

SB

438

"An Act relating to franchising agreements involving gasoline refiners, distributors and dealers; and providing for an effective date."

COMMITTEE REPORT

2/18/76

HOUSE

JUDICIARY

Mr. Speaker:

Date

9/13/76

The Committee on COMMERCE has had SB 438 AM

under consideration. A Majority of the members of the Committee

() recommends it DO PASS

() recommends it DO NOT PASS

() recommends it DO PASS WITH ATTACHED AMENDMENT(S)

(X) recommends it BE REPLACED WITH CS FOR SB 200 AM AND THAT

CS FOR SB 200 AM DO PASS UNAMENDED

() "and" recommends it BE REFERRED TO THE _____

COMMITTEE

() reports it back WITHOUT RECOMMENDATION

(X) "other"

Members signing the Majority report:

<u>[Signature]</u>	<u>[Signature]</u>	<u>[Signature]</u>
<u>[Signature]</u>	<u>[Signature]</u>	<u>[Signature]</u>
<u>[Signature]</u>	<u>[Signature]</u>	<u>[Signature]</u>
<u>[Signature]</u>	<u>[Signature]</u>	<u>[Signature]</u>

Members NOT concurring in the Majority report:

_____ recommends:

_____ recommends:

_____ recommends:

_____ recommends:

_____ recommends:

[Signature]
[Signature]

Chairman

STATEMENT OF J. R. SANDERS
ON BEHALF OF
STANDARD OIL COMPANY OF CALIFORNIA
ON SENATE BILL 438
"ALASKA GASOLINE PRODUCTS FRANCHISE ACT"

BEFORE THE HOUSE OF THE STATE OF ALASKA

Mr. Chairman and Members of the Committee:

My name is John Sanders. I am Division Manager for Standard Oil Company of California in its Alaska Division. I am responsible for the sale of its products throughout the State of Alaska. I appreciate the opportunity to present my Company's views on this legislation after which I will try to answer any questions you may have.

As I understand it, the intent of this proposed legislation is to guarantee service station dealers fair and equitable treatment by their petroleum suppliers. I don't think it would do that. In fact, in my opinion, it would merely provide a shield for ineffective dealers and would be to the detriment of consumers and good dealers alike. At the onset, we believe that additional legislation to protect the service station dealer is unnecessary. Furthermore, we believe the importance of an efficient and successful independent dealer organization cannot be overemphasized. It is through such independent dealers that the vast majority of service station sales are made. In the State of Alaska, Standard Oil Company of California supplies products to 42 conventional dealer stations plus about 112 car washes, garages, new car dealerships, and other miscellaneous accounts, all of which are operated by independent businessmen. With respect to dealer stations, (those being the 42 conventional stations) we presently provide, at our expense, all the marketing research,

site location, land acquisition, facility construction, fixed equipment, tankage and signs. We then lease the completed facility and the site to a dealer with the dealer being responsible only for such things as operating tools, movable equipment, and inventory. There is no "franchise fee" for the dealer to pay Standard. This arrangement affords the dealer entry into the service station business at a comparatively modest initial investment, in most instances between \$15-25,000. On the other hand, in recent years, our average investment for a new service station has been approximately \$500,000 including real property and facilities.

Our enormous investment and our complete marketing reliance upon the service station dealer demonstrate a very fundamental point about us and Chevron dealers: We need each other and we must assure the dealer a reasonable opportunity for success if we are both to succeed.

Our forms of dealer supply contract and dealer lease are available to the committee if it wishes to see them. We think that these agreements testify to our good faith in providing to Chevron Dealers on commercially fair terms a very valuable place of business in which the dealer has a reasonable opportunity to make a good living. These agreements are for a five year term and, after a brief initial trial period, they can be terminated by us during the term only for good cause. Our

relationship with dealers is both fair and reasonable and is founded upon the mutual interest of both parties. From the very onset we have been aware of the antitrust laws that govern our relationship with Chevron Dealers. Accordingly, Chevron Dealers are entirely free to price their products and services and to purchase also from other suppliers as they may decide. In other words, we recognize and respect the dealer as an independent businessman. If we were to change our policy and seek improperly to control a dealer's pricing or purchasing discretion we would surely be subject to the formidable sanctions of the antitrust laws, including treble damages. We therefore believe that the commercial interest of suppliers and the dealers who sell their products are mutual interests. These interests, together with the severe sanctions of the existing antitrust laws, are we believe entirely adequate to protect service station dealers and hence no further legislation is necessary. But, even if additional legislation were needed, Senate Bill 438 would be ill advised for the following principal reasons:

1. Section 45.50.810(a)(6)

This section would prohibit us from requiring Chevron Dealers to buy any quantity of our products unless we proved that such purchase obligations are "reasonably necessary for lawful purposes justified on business grounds and do not substantially affect competition".

This provision is unnecessary since the antitrust laws provide ample protection to dealers by forbidding any agreements which would require them to buy all or substantially all of their inventory requirements from a particular supplier. Accordingly a Chevron Dealer is merely required by contract to buy from us only such quantities of our products as may be necessary to satisfy customer demand for our products at his station. He may also handle any competitive products that he desires. Indeed, we find that most of our dealers do in fact choose to handle substantial quantities of competitive petroleum products and tires, batteries and accessories.

In addition, this section is wholly impractical because of the uncertainty of the language measuring the legality of the purchasing obligation. When are such obligations "reasonably necessary for lawful purposes justified on business grounds?" And when do they not "substantially affect competition?" The bill gives no guidance on this. Even entirely reasonable and otherwise lawful purchase obligations may affect competition as any aggregation of sales or purchases would, without in any way lessening or impairing competition. Suppliers cannot be expected to make the very substantial investments require for modern service stations if they do not have reasonable assurance that their products will be at least offered for sale at such stations.

