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FOUR YEARS UNDER THE ROBINSON-PATMAN ACT

By CHARLES BERTRAND BAYLY, JR.*

A SURVEY of the cases and orders handed down during the last four and one-half years under the Robinson-Patman Act of 1936 cannot begin without a word concerning its forerunner—the Clayton Anti-trust Act of 1914. Section 2 of the Clayton Act,[1] specifically directed against discrimination "in price between different purchasers of commodities," was primarily designed to prevent in the seller's line of business monopolies, brought about by local price cutting to the injury of a competitor in the same community. But, as large scale methods of distribution through chain stores, department stores, and mail-order houses increased in power, a greater danger of injury to competition, injury in the buyer's line of commerce, arose and created the potentiality of monopoly therein. To meet this new problem the Clayton Act was finally applied in 1929 to a situation where the price discrimination substantially lessened competition between buyers.[2] Another obstacle in preserving the old independent wholesaler and retailer by means of the Clayton Act, however, presented itself when the sixth circuit court of appeals ultimately held that the proviso in the Act, permitting a price discrimination "on account of differences in . . . quantity . . . , or that makes only due allowance for differences in the cost of selling or transportation, . . . " rendered legal a large price differential based upon a much smaller

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[1](1914) 38 Stat. at L. 730, 15 U. S. C. A. sec. 13, 15 F. C. A. sec. 13. McAllister, Sales Policies and Price Discrimination Under the Clayton Act, (1932) 41 Yale L. J. 518, 519; H. R. Rep. No. 627, 63d Cong., 2d Sess., p. 8.

[2]George Van Camp & Sons Company v. American Can Co., (1929) 278 U. S. 245, 49 Sup. Ct. 112, 73 L. Ed. 311, 60 A. L. R. 1060; Note, (1929) 42 Harv. L. Rev. 680; American Can Co. v. Ladoga Canning Co., (C.C.A. 7th Cir. 1930) 44 F. (2d) 763, cert. denied, (1931) 282 U. S. 899, 51 Sup. Ct. 183, 75 L. Ed. 792; (1931) 44 Harv. L. Rev. 867.

cost saving arising from the quantities purchased.[3] Thus a discount given on account of quantity purchased opened the way to limitless price discrimination in favor of a large mass distributor to the detriment of the smaller old-line wholesalers, retailers, and those manufacturers dependent on them for distribution. But apprehensive of the forthcoming result in this decision, and desiring to strengthen for the better protection of the independent wholesalers and retailers against those large scale distributors, already fast growing in number and size, the prohibitions against price discrimination, especially that brought by indirect means, Congress had already passed in June of 1936 the Robinson-Patman Act, of which sec. 1,[4] taking the place of sec. 2 of the old Clayton Act, is the most important of its four sections.

PRICE

The Act forbids "any person . . . , to discriminate in price. . . ." Although not expressly defined, by implication "price" seems to mean the net amount the buyer pays after deduction of all discounts and allowances.[5] Since the net amount which the buyer must pay is the important factor in order to compare such amount with what another buyer must pay under similar circumstances,

[3]Goodyear Tire & Rubber Co. v. Federal Trade Commission, (C.C.A. 6th Cir. 1939) 101 F. (2d) 620, cert. denied, (1939) 308 U. S. 557, 60 Sup. Ct. 74, 84 L. Ed. 468; (1939) 17 Tex. L. Rev. 517; (1939) 11 Rocky Mt. L. Rev. 259.

[4](1936) 49 Stat. at L. 1526, 15 U. S. C. sec. 13, Supp. 1939. Section 2 of the Clayton Act now has five subsections, (a) through (f). Throughout the article the provisions of the amendments will be referred to as sec. 2 and not sec. 1. Section 2 of the Robinson-Patman Act itself is a provision of temporary significance, enacted to allow the then pending (June 19, 1936) Goodyear litigation to be reopened to assert a violation of the amended Clayton Act, yet at the same time to preserve the record and order in the case prosecuted under the old sec. 2. Goodyear Tire & Rubber Co. v. Federal Trade Commission, (C.C.A. 6th Cir. 1937) 92 F. (2d) 677, rev'd on other grounds, (1938) 304 U. S. 257, 58 Sup. Ct. 863, 82 L. Ed. 1326. Very early much was written about the new Act. Legislation, (1936) 50 Harv. L. Rev. 106; (1937) 85 U. Pa. L. Rev. 306; Note, (1937) 46 Yale L. J. 447; Legislation, (1936) 36 Col. L. Rev. 1285; Robertson, The Robinson-Patman Act, (1936) 14 Fortune 96; Wheeler, Comments on the Robinson-Patman Act, (1938) 12 Conn. B. J. 171; Gallagher, Federal Price Fixing Laws and Decisions on Regulation of Business, (1938) 3 John Marshall L. Q. 230; Legislation, (1936) 24 Geo. L. J. 951 (legislative history); (1937) 23 Va. L. Rev. 201, 316.

[5]See Zorn and Feldman, Business Under the New Price Laws (1937) 74-75; Evans, Anti-Price Discrimination Act of 1936, (1937) 23 Va. L. Rev. 140, 160 (price is amount paid by buyer, not amount realized by seller); cf. In the Matter of United States Rubber Company, (1939) 28 F. T. C. 1489 ("net realized price" defined in cease and desist order as net amount of money paid by purchaser taking into account discounts and all other price adjustments). But see commission's definition in In the Matter of United Fence Manufacturers Association, (1938) 27 F. T. C. 377.

thus revealing any discrimination, this definition would seem to follow from the statutory wording itself.

Different Purchasers

Two purchasers must be involved to make possible a comparison to ascertain whether even a price difference between them actually does exist. Thus the price discrimination must be "between different purchasers," meaning, not one who wishes to buy, a prospective buyer, but one to whom an executed sale already has been made. Thus in *Shaw's v. Wilson-Jones Co.*,[6] the fact that the defendant had supplied the plaintiff in the past and had promised to quote prices on the particular supplies to fulfill the contract for which plaintiff was going to bid did not make the plaintiff a purchaser within the meaning of the Act. A past customer is not a present one. However, the plaintiff might well have been by reason of past dealings a customer within the words, ". . . competition with any person who . . . grants or . . . receives the benefit of such discrimination, or with customers of either of them." But "customer" seems to mean, as applied to such a case, the successful bidder—an actual purchaser—who did buy the supplies of defendant, since competition with him was

[6] Shaw's v. Wilson-Jones Co., (C.C.A. 3d Cir. 1939) 105 F. (2d) 331; Note, (1940) 40 Col. L. Rev. 157. The court's view in this case is sustainable as an interpretation of the Act by reason of several indications therein. Section 2 (a) reads ". . . , where either or any of the purchases involved in such discrimination are in commerce. . . ." "Purchases," referring back to "purchasers," seems to contemplate sales so that the goods may be said to have been placed in the current of commerce. Mere price quotations not appearing to be commerce, Congress would have no power to regulate such activity. But in the case decided, since an interstate sale was made by defendant to plaintiff's successfully bidding competitor to the injury of plaintiff, the words "where either . . . of the purchases involved . . . are in commerce" would give Congress power to regulate such interstate purchase made to the injury of plaintiff, as to whom no interstate commerce existed. (See p. 139 infra.) But the Act further reads ". . . , where such commodities are sold . . . ," referring back to "different purchasers of commodities." "Sold" contemplates the existence of actual sales and purchases to be compared. See In the Matter of Bird & Son, (1937) 25 F. T. C. 548, 553 ("Not until there is a discrimination in price among those chosen does sec. 2 (a) of the act have any application."); cf. Abouaf v. J. D. & A. B. Spreckels Co., (N.D. Cal. 1939) 26 F. Supp. 830. But cf. Letter from W. A. Ayres, Chairman of Federal Trade Commission, to Hon. Wright Patman with informal opinions of commission in 64 cases under Robinson-Patman Act, July 23, 1937. 81 Cong. Rec. 12456 (1937), No. 20, 2 C. C. H. Trade Reg. Serv. (8th ed) Par. 9170.20 (bid to U. S. Army at higher price than other sales). The same requirement was applied under the old Act. Cf. Lipson v. Socony-Vacuum Corp. (D. Mass. 1934) 7 F. Supp. 961; (1935) 35 Col. L. Rev. 127, aff'd, (C.C.A. 1st Cir. 1935) 76 F. (2d) 213; Arthur v. Kraft-Phenix Cheese Corporation, (D. Md. 1938) 26 F. Supp. 824.

interfered with. His competitor—plaintiff—was injured, when plaintiff was not awarded the bid and he, as the successful bidder, himself was a purchaser. Thus "customers" seem here to be used synonymously with "purchasers."

Had defendant in this case quoted plaintiff one set of prices and the successful bidder another, a more difficult problem would have been raised. Here again only one purchase would have existed, but two sets of prices to be compared. Only a slight, if any, difference in the effect on competition results between the situations where the unfavored buyer takes the goods at the higher prices, but does not make any, or as much, profit on resale as the favored buyer who acquires his goods at the lower price, and where the unfavored buyer does not buy at all, because he realizes that he cannot compete with such a favored buyer. Quoting two sets of prices does not seem to indicate bona fide customer selection and refusal to sell,[6a] but on the contrary willingness to sell to the unfavored buyer at the higher price. Although this situation is, however, probably excluded from sec. 2 (a) by its wording, as pointed out in the *Shaw's Case,* yet it falls within the policy of the Act. In such a restriction in the scope of the Act by thus requiring two actual purchasers as a basis to find a discrimination in price[7] Congress may be justified, both because it is so difficult to draw a sharp line between bona fide and discriminatory, unreasonable refusals to sell, whether by refusal to quote any price or by quoting higher, prohibitory prices, and because a possible remedy exists in other parts of the anti-trust laws.

Discrimination

Discrimination, it has been said, involves something more than a mere differential or variation in price. It involves such a relationship, as that of competition, between customers of a seller that they are entitled to equal treatment in price.[8] But the word-

[6a]See p. 167 infra.

[7]The district court had taken the view that refusal to sell at any price was a price discrimination, there being no other reason for such refusal, but held that refusal to quote prices was not the same as refusal to sell. This construction of the pleading seems unduly strict. Ordinarily a refusal to quote prices does indicate a refusal to sell, unless there is a possibility of price fluctuation between the time of quotation and sale. Shaw's v. Wilson-Jones Co., (E.D. Pa. 1939) 26 F. Supp. 713. See (1940) 40 Col. L. Rev. 157, 159, note 10. A refusal to sell at a dealer's discount is not a price discrimination between purchasers. Arthur v. Kraft-Phenix Cheese Corp., (D. Md. 1938) 26 F. Supp. 824 (under old Act) semble.

[8]See Representative Utterback in (1936) 80 Cong. Reg. 9559; Gaskill, What You May and May Not Do Under the New Price Discrimination Law —Robinson-Patman Law (1936) 20. But see McAllister, Price Control by

ing of sec. 2 (a) seems equally consistent with the notion that a price discrimination is merely a price difference. Further to find such a difference illegal all of the additional elements enumerated therein must be found, and no justification under any of the provisos proved. But, except in clear cases,[9] whether a price discrimination exists is often confused with the question of whether it is illegal. Although which "label" is used would seem to make no difference in the ultimate result, "discrimination" might well be reserved to describe a price difference after all of the elements enumerated in sec. 2 (a) have been proved. The question of its illegality then would not arise unless none of the justifications for such price discrimination in the provisos of sec. 2 (a) and (b) were proved.

Although a buyer can discriminate in favor of sellers by offering to buy at different prices, this is a more unusual situation, and is not proscribed by the Act.[10]

COMMODITIES

The Act does not operate unless "different purchasers of *commodities*" are involved. What are commodities? Generally tangible personal property is meant. Since the same wording appeared in the old sec. 2, decisions under the Clayton Act are here in point. Thus the transportation of passengers by bus is not a commodity within that section,[11] the distinction arising between tangible goods and services.[12] By inference *In the Matter of*

Law in the United States: A Survey, (1937) 4 Law & Contemp. Prob. 273, 291 (any difference is discrimination in price).

[9]See In the Matter of Standard Brands Incorporated, (1939) 29 F. T. C. 121 (price schedule based on monthly requirements, not actual purchases, and not adhered to anyway); In the Matter of Simmons Co., (1939) 29 F. T. C. 727 (discount depended on number of other units in central buying organization); In the Matter of Nutrine Candy Company, Docket No. 3756 (F.T.C. Dec. 19, 1939) (seller's salesmen permitted to classify purchasers in different price schedules on each order and separate items in same order); In the Matter of Curtice Brothers Co., Docket No. 3381 (F.T.C. April 15, 1940); In the Matter of Anheuser-Busch Inc., Docket No. 2987 (F.T.C. May 11, 1940). In so far as discounts based upon monthly requirements, not actual purchases, cause discrimination, as "off-scale" or lower price to one buying all his requirements from the seller, as in the Anheuser Busch Case would tend to abolish this discrimination.

[10]Letter of W. A. Ayres, supra note 6, No. 47. But cf. subsection (c) covering the reverse case—illegal brokerage payments by a buyer to seller. See p. 174 infra.

[11]Fleetway v. Public Service Interstate Transportation Co., (C.C.A. 3d Cir. 1934), 72 F. (2d) 761, cert. denied, (1935) 293 U. S. 626, 55 Sup. Ct. 347, 79 L. Ed. 713; (1934) 34 Col. L. Rev. 1566; see also In the Matter of the Goodyear Tire & Rubber Company, (1936) 22 F. T. C. 232 (Tires commodities within sec. 2 of Clayton Act).

