1/16/81	#4	SUMMONS, w/Marshall's return executed on Joan Rogers 12/10/80
	#4a	ANSWER & COUNTERCLAIM 2/5/81
2/5/81	#8	REPLY of plff to counterclaim REPLY MEMORANDUM of debt in suppt of mot for reconsideration - TENDERED 3/27/81 (Mot. ruled on 3/27/81, OVERRULED but memo was not ordered to be filed)
5/7/81	#28	PRELIMINARY TRIAL MEMO of debt
7/16/81	#34	AMENDED COMPLAINT of plff w/jury demand
7/21/81	#38	ANSWER & COUNTERCLAIM of debt to amended complaint
9/2/81	#42	JOINT STATEMENT of ptys to Agreed & Disputed Facts & Tentative Witness List
9/8/81	#43	PRELIMINARY TRIAL MEMORANDUM of debt
2/1/82	#71	PRELIMINARY TRIAL MEMORANDUM of plff
4/7/82	#77	NOTICE OF MOTION, of debt, counter-claim plff, Goodyear Tire & Rubber Co. for Order purs. to FRCP 56 granting S/J to Goodyear on their counter- claim w/affidavit & exb A-C attached.
	#78	MEMORANDUM OF LAW, of debt, counter-claim plff, n/suppt of mot
4/19/82	#79	MEMORANDUM IN OPPOSITION, of plff to debt's mot for S/J on debt's countclaim (PASSED RF#80)
6/30/83	#136	MOTION, of debt for S/J w/exb. A-M attached)CLERK'S NOTE: Appendix for mot for S/J, placed n/separate envelope & marked as such) - TUA RF#139
9/16/83	#161	MOTION, of plff for order compelling compliance w/Order & for award of expenses w/MEMORANDUM
9/20/83	#162	PRE-TRIAL MEMORANDUM of debt, Goodyear Tire & Rubber
	#163	PRE-TRIAL MEMORANDUM of plff & WITNESS LIST
	#164	MEMORANDUM, of plff n/ opposition opposition to debt motion for S/J.

9/23/83 #165 MOTION, of deft, Goodyear Tire & Rubber Co.
for leave to to supplement witness list

9/26/83 #166 SUPPLEMENTAL MEMORANDUM, of plff n/suppt of plff's
mot for order compelling compliance w/order & fo
for award of expenses.

#167 REPLY MEMORANDUM, of deft n/suppt of mot for S/J.

DIST.	OFF.	DOCKET YR. NUMBER	FILING DATE			J	N/S	O	D		R 23	\$ DEMAND	JUDGE/ MAG. NO.	COUNTY	JURY DEM.	DOCKET	
			MO	DAY	YEAR				PTF	DEF						YR.	NUMBER
0643	71	80 224	12	04	80	4	190	1	1	3		Nearest \$1,000 9999	308	21025	P	80	224

PLAINTIFFS

GARLAND LANSAW d/b/a
PADEN TIRE SERVICE

DEFENDANTS

THE GOODYEAR TIRE & RUBBER COMPANY

COUNSEL FOR BREATHITT CO.
TIRE SERVICE, INC.

A. Dale Bryant
Citizen's Bank Bldg.
Jackson, KY 41339
606/666-7794

Filed Obj. & resp. to Notice
to take depo. REF#114

DEMAND FOR JURY

PLAINTIFF

DATE

12/04/80

CAUSE

(CITE THE U.S. CIVIL STATUTE UNDER WHICH
IS FILED AND WRITE A BRIEF STATEMENT OF

28 U.S.C. 1332. Tortious interference with contract rights and breach of
contract. CBS

ATTORNEYS

Charles G. Atkins
Mitchell B. Goldberg
Strauss, Troy & Ruehlmann Co., L.P.A.
2100 Central Trust Center
Cincinnati, OH 45202
(513) 621-2120

Henry D. Stratton
Stratton, May & Hays
P. O. Drawer 851
Pikeville, KY 41501

Charles G. Atkins)
Richard Bodyston) See Above

Marshall Cox
Cahill, Gordon & Reindell
80 Pine Street
New York, NY 10005

HARBISON, KESSINGER, LISLE &
BUSH
Nathan Elliott, Jr.
400 Bank of Lexington Bldg.
Lexington, KY 40507

Patricia Farren
Cahihl, Gordon & Reindel
80 Pine St.
New York, NY 10005
212/825-0100

FALCON COAL COMPANY
a non party - serv, w/a
depo spa. & fil mot
REF#129

JOHN R. RHORER, JR.
Wyatt, Tarrant & Combs
1100 Kincaid Towers
Lexington, KY 40507
606/233-2012

☐ CHECK
HERE
IF CASE WAS
FILED IN
FORMA
PAUPERIS

DA

C.D. NUMBER

STATISTICAL CARDS

CARD DATE MAILED
JS-5
JS-6

CAHILL GORDON & REINDEL

EIGHTY PINE STREET

NEW YORK, N. Y. 10005

FLOYD ABRAMS
ROGER ANDRUS
HENRY G. BISGAIER
CARL M. BORNHANN
WALTER C. CLIFF, P.C.
BENJAMIN J. COHEN
JOSEPH P. CONWAY
MARSHALL COX
THOMAS F. CURNIN
CHARLES F. DETMAR, JR.
W. LESLIE DUFFY
RAYMOND L. FALLS, JR.
PATRICIA FARREN
BART FRIEDMAN
CIRO A. GAMBONI
CHARLES A. GILMAN
MARVIN S. GOLDKLANG
STEPHEN A. GREENE
ROBERT M. HALLMAN
EDWARD A. HANSEN
WILLIAM E. HEGARTY
DAVID R. HYDE
THOMAS R. JONES
ALLEN S. JOSLYN
THOMAS J. KAVALER
IMMANUEL KOHN
WILLIAM T. LIFLAND
MICHAEL MACRIS

JONATHAN I. MARK
DENIS MCINERNEY, P.C.
GERARD M. MEISTRELL
RALPH C. MENAPACE, JR.
CLIFFORD L. MICHEL
JOHN P. MITCHELL
MATHIAS E. MONE
HUGH P. MORRISON, JR.^o
DONALD J. MULVIHILL
KENNETH W. ORCE
CHARLES PLATTO
ROY L. REGOZIN
DEAN RINGEL
IRWIN SCHNEIDERMAN, P.C.
H. RICHARD SCHUMACHER
LAURENCE T. SORKIN
LEONARD A. SPIVAK
GERALD S. TANENBAUM
DUDLEY B. TENNEY, P.C.
MICHAEL P. TIERNEY
ROBERT USADI
JOHN R. VAUGHAN
GEORGE WAILAND
RALPH O. WINGER
GARY W. WOLF
JOHN R. YOUNG
R. ANTHONY ZEIGER

JOHN J. STANTON, JR.
DAVID J. YERES
COUNSEL

FREDDY DRESSEN^{oo}
EUROPEAN COUNSEL

F. ARNOLD DAUM
JERROLD G. VAN CISE
JOEL C. BALSAM
OF COUNSEL

WASHINGTON, D. C. OFFICE
1990 K STREET, N. W.
WASHINGTON, D. C. 20006

EUROPEAN OFFICE
19 RUE FRANÇOIS IER
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August 1, 1983.

The Honorable G. Wix Unthank
United States District Judge
Eastern District of Kentucky
Federal Building
P.O. Box 278
Pikeville, Kentucky 41501

Re: Garland Lansaw, d/b/a Paden Tire
Service v. The Goodyear Tire &
Rubber Company (Civil Action No. 80-224)

Dear Judge Unthank:

On June 30, 1983 we served and filed on behalf of our client, defendant The Goodyear Tire & Rubber Company, a motion for summary judgment against plaintiff Garland Lansaw, together with a supporting affidavit with pertinent exhibits and a detailed memorandum of law. We believe that our motion for summary judgment is well grounded and should be dispositive of this action. It rests principally on plaintiff's own deposition testimony and documents and admissions of record.

To date plaintiff has neither responded to our motion nor applied for any extension of his time within which to respond despite the fact that this Court's rules

contemplate a response within 15 days after service. The trial of this action is scheduled to begin on October 11, 1983, and intensive pre-trial proceedings will take place in September.