Also, depending upon a court's interpretation of the wording in this section, it may be in conflict with current State and

Federal Trademark Laws. If this section were to allow gasoline purchased by the dealer from another supplier to be sold through pumps marked with Standard's brands, then it appears obvious to us that it is in violation of applicable trademark laws.

This would obviously provide a great disservice to consumers who think they are buying Standard's products when, in fact, they may be sold someone else's product of lesser quality and performance characteristics. I think the Department of Weights and Measures would take a dim view of that situation.

6. Section 45.50.810 (d)

This section provides that no refiner or distributor may charge different prices to dealers unless they are based upon the quantity purchased or transportation costs. Such a provision is plainly anticompetitive.

The Federal Robinson-Patman Act does not forbid all price differences between customers, but only those that threaten substantial anticompetitive effects. Moreover, in order to avoid the anticompetitive effects of rigid price uniformity, the Federal statute provides that a lower price given to one customer, but not to others, is lawful if granted "in good faith to meet an equally low price of a competitor" (15 USC § 13(a)(b)). The purpose of this provision in the Federal statute was to give a supplier sufficient flexibility to respond to differing competitive conditions, when and where they occur. For example, a gasoline price war may break out in one city

within the State but not elsewhere. To assist its dealers to remain competitive in the area of the price war, Standard under present law would be able to lower its price to them without lowering it Statewide. If such a price reduction had to be extended Statewide, it probably would not be made at all. This feature of the bill would provide a strong upward pressure on pricing to the detriment of competition and the motoring public.

Thus, this provision is anticompetitive since it unduly limits the very price competition that is the principal goal of both the Alaskan and Federal antitrust legislation.

Consider also the not uncommon situation in Alaska where a service station dealer himself has made the investment in the station. That investment will normally induce suppliers to offer an investment allowance on gasoline to reflect the fact that the dealer and not the supplier in this instance is furnishing the station. In these circumstances, a competing supplier, such as Standard, should be able to respond to this competitive situation by offering a comparable allowance to obtain or retain this dealer's business. But here too, if the same price must be offered to all dealers throughout the State, regardless of the commercial circumstances, it is probable that such an allowance for the dealer's investment would not be offered. Again, the result of this section of the bill would clearly be to reduce competition and encourage pricerigidity. It

would be anomalous for Alaska, having recently passed general antitrust legislation, now to pass a law which would encourage uniform pricing and discourage price competition.

3. Section 45.50.810 (a)(8)

This section would forbid us to "unreasonably disapprove the transfer or assignment of a franchise by a dealer to a qualified transferee or assignee."

This section constitutes a totally unreasonable and arbitrary interference with our property rights. Having made a \$500,000 investment, and in light of a dealer's relatively small investment, it is only proper and just that we have the right to select a candidate whom we feel best qualified to operate a first class service station.

The consumer stands to lose the most from such a provision. If the dealer is permitted to assign his lease, there is the inevitable question of personal motivation in making the assignment. At Standard our motivation is simply to select dealers who are best qualified to manage the station and who are committed to providing the service to which we believe the motoring public is entitled.

4. Section 45.50.820

This section would require a supplier, upon termination or non-renewal of the franchise, to repurchase certain tangible assets from the dealer and, in certain circumstances, to compensate the dealer for "goodwill". We at Standard are opposed

to the payment of any sum of money for alleged dealer goodwill.

There is nothing in the nature of goodwill that is transferable from a dealer to his supplier or to a successor dealer where the station is owned by the supplying company. If a dealer's business is successful because the station is well located, and has excellent facilities, that portion of the success properly remains with the supplier. In this connection, all dealers, new or old, receive the benefit of large sums of money we have spent on advertising to promote public acceptance of our brands of products at our retail outlets. They also receive the benefit of the large number of credit cards we have solicited and the millions of dollars in accounts receivable we carry for the dealers. These things are in addition to the service station facility itself, which we furnish to the dealer and which currently costs us on an average about \$500,000 per unit. None of these sources of "goodwill" attributable to the station can be transferred by the dealer to us or to his successor.

Likewise, that portion of the dealer's success attributable to his personal skills, personality or the relationship he established with his customers belongs to him and is taken with him when he leaves and cannot be effectively transferred to us or to a succeeding dealer.

Thus it is a misnomer to say that the departing dealer has any "goodwill" that is transferable either to the supplier or to the new dealer.

5. Section 45.50.810 (a)(3)

This section would prohibit us from requiring a dealer to operate his station for more than 12 consecutive hours per day or more than six days per week.

It is safe to say that this provision would effectively eliminate gasoline availability on Sundays and between the hours of 10:00 p.m. and 6:00 a.m. This would be detrimental to the consumer and to the economy of the State of Alaska. Gasoline would be unavailable for emergency vehicles for such agencies as the police department; local travelers would be inconvenienced and tourism would be discouraged. Additionally, this provision completely disregards operating hour requirements imposed by many lessors in their ground leases to us; and while it does seem to recognize that longer hours may be required by the state or the federal government it does not recognize that as a condition to zoning permits, we may be required by municipal or borough authorities to provide for longer hours in certain locations.

6. Section 45.50.810 (a)(5)

This section provides that it would be a violation of law for us to sell, rent or offer to sell to a dealer any product or service for more than a "fair and reasonable" price.