[12]Since the same distinction is usually made in deciding what transactions are taxable under a state or city sales tax, cases thereunder are

Christmas Club[13] shows what is the nature of "commodities." There respondent was engaged in the sale of pass books, account books, advertising literature, and other paraphernalia, called "systems," for use by banks and trust companies in the conduct of Christmas Clubs and other savings plans for their depositors. The commission, while not discussing the question whether these "systems" were "commodities," found a violation of sec. 2 (a). The pass books, literature, etc., were tangible, but alone had little value except as they enabled the purchasing banks and trust companies to set up a savings plan. The idea involved was the important thing. Respondent in telling its customers how to inaugurate the "system" seemed to be rendering a service. If the ideas had been conveyed orally or by letters, "commodities" would not have been involved at all. Yet this situation is analogous to those illustrating the extended scope of application of retail sales taxes. The books and literature which changed hands, furthermore, were themselves tangible personal property, usable as such by consumers. Informally the commission has decided that the sale of advertising space is not the sale of "commodities" within the meaning of the Act.[14] But the fact that the sale of services is not within the Act offers a means of its avoidance in the form of a conversion contract or bailment, where the distributor provides the raw materials and hires the manufacturer to process them for him into the finished product.[15]

Of Like Grade and Quality

The Act forbids price discrimination "between different purchasers of commodities of like grade and quality."[16] But such differences, to justify varying price discounts, must be substantial. Otherwise a slight change in grade or quality of the product sold

analogous. State Tax Commission v. Hopkins, (1937) 234 Ala. 556, 176 So. 210; Note (1938) 51 Harv. L. Rev. 753.

[13](1937) 25 F. T. C. 1116; cf. In the Matter of the Williams and Wilkins Co., (1939) 29 F. T. C. 678 (medical and scientific books).

[14]Letter of W. A. Ayres, supra note 6, No. 9.

[15]Thorp and George, Check List of Possible Effects of the Robinson-Patman Act (1936) reprinted with additions from Dun & Bradstreet Monthly Review, August, 1936 issue.

[16]The Clayton Act made price discriminations illegal unless commodities of different grade *or* quality were involved. The Robinson-Patman Act makes illegal the price discrimination only if the commodities are of like grade *and* quality. Although the wording is different, the result in the two acts seems to be the same. Cf. Boss Mfg. Co. v. Payne Glove Co., (C.C.A. 8th Cir. 1934) 71 F. (2d) 768, cert. denied (1934) 293 U. S. 590, 55 Sup. Ct. 104, 79 L. Ed. 684 (mittens and gloves under Clayton Act).

to the favored buyer could be made the basis of a large price discrimination for his benefit.[17] Even assuming that a substantial difference exists, should the price difference be related to and limited by the cost differences in the manufacture, sale, or delivery between the two grades or qualities? The cost accounting problem involved in limiting the price differential to the actual cost differences of making, selling, or delivering the goods of these differing grades or qualities would become so difficult that Congress omitted such a requirement from the statute. For this reason minor grade and quality variations should be disregarded in testing the legality of a price differential. Furthermore, price discrimination, which affects most adversely competition in the field of distribution, arises in the large scale manufacture and distribution of standardized commodities, where quality and grade classifications are fewer and more pronounced. Where products are less standardized, many slight variations of grade and quality could lead to price discrimination.

But in *In the Matter of Christmas Club*[18] the savings club plan "systems" were found to be of "like grade and quality." Although the point was not raised, the nearer these "systems" partook of the nature of services, the more difficult would have become the problem of finding them "of like grade and quality," for each bank or trust company might well have presented a different problem in inaugurating a workable, satisfactory savings or Christmas Club plan. However, in most of the sales in that case differences probably would not have been substantial enough to justify the price variations there found.

A common problem arising under this clause involves the use of private brands on goods purchased. Thus in *In the Matter of the Goodyear Tire & Rubber Company*,[19] although Sears, Roebuck & Company had its own private brand—"All State"—for tires made especially for it by respondent, the commission found no substantial difference between that tire and those sold to respondent's independent tire distributors. But ladies' handbags purchased by a large chain store at a five to seven per cent better discount over other buyers were found not to be of the same

[17]See Gallagher, The Robinson-Patman Act, (1937) 2 John Marshall L. Q. 464, 476-7.

[18](1937) 25 F. T. C. 1116.

[19](1936) 22 F. T. C. 232 (grade and size of tires comparable). Although this case arose under the old Clayton Act, many points in it arise under the new Act. In the Matter of United States Rubber Company, (1938) 28 F. T. C. 1489 (special brand tires sold through chain stores and auto supply companies).

grade or quality as those sold to such unfavored customers, because these handbags were designed to match shoes sold by that chain store, and further carried its private brand.[20] The commission was rather liberal here in justifying such a large price concession by finding substantial differences in grade and quality, for the greater the price differential, the more clearly should such grade and quality distinctions stand out. But a private brand alone will not make the commodity of different grade and quality. Thus *In the Matter of Hansen Inoculator Company,*[21] involved the situation of one dealer-jobber paying ten cents less per bushel than other buyers for bacteria cultures (an inoculant), but affixing his own private brand thereon for resale to his customers. The inoculant was found to be the same as that sold to all others, the finding being reinforced by the fact that even the private trademark closely resembled that of the manufacturer-seller-respondent.

On the other hand, in so far as a nationally known brand has developed a definite consumer demand, the fact that the identical commodity with a private brand sells for less will not affect sales of the more expensive standard brand. This competitive test would lead to the conclusion that these goods with such a private trademark are not "like" commodities. The suggestion is made that the complexities of application of this test preclude its adoption.[22] But in so far as price differentials cannot affect consumer demand because of belief, arising from differing brands, of grade and quality differences or because of desire for the national brand anyway, the harmful effect on competition required to be found by the Act cannot result. The two commodities do not compete. Conversely, goods extrinsically and intrinsically different may so exactly fulfill the same needs that consumers are influenced in buying the one or the other merely because of price differences.

Whether price is the sole or substantial motivating factor in controlling consumer demand seems to have been the test so far applied, even though unconsciously. Thus because of lower price, potential Goodyear tire purchasers switched to "All State," while the lower price in the handbag case had no effect on any

[20]Letter of W. A. Ayres, supra note 6, No. 31; cf. No. 17 (mixed grade and quality orders); No. 38 (hats different in style, size, trimming, dyes).

[21](1938) 26 F. T. C. 303. Cf. In the Matter of the Nitragin Company, Inc., (1938) 26 F. T. C. 320.

[22]See Zorn and Feldman, Business Under the New Price Laws (1937) 77-78.

consumer demand not originally wanting to match with handbags shoes purchased from the favored buyer nor desiring that store's private label on such bags. But such a test does not clearly delineate the additional elements of an illegal price discrimination—particularly whether the required injury to competition exists with the price differential as its proximate cause. For this reason the simpler test of physical identity may be preferable in determining "like grade and quality."[23] Then if consumer demand continues to differentiate between the private and the standard brand, no appreciable effect on competition will be found. The ultimate result in either case will be the same.

COMMERCE

Like the Clayton Act, the amended sec. 2 (a) requires that the grantor of the price discrimination be "engaged in commerce."[24] The price discrimination must occur "in the course of such commerce." But unlike the original, the amended sec. 2 (a) further adds, "where either or any of the purchases involved in such discrimination are in commerce." All of these requirements as to the finding of "commerce" would seem to be satisfied if one of the two purchases to be compared is an interstate sale; i.e., where the buyer is in another state and goods are ordered and shipped across a state line to him. If such a sale discriminates in favor of or against such buyer, it could be said to be "in the course of such commerce." But if such a sale were the only interstate sale made by the seller charged, it would be more difficult to call such seller "engaged in commerce." This problem may be confused with that of whether one act of discrimination alone has the necessary harmful effect on competition, but should be kept separate. The Clayton Act requires both purchases to be in interstate commerce, or substantially to affect it. The theory in the amendment is that Congress can prevent a price discrimination in favor of an extra-state buyer from injuring a local competitor or local competition because of its power to prevent the direct use of interstate commerce to accomplish a harmful object, and can further prevent a price discrimination in favor of a local buyer from injuring an extra-state competitor or competition be-

[23] See Smith, The Patman Act in Practice, (1937) 35 Mich. L. Rev. 705, 721-24 (test should be that of a sophisticated judge). In determining similarity of grade and quality, should the container be considered part of the commodity, especially if inseparable therefrom? See p. 184 infra.

[24] Since the Robinson-Patman Act takes the place of sec. 2 of the Clayton Act, the definitions of the latter apply to the former. Thus the old definition of "commerce" still applies.

cause of its power to prevent local activities from directly burdening the flow of interstate commerce.[25]

Although this theory be constitutional, nevertheless the problem of when a purchase is in commerce, required of at least one of the purchases involved, still remains. To this problem all of the precedents on what is in interstate commerce are applicable.[26] But it is not essential that the purchaser or his customer who receives the advantage or disadvantage of the price discrimination be in commerce himself. He need do business only locally.[27] For the protection of such small local retailers and wholesalers the Act was designed. Mindful of its own power, the commission has dismissed several cases, because the purchases have neither been in nor have involved interstate commerce.[28]

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[25]Sen. Rep. No. 1502, 74th Cong. 2d Sess. (1936) 4-5; H. R. Rep. No. 2287, 74th Cong. 2d Sess. (1936) 8; see In the Matter of National Numbering Machine Company, Inc., Docket No. 3889 (F.T.C. December 19, 1939). "In any line of commerce" seems to be a requirement that the injured buyer himself also be engaged in interstate commerce. Cf. Port v. Girdler, (N.Y. Co. Sup. Ct. Nov. 10, 1939) 1 P. H. Trade Serv. (2d ed.) par. 40,529 (though seller engaged in interstate commerce, transactions complained of must also be in interstate commerce). See McLaughlin, The Courts and the Robinson-Patman Act: Possibilities of Strict Construction, (1937) 4 Law & Contemp. Prob. 410, 414 (new Act more restrictive than Clayton Act, because former requires one sale at least to be in interstate commerce, while "in the course of such commerce" in the latter requires two only local sales which directly and substantially affect interstate commerce). American Can Co. v. Ladoga Canning Co., (C.C.A. 7th Cir. 1930) 44 F. (2d) 763 cert. denied (1931) 282 U. S. 899, 51 Sup. Ct. 183, 75 L. Ed. 792 (sales to favored, local buyers held in course of interstate commerce because of resales in interstate commerce), (1931) 44 Harv. L. Rev. 867. But cf. Bunte Bros. v. Federal Trade Commission, (C.C.A. 7th Cir. 1940) 110 F. (2d) 412, (1940) 53 Harv. L. Rev. 1205 (under F.T.C. Act).

[26]Cf. Alabama Independent Service Station Ass'n v. Shell Petroleum Corporation, (N.D. Ala. 1939) 28 F. Supp. 386 (sales from local storage tanks still in interstate commerce, tanks being mere conduits through which flowed subjects of interstate commerce), with Lipson v. Socony Vacuum Corporation, (C.C.A. 1st Cir. 1937) 87 F. (2d) 265, cert. granted, (1937) 300 U. S. 651, 57 Sup. Ct. 612, dismissed per stipulation, (1937) 301 U. S. 711 (anticipated demands of customers without specific contract for gasoline, brought into state and locally stored, held not to cause interstate commerce to continue till deliveries made to buyers); cf. In the Matter of Kraft-Phenix Cheese Corporation, (1937) 25 F. T. C. 537 (continuous flow of interstate commerce to retailer found by reason of manufacturer's control over resale price and integrated distribution service); In the Matter of Pittsburgh Plate Glass Company, (1937) 25 F. T. C. 1228; In the Matter of Bausch & Lomb Optical Company, (1939) 28 F. T. C. 186; In the Matter of Simmons Company, (1939) 29 F. T. C. 727.

[27]Contra: Abouaf v. J. D. & A. B. Spreckels Co., (N.D. Cal. 1939) 26 F. Supp. 830 (buyer discriminated against must be engaged in interstate commerce).

[28]Letter of W. A. Ayres, supra note 6, Nos. 10, 16, 19, 20, 21, 28, 29, 34 (practically), 35, 36, 51, 61, 63. Trade associations, not themselves engaged in commerce, have been found to have engaged in unfair methods direct-

EFFECT ON COMPETITION

Section 2 (a) reads

"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.*"[28a]

The last part was added by the amendments, because Congress wanted to be able to prevent price discrimination before competition had been substantially lessened or a monopoly had tended to be created, but some question arises whether "substantially" should not also be read into this last clause. Although each of the enumerated effects on competition is separate and distinct, a "rule of reason" accomplishing almost the same result has been applied. The commission, under the amendments, can come to the rescue of competitors before they have gone under in the struggle or they can have a cause of action themselves before being completely put out of business as soon as ascertainable monetary damages occur. In other words the new Act becomes applicable at an earlier stage to stop the trend toward monopoly and to protect the existence of the small entrepreneur.[29] In the

ly affecting commerce. In the Matter of Pittsburgh Plate Glass Co., (1937) 25 F. T. C. 1228; In the Matter of Golf Ball Manufacturers' Ass'n, (1938) 26 F. T. C. 824; In the Matter of United Fence Manufacturers Ass'n, (1938) 27 F. T. C. 377; In the Matter of Quality Bakers of America, (1939) 28 F. T. C. 1507, modified (1939) 29 F. T. C. 1328, aff'd, (C.C.A. 1st Cir. 1940) 114 F. (2d) 393, (violation of subsection (c) with same requirements as to commerce, answering argument that sale of services is not interstate commerce). The Act reads "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." Although sales for export do not come within the Act, false export sales will not be allowed. Gaskill, What You May and May Not Do Under the New Price Discrimination Law: Robinson-Patman Law (1936) 26. See McLaughlin, The Courts and the Robinson-Patman Act: Possibilities of Strict Construction, (1937) 4 Law & Contemp. Prob. 410, 414 (no violation of Act if chattels sold without specification for purpose for which sold). The use of mails to send money across state lines has also been used as a jurisdictional element. In the Matter of Quality Bakers of America, (1939) 28 F. T. C. 1507.

[28a]Italics supplied.