In these circumstances, we believe it appropriate for the Court to proceed to decide our motion. As Fed. R. Civ. P. 56 (e) provides, in part:

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Little over a month ago the United States Court of Appeals for the 6th Circuit emphasized that summary judgment is and ought to be available in antitrust cases where, like here, a defendant demonstrates that on the undisputed facts it is entitled to judgment as a matter of law:

"It is a well established rule that motions for summary judgment are disfavored in antitrust litigation and that the standard for granting summary judgment is strict. See First National Bank of Arizona v. Cities Services Co. [1968 Trade Cases ¶ 72,458], 391 U.S. 253, 284-90, reh'g denied, 393 U.S. 901 (1968); Poller v. Columbia Broadcasting System, Inc. [1962 Trade Cases ¶70,228], 368 U.S. 464, 473 (1962), Smith v. Northern Michigan Hospitals, Inc. [1983-1 Trade Cases ¶65,289], 703 F.2d 942, 947 (6th Cir. 1983); Davis-Watkins Co. v. Service Merchandise [1982-2 Trade Cases ¶64,901], 686 F.2d 1190, 1197 (6th Cir. 1982); Taylor Drug Stores, Inc. v. Associated Dry Goods Corp. [1977-2 Trade Cases ¶61,579], 560 F.2d 211, 213 (6th Cir. 1977). However, this general rule does not preclude the use of summary judgment in appropriate anti-trust litigation. See First National Bank of Arizona, supra, 391 U.S. at 288-90; Smith, supra,

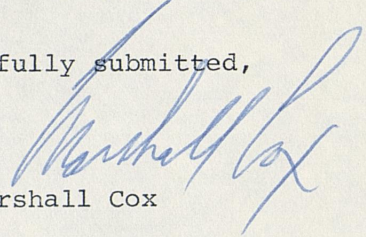
703 F.2d at 947-48; Davis-Watkins Co., supra, 686 F.2d at 1197; Lupia v. Stella D'Oro Biscuit Co., Inc. [1978-2 Trade Cases ¶62,343], 586 F.2d 1163, 1166-67 (7th Cir. 1978), cert. denied, 440 U.S. 982 (1979). See also Fed. R. Civ. P. 56 advisory committee note (1982) (summary judgment is 'applicable to all actions'). Indeed, the very purpose of a motion for summary judgment, to eliminate a trial where it would be unnecessary and merely result in delay and expense, warrants summary disposition of such cases when appropriate.

"In ruling on a motion for summary judgment, the evidence must be viewed in a light most favorable to the party opposing the motion. That party must be given the benefit of all reasonable inferences. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 158-59 (1970); United States v. Diebold, Inc. [1962 Trade Cases ¶70,322], 369 U.S. 654, 655 (1962); Davis-Watkins Co., supra, 686 F.2d at 1197. However, when a motion for summary judgment is made and supported, the opposing party may not rest on its pleadings, but must present sufficient evidence supporting its claims to demonstrate that there is a genuine issue of material fact. See Adickes, supra, 398 U.S. at 159 & n. 19; First National Bank of Arizona, supra, 391 U.S. at 288; Smith, supra, 703 F.2d at 947-48. See also Fed. R. Civ. P. 56 (e). If the record evidence is not disputed as to any material fact, the case should be decided as a matter of law rather than submitted to a jury. Davis-Watkins Co., supra, 686 F.2d at 1197; Smith v. Hudson, 600 F.2d 60, 64-65 (6th Cir.), cert. dismissed, 444 U.S. 986 (1979). Accordingly, 'the absence of any relevant probative evidence in support of a litigant's antitrust claims will expose such claims to summary judgment disposition.' Davis-Watkins Co., supra, 686 F.2d at 1197. See First National Bank of Arizona, supra, 391 U.S. at 290; Smith v. Northern Medical Hospitals, Inc., supra, 703 F.2d at 947-48." Bouldis v. U.S. Suzuki Motor Corp. CCH 1983-1 Trade Cas. ¶65,465 at 70,668-69 (6th Cir. June 27, 1983).

A copy of the Court's opinion is attached.

Plaintiff having failed to respond to defendant's motion for summary judgment, that motion is ripe for determination. For all the reasons set forth in our memorandum of law in support of the motion, summary judgment should be entered for defendant The Goodyear Tire & Rubber Company at this time.

Respectfully submitted,



Marshall Cox

Enclosure

cc: Henry D. Stratton, Esq.
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competitive conduct constitutes the actions of the state, in its sovereign capacity, it is unnecessary to determine whether the challenged conduct was authorized by the state legislature. Consequently, I find that defendant Department of Labor's conduct need not satisfy both prongs of the *Midcal*

Aluminum inquiry. Therefore, under the facts of this case, I find that the Michigan Department of Labor is exempt from suit under sections 1 and 2 of the Sherman Act. Accordingly, the action with respect to the Michigan Department of Labor is dismissed.

[¶ 65,465] *Pete Bouldis, et al. v. U. S. Suzuki Motor Corp., et al.*

U. S. Court of Appeals, Sixth Circuit. No. 82-3277. Decided and Filed June 27, 1983. Appeal from U. S. District Court, Northern District of Ohio.

Sherman and Clayton Acts

Price Discrimination—Motorcycle Dealership Financing Programs—Refusal to Allow Participation—Legitimate Business Reasons.—A motorcycle manufacturer's refusal to allow a dealership to participate in favorable credit financing did not constitute illegal price discrimination, because the decision was based upon legitimate business reasons. The dealer had a history of late payments for parts ordered and for models it had procured under a previous "pay as sold" program; when it had acquired the motorcycle dealership, the dealer had a loss carryover of \$44,000 from prior years as an automobile dealer; and the dealer had liabilities considerably exceeding its net worth. See ¶ 3375.

Price Discrimination—Quantity Discounts and Rebates—Availability to All Dealers—Failure to Participate—Causal Relationship.—A motorcycle manufacturer's incentive programs, which offered to dealers various rebates, inventory adjustments, freight, and other allowances, did not constitute illegal price discrimination because the manufacturer's programs were practically and realistically available to a complaining former dealer. The dealer had a floor plan comparable with that of other area dealers; the imposed purchasing conditions, although varying with each promotional package, did not require large-scale outlays; and the dealer had participated in the largest promotional program offered by the manufacturer. By the dealer's own admission, cash flow and inventory problems had prevented it from participating in the promotional sales, and there was no causal link between the dealer's injuries and the manufacturer's practices. See ¶ 3380.94, 9026.84.

Allowances and Services—Services Not Connected with Resale of Product—Scope of Secs. 2(d) and 2(e), Robinson-Patman Act—Allocation of Advertising Fund—Motorcycle Dealership.—A motorcycle manufacturer's practices of extending credit and of granting freight allowances, services, and return privileges to dealers did not constitute violations of Sec. 2(d) or 2(e) of the Robinson-Patman Act even though these allowances were not extended to a complaining former dealer. The credit programs and freight allowances related to the original sale of the product rather than its resale and were beyond the scope of those sections of the Act. Because the manufacturer's refusal to accept return merchandise from the dealer took place after the dealership had been terminated, it, too, had no relation to the resale of the goods. A program under which the manufacturer allocated advertising funds according to the number of motorcycles purchased by a dealer was acceptable under FTC guidelines. See ¶ 3835, 3845.

Tying Arrangements—Motorcycle Manufacturer's Sales to Dealers—Freight, Rebates, and Advertising Funds—Separate Products.—A motorcycle manufacturer's offer to its dealers to prepay freight charges if they purchased a specific quantity of motorcycles did not constitute a tying arrangement because individual dealers were not compelled to participate in the program, the scheme was to the advantage of the dealers, the manufacturer did not offer to provide the freight services, and the freight allowance was not a separate product. Rebates based upon the purchase of a number of motorcycles also did not constitute illegal tying because a rebate is neither a service nor a product for which a separate market exists. Conditioning free motorcycles, freight allowances, and advertising funds upon the dealers' purchase of a number of motorcycles did not amount to tying either, because price concessions under those circumstances were so related to the principal product that they could not be considered separate products. Advertising

¶ 65,465

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materials, which could be purchased separately and freely by any dealer, could also not be considered products tied to the purchase of motorcycles. See ¶ 3030.

Tying Arrangements—Credit as Tying Product—Motorcycle Manufacturer's Sales to Dealers—Separate Products.—A motorcycle manufacturer's finance program for dealers did not constitute an illegal tying arrangement because motorcycles could have been purchased for cash, and the extension of credit by the manufacturer was such an inseparable part of the purchase price of the motorcycles that the transaction involved only a single product. See ¶ 3030.26.