This section would in effect subject the pricing of our service station products to a kind of public utility control with the courts serving as the regulatory agency. Apart from governmental price control during periods of acute economic distress,

at which rare times control could be vested in an administrative agency such as the Federal Energy Administration, it is neither desirable nor necessary to supplant ordinary market forces as proper regulators of prices and rents. Competition establishes fair market prices which balance all the effects of supply, demand and necessary return on capital. On the other hand, when prices are fixed at levels different from those established by the fair market this balance is inevitably upset and economic dislocations result, all to the public's disadvantage.

7. Section 45.50.810 (a)(10)

Under this section it would be a violation for a supplier to fail to deal with a dealer in "good faith". That phrase is so vague and generalized that it would be impossible to administer or comply with. No standards are stated as to how good faith is to be measured. We expect that every difference of opinion or commercial judgment would become a controversy over good faith. Such a provision would inescapably provoke endless dispute and litigation.

8. Section 45.50.810 (b)

This section would require that a refiner or distributor give 90 days notice prior to terminating or failing to renew a franchise except where such termination or failure to renew is due to the voluntary abandonment of the station by the dealer; or where the dealer is convicted of an indictable offense

directly related to the business. This requirement is not needed for the protection of the franchise and is commercially unfair and impracticable. Notice of intention to terminate for breach of contract should generally afford the dealer an adequate opportunity to cure the breach and avoid termination, as our Chevron dealer contracts provide.

But the 90 days prior notice is unrealistically long in many situations other than those two recognized in the bill. Consider for instance the case of a dealer engaged in fraudulent and deceptive sales practices against the motoring public. In this example, there is normally ample evidence of repeated illegal practices such as the deliberate damaging of tires and/or fan belts. Prompt termination was necessary in another situation, we recently found, as a result of a fire caused by the dealer's improper use of a welding torch in violation of city ordinances and contrary to our instructions against the practice. Obviously to permit such situations to continue for a minimum of 90 days would be to the detriment of consumers and good dealers alike.

In addition to that kind of illegal conduct by the dealer, there are numerous other situations in which 90 days prior notice would be wholly unrealistic. For example: (a) The Dealer's death or mental or physical incapacity to operate the station and (b) refusal by the dealer to pay debts owed to his supplier or the dealer's bankruptcy or insolvency.

Any of these cases would prevent us from regaining possession of our investment for 90 days and would to that extent arbitrarily deprive us of our property and would require enormous efforts by a new dealer to rebuild the business that has been needlessly impaired by prolonged neglect or idleness.

9. Section 45.50.810 (c)

This section deals with the causes for termination and provides that no refiner or distributor may terminate, cancel, or fail to renew a dealer lease without good cause which is defined as including: "The failure of a franchisee to comply with the lawful material provisions of a franchise between distributor or refiner and the franchisee/dealer..."

What provisions in dealer agreements would meet these criteria is a speculative matter at best; and different courts or juries may be expected to have conflicting views of the same contractual provisions. Thus, a particular term or condition in the lease or supply contract may or may not be enforceable based upon the interpretation of a judge or jury without experience in such commerce. Moreover, this bill would give a judge or jury no instructive guidance for making the required determinations. We understand that some service station dealers are supplied petroleum products pursuant only to oral agreements; others, like our Chevron dealers, are supplied under quite detailed written agreements designed to clarify the continuing business relationship for the benefit of both parties. However, in addition to the fundamental obligations to sell, to buy and

to pay for products, there are other commercially important provisions such as those relating to the maintenance of a very expensive station. Are these to be deemed non-material by a judge or jury unfamiliar with service station business practices?

And, while the bill provides for some specific situations to be construed as good cause for termination, cancellation or non-renewal, it fails to recognize many others, such as:

- a dealer's death or mental or physical incapacity to operate the station;
- refusal by the dealer to pay debts owed to his supplier;
- adulteration, commingling, mislabeling or misbranding gasoline;
- trademark violation;
- repeated consumer complaints concerning the dealers;
and
- the supplier's decision to materially alter the facilities to meet changing consumer needs.

Furthermore, it is unclear whether the requirement to give the franchisee a reasonable opportunity to cure a default is applicable only where the breach is curable, such as the failure to pay for goods delivered. Surely, for example, where a dealer is convicted for fraudulent or deceptive sales practices, or becomes bankrupt or abandons the station, the default is essentially non-curable.

Moreover, subpart (4) would, in effect, require that the terms of our agreements be essentially the same as those offered other dealers in similar retail outlets.

Surely, there is no sound basis for requiring every franchise agreement to be the same as that offered to every franchise dealer. The term "similar" retail outlets does not cure this deficiency since the word "similar" is undefined and like other terms in the bill would be subject to varying and conflicting interpretations.

Rental terms vary from dealer to dealer quite properly; there are differing types and sizes of service stations and differing locations. Also, when we lease station sites from property owners, they require differing ground rents. In addition, there are differences in the costs incurred in supplying products to various dealers.

In closing, I would restate that in recent years our average investment for a new service station has been approximately \$500,000. This figure is probably typical of the recent expenditures made by similar suppliers in this industry. While we cannot speak for others, we seriously doubt that we could continue making these kinds of investments not knowing what our contracts would mean, and, in addition, be subject to the

other restrictive conditions set forth in this bill. It is difficult to foresee who would make such investments or who would maintain the current level of availability for these services which the public has come to expect.

Nowhere else can a Dealer obtain a half million dollar income producing business investment with such minimal risk. Nowhere else does the consumer enjoy the level of assurance of product quality, service skills, competitive pricing, and image achievable through our system as it presently operates. Legislation which removes the incentives for the investments required to construct service stations today will prove to be counter productive working against the common goals of both the consumer and the dealer.