[29]Sen. Rep. No. 1502, 74th Cong. 2d Sess. (1936) 5; H. R. Rep. No. 2287, 74th Cong. 2d Sess. (1936) 8. The new emphasis is on protection of the individual competitor rather than of competition in general. Hamilton and Loevinger, The Second Attack on Price Discrimination: The Robinson-Patman Act, (1937) 22 Wash. U. L. Q. 153, 163 (injury to competitor is pro tanto injury to competition). But cf. Abouaf v. J. D. & A. B. Spreckels Co., (N.D. Cal. 1939) 26 F. Supp. 830 (individual injured must himself be engaged in interstate commerce to find requisite injury to

Goodyear Case under the old Clayton Act, sec. 2, the commission had attempted to reach the same result by interpreting the words "where the effect of such discrimination may be" as indicating that it was only a tendency and a probable effect rather than actual results that were important in testing the harmful consequences of a particular price discrimination. Furthermore, the words "substantially lessen competition" were not to be taken in a quantitative or arithmetical sense. Competition could not be measured with a yardstick. "May be" indicated neither bare possibility nor certainty, but probability to be deduced from the intent or inherent character of the acts themselves.

The first complaint issued under the Robinson-Patman Act was dismissed after full hearing chiefly on the ground that the requisite effect on competition did not exist. In *In the Matter of Kraft-Phenix Cheese Corporation,*[30] respondent was charged with discrimination in price in the use of quantity and volume discounts in sales of cheese to retailers. But the evidence indicated that the use of discounts similar to those used by respondent was prevalent in the industry. Even with respondent's discounts its products sold at retail prices exceeding those of its competitors. Hence respondent was not unfairly depriving competitors of business, promoting a monopoly or lessening competition with them.

In the buyers' line of commerce, even if an unjustified price favoritism had been shown, no perceptible injury to those who did not so benefit was manifested, since the difference in price amounted only to three-fourths of a cent a package or less, and retail prices varied as to cheese products as much as two or three cents a package. Furthermore, concerns receiving the discount from respondent sold at higher prices than those not receiving it. The commission further indicated that an injury to competition in the buyers' line of commerce serious enough to warrant a cease and desist order against price discrimination causing it was not manifested where the effect of failure to acquire the discount was not the need of selling at a loss, but at most only the receipt of a smaller profit than was realized by others receiving such dis-

competition); Arthur v. Kraft-Phenix Cheese Corp., (D. Md. 1938) 26 F. Supp. 824 (replacing injured competitor results in no injury to competition in buyer's line).

[30](1937) 25 F. T. C. 537. For discussions of the case see Smith and McConnell, An Analysis of FTC Action on 66 Robinson-Patman Act Cases, Dun's Review for Jan., 1938; Walsh, Substantial Lessening of Competition, 249 and Aronson, Defenses Under the Robinson-Patman Act, 212, both in Werne, Business and the Robinson-Patman Law (1938).

count. An annual $6.50 differential had such a remote and minute effect on the income of the less favored competitors that it could not be considered injurious to competition.

When the Act says "where the effect of such discrimination," it requires that a causal connection be established between the price practices of the seller and the harm done to competition. Thus here, because of other factors involved, the receipt of the discount could not be said to have governed the retail price of the cheese products, although trade may have been diverted to the beneficiary of the price discrimination and diversion of trade is an element of injury to competition. But such an injury to competitors can only be attributed to price differentials, if such differentials themselves exercise a perceptible influence upon retail prices. Hence the price differential must result in lower resale prices, which in turn must cause a diversion of consumers' buying power to render such differential a violation of sec. 2 (a). But besides lower resale prices other customer appeals, made possible by price favoritism, may cause trade diversion.

The amendments were passed among other things to enable the commission to protect the market of the independent, old-line distributors. But a reasonable probability must exist, before a cease and desist order will be entered, that, if the price discriminations involved were allowed to continue, the standing of such independents in the competitive field will be impaired. To this extent in so far as an individual competitor can show any monetary injury, this injury-to-competition element of a cause of action under the Robinson-Patman Act may be more easily provable in a suit prosecuted by a private litigant than in government-prosecuted proceedings. Such a reasonable interpretation of the Act in the latter action should allay the fears, arising upon its passage, over its disastrous consequences to business.[31]

A five per cent alternative discount in favor of group buyers, billed jointly and taking more than $100 worth a week, was found to be far from injuring, but rather fostering competition of the small independent distributors who could not otherwise earn the other discounts, and who were the only ones who could qualify as group buyers for this alternative discount.[32]

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[31]Levy, The Robinson-Patman Act—A Year's Retrospect (1937); McLaughlin, The Courts and The Robinson-Patman Act: Possibilities of Strict Construction, (1937) 4 Law & Contemp. Prob. 410.

[32]A discount to loaf cheese buyers in 750 lb. lots or over of one-half a cent a pound was presumed to be of even less significance as injuring competition than the discounts previously considered, to which a further

In *In the Matter of Bird & Son*[33] respondent had been selling felt base floor coverings to retailers at prices fourteen and eighteen per cent higher than to Montgomery Ward & Company and other mail-order houses. When the Robinson-Patman Act was passed, only one per cent of all of respondent's sales were made directly to any retailer, this sales practice being pursuant to a change of policy to one of selling only through jobbers, completed by October, 1936. The complaint was filed September 30th. The commission found that any price discrimination during that transition period was incidental to such change and involved only a negligible portion of respondent's business. Hence no injury to competition existed, and even if so it had ceased.[34]

While the Clayton Act was designed primarily to prevent lessening of competition and monopoly in the manufacturer-seller's line of commerce, the Robinson-Patman Act shifted the emphasis with the growth of large scale distributors to preserving competition in the buyer's line. And this situation is presented in most of the cases before the commission thus far. But findings as to injury to competition in the seller's line is also found in many cases. Price discrimination as such does not seem to injure competition with the seller unless other seller-competitors do not give the favored buyer the same low price. The real point here seems to be not that the seller gives one purchaser a better price than he gives another competing purchaser, but that he gives one purchaser a better price than another competing *seller* gives that same purchaser. A finding confined to the former

discount of one cent a pound on orders of thirty pounds or over was compared. Respondent's price policy in In the Matter of Shefford Cheese Co., (1937) 25 F. T. C. 1209, was found similar, most items being identical, with that of the Kraft Case. To reach the same conclusion because of price identity without an independent investigation seems unwise.

[33](1937) 25 F. T. C. 548. A retailer himself may be guilty of an illegal price discrimination. Cf. In the Matter of United States Rubber Company, (1939) 28 F. T. C. 1489.

[34]But a negligible portion of a seller's business may still be a large part of the buying field.

The Commission said, (1937) 25 F. T. C. 552, "By the end of October, 1936, no goods were being sold direct to retailers, while jobbers and mail order houses were being sold at the same net prices." This fact would give mail order houses a big advantage over retailers buying through jobbers and would result in injury to competition, even though prices were uniform to all purchasers. Compare the discrimination inherent in the uniform delivered price and in unreasonable customer classification; i.e., according to a retailer wholesale prices. See Kaylin, Retailing Under the Patman Act in Werne, Business and the Robinson-Patman Law (1938) 134.

fact seems irrelevant to the issue of the latter.[35] Yet the commission regularly discovers injury to competition with the seller, both when injury to competition among buyers is certain and when there is no such injury. But often injury to competition among buyers has adverse effects on the seller's competitors, so that the seller's price policy *indirectly* by way of injuring the buyers affects competition with itself.[36]

The commission in *In the Matter of H. C. Brill Company*[37] indicated how far it would extend the meaning of "may be" in connection with the new clause added by the 1936 Amendments to authorize a cease and desist order against a price discrimination. Although here a 2.25 per cent price differential, which meant the difference between profit and loss on a product of as little importance as ice cream powders, might not alone have been sufficient to give the chain store buyer there involved—the A & P Stores—an appreciable competitive advantage in all of its business, yet an accumulation of several such discounts from many sellers of different commodities, each alone of no effect, would give such buyer a decided competitive advantage.[38] If one such discount cannot be prohibited, none can.

[35]See Hamilton & Loevinger, The Second Attack on Price Discrimination: The Robinson-Patman Act, (1937) 22 Wash. U. L. Q. 156 (discrimination not cause of seller competition injury, but cut price); cf. In the Matter of Christmas Club, (1937) 25 F. T. C. 1116 (only injury to seller's line of commerce found, since Commission not interested in competition between banks, Clayton Act, sec. 11, and lessening of competition in sale of "systems" not kind of problems involved in field of marketing standardized commodities, with competition in which Act is concerned); In the Matter of United Fence Manufacturers Ass'n, (1938) 27 F. T. C. 377; In the Matter of Metz Brothers Baking Company, Docket No. 3740 (F.T.C. Dec. 28, 1939).

[36]See In the Matter of the Goodyear Tire & Rubber Co., (1936) 22 F. T. C. 232; In the Matter of American Optical Co., (1939) 28 F.T.C. 169 (favored treatment of retailers diverted business from independent wholesalers on whom more limited-line manufacturers depend for existence); In the Matter of Bausch & Lomb Optical Co., (1939) 28 F. T. C. 186; In the Matter of Simmons Co., (1939) 29 F. T. C. 727.

[37](1938) 26 F. T. C. 666.

[38]Similarly whether only one instance of price discrimination warrants a cease and desist order depends on the injury to competition or a competitor involved. Cf. In the Matter of National Numbering Machine Company, Docket No. 3889 (F.T.C. Dec. 19, 1939) (only two specific sales found); see Gordon, Robinson-Patman Anti-Discrimination Act—The Meaning of Sections 1 and 3, (1936) 22 A. B. A. J. 593, 594-5 (arguable that single act of discrimination not sufficient—that the injury must be continuing or recurrent); cf. In the Matter of Standard Brands Incorporated, (1939) 29 F. T. C. 121. "to injure, destroy, or prevent competition with" the buyer connotes directly harming the unfavored buyer. Actually the effect on competition results from unduly benefiting the favored buyer. The lower price to such favored buyer enables him either to sell at a lower price or to give better service to the customer. Even

The commission in passing on the effect of a price discrimination has indicated that the obstruction and prevention of the establishment of new distributing enterprises may be a sufficient prevention of competition to warrant a cease and desist order.[39] In so far as "to injure, destroy, . . . competition" connotes actual competition already existing, "prevent" would seem to be construed in the same way. And the difficulty of ascertaining the potential existence of imminent competition, but nipped at the outset because of the price favoritism, may be such as further to preclude such an extended interpretation. But the chances of an unwise extension of the meaning of the Act herein is not manifest when such findings are coupled with those of an injury to actually existing competition.

The commission has been very reasonable in requiring a showing of substantial injury to competitors.[40] Thus price discounts, otherwise illegal, *in the range of* all average buyers, even though not all purchase, can have no adverse effect on competition.[41] But a further extension of this "rule of reason" has been indicated, even though an injury to competition is present, in a justification for price-discrimination based upon trade practices and policies, the reasonableness of which is manifest to the commission.[42] Yet no specific wording of the Act seems to authorize any

the pocketing of greater profits might injure competition. If a better discount is found and trade is thereby diverted, the commission does not inquire into how it is done.

[39]See In the Matter of Pittsburgh Plate Glass Co., (1937) 25 F. T. C. 1228; In the Matter of Golf Ball Manufacturers' Ass'n, (1938) 26 F. T. C. 824. Both cases, however, in addition involved charges under the Federal Trade Commission Act.

[40]Smith and McConnell, An Analysis of FTC Action on 66 Robinson-Patman Act Cases, Dun's Review for Jan., 1938; Letter of W. A. Ayres, supra note 6, Nos. 1, 4, 15, 16, 24, 30, 32, 34, 35, 38, 39, 42, 43, 52, 62.

[41]Cf. In the Matter of Kraft-Phenix Cheese Corp., (1937) 25 F. T. C. 537 (exchange of deteriorated cheeses enables all buyers to take advantage of quantity discounts); In the Matter of American Optical Co., (1939) 28 F. T. C. 169 (largest discount on fifty units in reach of all); In the Matter of Bausch & Lomb Optical Co., (1939) 28 F. T. C. 186; In the Matter of Standard Brands Incorporated, (1939) 29 F. T. C. 121 (discounts on foil yeast found discriminatory prior to April, 1940 in modified order) (F.T.C. May 8, 1940); Letter of W. A. Ayres, supra note 6, No. 30 (discount plan open to all); cf. In the Matter of Biddle Purchasing Co., (1937) 25 F. T. C. 564, 573, "No subscriber has any exclusive right to the Biddle services, but they are sold to any wholesaler who wants them, subject only to the requirement that we (sic.) have good credit rating." In the Matter of Oliver Bros., (1937) 26 F. T. C. 200. But such price discounts in the range of all buyers should be made known to all. Lack of knowledge is just as injurious to competition as lack of ability to purchase in the requisite quantities to earn the discount, cf. In the Matter of Curtice Bros. Co., Docket No. 3381 (F.T.C. April 15, 1940).

[42]Thus in the Kraft Case the discount on large purchases was really

price policy as rendering lawful an otherwise illegal price discrimination.