For plaintiffs-appellants: Larry A. Zink (argued), of Zink, Zink & Zink Co., L. P. A., Canton, Ohio. For defendants-appellees: Robert B. Gosline, of Shumaker, Loop & Kendrick, Toledo, Ohio, Robert G. Clayton, Jr. and David W. Wicklund (argued).

Before EDWARDS, Chief Circuit Judge, ENGEL, Circuit Judge, and PHILLIPS, Senior Circuit Judge.

[Opinion]

PHILLIPS, Sr. Cir. J.: Plaintiff, Bold-Morr, Inc. a former Suzuki motorcycle dealership, appeals a summary judgment dismissing its claim that defendants, U. S. Suzuki Motor Corporation and Daryl Lucian, a district sales manager for Suzuki, had committed a number of violations under the federal antitrust laws. The other plaintiffs, Pete Bouldis and Norman Morris, are officers and sole stockholders of Bold-Morr. In its complaint Bold-Morr sought treble damages, alleging that certain of Suzuki's business policies and practices violated § 2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. § 13(a), (d) & (e) (price discrimination), § 1 of the Sherman Antitrust Act, 15 U. S. C. § 1 (tying arrangements), and § 3 of the Clayton Act, 15 U. S. C. § 14 (tying arrangements).

The parties engaged in extensive discovery, including interrogatories, requests for documents and depositions. Suzuki then filed a motion for summary judgment. On March 11, 1982, District Judge Nicholas J. Walinski entered a comprehensive 40 page opinion and granted Suzuki's summary judgment motion. While noting that summary procedures should be used "sparingly" in such cases, Judge Walinski concluded that summary judgment was appropriate in the present action because the evidence did not establish any factual basis upon which

the asserted antitrust violations could be premised.

On appeal Bold-Morr contends that it was error for the district court to grant summary judgment. We affirm.

I

[Motorcycle Dealership]

Bold-Morr was incorporated in 1972. During the years 1972-75, it operated as a Mazda automobile dealership. Due to substantial losses sustained by Bold-Morr, this venture was terminated. After the demise of the Mazda automobile dealership, appellants contacted the U. S. Suzuki representative serving the Canton, Ohio, area to inquire about obtaining a Suzuki motorcycle dealership. Subsequently, Bold-Morr acquired a motorcycle dealership, when the only other Suzuki dealer in the Canton area left the business.

Pursuant to a written Dealer Agreement, dated January 28, 1975, Bold-Morr acquired an exclusive motorcycle dealership location, and Suzuki agreed not to locate another dealer within Bold-Morr's area. In commencing its dealership, Bold-Morr was permitted to obtain the former dealer's inventory on "pay as sold" terms.¹ Also, Suzuki authorized Bold-Morr to purchase new models on a pay as sold and prepaid freight basis.² Additionally, to increase its inventory, Bold-Morr purchased several models under an initial floor plan line of credit through the

¹ Pay as sold terms constitute a form of credit offered to qualified dealers by Suzuki. Under this plan, when a dealer purchases a certain quantity of promoted motorcycles, he does not have to pay for them immediately, but at a designated due date in the future. If all units purchased on these terms have been sold by the dealer and the dealer's price for each unit has been paid to Suzuki before the due date, then nothing is due and owing to Suzuki. However, any units that remain unsold as of the due date must be paid for on

the due date. The advantage of obtaining motorcycles on pay as sold terms is that a dealer's interest charges incurred on normal floor plan financing are avoided.

² Under the Dealer Agreement the dealer was required to pay for all transportation charges in the shipment of motorcycles from the Suzuki facility. However, under several promotional offers made by Suzuki, a dealer could qualify to receive the promoted motorcycles with Suzuki paying the freight cost.

Borg Warner Corporation.³ Subsequently, in March 1975, Bold-Morr arranged its floor plan line of credit through the Harter Bank and Trust Company of Canton, Ohio. The Harter Bank extended a \$125,000 line of credit to Bold-Morr.

During the years 1975-76, Bold-Morr experienced some difficulties in making prompt payment for models procured under the pay as sold program and for parts it had ordered. Because of financial problems, in November 1975, Bold-Morr applied for an additional line of credit through the Suzuki Finance Program.⁴ Due to its precarious financial posture, Bold-Morr was not approved for this additional funding. Consequently, as Bold-Morr's financial woes increased, so did its inability to participate in several promotional programs offered by Suzuki.

In May 1976, the Harter Bank terminated Bold-Morr's floor plan line of credit, when the dealership was unable to pay the principal and interest on its capital loans. Efforts by appellants to obtain alternative financing or to sell the dealership proved unsuccessful. Inability to purchase new models, maintain inventory and conduct an effective advertising campaign marked the quick and ultimate demise of the dealership. In December 1976, the Harter Bank repossessed Bold-Morr's entire inventory and, in turn, appellants terminated the Suzuki dealership.

In an effort to recover losses, appellants filed suit against Suzuki alleging violations of federal antitrust laws. In attacking the propriety of summary judgment, Bold-Morr asserts that Suzuki's promotional programs and business policies constituted forms of price discrimination in violation of the Robinson-Patman Act. Additionally, it is contended that certain arrangements between the parties culminated in a series of tying agreements in violation of both the Sherman Antitrust Act and the Clayton Act.

II

[Summary Judgment]

It is a well established rule that motions for summary judgment are disfavored in

antitrust litigation and that the standard for granting summary judgment is strict. See *First National Bank of Arizona v. Cities Services Co.* [1968 TRADE CASES ¶72,458], 391 U. S. 253, 284-90, reh'g denied, 393 U. S. 901 (1968); *Poller v. Columbia Broadcasting System, Inc.* [1962 TRADE CASES ¶70,228], 368 U. S. 464, 473 (1962); *Smith v. Northern Michigan Hospitals, Inc.* [1983-1 TRADE CASES ¶65,289], 703 F. 2d 942, 947 (6th Cir. 1983); *Davis-Watkins Co. v. Service Merchandise* [1982-2 TRADE CASES ¶64,901], 686 F. 2d 1190, 1197 (6th Cir. 1982); *Taylor Drug Stores, Inc. v. Associated Dry Goods Corp.* [1977-2 TRADE CASES ¶61,579], 560 F. 2d 211, 213 (6th Cir. 1977). However, this general rule does not preclude the use of summary judgment in appropriate antitrust litigation. See *First National Bank of Arizona, supra*, 391 U. S. at 288-90; *Smith, supra*, 703 F. 2d at 947-48; *Davis-Watkins Co., supra*, 686 F. 2d at 1197; *Lupia v. Stella D'Oro Biscuit Co., Inc.* [1978-2 TRADE CASES ¶62,343], 586 F. 2d 1163, 1166-67 (7th Cir. 1978), cert. denied, 440 U. S. 982 (1979). See also Fed. R. Civ. P. 56 advisory committee note (1982) (summary judgment is "applicable to all actions"). Indeed, the very purpose of a motion for summary judgment, to eliminate a trial where it would be unnecessary and merely result in delay and expense, warrants summary disposition of such cases when appropriate.

In ruling on a motion for summary judgment, the evidence must be viewed in a light most favorable to the party opposing the motion. That party must be given the benefit of all reasonable inferences. See *Adickes v. S. H. Kress & Co.*, 398 U. S. 144, 157, 158-59 (1970); *United States v. Diebold, Inc.* [1962 TRADE CASES ¶70,322], 369 U. S. 654, 655 (1962); *Davis-Watkins Co., supra*, 686 F. 2d at 1197. However, when a motion for summary judgment is made and supported, the opposing party may not rest on its pleadings, but must present sufficient evidence supporting its claims to demonstrate that there is a genuine issue of material fact. See *Adickes, supra*, 398 U. S. at 159 & n. 19; *First National Bank of Arizona, supra*, 391 U. S. at 288; *Smith, supra*, 703 F. 2d at 947-48. See also Fed. R. Civ. P.

³ Suzuki required dealers to pay for motorcycles when the orders were submitted to Suzuki or upon delivery by cash or sight draft. However, if the dealer had a floor plan line of credit with a financial institution, and proper arrangements made, Suzuki would bill the lending institution. In this instance, payment was due upon receipt of the invoice for the order. Thus, with respect to Bold-Morr,

Suzuki would bill Borg-Warner and then when Bold-Morr changed its floor plan financing to the Harter Bank, it would bill the bank.

⁴ The Suzuki finance program was devised for floor plan financing of motorcycles. If a dealer was credit qualified, as determined by Suzuki's Credit Department, he could use this financing in lieu of other arrangements or as a supplement to existing financing.