I hope the views I have expressed will be helpful to you. I respectfully urge you to consider them and to reject this bill. If you have any questions, I would be pleased to respond.

POSITION PAPER

PROVISIONS TO BE CONSIDERED
IN ANY
DEALER DAY IN COURT LEGISLATION

Although there is no demonstrated need for dealer day in court legislation, any such legislation which is considered should be designed to accomplish the following:

- 1) Provide for disclosure by the supplier of essential facts regarding its relationship with prospective dealers to the extent that such disclosure is necessary to prevent fraud in the inception of the contract and to furnish the dealer with a reasonable basis for any investment decision he is required to make.
- 2) Protect the dealer from arbitrary or unreasonable cancellation by his supplier (refiner or jobber) while maintaining in the supplier a reasonable right to terminate marketing agreements upon written notice (as provided in the agreement) for reasons such as death, bankruptcy or insolvency of the dealer, abandonment of the station, criminal misconduct or consumer fraud or failure to pay amounts due.
- 3) Provide suppliers reasonable rights of nonrenewal with

adequate notice for such situations are:

- a) Sale of the property by the supplier or the relinquishment of his leasehold interest if it is owned by a third party.
 - b) A decision to rebuild or materially alter or add to the facilities to meet changing consumer needs.
 - c) Use of the premises for purposes other than the sale of motor fuels.
 - d) Repeated consumer complaints concerning the dealer.
 - e) Inability to agree on reasonable terms and conditions of the renewal agreement.
- 4) Provide that the supplier, in event of termination, will repurchase from the dealer at current wholesale prices, branded merchandise originally purchased from the supplier; provided however, that such goods are in merchantable condition, that the dealer's title to them is free and clear and that the proceeds of any such repurchase will be applied first to any indebtedness of the dealer to the supplier.
- 5) Apply to only those marketing agreements entered into after effective date of the legislation.

January 13 1975

POSITION PAPER

STATE GASOLINE DEALER DAY IN COURT LEGISLATION

INTRODUCTION

Gasoline "dealer day in court" legislation is the application of franchise type laws to automotive gasoline marketing. Historically, gasoline suppliers (refiners and jobbers) have not regarded their contractual relationships with dealers as franchises because of the dissimilarity with the typical franchise arrangement. Franchise fees are not required, and highly specified duties and responsibilities of the dealer are not detailed in the sales contract. Gasoline dealer day in court legislation is of extreme concern to the petroleum industry because it impairs the ability of gasoline suppliers to manage their marketing investments by unreasonably restricting rights of termination or nonrenewal of contracts with dealers.

NEGATIVE EFFECTS OF DEALER DAY IN COURT LEGISLATION

Anti-Consumer Effects

The usual dealer day in court legislation tends to perpetuate all existing branded sales contracts between suppliers (refiners and jobbers) and reseller customers (dealers and jobbers) so long as minimum standards are met, regardless of the agreed time period

in the contract. This results in a disservice to the motoring public which is entitled to higher, not lower standards of operation. Further, legislation of this type would not adequately protect consumers against the limited number of unscrupulous service station operators who provide shoddy service, maintain poor standards of cleanliness, oversell, mistreat or defraud consumers.

Anti-Dealer Effects

One of the strongest assets that a successful dealer has is in the integrity of the brand and the reputation of the supplier whose products he sells. Dealer day in court legislation actually works against the interests of effective and efficient dealers who may see the value of their business diminished by the perpetuation of unsatisfactory dealers selling under the same brand.

Anti-Competitive Effects

Dealer day in court legislation is anti-competitive because it suppresses competition for available service station sites and because it tends to exclude new entries into the service station business which historically has provided an opportunity for the entrepreneur with limited capital resources. This exclusion is especially unfortunate when considered in the light of the country's efforts to increase the number of minority small businessmen. In an effort to protect a small number of ineffective dealers from competition, legislation of this type will deny business opportunities to many able and

deserving potential entrepreneurs.

Anti-Supplier Effects

Dealer day in court legislation is unfair to suppliers as it diminishes the value of their capital investments in service stations and erodes the value of their trademarks. By giving all dealers regardless of individual merit, virtual perpetual tenure, this type of legislation unreasonably abridges contractual rights and may well violate the constitutional rights of suppliers as property owners.

DEALER DAY IN COURT LEGISLATION UNNECESSARY

There is a lack of basic need for dealer day in court legislation in view of the well developed body of federal and state laws already in effect which regulates and prevents abuse in the usual gasoline dealer-supplier agreements.

For example, the antitrust laws make it illegal for a petroleum supplier, either by contract or coercion or threats of termination to require a dealer to purchase the supplier's brand of TBA in order to keep his dealership. These same laws require clear dealer freedom in all product pricing and in the selection and purchasing of allied products. A cancellation or nonrenewal of a dealer agreement because of the dealer's noncompliance with the supplier's desires in these areas is prohibited.

In the area of fraud, misrepresentations and deceptive practices, the FTC, under Section 5 of the Federal Trade Commission Act,

vigorously prosecutes fraudulent and deceptive practices in commerce. State laws also operate in this area.

The supplier-dealer relationship is contractual. Its formation and interpretation are governed by general contract law, of which the cornerstones are voluntary agreement and fair dealing between the parties. Additionally, there are the judicial remedies of rescission and damages provided for common law fraud, deceit or misrepresentation.