Competition is materially influenced by the type of customer to whom sales are made. Thus sales to federal government agencies have been ruled exempt from the Act.[43] Although this ruling did not include sales to state agencies, the same result should be reached, because government purchases are ordinarily for consumption. Consequently competition by buyers in the resale business is not injured,[44] no competition existing between a consumer and a distributor. But competition between consumers can be affected. The Act does not contemplate the protection of competition only in the business of sale and resale of commodities. It speaks of price discrimination "where such commodities are sold for use, consumption. . . ." Commercial or industrial users of commodities can be equally as handicapped in the competitive struggle because of the discrimination practiced against them in the cost of goods they use as can be concerns which for resale purchase at discriminatory prices. The statutory language quoted appears to contemplate this situation. One ground for sustaining the decision in *In the Matter of American Oil Company and General Finance*[45] is based on it. On this interpretation of the facts, there the purchaser of gasoline and petroleum products received a favorable price differential on purchases for its own commercial use, namely resales in form only to taxicabs owned or operated by six corporations, which respondent-buyer controlled through stock and taxicab ownership. Orders for resale to the public generally were billed to respondent at the customary retailer prices. Although sales for consumption by the taxicabs may have been considered sales at retail, yet if the corporate

a sales promotion discount to push sales and make the truck delivery system worth operating. In the Bird Case elimination of sales to retailers except Montgomery Ward was found justified to cut distribution costs. Letter of W. A. Ayres, supra note 6, No. 24 (denial of quantity lots and discounts to those who could not sell product before it deteriorated). See Smith & McConnell, An Analysis of FTC Action on 66 Robinson-Patman Act Cases, Dun's Review for Jan., 1938, at 47.

[43]See (1936) 38 Op. Atty. Gen. 539. See also (1937) O. A. G. Minn. 342e (not applicable to state purchases or business concerns bidding for them); 26 O. A. G. Wis. 142.

[44]Cf. Letter of W. A. Ayres, supra note 6, Nos. 14, 42.

[45](1939) 29 F. T. C. 857. Cf. In the Matter of United States Rubber Company, (1939) 28 F. T. C. 1489 ("purchaser" may be consumer); In the Matter of Standard Brands Incorporated, (1939) 29 F. T. C. 121 (yeast buyer is baker); In the Matter of Anheuser-Busch, Inc., Docket No. 2987 (F.T.C. May 11, 1940) (yeast) and Docket No. 3798 (F.T.C. September 25, 1940) (corn syrup). Letter of W. A. Ayres, supra note 6, No. 63 (seller requires contract of buyer himself to use tires).

fiction and formal bookkeeping were disregarded, respondent was the real consumer.[46] Competition with respondent considered as a retailer of this gasoline could hardly have been injured by the price differentials granted, since the taxicabs, owned or controlled by respondent, would have purchased gasoline of respondent even if no favorable discount had existed. This trade was already diverted to respondent. No causation would have existed. Thus it was only in the operation of taxicabs that competition could have been injured with respondent in so far as it was able to buy gasoline for consumption at lower prices than other taxicab companies and such costs were a major factor in the taxicab business.

Similarly buyers who are located in different localities ordinarily neither resell in the same area nor compete for customers. It is impossible to discover an injury to competition between them. But in *In the Matter of National Numbering Machine Company*,[47] where the two purchasers involved were located in New York and Boston respectively, the commission concluded that they were in active competition in the resale of the machines involved. Thus in spite of two different buying areas, each in itself a large market, the two buyers might have retailed in both areas. Or the price differential might have more than covered transportation costs, so that buyers in New York City, when discovering such price differential, if it were passed on, would have been attracted to the Boston dealer. But even if because of price variations granted in different localities no injury to competition among buyers is found, still harm may result to competition among sellers.[48] When a price discrimination is found where by reason of a uniform delivered price more distant purchasers receive an undeserved benefit over those more closely situated to the seller, it is more difficult to see how competition is injured between buyers. As the discrimination becomes proportionately more extreme, the overlapping of the competitive areas of the buyers by reason of distance becomes less.[49]

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[46]The commission has disregarded the corporate fiction in other cases, as in In the Matter of the Webb Crawford Co., (1938) 27 F. T. C. 1099; Letter of W. A. Ayres, supra note 6, No. 38 (to find no injury to competition).

[47]Docket No. 3889 (F.T.C. December 19, 1939).

[48]See In the Matter of Metz Bros. Baking Company, Docket No. 3740 (F.T.C. December 28, 1939); cf. Letter of W. A. Ayres, supra note 6, Nos. 39, (wholesalers not doing business in same community); 43 (favored customer in area where seller has no other customer).

[49]Cf. In the Matter of United Fence Manufacturers Ass'n, (1938) 27 F. T. C. 377.

OR WITH CUSTOMERS OF EITHER OF THEM

An addition to the effect-on-competition clause in the amendments of 1936 is the words—"or with customers of either of them," meaning customers of either the buyer or the seller.[50] The buyer himself is a customer of the seller so that the requirement that the injured competition must be "with any person who . . . knowingly receives the benefit of such discrimination," is thus effectively nullified. Ordinarily most buyers will know that they are receiving a price favoritism, but to authorize a cease and desist order against a seller such buyer-knowledge seems immaterial. Competition among buyers can be as seriously injured regardless of buyer knowledge. And a similar order cannot be entered against a buyer unless he knowingly induces or knowingly receives a discrimination in price.[50a]

In determining the effect caused by the seller's prices on competition among the customers of the immediate purchaser the commission has shown a tendency to telescope this two-step process. In the *Kraft Case* it characterized a retailer who bought cheese products from jobbers and wholesalers as a "purchaser" along with retailers who bought directly from respondent-producer. Thus the price discrimination can be said to have been made between such retailers supplied through a jobber or wholesaler and the other buyers purchasing directly. The justification for such a characterization lay in respondent's recognition of such retailers as its own customers by personally soliciting them and carrying out in sales to them a system of resale price maintenance. "A retailer is none the less a purchaser because he buys indirectly if, as here, the manufacturer deals with him directly in promoting the sale of his products and exercises control over the terms upon which he buys."[51] The seller must be the one to give a price difference. This element of control over the resale price justifies the conclusion that respondent here was the one to give the varying discounts to retailers and not the jobber-

[50]It has been indicated that "customers of either" means the seller's other customers. See Zorn and Feldman, Business Under the New Price Laws (1937) 97. But cf. 113-116. But competition with another customer can be injured only if he is favored in some way and this occurs by receiving the benefit of a price discrimination. Literally it must be a customer of a *knowing* customer with whom competition is injured. Query whether "knowingly" will be read into the second customer?

[50a]See p. 185, infra.

[51]In the Matter of Kraft-Phenix Cheese Corp., (1937) 25 F. T. C. 537, 546. This expanded definition of "purchases" was applied to sec. 2(e). In the Matter of Luxor, Ltd., Docket No. 3736 (F.T.C. July 31, 1940).

intermediary and that the retailer, buying from the jobber, was a purchaser within the meaning of the Act. To hold otherwise would permit a vendor to favor one retailer over another by having an independent, but compliant, jobber pass on the price benefits in the form of a resale, where only the jobber would be the purchaser. But competition could here be said to be injured "with customers of" such jobber—in this case, the retailer, himself not a "purchaser." Thus when only two successive sales are involved, the expanded definition of "purchaser" makes no difference. It would be otherwise, when the injured competitor is in a line of commerce three sales removed from the original discriminating seller. Thus the necessity for such an expanded definition of "purchaser" does not here readily appear, except to sustain a cease and desist order against a seller whose price discriminations are passed on to a customer of the customer of his customer. In so far as a seller is made responsible for the passing-on of the favorable price by his purchaser, difficulty arises when such seller has not the slightest control over whether this price differential is passed on or not. But, if a vendor accords a better discount to one vendee-jobber, he might well foresee that its effects might be passed on in whole or in part with consequential harmful effects on competition among more remote vendees and thus be held liable for such effects.

In the *Bird Case*[52] the commission indicated that it would not extend this definition of "purchasers" beyond the limits of the elements laid down in the *Kraft-Phenix Case*. Here the same reasons might well have existed to call retailers, who bought through jobbers, "purchasers" from respondent manufacturer in order to prohibit the jobber discount to Montgomery Ward, in reality selling at retail, which discount would have a harmful effect on the competition with Montgomery Ward by those retailers buying through jobbers. Furthermore the words—"to injure, . . . competition . . . with customers of" the purchasers—would not fit this situation, because here it is the competitive ability of those customers themselves that is being injured in relation to their competitor, Montgomery Ward, and not vice versa, which is the situation contemplated by the statutory wording.

The expanded definition of "purchasers" first enunciated in the *Kraft-Phenix Case* was essential to find even a price difference

[52](1937) 25 F. T. C. 548.

in *In the Matter of Pittsburgh Plate Glass Company,*[53] where member manufacturers of respondent trade association sold directly at a uniform price only to "quantity buyers" and at a higher uniform price indirectly to "carload lot buyers" through such "quantity buyers." It was necessary to call the "carload lot buyers" "purchasers" from respondent-manufacturer-sellers in order to find a price discrimination "between different purchasers" —here the two classes of buyers. This conclusion was justifiable inasmuch as respondent-manufacturers through their trade association supervised the practices and policies of distributors, some of which were their own outlets engaged in the resale of window glass, in order to effectuate the price practices laid down, required uniformity in such practices and methods, and in general acted concertedly to control the channels of distribution. A customer of a distributor-agent of the seller can be said to be a purchaser from such seller. To the extent that the seller exercises the same control over the terms of resale to a buyer from an independent distributor, such buyer may still be said to be a purchaser from such seller within the meaning of the Act.

The commission concluded that the price differentials involved in *In the Matter of Agricultural Laboratories*[54] might have had the effect of preventing competition with customers of respondent's favored distributor. This could occur, it would appear, only if the benefit of such price differentials were passed on, in whole or in part, by such favored distributor to his own customers, so that the latter could undersell their own competitors who either bought directly from respondent at the higher retail prices or who bought from wholesalers, not accorded by respondent such advantageous price discounts and thus unable to pass on any similar price advantages to their own retailer-customers. Although the argument could be made that these retailers, buying of the less favored wholesaler, were not discriminated against in so far as they could have bought of the favored wholesalers who were passing on price benefits received, in actuality retailers do not change over and buy from such wholesalers either because of ignorance of the trade advantages involved, habit, or both. Hence the real cause of injury to competition in such retailers' line may be said to have been the respondent's price practices.[55]

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[53](1937) 25 F. T. C. 1228.

[54](1938) 26 F. T. C. 296; Letter of W. A. Ayres, supra note 6, No. 62 (no evidence functional differential was passed on).

[55]If the fact—that a price advantage is open to all in a situation to meet its terms—were a defense to a charge of price discrimination, no

The commission indicated in *In the Matter of Miami Wholesale Drug Corporation*[56] the extent to which it would apply the words of sec. 2 (a) "or with customers of either of them." Respondent—a wholesaler of drug products—receiving a 33⅓ to 50 per cent greater discount, was thus able to resell to other wholesalers at prices below those at which competitors of such other wholesalers could buy directly from the manufacturer-sellers of such products. Also both respondent and its wholesaler-customers could undersell their wholesale rivals in this way. The commission found an injurious effect on competition with not only respondent's wholesaler-customers (customers of the recipient of the price discrimination), but also with customers (retailers) of those wholesalers to whom respondent sold (customers of the customers of the recipient of the price favoritism). The statutory language does not appear to justify extending the recognition of the effects on competition of the price discrimination by this extra step. Congress probably felt that a line must be drawn on the responsibility of a seller for the permeating effects of a price differential, which he has given, on competition among more remote buyers. Yet as a matter of proximate causation this respondent-buyer might well be held responsible for the results of his price practice, for this responsibility is no greater in scope than that which sec. 2 (a) already imposes on the seller—responsibility, which in each case involves a causal connection of only two steps.[57]

TYPES OF PRICE DISCRIMINATION

(a) INDIRECT PRICE DISCRIMINATION.—Section 2 (a) makes it unlawful "either directly or indirectly, to discriminate in price.

violation of the Act would ever exist in spite of injury to competition, a small buyer not being able to attain the size of a large one and to meet the terms of such quantity discounts. In the Matter of H. C. Brill Co., (1938) 26 F. T. C. 666 (willingness to accord cumulative discount to all mere idle gesture). But in so far as a discount can be taken advantage of by all buyers and some do not, their injury arises from their own fault.

[56](1939) 28 F. T. C. 485.

[57]In so far as the Miami Case involved a buyer guilty of inducing a violation of subsection (d), the provision of subsection (a), concerning injury to remote lines of competition, is inapplicable. Other cases in which the commission has extended its findings as to injury to competition to customers of customers have been—In the Matter of Pittsburgh Plate Glass Co., (1937) 25 F. T. C. 1228; In the Matter of United States Rubber Co., (1939) 28 F. T. C. 1489; see Montague, Merchandising Under the Robinson-Patman Act, (1936) 5 (passing on discounts makes seller violator of Act); Buckley, The Robinson-Patman Act—An Interpretation, (1939) 9 Am. L. School Rev. 311, 313, 315; McAllister, Price Control by Law in the United States: A Survey, (1937) 4 Law & Contemp. Prob. 273, 294 (vendor responsibility for price policy of vendee cannot stand without showing of complicity of vendor with such vendee).

. . ."[58] The other subsections of the amendment—(c), (d), and (e)—while involving specific practices which are considered to be unfair and hence harmful per se without regard to a finding of their effect on competition, describe forms of indirect price discrimination.[59] But not every indirect method of discrimination in price can be imagined, let alone proscribed in specific terms in the statute. Hence "indirectly" in sec. 2 (a) is designed to cover all such subsequently designed methods.

Some of these methods were illustrated in *In the Matter of Agricultural Laboratories,*[60] where respondent was engaged in the sale of nitrogen-fixing bacteria used to inoculate seeds of leguminous plants. Some retailers and wholesalers, although paying a uniform price, effective for all buyers, received the cultures of bacteria at such price delivered, others paying the transportation charges. Some purchasers, such as mail-order houses, were further favored with the privilege of returning unsold cultures. All wholesalers except one received the same privilege of returning unsold goods up to ten per cent of their annual purchases. This was a valuable privilege, because unsold goods were practically worthless when returned. On these facts the commission found discriminations in price. For respondent to refund to all wholesalers except one the costs of unsold goods up to ten per cent of their annual purchases, resulted in a reduction of price to such wholesalers only, if from this assurance they would purchase larger amounts than they knew could ever be resold in order to take advantage of any quantity discounts given. In this way a wholesaler could receive a lower price with the same volume of resale business than any wholesaler not accorded the same privilege. But there was no evidence here of any such quantity discount. Also, in so far as all wholesalers accurately estimated their resale business, uniformity of treatment would exist. Annual purchases would probably never run ten per cent over needs, even if impossible of exact estimation, so that the mail-order houses with the unlimited return of goods privilege would be

[58]A discrimination in "terms of sale" was stricken from the Senate draft of the Act by the conferees, their opinion being that the Act should be inapplicable except to terms of sale amounting to price discrimination. (1936) H. R. Rep. No. 2951 74th Cong. 2d Sess. 5.