56(e). If the record evidence is not disputed as to any material fact, the case should be decided as a matter of law rather than submitted to a jury. *Davis-Watkins Co.*, *supra*, 686 F. 2d at 1197; *Smith v. Hudson*, 600 F. 2d 60, 64-65 (6th Cir.), cert. dismissed, 444 U. S. 986 (1979). Accordingly, "the absence of any relevant probative evidence in support of a litigant's antitrust claims will expose such claims to summary judgment disposition." *Davis-Watkins Co.*, *supra*, 686 F. 2d at 1197. See *First National Bank of Arizona*, *supra*, 391 U. S. at 290; *Smith v. Northern Medical Hospitals, Inc.*, *supra*, 703 F. 2d at 947-48.

Upon review of the record, we conclude that Bold-Morr has failed to submit any relevant evidence which would provide a sufficient factual basis to withstand summary judgment as to any of the asserted grounds for relief. The antitrust claims in the instant action raise only questions of law. Therefore, we conclude that disposition by summary judgment was proper under the circumstances of this case.

III

[Price Discrimination]

Bold-Morr contends that the district court erred in dismissing its claim of price discrimination under § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.¹ Essentially, this section makes it unlawful for a seller to discriminate in price between purchasers of the same or similar goods actually sold, whether to the ultimate purchaser or for resale, if the effect of such price discrimination may be to lessen competition substantially in a line of commerce or with the competitors of the seller or its customers. See *Federal Trade Comm. v. Anheuser-Busch Inc.* [1960 TRADE CASES ¶ 69,737], 363 U. S. 536, 547-51 (1960) (the term "price discrimination" is defined as merely a difference in price). Bold-Morr asserts two arguments to support its claim. First, it is charged that Suzuki initiated and maintained credit programs to enable dealers to purchase Suzuki products, and that Bold-Morr was not permitted to participate in these programs. Bold-Morr as-

serts that, as a result, its actual cost for motorcycles was greater than that of other Suzuki dealers who were approved for these credit programs. Two programs are cited by Bold-Morr in support of this contention: the "pay as sold" and the Suzuki finance programs.

Both the pay as sold program and the Suzuki finance program were initiated to afford credit to qualified dealers. Suzuki maintains that participation in its credit program is contingent upon a dealer's overall credit worthiness, and, therefore, credit decisions are based upon legitimate business factors. Suzuki presented evidence that its adverse credit decisions with respect to Bold-Morr were based upon Bold-Morr's poor financial condition.

Section 2(a) is not violated when the credit decisions are based upon legitimate business reasons. See, e.g., *Craig v. Sun Oil Company of Pennsylvania* [1975-1 TRADE CASES ¶ 60,290], 515 F. 2d 221, 224 (10th Cir. 1975), cert. denied, 429 U. S. 829 (1976). As noted by the Tenth Circuit, decisions involving the extension of credit do not, as a matter of law, constitute a Robinson-Patman violation, since "differences in the borrower's financial strength, business experience, and many other factors bring about differences in the terms of credit, security required, guarantees, and other devices used by creditors under [such] circumstances." *Craig, supra*, 515 F. 2d at 224.

The record shows that Suzuki demonstrated the existence and application of business factors in making its credit decisions. To be eligible under the pay as sold program the dealer was required to meet the following requirements: satisfactory credit history with Suzuki; signing a continuing guaranty; signing a security agreement; obtaining sufficient insurance coverage; and providing a current financial statement. The record also reflects factors used by Suzuki in evaluating the dealer's credit worthiness, such as: the dealer's credit history, net worth, capital, cash position, personal guaranty and success of the dealership. Such financial factors also were used by Suzuki's credit department in de-

¹ 15 U. S. C. § 13(a) provides, in part:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption or resale within the United States or any

Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . .

termining whether a dealer was eligible for a line of credit under the Suzuki finance program.

Application of these factors to Bold-Morr's financial position reveals a prudent credit decision by Suzuki. Bold-Morr had a history of late payments for parts ordered and for the models it procured under pay as sold terms. When Bold-Morr acquired the dealership, it had a loss carryover of approximately \$44,000 from prior years as a Mazda dealer. In addition, Bold-Morr had liabilities considerably exceeding its net worth.

These facts demonstrate that Suzuki's credit decisions with respect to Bold-Morr were based upon legitimate business factors. Bold-Morr has failed to submit any probative evidence which would suggest that Suzuki's credit decisions were based upon any other factors or motive. We reemphasize that under Fed. R. Civ. P. 56(e), Bold-Morr may not rest upon mere allegations but must set forth specific facts showing that there is a genuine issue of material fact for trial. See *First National Bank of Arizona, supra*, 391 U. S. at 288-90. Since a decision to extend or withhold credit which is based upon valid business considerations does not violate § 2(a), and since the only record evidence establishes that Suzuki's refusal to extend credit to Bold-Morr under either program was based upon valid considerations, it was not error for the district court to grant summary judgment on this issue.

Bold-Morr's second price discrimination argument is that Suzuki's incentive programs, which offered to dealers various rebates, inventory adjustments, freight and other allowances, were not practically or functionally available to it, in violation of § 2(a) of the Clayton Act, as amended. The crux of Bold-Morr's claim is that Suzuki conditioned the various price concessions and allowances on the purchase of specific quantities and makes of motorcycles, and, as such, these promotional programs were only available to large dealers and not dealers of average size, thereby giving the large volume dealer a competitive advantage.

The practice of conditioning price concessions and allowances upon the customer's purchase of a specific quantity of goods will not give rise to a Robinson-Patman violation if the concessions are available equally and functionally to all customers. See *Federal Trade Comm. v. Morton Salt*

Co. [1948-1949 TRADE CASES ¶62,247], 334 U. S. 37, 42 (1948); *Shreve Equipment, Inc. v. Clay Equipment Corp.* [1981-1 TRADE CASES ¶64,016], 650 F. 2d 101, 105 (6th Cir.), cert. denied, 454 U. S. 897 (1981); *Mowrey v. Standard Oil Company of Ohio*, 463 F. Supp. 762, 775-76 n. 17 (N. D. Ohio 1976), aff'd without opinion, 590 F. 2d 335 (6th Cir. 1978). See generally 16C Von Kalinowski, *Business Organizations* § 27.04 (1982). Further, a claim of price discrimination will not lie if the buyer failed to take advantage of a price concession which was realistically and functionally available. See *Shreve Equipment, Inc., supra*, 650 F. 2d at 105. The legislative history reveals that the aim of the Act is to prevent a large buyer from gaining discriminatory preferences over the small buyer solely because of the large buyer's greater purchasing power. See *Federal Trade Comm. v. Henry Broch & Co.* [1960 TRADE CASES ¶69,728], 363 U. S. 166, 168-69 (1960); *Morton Salt Co., supra*, 334 U. S. at 43.

In granting summary judgment on this claim, the district court found that the various concessions and allowances made available by Suzuki's promotional programs were practically and realistically available to Bold-Morr. We agree. A review of the record demonstrates that the purchasing conditions imposed were well within the means of the average Suzuki dealer.

Bold-Morr had a comparable floor plan (\$125,000) with that of other area Suzuki dealers. The imposed purchasing conditions, although varying with each promotional package, did not require large-scale outlays; rather, the purchase requirements involved with most of Suzuki's promotions required the purchase of four to eight units, an outlay of less than \$10,000. The record shows that Bold-Morr participated in the largest promotional program, the "Super Deal," which required the purchase of at least 30 units.

It is also important to note that the promotional packages were intended to enhance the sale of products to dealers by providing economic incentives to purchase the promoted models. Moreover, Suzuki did not expect a dealer to participate in every promotional program. It was a matter of discretion with each dealer, in the exercise of its business judgment, whether to take advantage of the promotion. Appellant Pete Bouldis testified that on some occasions he participated in the promotional programs and at other times he did not, despite the fact that he had the financial ability to do

so. Bouldis testified that he had cash flow and inventory problems which prevented him, at times, from participating in the promotional sales. Accordingly, by appellant's own admission, there is no causal link between Suzuki's practices and appellant's alleged injuries. See generally 16C Von Kalinowski, *supra*, at § 31.01[5][c].

Accordingly, we conclude that Suzuki's promotional programs were equally and functionally available to Bold-Morr, and, therefore, § 2(a) of the Clayton Act, as amended, was not violated.

IV.