January 11, 1975

1 PROPOSED AMENDMENTS TO ~~SENATE BILL~~ SENATE BILL ~~3~~

2 (Language in Brackets Indicates Deletions
3 and
4 Language With Underscoring Indicates Additions)

5 A BILL FOR AN ACT

6 Relating to retail service stations /; and declaring an emergency/.

7 Be It Enacted by the People of the State of Oregon:

8 SECTION 1. Sections 2 to /12/ 11 of this Act are added to and
9 made a part of ORS chapter 646.

10 DEFINITIONS

11 SECTION 2. As used in sections 2 to /13/ 11 of this 1975 Act,
12 unless the context otherwise requires:

13 (1) "Dealer" means / a / any person engaged primarily in the retail
14 sale of gasoline /through a retail outlet owned or leased by the person
15 and operated by the person/ purchased from a supplier under the terms
16 of a contractual agreement.

17 (2) "/Distributor/ Supplier" means any person /or corporation other
18 than a refiner/ engaged in the sale, /assignment/ consignment or
19 distribution of gasoline to /four or more/ a dealer /operated retail
20 outlets/ under the terms of a contractual agreement.

21 (3) "/Franchise/ Contractual agreement" means an oral or written
22 contract or agreement or series of agreements, either express or implied,
23 /in which the dealer is required directly or indirectly to purchase 50
24 percent or more of his supply of gasoline from a distributor or refiner/
25 between a dealer and a supplier under which such dealer is granted
26 authority to use a trademark, trade name, service mark or other identifying
27 symbol or name owned or controlled by the supplier in connection with
28 the sale of gasoline of such supplier, and /in/ under which the dealer

1 is granted authority to occupy premises owned, leased or in any way
2 controlled /, directly or indirectly, / by the /refiner or distributor/
3 supplier for the purpose of allowing such dealer to operate a retail
4 outlet. Any other agreement or contract between a dealer and a supplier
5 which is ancillary to the grant of authority to use a trademark, trade
6 name, service mark, or other identifying symbol or name of a supplier in
7 connection with the sale of gasoline of such supplier or to real estate
8 premises covered by such other agreement or contract shall not be included
9 within the definition of "contractual agreement".

10 (4) "Franchisee-dealer" means a dealer who is a party to a franchise/
11 Retail sale of gasoline" means the sale of gasoline for consumption and
12 not for resale at a retail outlet in this state serving the general
13 motoring public.

14 (5) "Gasoline" means /all products commonly or commercially known
15 or sold as gasoline/ automotive gasoline used as motor fuel in motor
16 vehicles.

17 (6) "Refiner" means a company, corporation or individual who owns
18 or controls through a substantially owned subsidiary, partnership, or
19 joint venture, a refinery used for the production of gasoline, diesel
20 or other motor vehicle fuels./ "Retail outlet" means a gasoline service
21 at which a dealer is primarily engaged in the retail sale of gasoline,
22 for purposes other than resale, to the general motoring public.

23
24 (7) "Engaged primarily in the retail sale of gasoline" means that
25 fifty percent of the annual gross revenue of the dealer is derived from
26 the retail sale of gasoline.

27 (8) "Good faith" means the duty of a dealer and a supplier to act
28 at all times in a fair and equitable manner toward the other in the

1 performance of or compliance with, or in the demanding performance of or
2 compliance with, the terms or provisions of the contractual agreement so as
3 to guarantee each party freedom from coercion, intimidation, or threats
4 of coercion or intimidation from the other party; provided that recommenda-
5 tion, suggestion, endorsement, exposition, persuasion, counseling, urging,
6 or argument shall not constitute a lack of good faith; and provided
7 further that the imposition of standards of quality and service reasonably
8 related to the contractual agreement and the public good will behind the
9 supplier's trademarks shall not constitute a lack of good faith.

10
11
12
13 DISCLOSURES

14 SECTION 3. Prior to entry into a /franchise/ contractual agreement,
15 a /refiner or distributor/ supplier shall disclose to the dealer /facts
16 which would reasonably be considered material to the dealer's decision to
17 enter into the franchise. Such facts shall include, but are not limited
18 to/ , which disclosure may be within the terms and conditions of a written
19 contractual agreement, or separately, the following information:

20
21 (1) /Ownership/ The owner of the real property /of/ on which the
22 retail outlet is located.

23 (2) If the real property is not owned by /a refiner or distributor/
24 the supplier, the nature of the relationship between the real property
25 owner and the /refiner or distributor/ supplier and, if applicable, the
26 /length/ term of the underlying lease of real property.

27 (3) /Last known/ The name and addresses of the dealer or dealers
28 operating the retail outlet for the /last/ immediately preceding /five/

1 three years or such shorter period during which such dealer or dealers
2 were engaged primarily in the retail sale of gasoline at the retail
3 outlet, to the extent known to and contained in the existing records of
4 the supplier.

5 (4) The gasoline gallonage history of the /station/ retail outlet
6 for the /last/ immediately preceding /five/ three years or such shorter
7 period during which a dealer or dealers engaged primarily in the retail
8 sale of gasoline at such retail outlet, to the extent known to and
9 contained in the existing records of the supplier.

10 /5/ Any sales goals or quotas the refiners or distributors intend
11 to apply to the station.

12 /6/ 5/ /Nearest/ The address of the nearest /gasoline/ retail
13 outlet owned, leased, controlled or operated by /refiner or distributor/
14 the supplier within a two (2) mile radius of the premises at the time the
15 contractual agreement is entered into, and any finally approved plans
16 /distributor or refiner/ the supplier has to open new retail outlets
17 /within the trade area of the/ closer than said nearest retail outlet
18 during the term of the contractual agreement.