[59]See In the Matter of the Great Atlantic & Pacific Tea Co., (1938) 26 F. T. C. 486, 501.

[60](1938) 26 F. T. C. 296. Other cases involving discrimination in the form of allowance of carriage charges are: In the Matter of Albert L. Whiting, (1938) 26 F. T. C. 312 (postage); In the Matter of Master Lock Co., (1938) 27 F. T. C. 982 (freight).

receiving little if any price advantage. Furthermore, the latter paid from four to six cents more per bushel than the wholesalers, thus presumptively cancelling any discrimination in their favor. Farm bureaus competing in reselling at retail with the mail-order houses received no such privilege of returning unsold goods. But the fact that they received a six cents lower price than the mail-order houses probably more than nullified any disadvantage.[61]

Although a cash payment by respondent to wholesalers or mail-order houses for all unsold goods in taking them back at the end of a fixed period looks like a cumulative discount, such favored wholesalers had already paid respondent-seller more than a wholesaler not receiving such a rebate, because the former purchased more cultures. Standing alone, it is difficult to see that any discrimination, even indirect, in price here exists, since the net effect does not reduce the price to one buyer over that accorded another. Yet, if the evidence shows that an unfavored purchaser has been injured in his competition with the favored ones, the inference arises that probably that practice found was the cause. But a price discrimination must exist before its effect on competition is investigated. A harmful effect on competition cannot alone be used to infer that the cause was a price discrimination.

The amendment does not cover all kinds of discrimination that by means of terms of sale may have an injurious consequence on competition, but only those in price. Transactions disconnected from individual sales of goods, however, may be discriminations in price. Thus in the *Goodyear Case* an assignment by the tire manufacturer-seller of 18,000 shares of its common treasury stock and the payment of $800,000 in cash to Sears, Roebuck & Company, the purchaser under a contract to buy, without similar assignments and payments to its other regular customers, was held a discrimination in price.[62] Although, as a matter of bookkeeping, the final net result to such favored buyer would be a reduction of the purchase price of tires bought, nevertheless it is difficult to see the discrimination as one of price when it can be made totally independent of any sale, even though, as in this case, it was made as part of a contract to sell and contemplated sales in the future, which were made. Since the net result of almost every

[61]The return-of-unsold-goods privilege is similar to the promotional discounts found justifiable in the Kraft Case.

[62]In the Matter of the Goodyear Tire & Rubber Co., (1936) 22 F. T. C. 232. George, The Federal Trade Commission Decision in the Goodyear Case, (1936) Dun & Bradstreet Monthly Review. But Goodyear added this expense into the cost of tires sold to Sears.

discrimination of a seller in favor of one buyer is to lower the latter's cost of goods sold, to enable him to gain more profits and hence to acquire a competitive advantage, the commission should be allowed a wide leeway in broadening the limits of what is considered indirect discrimination in price.[63]

(b) CUMULATIVE DISCOUNTS.—The question of whether cumulative or volume discounts are illegal price discriminations has occupied the attention of the commission in several cases, of which the leading one is *In the Matter of H. C. Brill Company*.[64] Respondent—a manufacturer of ice cream preparations—had separate contracts with the Great Atlantic & Pacific Tea Company and two other chain stores reciting that "in view of the purchases in large quantities present and prospective" respondent agreed to allow quantity discounts on amounts bought for a year's period, the discount being payable at the end thereof and varying from a low of one per cent on an annual volume of $5,000 to three per cent on $15,000. The respondent-seller further expressed willingness to make the same agreement "with any other purchaser similarly situated and on proportionately equal terms." Only two of the chain stores ever qualified for any discount thereunder, the A. & P. receiving the three per cent by combining the annual purchases of each of its warehouses which were solicited,

[63]Cf. Letter of W. A. Ayres, supra note 6, No. 13 (trouser buying retailer required manufacturer-seller to buy buttons for trousers made, from a jobber in consideration of latter's paying retailer five per cent on all buttons sold thereunder). Free deals are also an indirect type of price discrimination. Nos. 5 (two loaves of bread for price of one treated like quantity discount); 7 (two cup-cakes with every purchase of loaf of bread). Cash discounts, in so far as they are administered loosely, can result in price discrimination, as when one buyer still gets the advantage of such price discount, although not paying on time. Compare uniform delivered prices p. 159, infra.

[64](1938) 26 F. T. C. 666. Quantity discounts are often in reality cumulative discounts. See In the Matter of the Goodyear Tire & Rubber Co., (1936) 22 F. T. C. 232; In the Matter of Master Lock Co., (1938) 27 F. T. C. 982; In the Matter of American Optical Co., (1939) 28 F. T. C. 169; In the Matter of Bausch & Lomb Optical Co., (1939) 28 F. T. C. 186; In the Matter of Standard Brands Incorporated, (1939) 29 F. T. C. 121; In the Matter of Simmons Co., (1939) 29 F. T. C. 727 (retroactive cash rebate on total number of yearly orders); In the Matter of Anheuser-Busch, Docket No. 2987 (F.T.C. May 11, 1940). In so far as the buyer contracts to take a definite, large amount over a fixed period delivered in odd quantities, his order may be a single purchase and the discount a true quantity discount. The promise of the buyer in the Brill Case the commission evidently considered illusory. The buyers used the same type of a promise to avoid sec. 2 (c) of the Act in In the Matter of Atlantic Commission Co., Docket No. 3344 (F.T.C. July 24, 1940). A purchase for future delivery is tested to ascertain its discriminatory character as of the time of entering the order, not that of actual delivery. Cf. Letter of W. A. Ayres, supra note 6, No. 48; In the Matter of the Nitragin Company, (1938) 26 F. T. C. 320.

shipped to, and billed separately by respondent-seller. The discount did not relate to individual orders, none of which ever approached the lowest discount figure. A price discrimination was found. The commission did not base its decision on the ground that the discount was in the form of an annual rebate, which looks more discriminatory than a lower net price on each individual sale, but indicated that cost savings on such individual orders could legally be withheld, cumulated, and paid over in the form of a rebate at the end of a period of time. Such rebate then would not be a cumulative or volume discount, but a true quantity discount.

(c) FUNCTIONAL DISCOUNT—CUSTOMER CLASSIFICATION.—Many fears were expressed when the Robinson-Patman Act was passed that it would outlaw functional discounts, since wholesalers usually receive a lower price than retailers. If all buyers must be treated alike, the violation of sec. 2 (a) would be clear. The problem seems to be approachable from the question of effect on competition. A true wholesaler or jobber, properly so classified, is *not* in competition with a retailer, because he does not resell to the same customers. Hence no adverse effect on competition between such wholesale and retail buyers is manifested.[65] Granting ordinary functional discounts, furthermore, seems to have no effect on competition with the seller.

The commission expressly recognized the validity of functional discounts in *In the Matter of Hansen Inoculator Company,*[66] where it found, to justify the price discrimination, no "savings in cost of production, sale, or delivery, or *functions performed by the buyer in the resale of the goods.*"[66a] But does this statement indicate that the limitation of the cost savings proviso is here placed on the amount of such functional discounts? Must a seller demonstrate that traditional functional differentials are no greater than the cost savings resulting to him from selling through whole-

[65]Another line of attack is by means of the savings of cost justification proviso, infra, p. 161. Letter of W. A. Ayres, supra note 6, No. 4. In so far as the justification for the existence of a wholesaler is that he relieves the manufacturer or producer of the burdens of the costs of marketing, which the latter otherwise would be required to bear if sales were made directly to retailers, definite cost savings in sales to wholesalers, as compared to sales to retailers, can be demonstrated. No price discrimination at all may exist in this situation. See Utterback in (1936) 80 Cong. Rec. 9559.

[66](1938) 26 F. T. C. 303. See also Letter of W. A. Ayres, supra note 6, Nos. 25 (wholesaler-retailer); 32 (bottlers-jobbers); 62 (distributors-service station operators).

[66a]Italics supplied.

salers and jobbers instead of selling more directly through retailers? Such a requirement might outlaw the majority of the traditional functional discounts, contrary to the purpose of the Act to preserve this old-line method of distribution—producer—wholesaler—retailer—consumer in the face of the newer methods of the chains, mail-order houses, large department stores, cooperatives, and mixed function distributors. But even if such functional discounts cannot be justified by cost differences, their competitive effect would be slight in the case of the jobbers or wholesalers whose resale market does not overlap that of retailers. In a companion case[67] the commission indicated another, more lenient test on which it would sustain the functional discount:—permitting jobber prices when such buyers actually rendered jobbing services in connection with the sale of the products purchased at such discounts.

The more difficult problem of functional discounts and customer classification comes when manufacturers and producers market through a distributor who combines several functions, a mixed distributor who cannot be put exclusively into any one of the old customary distributor groups, since he sells to wholesalers, retailers, and consumers. Actual price discrimination either in his favor or against him may occur because the seller's single classification does not fit him.

In *In the Matter of Agricultural Laboratories,*[68] wholesale distributors of respondent's bacteria cultures sold both to retailers and directly to farmers. Respondent sold also to mail-order houses, farm bureaus, and a few retailers, all competing with each other, the two former receiving much better prices than the retailers. Competition of the retailers was impeded in so far as respondent accorded wholesale prices to wholesalers, selling directly to consumers. Especially would retailers, customers of such wholesalers, be harmed in so far as the latter also resold directly to users. Respondent had misclassified such wholesalers. As to these sales they were really retailers. The seller, however, should not be held responsible for an occasional consumer sale made out of the usual distribution channel by a wholesale-buyer, but if such practice is habitual, such a seller might well be put on notice of such sales and price policy of his customer to whom he directly sells. For injury to competition in some line of commerce is certain to result—with that wholesaler, if he retains

[67]See In the Matter of Albert L. Whiting, (1938) 26 F. T. C. 312, 317.
[68](1938) 26 F. T. C. 296.

the discount and with both the wholesaler and retailer, if the discount is passed on to the retail-buyer. Likewise, in the *Hansen Case*[69] both jobbers and farm bureaus receiving jobber prices undersold retailers by selling directly to consumers. The commission concluded that the difference in prices resulting from respondent's method of customer classification in sales to customers competitively engaged in reselling to consumers was a price discrimination. Here functional discounts were not made in good faith, but covered up real price discrimination. In *In the Matter of Albert L. Whiting,*[70] where farm bureaus again were performing a mixed function, but receiving on all purchases a wholesale rate, the commission allowed such lower price on goods only when the bureaus actually rendered jobbing services. Since the seller can not tell beforehand what proportion of the goods sold to such bureaus will be resold at retail and what part at wholesale, the buyers should have such a seller readjust the prices at the end of fixed periods, when by hindsight such proportions can be accurately estimated. Thus, whereas functional discounts are still valid, they cannot be used to conceal a price discrimination in favor of "mixed" distributors.

In the reverse situation, the seller's customer-classification can also be so rigid that purchasers who should be characterized as wholesalers are forced to buy at retail prices. Although the Act, it has been said, does not compel the manufacturer-seller to grant, on a particular order, the benefit of savings in cost derived from different methods of manufacture, sale or delivery of that order,[71] so that he would not then need to accord a true wholesaler the price benefit derived from the savings in seller's costs arising from the taking over from such seller by this buyer of the obligation of performing those functions of the usual wholesaler, yet if the seller does accord such a price benefit only to *some* of the wholesale-buyers a clear discrimination against the rest results. Thus in *In the Matter of Pittsburgh Plate Glass Company,*[72] where respondent-manufacturers forced some of the buy-

[69](1938) 26 F. T. C. 303; In the Matter of Standard Brands Incorporated, (1939) 29 F. T. C. 121.

[70](1938) 26 F. T. C. 312; In the Matter of the Nitragin Company, (1938) 26 F. T. C. 320.

[71](1936) Sen. Rep. No. 1502 74th Cong. 2d Sess. 6; (1936) H. R. Rep. No. 2287, 74th Cong. 2d Sess. 9-10.

[72](1937) 25 F. T. C. 1228; cf. In the Matter of Bird & Son, (1937) 25 F. T. C. 548 (same price to jobbers and mail order house). The order in the Pittsburgh Case covered discrimination only on direct shipments to carload lot buyers, allowing the functional discount on indirect.

ers into the retailer class by characterizing them as "carload lot buyers" and making them buy only from the class called "quantity buyers," the only ones who could purchase directly from the manufacturers, and buy at prices seven and one-half per cent higher than those which such "quantity buyers" paid, five per cent of this difference going to such "quantity buyers," the commission found a price discrimination. This process might also be described as the reverse one—that of putting some retailers into a wholesaler classification by forcing other retailers to buy only from them. Investigation by the respondent-manufacturers' association was required for a purchaser to make the "quantity buyer" list, and hence excellent opportunities for arbitrary action and favoritism existed. "Carload lot buyers" could not pool their orders to obtain this more favorable discount. Such free exercise of discretion by a seller in placing customers in different functional groups to accord to them different prices leads to the grossest kind of price discrimination.