[Allowances and Services]

Bold-Morr contends that the district court erred in finding that Suzuki's practice of extending credit, granting freight allowances, services and return privileges did not violate §§ 2(d) and 2(e) of the Clayton Act, as amended.

Section 2(d) prohibits a seller from making payments to one customer for services or facilities furnished by the customer, unless such payments are available to all purchasers on an equally proportional basis.¹⁵ See *Federal Trade Comm. v. Fred Meyer, Inc.* [1968 TRADE CASES ¶72,383], 390 U. S. 341, 350-53 (1968); *Federal Trade Comm. v. Simplicity Pattern Co., Inc.* [1959 TRADE CASES ¶69,361], 360 U. S. 55, 65 reh'g denied, 361 U. S. 855 (1959); *Zoslaw v. MCA Distributing Corp.* [1982-83 TRADE CASES ¶65,078], 693 F. 2d 870, 881 (9th Cir. 1982), cert. denied, — U. S. — (1983); *Vanity Fair Paper Mills, Inc. v. Federal Trade Comm.* [1967 TRADE CASES ¶70,569], 311 F. 2d 480, 486-87 (2d Cir. 1962); *Exquisite Form Brassiere, Inc. v. Federal Trade Comm.* [1961 TRADE CASES ¶70,157], 301 F. 2d 499, 500 (D. C. Cir. 1961), cert. denied, 369 U. S. 888 (1962). On the other hand, § 2(e) prohibits the seller from furnishing services or facilities connected with the process and handling of commodities upon all terms not accorded to all purchasers on a proportionally equal basis.¹⁶ See *Simplicity Pattern Co.,*

supra, 360 U. S. at 65; *Zoslaw, supra*, 693 F. 2d at 881; *Exquisite Form Brassiere, Inc., supra*, 301 F. 2d at 500. See generally E. Kinter, A Robinson-Patman Primer 30-34, 245-47 (1970); 16D Von Kalinowski, *supra*, at § 34.02.

The aim of both sections is to eliminate devices by which preferred buyers obtain discriminatory preferences under the guise of promotional allowances. See *Fred Meyer, Inc., supra*, 390 U. S. at 349-50; *Henry Broch & Co., supra*, 363 U. S. at 168. However, it is important to note that the discriminatory practices made unlawful by §§ 2(d) & 2(e) must occur in connection with commodities obtained by the purchaser for resale. See *Fred Meyer, Inc., supra*, 390 U. S. at 355-57; *L & L Oil Co., Inc. v. Murphy Oil Corp.* [1982-2 TRADE CASES ¶64,725], 674 F. 2d 1113, 1119 (5th Cir. 1982); *Purdy Mobile Homes, Inc. v. Champion Home Builders Co.* [1979-1 TRADE CASES ¶62,620], 594 F. 2d 1313, 1317 (9th Cir. 1979).

Bold-Morr first claims that Suzuki's credit programs (pay as sold and Suzuki finance) violated §§ 2(d) and 2(e), as such programs were only available to certain favored customers. This claim is without merit because discriminatory practices in the extension of credit from the seller to the buyer are beyond the scope of either § 2(d) or § 2(e). See, e.g., *Murphy Oil Corp., supra*, 674 F. 2d at 1119 & n. 7; *Skinner v. United States Steel Corp.* [1956 TRADE CASES ¶68,344], 233 F. 2d 762, 765 (5th Cir. 1956). Accordingly, the extension of credit is a practice incident to the original sale rather than to the subsequent resale of the product, and, therefore, outside the coverage of §§ 2(d) & 2(e). See 16C Von Kalinowski, *supra*, at § 27.05; Annotation, "Validity, construction, and application of §§ 2(d) and 2(e) of the Robinson-Patman Act, regarding discriminatory payment for or furnishing of services or facilities," 24 ALRFed 9, 81-83 (1975).

Bold-Morr also argues that Suzuki's freight allowances (prepaid freight promotions), conditioned upon the purchase of a

tomers competing in the distribution of such products or commodities.

¹⁵ 15 U. S. C. § 13(d) provides:

It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other cus-

It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

specific number of motorcycles, violated §§ 2(d) & 2(e). This claim also lacks merit, since freight allowances relate merely to the initial sale of the product and not its resale. Therefore, freight allowances fall outside the coverage of both § 2(d) and § 2(e). See, e.g., *Centex-Winston Corp. v. Edward Hines Lumber Co.* [1971 TRADE CASES ¶ 73,671], 447 F. 2d 585, 588 n. 5 (7th Cir. 1971), cert. denied, 405 U. S. 921 (1972); *Chicago Spring Products Co. v. United States Steel Corp.* [1966 TRADE CASES ¶ 71,766], 254 F. Supp. 83, 84-85 (N. D. Ill. 1966), aff'd *per curiam*, 371 F. 2d 428 (7th Cir. 1966); 16C Von Kalinowski, *supra*, at § 27.05.

It is also asserted that Suzuki violated §§ 2(d) & 2(e) by refusing to accept merchandise returns from Bold-Morr, while accepting returns from other dealers. Under the Dealer Agreement between the parties, Suzuki merely had the "option" to repurchase a dealer's models and inventory. Nonetheless, the record demonstrates that Suzuki did repurchase from the Harter Bank all of Bold-Morr's floor plan financed units. In addition, Suzuki exercised its repurchase option with respect to all the units Bold-Morr acquired under pay as sold terms.

It has been held that a seller who permits certain of its customers to return unsold goods for credit, while not extending the same privilege to other customers, violates § 2(e). See, e.g., *Joseph A. Kaplan & Sons, Inc. v. Federal Trade Comm.* [1965 TRADE CASES ¶ 71,444], 347 F. 2d 785, 787-88 (D. C. Cir. 1965); *Students Book Co. v. Washington Luv Book Co.* [1955 TRADE CASES ¶ 68,201], 232 F. 2d 49, 50 (D. C. Cir. 1955), cert. denied, 350 U. S. 988 (1956). However, it is also required that the return privilege be connected with the resale of the product to trigger the application of § 2(e). See *Fred Meyer, Inc., supra*, 390 U. S. at 349. In the present case, Bold-Morr's dealership was terminated by the time the repurchase option became effective, and, therefore, Bold-Morr no longer was engaged in the ongoing business of selling motorcycles. Clearly, this situation is unlike one where return privileges are denied to an ongoing and viable business enterprise. Accordingly, with the dealership terminated, the failure of Suzuki

to exercise its repurchase option with respect to portions of Bold-Morr's inventory, had no relation to the resale of the goods as required by § 2(e).

The final claim under §§ 2(d) & 2(e) is that advertising monies, termed co-op funds, were made available to other dealers which were not practically available to Bold-Morr.⁸ There is no dispute that these advertising allowances fall within the scope of § 2(d), and, thus, Suzuki was required to make the allowances available on proportionally equal terms to all of its customers. See *Simplicity Pattern Co., supra*, 360 U. S. at 65; *Schoenkopf v. Brown & Williamson Tobacco Corp.* [1980-81 TRADE CASES ¶ 63,687], 637 F. 2d 205, 209 (3d Cir. 1980).

Generally, to assure proportionality, the seller is free to devise any particular method, so long as the system utilized does not discriminate in favor of the large volume buyer. The Federal Trade Commission has stated that the best way to assure fairness in advertising allowances is to base the payments "on the dollar volume or on the quantity of goods purchased during a specified period." FTC Guides for Advertising Allowances and other Merchandising Payments and Services, 16 C. F. R. § 240.7 (1982). See 16D Von Kalinowski, *supra*, at § 35.04.

The record shows that Suzuki based the allocation of co-op advertising funds according to the number of motorcycles purchased by a dealer. Under this plan, a certain dollar amount for each model purchased by the dealer would be credited to the dealer's co-op advertising fund. The record further demonstrates that Suzuki's promotional programs which offered allowances for advertising, involved modest requirements to assure that the co-op funds were available to all dealers on a proportionately equal basis. Therefore, since Suzuki allocated its advertising allowances pursuant to a plan acceptable to the Federal Trade Commission, we conclude that it was appropriate to grant summary judgment on this issue as well. See *Fred Meyer, supra*, 390 U. S. at 358 (payment of promotional allowances is not barred so long as the supplier takes responsibility under the rules and guidelines promulgated by the Federal Trade Commission).

⁸ Co-op advertising is a program employed by Suzuki to supplement a dealer's local advertising. Co-op funds are generated by the purchase of motorcycles. Specified dollar amounts for

each model of motorcycles purchased by the dealer are credited to the dealer's co-op advertising fund. The dollar amounts vary from time to time and from model to model.