19 /7/ 6/ Any finally approved plans the /refiner or distributor/ supplier
20 has for /the future of/ the /subject/ retail outlet during the term of
21 the contractual agreement which will significantly and detrimentally alter
22 the improvements or equipment, or the land upon which the retail outlet
23 is located.

24 PROHIBITED PRACTICES

25 SECTION 4. No person shall, directly or indirectly, or through his
26 officers, agents, employees or otherwise:

27 (1) Require the /franchisee-dealer at the time of entering into
28 the franchise agreement to assent to release, assignment, novation,

1 waiver or estoppel which would relieve any person from liability imposed
2 by this 1975 Act.

3 (2) Require a [the franchisee-] dealer to agree to waive his
4 right to a jury trial or any right of counterclaim he may have.

5 [(3) Require the franchisee-dealer to keep his retail outlet open
6 for business more than 16 consecutive hours per day or more than six
7 days a week, except this subsection shall not be construed to prevent
8 any retail outlet from being open when required to be open to conform
9 to any state or federal law or regulation.]

10 [(4)] 3) Restrict or inhibit, directly or indirectly, the right
11 of free association for any lawful purpose of a [the franchisee-] dealer.

12 [(5) Sell, rent or offer to sell to a franchisee-leader any product
13 or service for more than a fair and reasonable price.]

14 [(6)] 4) Require a [franchisee-] dealer to purchase or otherwise
15 lease goods or services of a [refiner or distributor or from an approved
16 source of supply unless, and to the extent that, the refiner or
17 distributor satisfies the burden of proving that such restricted purchasing
18 agreements are reasonably necessary for lawful purposes justified on
19 business grounds and do not substantially affect competition. However,
20 this subsection does not apply to the initial inventory of the franchise.
21 In determining whether a requirement to purchase is lawful, the court
22 shall be guided by the decisions of the courts of the United States
23 in interpreting and applying the antitrust laws and the Federal Trade
24 Commission Act of the United States/ supplier where such requirement when
25 imposed would be a violation of any law, rule or regulation of this state
26 or of the United States.

27 [(7)] 5) Impose unreasonable standards of performance on a [the
28 franchisee-] dealer, provided that standards reasonably established in

1 good faith may be imposed by a supplier and shall be, when imposed,
2 adhered to by a dealer.

3 (8) Unreasonably disapprove the transfer or assignment of a
4 franchise by a franchisee-dealer to a qualified transferee or assignee.

5 (9) 6 Require a franchisee-dealer to participate financially
6 in the distribution of or to use any premium, coupon, give-away or
7 rebate in the operation of the his business; except provided that
8 a distributor supplier may require a the franchisee-dealer to
9 distribute premiums, coupons or give-aways to customers which are
10 provided without expense to the franchisee-dealer at the expense
11 of the refiner or distributor or where the promotion is self-liquidating;
12 provided, further, that nothing in this section shall prohibit a dealer
13 from voluntarily participating in the distribution of or using any
14 premium, coupon, give-away or rebate in the operation of his business
15 and the dealer may be required to complete any promotion voluntarily
16 undertaken by him.

17 (10) 7) Fail to deal with a the franchisee-dealer or a supplier in/ good faith

18 NOTICES

19 SECTION 5. No refiner or distributor supplier shall directly
20 or indirectly, through any officer, agent or employee terminate, cancel
21 or fail to renew a franchisee contractual agreement prior to the
22 expiration date of such agreement without first giving written notice
23 setting forth all of the reasons for such termination or cancellation
24 or intent not to renew to the franchisee-dealer in accordance with the
25 terms of the contractual agreement, or to the dealer at his last known
26 address by certified mail posted at least 90 45 days in advance of
27 such termination, cancellation or failure to renew, except:

28 (1) Where the alleged grounds are voluntary abandonment by the
29 franchisee-dealer of the franchise relationship, in which event the
30 aforementioned notice may be given five days in advance of such

1. termination, cancellation or failure to renew; or

2. (2) Where the alleged grounds are the conviction of the franchisee-
3. dealer in a court of competent jurisdiction of an indictable offense
4. directly related to the business conducted pursuant to the franchise
5. in which event, the termination, cancellation or failure to renew shall
6. be effective immediately upon the delivery of written notice thereof.⁷
7. ; provided, however, that if in the light of the circumstances it would
8. not be reasonable to give notice 45 days in advance of such termination,
9. the supplier shall give notice as provided in this section at the earliest
10. date that is reasonably practicable; provided, further, that such
11. termination may occur as specified in the contractual agreement and
12. without regard to the notice provisions of this section where such
13. agreement provides for a shorter notice period in situations included
14. in those set forth in subsection (3) of section 6 of this Act.

15. TERMINATION, REMEDIES AND DEFENSES

16. SECTION 6. No refiner or distributor shall terminate, cancel or
17. fail to renew a franchise without good cause. Good cause includes without
18. limitation:

19. (1) The failure of a franchisee-dealer to comply with the lawful
20. material provisions of a franchise between distributor or refiner and the
21. franchisee-dealer and to cure such default after being given written
22. notice thereof and a reasonable opportunity to cure such default;

23. (2) Adjudication of the franchisee-dealer as bankrupt or insolvent
24. or an assignment by the franchisee-dealer for the benefit of creditors
25. or a similar disposition of assets of franchise business or voluntary
26. abandonment by the franchisee-dealer of the franchise business or
27. conviction of or entry of plea of guilty or no contest by the franchisee-
28. dealer to a charge of violating any law relating to any franchise business;

1 (3) The good faith business decision of franchisor that he no
2 longer requires a retail outlet at that location for the marketing of
3 gasoline; or

4 (4) The franchisee-dealer's failure to sign the new agreement of at
5 the time of renewal of the franchise, the distributor or refiner and the
6 franchisee-dealer cannot agree upon new terms and the terms offered by
7 the refiner or distributor do not violate any other sections of this
8 1975 Act or other laws of the State of Oregon or of the United States
9 and the terms are essentially the same as those offered to other franchisee-
10 dealers in similar retail outlets and do not discriminate against the
11 subject franchise-dealer.]