In *In the Matter of American Oil Company*[73] the commission was strict in defining the classification of commercial consumer. Respondent-buyer here controlled through stock and asset ownership six subsidiary corporations which operated taxicabs. Gasoline and petroleum products purchased by respondent at a discount over quotations to retail service stations were resold to these taxicab operators. The sales were presumably within the same corporate group. But the commission concluded that such products were purchased and resold at retail, thus classifying respondent as a retailer of gasoline, not as a taxicab company, and justifying a cease and desist order. The current practice—for respondent to buy at retail prices, but then to make monthly reports of orders resold to the public generally and those consumed by the taxicabs, and on the latter orders subsequently to receive the commercial consumer differential—constituted the discrimination,[74] *all* orders being classified as retail sales.

(d) UNIFORM DELIVERED PRICE.—Uncertainty arises con-

[73](1939) 29 F. T. C. 857. But cf. Letter of W. A. Ayres, supra note 6, No. 63 (employees of national accounts—independent tire dealers). The commission was also strict in In the Matter of United States Rubber Co., (1939) 28 F. T. C. 1489, where a price discrimination with resulting injury to competition in the seller's line was found in price differences granted to users, consumers and commercial accounts, on the one hand, and retailers on the other.

[74]See complaint General Motors Corporation, Docket No. 3886 (F.T.C. September 12, 1939) C. C. H. Trade Reg. Serv. 8th ed. vol. 2 par. 9971.23 (discrimination between automobile manufacturers buying for original equipment and a non-contract retailer-supplier).

cerning whether price discrimination exists in the situation of the uniform delivered price. In *In the Matter of United Fence Manufacturers Association*[75] respondent-association members manufactured and sold snow fences, a substantial part of the average costs of which were in transportation charges. In an area of fourteen states each member-seller quoted a uniform delivered price to any buyer, no matter where located in that area. In other words, for each buyer the seller included transportation costs in price. Further, uniformity of sale prices between manufacturers was maintained despite variations in cost of production. Thus because of this uniform price understanding, which gave him the same opportunity in the more distant markets, each member-seller sacrificed his natural monopoly in his

[75](1938) 27 F. T. C. 377. Cf. In the Matter of Anheuser Busch, Docket No. 3798 (F.T.C. September 25, 1940) (varying delivered prices not justified by differences in delivery cost). In the Matter of Bird & Son, (1937) 25 F. T. C. 548, where uniform prices granted no wholesale-differential, seems inconsistent with the United Fence Case, where similarly uniform prices recognized no differential for absence of transportation costs. The theory of the commission in the United Fence Case is based on a definition of price as being what the seller receives and not what the buyer pays (p. 8). In so far as the commission proscribed the efforts of the Association to prevent price differentials based on cost savings, the cease and desist order attacked practices similar to those attacked in Sugar Institute v. United States, (1936) 297 U. S. 553, 56 Sup. Ct. 629, 80 L. Ed. 859; see Fly, The Sugar Institute Decisions and the Anti-Trust Laws 2; (1936) 46 Yale L. J. 228 (apparent inconsistency of Robinson-Patman Act with Sugar Institute Case merely reflects change in emphasis from consumer to independent retailer and wholesaler protection). Although no cease and desist order has been handed down based on the complaints filed by the commission involving the legality of the single and multiple basing point system, the principle involved is similar to that involved in the uniform delivered price system. The complaints are: Cast Iron Soil Pipe Ass'n, Docket No. 3091 (F.T.C. March 30, 1937), C. C. H. Trade Serv. (8th ed.) vol. 2 par. 8873; The Cement Institute, Docket No. 3167 (F.T.C. July 5, 1937), supra, par. 9056; Chilean Nitrate Sales Corp., Docket No. 3764 (F.T.C. April 20, 1939), supra, par. 9960.14. Authorities differ as to whether the amendments proscribe the basing point and uniform delivered price systems. See Gaskill, What You May and May Not Do Under the New Price Discrimination Law—Robinson-Patman Law (1936) 34-35; Zorn and Feldman, Business Under the New Price Laws (1937) 196-201; Brown, The Scope of Federal Power Over Price Discriminations, (1936) 10 U. Cin. L. Rev. 430, 434-5; Hamilton & Loevinger, The Second Attack on Price Discrimination: The Robinson-Patman Act, (1937) 22 Wash. U. L. Q. 153, 174-6; Withrow, Basing-Point and Freight—Zone Price Systems Under the Anti-Trust Laws, (1937) 85 U. Pa. L. Rev. 690; Sharp, Discrimination and the Robinson-Patman Act, (1938) 5 U. Chi. L. Rev. 383. Whereas single and multiple basing point systems when applied to some instances result in price discrimination with harmful effect on competition between buyers, the system does not seem to be illegal in toto under the Robinson-Patman Act, especially in view of the fact that the anti-basing point provision in the definition of price was stricken out. (1936) 80 Cong. Rec. 8223. But cf. In the Matter of United States Steel Corp., (1924) 8 F. T. C. 1 (single basing point illegal under Clayton Act), Note (1932) 45 Harv. L. Rev. 548.

local market, based upon lower carriage charges and hence more successfully exploited by him than by his competitors. The situation was one of price uniformity, not price difference. Although the actual effect was a discrimination against local buyers, who otherwise would have received a lower price based upon their geographical advantages in savings in transportation costs, yet the Act, it has been said, does not require that cost savings be passed on. But the commission here seems to be requiring exactly that. In so far as competition is injured among seller-manufacturers, as the commission found, the cause is not the uniformity of price that one manufacturer accords all buyers, but the uniformity of price all manufacturers accord one buyer. Thus sec. 2 (a) of the Robinson-Patman Act does not seem to be the method to attack the price practices here involved.

Only Due Allowance for Differences in Cost

The first proviso in sec. 2 (a) reads:

"*Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

A price discrimination and its harmful effect on competition either with the giver, the recipient, or their customers may be made out, but, if it can further be demonstrated that the discount was given because of savings to the seller in cost of manufacturing, selling, or delivering to the particular customer favored by the discount, and that the discount was no greater than such savings, although it could have been less, then the policy of according the buyer, whether for resale or consumption, the benefit of the cost savings involved outweighs the disadvantages to competition also present, and permits the discount.

Although the cease and desist order instituted in *In the Matter of Goodyear Tire and Rubber Company*[76] was finally set aside

[76] (1936) 22 F. T. C. 232; rev'd (C.C.A. 6th Cir. 1939) 101 F. (2d) 620, cert. denied, (1939) 308 U. S. 557, 60 Sup. Ct. 74, 84 L. Ed. 468; (1936) 84 U. Pa. L. Rev. 1030; (1939) 11 Rocky Mt. L. Rev. 259; (1939) 17 Tex. L. Rev. 517 (in circuit court of appeals). The commission concluded that any *intangible* cost savings on Sears volume of business would be reflected in greater or at least equal profits on that business as compared to an equal volume of business with the independent tire dealers. A comparison of these two profits still left a lower profit on Sears business, the difference being the average sales price discrimination not accounted for by cost savings. The concealment of the prices given Sears from competitors of Sears and Goodyears' own staff further helped to indicate that the price differential was not a real quantity discount based on actual cost savings.

by the circuit court of appeals, the indications given therein by the commission, as to what elements will be considered as actual savings in cost "resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered," are important guides for cases arising today under the Robinson-Patman Act Amendment. There manufacturing costs on tires sold under the discriminatory price contract in favor of Sears, Roebuck & Company were concededly the same as those on tires distributed through independent Goodyear dealers. The commission concluded that respondent had failed to show that the price discrimination in favor of Sears against these dealers was justified by differences in costs of transportation or selling. Sears was not charged with any advertising or selling expenses or interest on borrowed money. To prove a reduction in costs attributable to the contract, respondent argued that the volume of Sears' business had value to it in removing hazards and insuring stability by avoiding fluctuation of profits inevitable in respondent's other business and in casting on Sears the risks which respondent normally bore of raw material price declines and credit losses. The commission rejected this contention, because these advantages could not be translated into precise terms of dollars and cents benefit and were too speculative, intangible, and remote to justify or be reasonably related to the price discrimination. Thus it would seem that, if respondent's situation were such that it could mathematically prove a cost saving attributable solely to Sears' contracts, a defense would be established. The commission did not reject these items as falling into a class of items not recognizable as cost savings. This problem is involved in deciding whether a definite cost saving, clearly provable, can be attributed only to one order or must be allocated to all sales or to none at all. Thus respondent argued that Sears orders absorbed Goodyear's overhead. The commission determined that the proper accounting method was to allocate overhead expense impartially to all tire units passing through the factory and that the much larger volume of business obtained from Goodyear independent dealers as a group was just as important to respondent as the volume from Sears. In general, arbitrarily to attribute more importance to one than to other customers' contribution to total volume and to consequential per-unit reduction in overhead is no real cost justification, but constitutes one means of creating an unfair preferential advantage in favor of that one customer. But

remote and unsubstantial cost differences may be disregarded. A discount is not to be condemned merely because it does not mathematically accord with cost differences. The commission then will not split hairs, but will view the problem as a practical one depending on the intent and effect of the scheme as a whole. This has been the keynote of its attitude in subsequent cases under the amendments.

But at the same time an important qualification to the rule—that cost savings will justify an otherwise illegal price discrimination—was set up. Such quantity discount cannot be secret, but must be open to all, so that any customer may purchase a similar quantity at like price or terms. Such secrecy stigmatizes the good faith of the seller. Injury to competition may be greater where others cannot take advantage of the more favorable price, not because they are not in a position to meet its requirements as to quantity ordered, but because of their ignorance of the opportunity to purchase at such a price. This interpretation of the Act seems to import the requirement that differentials be given expressly on account of cost savings differences, the seller having that idea in mind, and not merely to favor one competitor over another. Although this view may be well within the spirit of the statute, it is doubtful whether it also fits the words, which appear to allow a price discrimination no matter for what reason given, if it is subsequently found to be no greater than cost savings.

The commission further indicated that cost savings sufficient to justify a price discrimination in the form of a quantity discount could arise only on *individual* orders. The discount in the *Goodyear Case* could not be called a quantity discount, because individual sales to Sears were no larger than those to many other independent dealers. This view was further spelled out in the *Brill Case*,[77] where the conclusion was reached that, although a purchaser of large annual amounts may buy in larger individual shipments than buyers of smaller annual amounts, in reality the former usually places numerous orders individually smaller than those of the latter, with a resulting cost to the seller greater per dollar of sales to serve such a customer, with his large number of small orders, than to serve those with a fewer number of large

[77](1938) 26 F. T. C. 666; In the Matter of Master Lock Co., (1938) 27 F. T. C. 982; cf. In the Matter of American Optical Co., (1939) 28 F. T. C. 169; In the Matter of Bausch & Lomb Optical Co., (1939) 28 F. T. C. 186; In the Matter of Simmons Co., (1939) 29 F. T. C. 727 (retailer with several outlets each of which ordered and received separate deliveries with consequent increase in cost).

orders, but aggregating a smaller total volume than that of the former over a year's time. A belief that such cumulative discounts represent savings to the seller when the facts are otherwise does not make such discount any the less discriminatory. A price difference based upon the size of individual purchases and shipments is sound and understandable. A cumulative discount—one given at the end of a period of time—is justifiable then only where savings have been achieved by the seller on individual orders of the particular buyer, and have not been reflected in the price then paid. The savings in the form of a discount can then be reserved and refunded at the end of a period of time. Hence the true cumulative or volume discount is outlawed because not supported by cost savings. Only a cumulative-quantity discount remains.

The commission is correct in its view that no savings result to a seller to justify giving one buyer a better price simply because at the end of a period of time it is discovered he has purchased more than another buyer. But, on the other hand, if the seller is certain in advance that such buyer will purchase within a definite period a larger volume than other buyers, though individual orders are smaller, this knowledge may well enable such a seller to effectuate cost savings on these orders. This situation existed in the *Goodyear Case,* where no such defense was found, not, however, because such cost savings would not be recognized, but because they were not satisfactorily proved. The contract in *In the Matter of H. C. Brill Company,*[78] contained no promise by the buyer to purchase a definite amount over a fixed period, although the certainty based on past experience, that such buyer would in fact buy a large amount over such period, might well enable the seller to save as much in costs of manufacture, sale, and delivery, as if such a promise really existed.[79] Yet proof of whether such certainty exists is a difficult administrative problem and the line may be drawn between the actual existence and non-existence of a promise. Such a contract could then be considered as only one sale with delivery in indefinite quantities as requested over a certain period of time. Then any demonstrable cost savings on the whole order should justify the price differential involved.

[78](1938) 26 F. T. C. 666.

[79]Cf. Gardner, An Inquiry Into the Principles of the Law of Contracts, (1932) 46 Harv. L. Rev. 1, 8. The promise may be one of form only. Thus in the Brill Case the contract read:—"The purchaser has obligated itself to buy from the manufacturer a large quantity of merchandise." Cf. In the Matter of the Great Atlantic & Pacific Tea Co., (1938) 26 F. T. C. 486.

Besides savings in cost, based upon quantity ordered, different methods of delivery may result in cost savings. Thus in *In the Matter of Kraft-Phenix Cheese Corporation*[80] a five per cent discount was denied buyers of package cheese and cheese products unable or unwilling to handle by single purchase $5.00 worth in two or three weeks. Any retailer could so qualify, because respondent exchanged new goods for deteriorated products in the retailer's stock. To maintain freshness respondent ran a truck delivery system directly to retailers. Quantities sufficient to make this distribution system economically possible were encouraged by such discounts. Smaller orders required higher delivery costs. The commission therefore found such differentials justified by differences in the cost of delivery based upon differing quantities. A price discount, greater when one hundred fifty pounds and over of loaf cheese were ordered, was found similarly justified in cost savings, because as to them delivery was direct from the warehouse at a smaller cost than that of purchases of less than one hundred fifty pounds, delivered by the same truck distribution service maintained for package cheese. Although it would have been improper accounting to allocate to loaf cheese the same percentage of distribution costs as was attributed to the package cheese products, to take care of the charges of this more expensive delivery service, because the loaf cheese did not ncessitate such a frequent and expensive distribution system, yet any reasonable allocation still left a cost difference between the orders above and below the one hundred fifty pound limit large enough to justify the distinction in discounts granted. Since accurate allocation of delivery costs was particularly impossible, the commission was willing to indulge in reasonable inferences in favor of justification of the price differential.