V.

[Tying Arrangements]

Bold-Morr's final claim on appeal is that Suzuki imposed a number of unlawful tying agreements, violating both § 1 of the Sherman Antitrust Act⁹ and § 3 of the Clayton Act.¹⁰

A tying agreement exists when a seller, having a product which buyers want (the "tying product"), refuses to sell it alone and insists that any buyer who wants it must also purchase another product (the "tied product"). *Northern Pacific Ry. Co. v. United States* [1958 TRADE CASES ¶68,961], 356 U. S. 1, 5-6 (1958); *Bell v. Cherokee Aviation Corp.* [1981-2 TRADE CASES ¶64,318], 660 F. 2d 1123, 1126 (6th Cir. 1981). The "essence of illegality in tying agreements is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next." *Times-Picayune Publishing Co. v. United States* [1953 TRADE CASES ¶67,494], 345 U. S. 594, 611 (1953). Thus, tying arrangements are *per se* unlawful under § 1 of the Sherman Act, § 3 of the Clayton Act, or both, "whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected." *Fortner Enterprises, Inc. v. United States Steel Corp.* [1969 TRADE CASES ¶72,757], (*Fortner I*) 394 U. S. 495, 499 (1969), quoting *Northern Pacific Ry. Co., supra*, 356 U. S. at 6.

Under § 1 of the Sherman Act, a tying arrangement is *per se* illegal if the following three elements are presented:

- (1) There must be a tying arrangement between two distinct products or services;
- (2) The seller must have sufficient economic power in the tying market to restrain appreciably competition in the tied product market; and
- (3) The amount of commerce affected must be "not insubstantial."

⁹ 15 U. S. C. § 1 provides, in part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

¹⁰ 15 U. S. C. § 14 provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular posses-

Fortner I, supra, 394 U. S. at 499; *Northern Pacific Ry. Co., supra*, 356 U. S. at 6; *Bell, supra*, 660 F. 2d at 1127. Additionally, § 3 of the Clayton Act is violated if the tying arrangement involves goods, wares, merchandise or other commodities. See generally 16B Von Kalinowski, *supra*, at § 12.04[1].

A.

[Freight]

The first alleged tying arrangement involves freight allowances. Normally, the dealer was obligated to pay all freight charges in the shipment of motorcycles. However, under various promotions offered, Suzuki agreed to prepay the freight charges if the dealer purchased a specific quantity of motorcycles. Bold-Morr avers that this practice constituted an unlawful tying arrangement, with the tying product being motorcycles and prepaid freight as the tied product.

Such an allegation cannot withstand analysis. Bold-Morr was never compelled to participate in these programs to obtain the tying product. Unlike the common scheme found in tying arrangements, it was to Bold-Morr's advantage to participate in the promotional programs, as it would shift the expense for freight services from Bold-Morr to Suzuki. Additionally, Suzuki did not offer to provide freight services, but, rather, it only offered to absorb the cost for such services. Thus, this situation is distinguishable from those cases relied upon by Bold-Morr in which buyers were required to pay for freight service supplied by the seller in order to procure the tying product. See e.g., *Anderson Foreign Motors, Inc. v. New England Toyota Distributor, Inc.* [1979-2 TRADE CASES ¶62,833], 475 F. Supp. 973, 981-86 (D. Mass. 1979). Lastly, under the circumstances presented, it appears doubtful that freight allowances could be considered a "separate product" for purposes of § 1, as the allowances appear to constitute an inseparable part of the purchase price for the tying product. Cf.

slon or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Fortner I, *supra*, 394 U. S. at 507 (credit may constitute an inseparable part of the purchase price for the item so that the entire transaction could be considered to involve only one product); *Foster v. Maryland State Savings and Loan Association* [1978-2 TRADE CASES ¶62,283], 590 F. 2d 928, 931-33 (D. C. Cir. 1978), cert. denied, 439 U. S. 1071 (1979) (fee for legal services are not a separate product but incidental to purchase of residential property loan).

Therefore, we conclude that the offered freight allowances did not violate §1 of the Sherman Act. It is also clear that the allowances did not violate the Clayton Act, since freight allowances do not constitute a commodity triggering the application of §3.

B.

[Rebates]

Bold-Morr argues that rebates offered by Suzuki, conditioned upon the purchase of a number of models, constituted a tying arrangement. Under this theory, motorcycles represent the tying product and rebates are the tied product.

This contention, too, is without merit. A rebate is a retroactive price discount or adjustment given by the seller to induce the sale of a particular product. It is neither a service nor a product for which a separate market exists. Therefore, such a claim cannot be sustained under the Sherman Act or Clayton Act.

C.

Another alleged tying arrangement involves various package deals offered by Suzuki to its dealers. Such deals involved the conditioning of free motorcycles, freight allowances, advertising materials and co-op funds, upon the dealer's purchase of a number of motorcycles. Thus, Bold-Morr contends that the tied product is motorcycles and that the various items and price discounts constitute the tying products.

As noted, above, the price concessions under these circumstances are so related to the principal product that it is difficult to conclude that two separate products exist. On the other hand, it is arguable that some of the advertising materials—spec sheets and displays—do constitute separate products, and, therefore, the potential for a tying arrangement is present. However, Bold-Morr is unable to prevail on this claim, since the record clearly demonstrates that the various advertising materials could

be purchased freely by any dealer. Accordingly, since these items could be obtained without purchasing the tied product, no tying arrangement could exist. See *Northern Pacific Ry. Co.*, *supra*, 356 U. S. at 6 n.4.

D.

[Credit]

The final alleged tying arrangement claimed by Bold-Morr is that the pay as sold terms and participation in the Suzuki finance program were conditioned upon Bold-Morr purchasing certain models and quantities of motorcycles. Although this allegation seemingly makes motorcycles the tied product and credit as the tying product, Bold-Morr, in response to Interrogatory #85, stated that the tying products are motorcycles and credit represents the tied product.

Assuming that credit is the tied product, there is no way a tying arrangement could exist, as Bold-Morr would have to show that in order to purchase the tying product it was required to obtain credit from Suzuki. However, it is clear from the record that Suzuki did not condition the purchase of motorcycles on Bold-Morr's participation in the credit programs. Rather, it is evident that motorcycles could be purchased for cash, by credit from an outside lender, or pursuant to Suzuki's promotional or credit programs.

Even if the arrangement is considered in the alternative (i.e., credit as the tying product and motorcycles as the tied products) a tying arrangement cannot be found. Under this analysis the focus, once again, is whether two separate and distinct products exist. Under the circumstance of this case, we are convinced that the extension of credit by Suzuki to its dealers was such an inseparable part of the purchase price for the motorcycles that the transaction involved only a single product. *Cf. Catalano, Inc. v. Target Sales, Inc.* [1980-2 TRADE CASES ¶63,352], 446 U. S. 643, 648, reh'g denied, 448 U. S. 911 (1980) (credit terms must be characterized as an inseparable part of the price); *United States Steel Corp. v. Fortner Enterprises, Inc.* [1977-1 TRADE CASES ¶61,294], (Fortner II) 429 U. S. 610, 622-23 (1976) (Burger, C. J., concurring) (*Fortner I* should not be read to cast doubt on the legality of credit financing by manufacturers or distributors); *Fortner I*, *supra*, 394 U. S. at 507 ("In the usual sale on credit the seller, a single individual or corpora-

tion, simply makes an agreement determining when and how much he will be paid for his product. In such a sale the credit may constitute such an inseparable part of the purchase price for the item that the entire transaction could be considered to involve only a single product."'). Therefore, we conclude that no tying arrangement existed under the Sherman Act with respect to Suzuki's credit programs. It is also clear that the Clayton Act is inapplicable under this claim, as credit is a service and not a commodity.

In summary, appellants fell victim to the economy and poor financial management. The record discloses no real issues of fact which would be appropriate for a full scale trial. Appellants have shown no issues of material fact requiring a remand for trial. Accordingly, we conclude that the district court did not err in granting Suzuki's motion for summary judgment.

Affirmed. The costs of this appeal are taxed against appellant.