12 (1) No supplier shall terminate a contractual agreement prior to
13 the expiration date thereof unless the dealer whose contractual agreement
14 is terminated failed to perform or comply with, or failed to act in
15 good faith in performing or complying with, any of the terms or provisions
16 of the contractual agreement, except that a supplier shall be permitted
17 to provide in the contractual agreement for the termination of such
18 agreement without cause during a reasonable trial period, not to exceed
19 one (1) year, where the dealer involved has not been a dealer of the
20 supplier for that period of time at the premises described in the
21 contractual agreement.

22 (2) If a supplier who has entered into a contractual agreement
23 with a dealer engages in conduct prohibited under subsection (1) of
24 this section, or prohibited by or in violation of any other section of
25 this Act, the dealer may bring an action in any court of competent
26 jurisdiction in this state against such supplier for actual damages
27 sustained or for injunctive relief as may be necessary to prevent or
28 restore rights lost because of the conduct of such supplier. In any

1 action brought under the provisions of this subsection, the prevailing
2 party shall recover from the losing party all costs incurred, including
3 reasonable attorney and expert witness fees, according to the discretion
4 of the court.

5 (3) In any suit brought under subsection (2) of this section,
6 there shall be defenses available to the supplier to include the following
7 situations:

8 (a) Failure of the dealer to perform or comply with, or his
9 failure to act in good faith in the performance or compliance with, any
10 of the terms and provisions of the contractual agreement:

11 (b) Criminal misconduct, unfair trade practice, or fraud of the
12 dealer in connection with the operation of the business conducted pursuant
13 to the terms and provisions of the contractual agreement; or the conviction
14 of the dealer of any felony;

15 (c) Bankruptcy or insolvency, death or incapacity of the
16 dealer; provided that such incapacity, whether mental or physical,
17 shall be to such extent that the dealer is unable to perform under the
18 terms and provisions of the contractual agreement as was originally
19 intended when such agreement was entered into by him with the supplier;

20 (d) Loss by the supplier of the right to use a trademark,
21 trade name, service mark, or other identifying symbol or name covered
22 by the contractual agreement; or loss by the supplier of the right to
23 grant possession of, or the destruction of, all or a substantial part
24 of the premises covered by the contractual agreement; or expropriation,
25 appropriation, condemnation, or other taking, or restriction of the use,
26 of the premises covered by a contractual agreement, in whole or in part,
27 pursuant to the power of eminent domain or the regulatory police power
28 of this state; or any similar cause which is beyond the reasonable
control of the supplier;

1 (e) Abandonment by the dealer, or failure by the dealer
2 to operate, the retail outlet located on the premises covered by the
3 contractual agreement;

4 (f) Failure of the dealer to make any payment due the supplier
5 as provided in the contractual agreement, or otherwise;

6 (g) Adulteration, commingling, mislabeling or misbranding
7 of gasoline by the dealer; or trademark violations of the dealer, or
8 those under his control against the trademark of the supplier;

9 (h) Failure of the dealer to comply with federal, state
10 or local laws, ordinances or regulations relevant to the operation of
11 the business conducted pursuant to the contractual agreement;

12 (i) Execution of a mutual agreement by the dealer and supplier
13 to terminate the contractual agreement;

14 (j) The occurrence of any circumstance which is specified
15 in the contractual agreement which circumstance is relevant to the
16 operation of the contractual relationship and where termination before
17 the expiration date specified in the contractual agreement is reasonable
18 in light of such circumstance.

19 REPURCHASE OF GOODS

20 SECTION 7. In the event /that/ the supplier /refiner or distributor
21 for good cause/ terminates /, cancels or fails to renew a franchise under
22 this 1975 Act, he shall compensate the franchisee-dealer for the fair
23 market value of the franchise including goodwill. Valuation other than
24 goodwill includes the fair market value of a franchisee-dealer's
25 inventory supplies, equipment and furnishings purchased from the refiner
26 or distributor exclusive of personalized materials which have no value
27 to the refiner or distributor and inventory supplies, equipment and
28 furnishings not reasonably required in the conduct of the franchise

1 business. Such compensation shall be made within 60 days from the
2 date of termination unless it is necessary that a lawsuit be filed
3 under section 10 of this 1975 Act or the franchisee-dealer fails to
4 comply with the provisions of ORS 76.1070. The refiner or distributor
5 may offset against accounts owed by the franchisee-dealer under this
6 section any amount owed by the franchisee-dealer to the refiner or dis-
7 tributor. 7 a contractual agreement, such supplier shall make or cause
8 to be made a good faith offer to repurchase from the dealer, his heirs,
9 successors or assigns, at the current wholesale prices, any and all
10 merchantable products and merchandise which are
11 undamaged and unadulterated from their original form, purchased by
12 the dealer from such supplier; provided, that such supplier shall
13 have the right to apply the proceeds against any existing indebtedness
14 owed to him by the dealer; and, further provided that such repurchase
15 obligation is conditioned upon there being no other claims or liens by
16 or on behalf of other parties, including creditors and governmental
17 agencies, against such products and merchandise.