Often one method of cost accounting may result in a cost savings justification for the price discount, while another may not, and yet each accounting method as applied to the situation involved may of itself be not unreasonable. Which one is the commission to choose? A customary system already in use by respondent and not devised for the occasion should have a strong presumption in its favor. Accountants differing as to which method more accurately portrays costs, the commission should allow the discount, if any one of these reasonable cost accounting methods can justify it by demonstrating cost savings within the limits of the proviso.

[80](1937) 25 F. T. C. 537.

The delivery system of respondent in the *Kraft Case* suggests a possible means of evading the statute in connection with the cost savings proviso. Respondent-seller might have raised costs above what were required in sales to the unfavored buyers by going through unnecessary processes in connection with such orders. Thus the cheese manufacturer here might have delivered all loaf cheese directly from warehouses, instead of distributing certain lots directly to retailers by the more expensive truck system. The one hundred fifty pound limit between different delivery methods might have been lowered or raised in accordance with respondent's desires to favor larger or smaller orders. In this case, however, any cost manipulation would have been prevented by a more careful allocation of the delivery costs between loaf and packaged cheese products.[81] Ordinarily a seller's desire to make profits would prevent him from unnecessarily adding to costs on smaller orders, even to favor larger ones. Furthermore, the commission has indicated that only the costs of "essential" functions will be allowed,[82] again with a reasonable latitude as to what is "essential."

The commission, in considering whether cost savings justify a given price differential, will sustain the defense based upon any cost accounting system offered by respondent that is reasonable, even if developed only for the occasion. But such a method must not be based too much on guess work and non sequiturs. In *In the Matter of Standard Brands, Incorporated,*[83] respondent developed an elaborate cost accounting system to justify, by cost

[81]Cf. In the Matter of Hollywood Hat Co., (1937) 25 F. T. C. 555 (costs of labor graduated in accordance with price range classification). Here selling price variations did not depend on cost, but cost variations in wages were made to depend on price differences; thus any price could be justified by such cost differences.

[82]In the Matter of Standard Brands, Incorporated, (1939) 29 F. T. C. 121. The commission's accountants corroborate the cost accounting evidence presented by respondent. Cf. In the Matter of Bird & Son, (1937) 25 F. T. C. 548. The cost proviso justification seems to have been allowed only when distinctive methods of sale or delivery existed, arising from the quantity bought or the nature of the buyer. Compare Kraft and Bird Cases with Standard Brands Case.

[83](1939) 29 F. T. C. 121. The studies on which direct costs were based and allocated were found here not to be dependable. For example, solicitation costs on the basis of number of calls did not consider length of time of each call and included promotional costs, which should have been separately treated. Service costs were charged to all customers whether services were availed of or not. Comment, Cost Accounting Defenses Under the Robinson-Patman Act, (1940), 35 Ill. L. Rev. 60; cf. Cies, Costing Problems Posed by the Robinson-Patman Act, (1939) 17 Harv. Bus. Rev. 350. Furthermore the varying discounts were not uniformly given to each respective customer.

savings in selling and delivery, the discounts there found on the sales of bakers' yeast. The commission rejected the whole accounting system. Here monthly averages of total sales and costs for a period of three months operation were calculated. A percentage of such total costs was allocated to bakers' yeast by applying a predetermined percentage to dollar sales. Direct costs were then estimated and allocated to the various discount brackets by a period survey, and were further subtracted from the total costs, derived by the predetermined percentage method, to find indirect costs. In addition, the commission could not see in what way many items of such indirect costs could within reason have been incurred in connection with sales of bakers' yeast. The inaccuracy of these ratios used to allocate costs to the separate discount classifications was demonstrated when the commission found that, as to one such item of indirect cost—for stockroom—no cost differences between orders of cartons and less-than-carton amounts could exist in the sale of bakers' yeast. Although the allocation of costs to each product may not have been accurate, the allocation between the various discount brackets seems to have been more important in demonstrating cost savings.[84] But the inaccuracy of both was demonstrated.

Customer Selection

"*And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise

[84]A three cents per dozen difference between purchases of foil yeast over and under 300 pieces per month was at first found not to have substantially lessened competition, but later this finding was reversed and further, such difference was found not justified by the cost savings proviso. But a change to a cent and one-half difference was held so justified.

Usually the commission has allowed the defense of savings in cost when different methods of manufacture, sale, or delivery clearly stood out. In the Matter of Bird & Son, (1937) 25 F. T. C. 548; Letter of W. A. Ayres, supra note 6, Nos. 3 (carload lots); 4 (retailer-wholesaler); 12 (carload lots); 16 (materials, styling, and selling); 24 (hundred dollar lots); 26 (chain store performs service manufacturer otherwise would have to do for self); 50 ($.013 per carton difference justified by varying costs in selling and handling). See generally the difficulties of cost accounting under the Act. Smith, The Patman Act in Practice, (1937) 35 Mich. L. Rev. 705, 714-21; Burns, The Anti-Trust Laws and the Regulation of Price Competition, (1937) 4 Law & Contemp. Prob. 301, 314; Hamilton, Cost as a Standard for Price, (1937) 4 Law & Contemp. Prob. 321; McNair, Marketing Functions and Costs and the Robinson-Patman Act, (1937) 4 Law & Contemp. Prob. 334, 345 (cost accounting should be based on functional, not quantity approach, costs going where functions are performed). This test traces discounts to buyer's, not seller's costs. Paradoxically the commission has ordered cost savings to be passed on and even price discounts to be granted. In the Matter of United Fence Manufacturers Ass'n, (1938) 27 F. T. C. 377; cf. In the Matter of Anheuser-Busch, Docket No. 3798 (F.T.C. September 25, 1940) (discounts not justified by delivery cost differences).

in commerce from selecting their own customers in bona fide transactions and not in restraint of trade:"

This clause was mentioned, but not passed on, in *Shaw's v. Wilson-Jones Co.*,[85] where plaintiff was attempting to base a cause of action under sec. 2 (a) of the Act upon a mere refusal to quote prices or sell to him, whereby he lost a certain contract for which he otherwise would have bid successfully. This situation seems to be an exercise of the defendant-seller's right of customer selection. And yet the words—"in bona fide transactions"—indicate a restriction on such defense. Thus in *In the Matter of Bird & Son*,[86] where respondent was undergoing a change of sales policy, shifting from sales to both retailers and jobbers to sales to jobbers only, the commission found a situation of bona fide customer selection, which was not a combination in restraint of trade, but was to reduce the seller-respondent's cost of distribution, a valid reason for such selection. Thus individual traders have the right of customer selection in the absence of any such combination.

Another limitation on the right of a seller to select his customers may exist in the expanded definition of "purchasers" to include customers of a buyer when the seller has some measure of control over the resale. When such a seller is merely exercising his right to select his customers and thereby sells only to wholesalers, he may still find that retailers buying from such wholesalers have become "purchasers" from him within sec. 2 (a), and that he has become responsible as a price discriminator for price terms involved in the resales to such retailers.[87]

Changing Conditions

"*And provided further*, That nothing herein contained shall prevent changes from time to time when in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned."

[85]105 F. (2d) 331 (C.C.A. 3d Cir. 1939).

[86](1937) 25 F. T. C. 548; Letter of W. A. Ayres, supra note 6, No. 40 (careful customer selection in tobacco business, not in collusion, based upon number of customers already, credit risk, and general business methods of prospective buyers).

[87]In the Matter of Pittsburgh Plate Glass Co., (1937) 25 F. T. C. 1228; cf. Arthur v. Kraft-Phenix Cheese Corp., (D. Md. 1938) 26 F. Supp. 824 (under Clayton Act); Abouaf v. J. D. & A. B. Spreckels Co., (N.D. Cal. 1938) 26 F. Supp. 830 (Robinson-Patman Act).

This proviso is intended to preserve the right of a seller to dispose of the goods with normal and economically justifiable freedom of action, where the maintenance of the price is no longer in his control.[88] The Act does not compel price rigidity. An attempt to do so would probably fail. Although the use of this proviso should be carefully watched so that it is not used as a cloak for real price discrimination, the commission so far has been liberal in allowing this justification as a defense.[89]

BURDEN OF PROOF

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the commission is authorized to issue an order terminating the discrimination."

[88]Patman, The Robinson-Patman Act (1938) 147-8. This proviso did not appear in the Clayton Act and, if wisely administered, should prevent the dangers of price rigidity and unduly high prices. See Burling and Sheldon, Price Competition as Affected by the Robinson-Patman Act, (1939) 1 Wash. & Lee L. Rev. 31.

[89]Letter of W. A. Ayres, supra note 6, Nos. 33 (favored buyer had taken advantage of notice of price increase to stock up); 48 (buyer made large purchase on advantageous market several months before). The commission has adverted to this changing condition proviso, though not found to be a defense. In the Matter of Agricultural Laboratories, (1938) 26 F. T. C. 296 and companion cases. See Gordon, Robinson-Patman Anti-Discrimination Act—The Meaning of Sections 1 and 3, (1936) 22 A. B. A. J. 593, 597 (this proviso as one justification for price differences on current deliveries based upon price changes after long term contract with future deliveries entered into); Evans, Anti-Price Discrimination Act of 1936, (1937) 23 Va. L. Rev. 140, 161-3; cf. In the Matter of Christmas Club, (1937) 25 F. T. C. 1116. Section 2 (a) also contains a procedural provision designed to permit the Federal Trade Commission to fix the maximum quantity of any order when otherwise so few buyers of the commodity involved would be able to buy in the greater amounts required to receive the benefit of a low price, even though based on cost savings, that competition would be injured. The section reads: *"Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established." The cost defense proviso is a justification for a price discrimination, even where there is a harmful effect on competition, because of the policy of rewarding efficiency, yet when only a *few* buyers are so efficient as to be entitled to the benefit of such cost savings, the injury to competition outweighs the policy of rewarding such efficiency. The commission under this proviso then merely decides when the interest of preserving competition has outweighed that policy and fixes the largest unit that can receive a lower price.

By its words this procedural provision, placing upon the one charged with a violation of the Act the burden of affirmatively showing justification, applies only to complaints issued by the Federal Trade Commission. Hence private litigants, seeking an injunction, triple damages or both, or the Department of Justice, do not have the benefit of this procedural provision.[90] Furthermore (b) does not seem to apply to complaints under any subsections of the Act except (a) or (e).[91] In so far as the charge is against a buyer, it might also include (d). But to the commission the greatest advantage of this burden of proof shift arises in (a), where all of the justification provisos exist.[92]

[90]The indication in Alabama Independent Service Station Ass'n v. Shell Petroleum Corp., (N.D. Ala. 1939) 28 F. Supp. 386 was that the plaintiff, seeking to enjoin and recover damages for a violation of sec. 2 (a), has the full burden of proof even to disproving justifications. It was there found sufficiently to have been alleged that price differentials were not warranted by the "only due allowance" proviso of the statute. The complaint charged "an unjustified price differential." Contra: Gibson Canning Co. v. American Can Co., (E.D. Ill. 1932) 1 F. Supp. 242 (under Clayton Act). With this burden plaintiffs will need all the aid possible accorded to them under the new Federal Rules of procedure to make out a complete cause of action. See the difficulties of the plaintiff in C. F. Simonin's Sons v. American Can Co., (E.D. Pa. 1938) 22 F. Supp. 784, (E.D. Pa. 1939) 24 F. Supp. 765, (E.D. Pa. 1939) 26 F. Supp. 420, (E.D. Pa. 1939) 30 F. Supp. 901.

[91]In so far as "price" includes indirect price discrimination, and in so far as subsections (c), (d), and (e) describe indirect price discrimination, (b) might be said to apply to all these subsections. But the addition of "services or facilities furnished" seems to exclude this interpretation. See In the Matter of the Great Atlantic & Pacific Tea Co., (1938) 26 F. T. C. 486, 509 ((b) includes proceedings under (a), (d) and (e)), aff'd, (C.C.A. 3d Cir. 1939) 106 F. (2d) 667, cert. denied, (1940) 308 U. S. 625, 60 Sup. Ct. 380, 84 L. Ed. 521, petition rehearing denied, (1940) 309 U. S. 667, 60 Sup. Ct. 466, 84 L. Ed. 1035 ((b) includes (a) and (e) only); (1939) 7 U. Chi. L. Rev. 189. But "any hearing on a complaint, under this *section*" (italics supplied) seems to refer to all of sec. 2.

[92]A difference of opinion exists as to whether (b) requires the commission to show an injurious effect on competition before the respondent is required to rebut the commission's case by showing justification. See Watts, The Robinson-Patman Act (1936) 3 (facts of justification sufficiently in knowledge of respondent to put burden of proof on him, due process not thereby being violated). This view is opposed to Gaskill's. A price discrimination without any injury caused thereby to competition does not make out a prima-facie case. Justification is in the nature of a confession and avoidance, and indicates more clearly only those defenses included under the provisos of sec. 2 (a), of which the effect on competition is not one. The other construction would seem to raise constitutional doubts as to the validity of (b). An extremely narrow construction would apply subsection (b) only to the defense of meeting competition contained therein. Even under the Clayton Act, in private litigation the defendant had the full burden of proof as to justifications. American Can Co. v. Ladoga Canning Co., (C.C.A. 7th Cir. 1930) 44 F. (2d) 763, cert. denied, (1931) 282 U. S. 899, 51 Sup. Ct. 183, 75 L. Ed. 792; (1931) 44 Harv. L. Rev. 867. Furthermore "burden of rebutting the prima-facie case" seems to indicate a mere shift of going forward with the evidence, but "unless justification shall be

Although the effect of this provision is clear, the commission has applied it differently in various instances. The case of *In the Matter of Shefford Cheese Company*[93] arose after answer on a motion to dismiss the complaint. The commission founded its decision partly on the complaint, and partly on a supplemental investigation of facts. It held that no facts unearthed in the investigation controverted the allegation in respondent's answer that the differing discounts were made to meet those of competitors or the services or facilities they furnished. Thus respondent proved this defense by mere allegation, and the commission felt itself obligated to disprove it. Had the complaint gone to actual hearing, subsection (b) would probably have been applied against respondent.[94]

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affirmatively shown, the commission is authorized to issue an order terminating the discrimination:" seems to shift the burden of persuasion or proof itself.