[¶ 65,466] *The Interface Group, Inc. v. Gordon Publications, Inc.*

U. S. District Court, District of Massachusetts. Civil Action No. 83-92-G. Dated April 25, 1983.

Sherman and Massachusetts Antitrust Acts

Refusal to Deal—Computer Trade Show Publications—Distribution at Hotels—Preliminary Injunction.—For purposes of a preliminary injunction, a computer trade show producer's requests to hotels in cities where shows were being held to prohibit a competing trade show daily tabloid publisher from distributing its publications at the hotels did not amount to a concerted refusal to deal because the competitor had not demonstrated that such conduct would continue at future shows. Rather, the producer acknowledged that it had no right to interfere with the competitor's distribution of its publications at hotels and all other areas that had not been leased by the producer. See ¶ 2450.30.

Attempted Monopolization—Relevant Product Market—Free Daily Computer Trade Show Tabloids—Substitutability—Computer Dealer Trade Publication Advertising.—Free daily computer trade show tabloids did not constitute a relevant market or submarket for purposes of determining whether a trade show producer had attempted to monopolize a market by excluding a competing tabloid publisher from a show. The producer's tabloid editor set advertising rates by reference to rates charged by other computer trade publications; the same advertisers that advertised in the competitor's trade publications also advertised in its daily tabloid; while the minor daily updating of the news content of the tabloids might have been peripherally interesting to show attendees, there was no evidence that the daily updating affected the advertisers; the competitor's advertisers in its own tabloids showed that several of its publications were sent to the same organizations attending the show; and some of the advertisers that had placed ads in the competitor's other publications pulled their ads when they learned that that publication might not be allowed to be distributed at the show. The daily tabloids were in the market for computer dealer trade publications, a very competitive market in which the producer had a very small market share. See ¶ 760.67.

Attempted Monopolization—Dangerous Probability of Success—Exclusion of Free Computer Trade Show Tabloid from Show—Achievement of Monopoly Position.—The fact that a computer trade show producer charged five times the amount for advertising rates in its free daily trade show tabloid that a competing tabloid publisher had charged prior to being excluded from a trade show by the producer did not show that the producer had achieved a monopoly position or was charging monopoly prices. The producer had set a competitive price to compete with advertising in other trade publications, and the competitor's lower prices reflected its marketing strategy to use its show tabloid to attract advertising in its other publications. See ¶ 770.20.

Monopolization—Essential Facilities Doctrine—Exclusion of Free Computer Trade Show Tabloid from Show—Monopoly Power—Availability of Other Shows.—A computer trade show was not an essential facility for purposes of determining whether the show producer's exclusion of a free daily trade show tabloid publisher from the show constituted a misuse of monopoly power. The producer did not have monopoly power in the

Trade Regulation Reports

¶ 65,466

STRAUSS, TROY AND RUEHLMANN CO., L. P. A.

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* ALSO ADMITTED TO PRACTICE IN KENTUCKY
** ALSO ADMITTED TO PRACTICE IN INDIANA
*** ALSO ADMITTED TO PRACTICE IN FLORIDA

LUCIEN G. STRAUSS (1900-1962)
ORVILLE A. TROY (1896-1967)

January 18, 1983

Hon. G. Wix Unthank
Judge, United States District Court
U.S. Courthouse
Pikeville, Kentucky

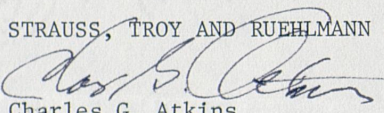
Re: Garland Lansaw v. The Goodyear Tire and Rubber
Company
Civil Action 80-224

Dear Judge Unthank:

I am enclosing a copy of Plaintiff's Motion for Continuance which is
being filed in the United States District Court, Eastern District of Kentucky
at Covington. The enclosed copy is for the Court's convenience.

Respectfully,

STRAUSS, TROY AND RUEHLMANN CO., L.P.A.


Charles G. Atkins

mas
enclosure

*Will grant request for Continuance
need to find another trial date
which will be convenient to Court.*

LAW OFFICES OF
HARBISON, KESSINGER, LISLE & BUSH

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TIMOTHY T. GREEN

CLINTON M. HARBISON
1886-1980
BEN L. KESSINGER
1896-1958
—
TELEPHONE
606-253-0373

May 26, 1982

Hon. G. Wix Unthank, District Judge
United States District Court
Federal Bldg.
Pikeville, Kentucky 41501

RE: Garland Lansaw v. The Goodyear Tire & Rubber Company
Pikeville Civil Action No. 80-0224

Dear Judge Unthank:

Enclosed is a draft of a Partial Summary Judgment in this case, prepared by Defendant, Goodyear Tire & Rubber Company, as the prevailing party. Please review this, and enter it if it meets with your approval.

Our latest check with the Clerk indicates that no bond has been posted by Plaintiff. As we understand the Court's May 17, 1982, Order, entry of judgment would now be in order.

Thank you for your attention.

Very truly yours,

HARBISON, KESSINGER, LISLE & BUSH

BY:

Charles J. Lisle
Charles J. Lisle

CJL/mw

Enc.

cc: Mr. Larry Silverman, Esq.
Mr. Charles G. Atkins, Esq.

JUDGE: I called the lawyers and told them to come prepared to discuss discovery deadline, pretrial and trial dates, and the damages portion of the defendant's motion for summary judgment. You need to overrule the motion for a continuance of the status conference. Thanks,

Satch

DATE MAY 17, 1982

AT 11:00 A.M.

JUDGE UNTHANK

SET FOR STATUS CONFERENCE

AT PIKEVILLE

PIKEVILLE

~~CRIMINAL~~ CIVIL 80-224

GARLAND LANSAW, d/b/a
PADEN TIRE SERVICE

Mitchell B. Goldberg
Henry D. Stratton

vs:

THE GOODYEAR TIRE & RUBBER CO.

Marshall Cox
Nathan Elliott, Jr.

- file

STATUS CONFERENCE

12/04/80	#1	COMPLAINT,
1/16/81	#4	SUMMONS, w/Marshall's return served on Joan Rogers 12/10/80
	#4a	ANSWER of deft
2/5/81	#8	REPLY of plff to Counterclaim
		REPLY MEMORANDUM of deft in support of mot for reconsideration - TENDERED 3/27/81
9/2/81	#42	JOINT STATEMENT of ptys of Agreed & Disputed Facts & TENTATIVE WITNESS LIST
2/2/82	#70	CIVIL MIN:(GWU) (1) Oral motion of deft for judgment on counterclaim to be submitted by written pleading NOTE: Has not been filed
4/22/82	#80	CIVIL MIN:(GWU) STATUS CONF. on 4/19/82, Plffs shall post supersedeas bond in amt \$18,060.00 on or bef. 5/4/82 & motion for S/J on counterclaim as to merits of case, PASSED for further consid. of Court.

5/11/82 #81

*Memorandum opinion of Court.
Court's opinion that portion of
defts mot. relating to liability
should be sustained. Court
will enter partial S/J. in
accordance w/ opinion.
Parties give to 5/20/82 to
file memo of law why such
partial S/J. should not be entered.*

Judge

ASSIGNED FOR STATUS CONFERENCE AT PIKEVILLE, KY.

ON APRIL 19, 1982 AT 1:00 P. M.

PIKEVILLE CIVIL NO. 80-224

JURY DEMAND - PLFF

GARLAND LANSAW d/b/a
PADEN TIRE SERVICE

Edberg
CHARLES G. ATKINS
HENRY D. STRATTON
RICHARD BOYDSTON
Dani

vs:

THE GOODYEAR TIRE & RUBBER COMPANY

Marshall Cox
Charles Lisle-Nathan Elliott, Jr.
Patricia Farren

12/4/80 COMPLAINT filed.

ANSWER & COUNTERCLAIM of deft TENDERED 1/30/81

7/16/81 AMENDED COMPLAINT of plff w/ JURY DEMAND
STIPULATION & PROTECTIVE ORDER as to confidential information

7/21/81 ANSWER & COUNTERCLAIM of deft to amended complaint

~~PRELIMINARY TRIAL MEMORANDUM of plff TENDERED 9/17/81~~

ANSWERS-of-plffs-to-1st-set-of-Interrogatories-TENDERED-10/27/81
FILED 2/3/82 P. O.

4/5/82 #77 MOTION, of deft for s/j on their counterclaim pur FRCP 56
#78 MEMORANDUM, of deft in support mot for s/j on counterclaim

4/19/82 #79 MEMORANDUM IN OPPOSITION of plff to deft's motion for S/J on deft's counterclaim.

*Please Note: Matter still set for Status
Conference on 5/17/82 at 11:00 A.M.
(Set by Order of Court on 5/21/81 at
Preliminary Conference.)*

STATUS CONFERENCE: Garland Lansaw v. Goodyear Tire.