18 SECTION 8. The Attorney General may bring a suit in the name
19 of the state against any person to restrain or prevent the doing of
20 any act herein prohibited or declared to be unlawful, and the prevailing
21 party may in the discretion of the court recover the costs of such
22 suit including reasonable attorney fees. 7

23 SECTION 9. The provisions of ORS 646.140 to 646.180 with respect
24 to a violation or threatened violation of ORS 645.010 to 646.180 apply
25 equally to a violation or threatened violation of sections 2 to 7 of
26 this 1975 Act. 7

27 SECTION 10. If under section 7 of this 1975 Act, a distributor
28 or refiner has good cause and the distributor or refiner and the

1 franchisee-dealer cannot agree on the fair market value of the franchise,
2 then either party may initiate an action in the circuit court of the
3 county where the franchise retail outlet exists and the matter shall be
4 tried in the same manner as the manner set forth in ORS chapter 35 for
5 general condemnation actions. Reasonable attorney fees and appraiser's
6 fees shall be awarded to the franchisee-dealer if the amount awarded
7 to the franchisee-dealer by the jury or the court is 10 percent higher
8 than the final offer, if any, made by the refiner or distributor prior
9 to the filing of the lawsuit.]

10 [SECTION 11. Every person who violates the terms of any injunction
11 issued pursuant to this 1975 Act shall forfeit and pay a civil penalty
12 of not more than \$25,000 per violation.]

13 ARBITRATION

14 SECTION 8. No action may be brought under section 6(2) of this
15 Act if the contractual agreement provides for the binding arbitration
16 of disputes arising under such agreement, including disputes arising
17 from the termination of such agreement, in accordance with the rules
18 of the American Arbitration Association, or as the parties may have
19 agreed upon in the terms and provisions of the contractual agreement.

20 LIMITATIONS

21 SECTION 9. No action may be brought under section 6(2) of this
22 Act unless commenced within two years after the cause of action shall
23 have occurred.

24 SEPARABILITY

25 SECTION /12/ 10. If any provision of this 1975 Act or its
26 applicability to any persons or circumstances is held invalid, the
27 remainder of the Act or the application of the provisions thereof
28 to other persons or circumstances is not affected.

EFFECTIVE DATE

1
2 SECTION /13/ 11. To the extent that such application does not
3 impair the obligations of contracts, sections 1, 2 and 4 to 11 of this
4 Act apply to franchises existing on the effective date of this Act./
5 This Act will take effect January 1, 1976, and shall apply to all
6 contractual agreements entered into or renewed after its effective
7 date.

8 SECTION 14. This Act being necessary for the immediate
9 preservation of the public peace, health and safety, an emergency is
10 declared to exist, and this Act takes effect July 1, 1975./
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March 29, 1976

Representative Bob Bradley
House of Representatives
Juneau, AK 99801

Dear Representative Bradley:

George Gregson is a substantial property owner in the Anchorage area and has called my attention to Senate Bill No. 438 which apparently is now under consideration by the Commerce Committee in the House. Mr. Gregson owns two service station sites in Anchorage and feels that the long-term effect of the new balance this legislation proposes to strike between the dealer on the one hand and the refiners and distributors on the other will be detrimental to his interest as a site owner. Personally, I long ago lost faith in the efficacy of this type of legislation to cure real or imagined evils. Having recently been engaged in attempting to represent a small trailer court operator who was swept into the consumer protection investigation net, I am even more sensitive to the abuses that can flow from the power this type of legislation places in the hands of a "dedicated" consumer protector.

I have discussed this proposed legislation in depth with Charlie Brown of Charlie Brown's Chevron and he is vehemently opposed to the legislation. He feels, as I do, that the burden placed on refiners and distributors by those dealers who feel they need the type of advantage here created, will ultimately be passed right back on those competent dealers that have run a successful business for years without this restructuring.

Representative Bob Bradley -2-

March 29, 1976

It is my understanding the matter is now before the House
Commerce Committee, but in any event I wanted to record this
expression with you.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Burton C. Biss".

Burton C. Biss

BCB:esp

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99801

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

April 15, 1976

SUBJECT: Commerce Committee Substitute for Senate Bill 438 am
TO: Representative Bradley, Chairman,
House Commerce Committee
FROM: David T. Walker, Legislative Counsel

Attached is a committee substitute drafted in accordance with the committee's request. I would like to remind you of an amendment which should be made to the bill to avoid a conflict with controlling federal law (15 U.S.C. 513).

I have attached a copy of a memo to Representative Rudd, dated March 29, which explains the necessity for the amendment and supplies the needed language.

cc: Rep. Rudd
Rep. Gardiner

M E M O R A N D U M

March 29, 1976

SUBJECT: Senate Bill 438 am
TO: Representative Lisa Rudd
FROM: David T. Walker, Staff Attorney *DTW*

I drafted § 45.50.810(d) of SB 438 at the request of Senate Commerce Committee. It was my intention to parallel the applicable federal law - in fact I represented to the committee that the language did that.

I have attached a copy of an amendment which should be made to the language of the bill. The added language would make it clear that the state law followed the controlling federal anti-trust provisions and would avoid needless litigation.

DTW:bh

Attachment

Amendment suggested to SB 435 at:

PAGE 5 LINE 3

After "dealers" insert the following:

"where the effect of the discrimination may be substantially to lessen competition"

PAGE 5 LINE 4

After "costs." insert the following:

"Nothing under this section shall prevent a refiner or distributor from offering a lower price or furnishing a service or facility to a dealer when the offer is made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by that competitor."