April 19

Judge: This is set for a status conference today. I think the main thing you should be aware of is defendant's motion for summary judgment as to its counterclaim in the sum of \$18,060.90. I have read the memo in support of the motion and think that the motion should be granted. They are going to argue the merits of it, so you will have the benefit of hearing the plaintiff's side of the story. I haven't had that benefit because the plaintiff has not given us his side of the story in writing. Some discovery has taken place, but the only outstanding motion is the one for summary judgment as to the counterclaim by Goodyear Tire.

Satch

STATUS C O N F E R E N C E: Landsaw v. Goodyear

Judge, the last thing you did was hold a preliminary conference on September 22, 1981. There was a kink in the discovery machine, and you attempted to work it out by proposing the following:

1. Parties to clarify their interrogatories and answers by 12/29/81.
2. plaintiff given 30 additional days in which to answer the 70 interrogatories. Given until 10/22.
3. on or before 11/23 parties to file request for clarification of interrogatories and answers thereto.

Since that time, the following things have been done by the parties:

1. On 10/27 plaintiff tendered their answers to defendant's first set of interrogatories.

Recommendation: order this filed.

2. Various notices to take depositions by plaintiff
3. On 11/18 plaintiff responded to defendant's first request for production of documents.
4. On 11/23 defendant requested clarification of and responsive answers to defendant's first set of interrogatories. (this was done by the deadline you set)
5. On 12/3 plaintiff requested clarification of and responsive answers to its first set of interrogatories. (they missed the deadline)
6. On 12/28 plaintiff responded to defendant's request for clarification and responsive answers to defendant's first set of interrogatories.

Conclusion: It appears that the defendant has not yet responded to the plaintiffs' request for clarification and responsive answers to plaintiffs' interrogatories.

Other than that, things seem to be picking up.

Recommendations: I would now attempt to limit the number of interrogatories used, and force them to go to oral depositions (that's what that tape on discovery was about). Make them cut down to the bare essentials what they are after. You might even want to suggest the use of phone conferences after this, since the lawyers are so far away. Keep after them so that this thing doesn't drag on and on....tell them that we have a limited warranty of triability.... three days. Go get em, Judge.

dwt

Judge Unthank

MONDAY, FEBRUARY 1, 1982

PIKEVILLE CIVIL NO. 80-224

JUDGE UNTHANK

GARLAND LANSAW, d/b/a
PADEN TIRE SERVICE

Richard Boyston
Charles G. Atkins
Henry D. Stratton

vs.

THE GOODYEAR TIRE & RUBBER COMPANY

Marshall Cox
Nathan Elliott, Jr.
Patricia Farren

STATUS CONFERENCE

PROCEEDINGS

FILED

12/4/80	#1	COMPLAINT
2/5/81	#8	REPLY of Plff. to Counterclaim
7/16/81	#36	AMENDED COMPLAINT of Plff. w/JURY DEMAND
7/21/81	#38	ANSWER & COUNTERCLAIM of DEFT. to AMENDED COMPLAINT
9/8/81	#43	PRELIMINARY TRIAL MEMORANDUM OF PLFF. <u>TENDERED 9/17/81 (Due 9/8/81)</u>
9/23/81	#44	ANSWERS of Plff.'s to First set of INTERROGATORIES - TENDERED 10/27/81 <u>(Out of time as of 10/22/81)</u>

*File in
Office File*

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*ALSO ADMITTED TO PRACTICE IN KENTUCKY

COUNSEL:
LUCIEN G. STRAUSS

October 26, 1981

G. Wix Unthank, Judge
United States District Court
Eastern District of Kentucky
Federal Building
136 Walnut Street
Lexington, Kentucky 40503

Re: Garland Lansaw v.
The Goodyear Tire & Rubber Company
U. S. District Court (E. D. Ky.)
Civil Action No. 80-224

Dear Judge Unthank:

I enclose for your information and retention in the file of the above styled action a copy of my letter dated October 21, 1981 to opposing counsel regarding service of plaintiff's answers to defendant's first set of interrogatories two days subsequent to the date the Court ordered those answers filed pursuant to its order dated September 23, 1981.

Sincerely,

STRAUSS, TROY AND RUEHLMANN
CO., L.P.A.

Richard Boydston

Richard Boydston

RB/jc

cc: Rufus Lisle, Esq.
Patricia Farren, Esq.

STRAUSS, TROY AND RUEHLMANN CO., L. P. A.

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*ALSO ADMITTED TO PRACTICE IN KENTUCKY

October 21, 1981

COUNSEL:
LUCIEN G. STRAUSS

Rufus Lisle, Esq.
Harbison, Kessinger, Lisle & Bush
4th Floor
Bank of Lexington Building
101 East Vine Street
Lexington, Kentucky 40507

Re: Garland Lansaw v. The Goodyear
Tire & Rubber Company
U. S. District Court (E. D. Ky.)
Civil Action No. 80-224

Dear Mr. Lisle:

We have prepared plaintiff's answers to defendant's first set of interrogatories, but Mr. Lansaw will be unable to review and sign them until Saturday, October 24, 1981 on which date he will hand deliver those answers to your office.

In addition in error we noticed the depositions for both Messrs. Stewart and Harig in Cincinnati at 9 a.m. on November 18, 1981. We would like to schedule the deposition of one of the two for 9 a.m. on November 17, 1981 and of the other at the same hour on the following day, November 18, 1981. We remain willing, however, to accommodate you, your client, the deponents, and other counsel for defendant as to the scheduling of these two depositions. Please advise me at your early convenience how you wish to proceed.

Sincerely,

STRAUSS, TROY AND RUEHLMANN
CO., L.P.A.

Richard Boydston

RB/jc

cc: Patricia Farren, Esq.

bcc: Pamela Todd Robinette, Esq., Charles G. Atkins, Esq.,
Mitchell B. Goldberg, Esq., Mr. Garland Lansaw

JUDGE: CIVIL ACTION NO. 80-224: GARLAND L. SAW d/b/a PADEN TIRE SER.

V.

THE GOODYEAR TIRE AND RUBBER CO.

THIS is an anti-trust suit in which the plaintiff alleges that defendant breached the terms of the Authorized Dealer Agreement of 7/16/75, and that defendant discriminated against plaintiff. Both parties have submitted an agreed statement of disputed and undisputed facts, and each has completed a preliminary trial memorandum .

Plaintiffs wish to take up some discovery matters with this court at the PTC, as it appears some of the records are quite voluminous. They contend as follows:

1. defendant violated RObinson-Patman Act by:
 - a. selling tires of like grade and quality to plaintiff's competitors at prices lower than those offered to plaintiffs.
 - b. not giving plaintiffs same chance w/r purchase opportunities and discounts as given other competitors;
 - c. discriminating vs. plaintiffs in payments and adjustments for warranty work.

Defendants have counterclaimed for money due it from plaintiffs. The defendants allege they have been stymied in their delineation of the legal issues due to slow compliance by the plaintiffss with discovery. Defendants defend on basis of Statute of Limitations, along with significant discussions about the burden the plaintiffs must bear.

dwt

MAY 21, 1981

AT PIKEVILLE

JUDGE UNTHANK

9:30 A.M.

PRELIMINARY CONFERENCE

PIKEVILLE CIVIL ACTION NO. 80-224

GARLAND LANSAW, etc.

Mitchell B. Goldbert
Henry D. Stratton

vs:

THE GOODYEAR TIRE & RUBBER CO.

Marshall Cox
Harbison, Kessinger, Lisle &
Bush

PRELIMINARY CONFERENCE

GARLAND LANSAW V. THE GOODYEAR TIRE AND RUBBER COMPANY

There is an outstanding motion for judgment on the pleadings, all the memoranda concerning which are not due until sometime in June.

This is an anti-trust action based on Sherman Anti-trust act and the Robinson Patman Act.

Plaintiff, a dealership for Goodyear says he was treated differently than the other authorized dealerships. Due to the prices charged him by Goodyear he was forced out of business.

Defendant has not filed a preliminary memorandum.

This case is extremely complex. After ruling on the motion for judgment on the pleadings, if there is still a case, we should consider some form of order to narrow the issues; perhaps similar to the pre-trial order for Blue Diamond.

In the interim:

1. Set date for agreed and disputed facts.
2. Set date for cut off of discovery. This should be rather lengthy -- as much as one year.
3. Set date for pre-trial, assuming the discovery is not too far in the future.