[93](1937) 25 F. T. C. 1209.

[94]See (1939) Annual Report of the Federal Trade Commission 7. In the informal part of the proceedings the commission itself investigates possible justifications, such as cost savings. But upon formal complaint the burden of proof rests upon respondent. Compare In the Matter of Agricultural Laboratories, (1938) 26 F. T. C. 296 with Letter of W. A. Ayres, supra note 6, Nos. 3, 4, 5, 7, 10, 12, 16, 21, 24, 27, 33, 40, 43, 45, 48, 50. In the Matter of the Williams and Wilkins Co., (1939) 29 F. T. C. 678, shows how (b) expedites the commission's procedure. In In the Matter of American Optical Co., (1939) 28 F. T. C. 169 cost justification in savings in sale and delivery based upon sizes of individual orders was assumed. The commission has not proceeded with a hearing on a complaint when the practices charged to violate the Act have stopped, even though continued after its passage. In the Matter of Bird & Son, (1937) 25 F. T. C. 548 (lasted only four months); American Safety Razor Corp., (1937) 24 F. T. C. 1388 (advertising and promotional service discounts practice abandoned when Robinson-Patman Act was passed—not likely to be resumed—case closed without prejudice); Procon Grocery Service Co., (1937) 24 F. T. C. 1402 (buyers' brokerage corporation dissolved); Quality Bakers of America, (1939) 29 F. T. C. 1328; In the Matter of Piel Brothers Starch Co., Docket No. 3799 (F.T.C. Dec. 15, 1939) (voluntary liquidation of respondent charged with price discrimination); Letter of W. A. Ayres, supra note 6, Nos. 3, 11, 13, 17, 18, 27, 44, 49, 52, 55, 64. Cases have been closed for other reasons. Letter of W. A. Ayres, supra note 6, Nos. 2 (seller charged was being sued for triple damages under Act involving same issues); 16 (not sufficient indications of illegality of price discrimination to justify time and money to proceed further); 40 (prior recent general investigation of tobacco industry); 46 (identical complaints under investigation by Department of Justice); 61 (selling plan involved prevalent in industry then being investigated).

All the remedies accorded under the Clayton Act of private treble damage and injunction suits still exist. Treble damage suits under the new act have been brought. Shaw's v. Wilson-Jones Co., (C.C.A. 3d Cir. 1939) 105 F. (2d) 331; Alabama Independent Service Station Ass'n v. Shell Petroleum Corp., (N.D. Ala. 1939) 28 F. Supp. 386 (injunction sought too); Frederick W. Huber v. Pillsbury Flour Mills Co., (S.D. N.Y. 1939) 30 F. Supp. 108; C. F. Simonin's Sons v. American Can Co., (E.D. Pa. 1939) 30 F. Supp. 901. Although the usual plaintiff is the purchaser discriminated against, the seller forced to accord a price discrimi-

MEETING COMPETITION

Subsection (b) further reads:

"Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

This provision[95] is similar to the one appearing in the Clayton Act, but because of a feeling that such a proviso offered too many loop holes, this type of justification was placed in the amendments in a procedural subsection. Fear has been expressed whether meeting competition will remain an absolute defense to a charge of price discrimination. But if such evidence rebuts a prima-facie case, it is difficult to see why it cannot be called an absolute defense. At least the commission's cease and desist order cannot stand, if no prima-facie case exists. That is the same thing in effect.[95a]

nation, it would seem, has a cause of action against the inducing favored buyer. Port v. Girdler, (N.Y. Co. Sup. Ct. Nov. 10, 1939) 1 P. H. Trade Serv. (2d ed.) par. 40,529 (price discrimination per se does not show loss on sale involved); Boss Mfg. Co. v. Payne Glove Co., (C.C.A. 8th Cir. 1934) 71 F. (2d) 768, cert. denied, (1934) 293 U. S. 590, 55 Sup. Ct. 104, 79 L. Ed. 684 (seller has suit against other seller discriminating in price); Louisiana Farmers' Protective Union v. Great Atlantic & Pacific Tea Co., (E.D. Ark. 1940) 31 F. Supp. 483 (producer of commodity, which buyer resells at discriminatory prices, as plaintiff). The new act has been involved also indirectly in private litigation. Progress Corporation v. Green, (1937) 163 Misc. Rep. 828, 298 N. Y. S. 154 (in suit for price of goods sold that defendant buyer was discriminated against in violation of Robinson-Patman Act is no defense, remedies therein provided being exclusive), (1938) 38 Col. L. Rev. 192; Barnsdall Refining Corp. v. Birnamwood Oil Co., (E.D. Wis. 1940) 32 F. Supp. 314. But cf. F. W. Stock & Sons v. Jacobson, (1939) 173 Misc. Rep. 621, 18 N. Y. S. (2d) 200 (defendant can assert violation of Robinson-Patman Act as defense to suit on brokerage-fee-splitting contract); Jacobson v. F. W. Stock & Sons, (S.D. N.Y. 1940) 1 F. R. D. 138; Kurtin v. Brookes, (N.Y. Co. Sup. Ct. Feb. 26, 1940) 1 Fed. Trade Serv. (2d ed.) par. 40,543 (cause of action against directors stated for waste of corporate assets by needless price discrimination under Act, practice as good business and resulting in future profits being defense only).

[95](1936) 80 Cong. Reg. 9415 puts a further limitation upon this proviso—that respondent can meet only a non-discriminatory price of his competitor. Such a distinction does not appear in the statutory wording, seems impractical from a business standpoint, and would raise constitutional doubts. In the Matter of the Goodyear Tire & Rubber Co., (1936) 22 F. T. C. 232 under the Clayton Act indicated at p. 331 the contrary view. Another constitutional issue is raised if this defense is not allowed in triple damage and injunction suits, but only in hearings before the commission, as the proviso in subsection (b) would seem to indicate.

[95a]Constitutional doubts may indicate such an interpretation. Cf. Fairmont Creamery Co. v. Minnesota, (1927) 274 U. S. 1, 47 Sup. Ct. 506, 71 L. Ed. 893, 52 A. L. R. 163.

In the *Goodyear Case,*[96] although evidence existed to prove that the third contract between Sears and Goodyear, with its secret stock and cash bonuses and its discriminatory price, was exacted from Goodyear by implications that Sears might "do better elsewhere," the commission concluded that the price discrimination there involved was not made in good faith to meet competition, because respondent's apprehension, if any, that competitors were offering or about to offer Sears a similarly low price for an equal quantity of tires of similar quality was not based on sufficient evidence. That submission to such terms is the only way to secure the particular buyer's business is not a defense. Otherwise the statute would be nullified. The commission further indicated that the price discrimination must be granted in order to meet competition—i.e., with knowledge that a lower price has already been offered by a competitor—and must be no more than enough to meet such competition. Thus good faith is part of respondent's case, and the defense cannot be an afterthought. The secrecy involved in the *Goodyear Case* would seem to preclude such good faith.

The justification of meeting competition has been likened to that of self-defense in torts and criminal law. The need for such action must be substantial, imminent, and employed as a last resort. A real rival must actually have appeared, and have cut his price below that of the seller-respondent. To defend himself such seller may then do no more than to match such lower price to the buyer or buyers in question. To give a greater price discrimination would only invite retaliation, and no limit would ever be reached. As in the defense of self-defense, the situation cannot be one of respondent-seller's own making, but one in which he finds himself.[97]

[96](1936) 22 F. T. C. 232.

[97]Cf. In the Matter of Standard Brands, Inc., (1939) 29 F. T. C. 121; Letter of W. A. Ayres, supra note 6, Nos. 5 (discrimination stopped when similar competitive practices stopped), 7 (same), 10, 11, 21, 27, 43, 48. The problem of comparison is more difficult when a lower price is used to match better services or facilities of a competitor. In the Matter of Shefford Cheese Co., (1937) 25 F. T. C. 1209 (such defense proved only by allegation when commission had no controverting evidence). A uniform delivered price system may be justified by this proviso. A seller favors by absorbing transportation costs the more distant buyer to meet competition of another seller located nearer that buyer. The same may be said of situations arising under the multiple basing point system. In the Matter of Albert L. Whiting, (1938) 26 F. T. C. 312, represented a situation where one dealer bought at 20c (10c lower than other competing dealers), but claimed as justification that the reason was to meet competition of farm bureaus, which bought at 17c. But in so far as that dealer's 40c retail price was higher than those of the bureaus, this defense does not seem

BROKERAGE

The only subdivision of section 2 to have been considered in the courts is that one concerning brokerage, which reads:—

"(c) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

The first case to result in a cease and desist order under this subsection was *In the Matter of Biddle Purchasing Company*.[98] Respondent—Biddle Company ran a market information and purchasing service for its subscribers, who were wholesalers of several lines of commodities. A monthly fee was paid by each subscriber for the market information, and on every order to purchase placed with Biddle by a subscriber Biddle collected from the seller with whom the order was placed a brokerage fee—the usual one paid by sellers to their brokers. To the knowledge of the seller in every case this brokerage fee was credited against the monthly subscription fee to the particular buyer. In fourteen per cent of the cases these brokerage fees thus credited resulted in an excess due such buyer, which excess was paid over to him in cash. The commission concluded that these practices enabled buyers through Biddle to receive lower prices than those not so purchasing. This fact was more evident because buyers charged such brokerage fees received not against their subscription dues, but to reduce the cost of goods bought. Biddle was a buyer's agent, not a seller's. The services of Biddle's purchasing staff in examining and testing wares of sellers, manufacturers, and producers were classed as incidental to the purchasing services Biddle rendered its subscribers, and, if of any value to sellers, were donated to them. Furthermore, they were not selling services.

bona fide. In the Matter of American Optical Co., (1939) 28 F. T. C. 169, permitted discounts to meet competition, presumably that of the Bausch and Lomb Company. See In the Matter of Bausch & Lomb Optical Co., (1939) 28 F. T. C. 186. The latter company was accorded the same privilege.

[98](1937) 25 F. T. C. 564, Note, (1938) 6 Geo. Wash. L. Rev. 203, (1939) 34 Ill. L. Rev. 319 (sec. (c) in general). See also Oppenheim, Administration of the Brokerage Provision of the Robinson-Patman Act, (1940) 8 Geo. Wash. L. Rev. 511; Note, (1940) 88 U. Pa. L. Rev. 736.

The seller could not be paying Biddle for services rendered, because their payments to Biddle were passed on to the particular ordering buyer. The commission also concluded that buyers rendered no services to sellers. It is arguable, however, that the monthly fee which buyers paid Biddle covered the cost of examining and testing seller's wares to make them marketable, and to this extent buyers rendered services to sellers. The answer seems, however, to be that whether these activities of Biddle were of value to the sellers, they were not rendered for those sellers under any contract with them to find purchasers, but for the buyers under a contract to find suitable sources of supply, and were performed to enable Biddle to fill orders when placed with it. The sellers did not contract for these services of testing and examining. The fees paid by them were not in return for such services, but for finding a buyer.

The commission, in ordering the sellers to cease and desist from paying brokerage fees, stressed the knowledge of such sellers that the fees were in fact either being turned over to the particular ordering buyer or used for his benefit. But such knowledge does not seem to be an essential element of sec. 2 (c). Nor does this provision require that the seller's payment be passed on by the agent to the buyer-principal. But, if Biddle retained the brokerage fees, no price favoritism would be accorded buyers. Competition only with other brokers would be injured and, brokers being engaged only in rendering services, the Act does not cover their activities as such. Although sec. 2 (c) makes unnecessary the finding of injury to any line of competition, such dispensation seems sustainable only by reason of the fact that such a practice of payment of brokerage for no services rendered would in the normal case injure competition between buyers, and is so outside the average competitive practices as to be deemed illegal in itself. Congress may be justified in presuming that in the great majority of cases brokerage fees, paid to the buyer's broker, ultimately benefit the buyer himself, so that a few cases where this does not occur can still be included within the general proscription.[99]

The circuit court of appeals sustained the commission's views.[100] Although subdivisions (c) (d) and (e) of the Act

[99]In the Matter of the Great Atlantic & Pacific Tea Co., (1938) 26 F. T. C. 486.

[100]Biddle Purchasing Co. v. Federal Trade Commission, (C.C.A. 2d Cir. 1938) 96 F. (2d) 687, cert. denied, (1938) 305 U. S. 634, 59 Sup. Ct. 101; (1938) 24 Iowa L. Rev. 179; Note, (1939) 7 Geo. Wash. L. Rev. 910;

contain more specific congressional language on what may be an indirect price discrimination, yet since (c) requires no finding as to a harmful effect of the practices there prohibited on competition, the court refused to read such a requirement taken from (a) into (c), and further held that such construction did not render the provision violative of due process.

What Congress contemplated in section 2 (c) was the end of the practice of large buyers forcing a seller to grant an indirect and secret price discrimination by means of a brokerage payment to a buyer-controlled "broker." Here competition with other buyers is clearly injured. But in the *Biddle Case* nothing indicated that not all buyers, big and small, could subscribe for Biddle services. All subscribers were as free to buy as much as they wanted through Biddle. But here again mere size of the buyer, manifested by his larger number of orders, resulted in his receiving a proportionately greater amount of free marketing service and ultimately a cash discount. Although payment of brokerage fees to buyers to get them to use Biddle's purchasing service, which in turn would make sellers more cooperative in giving marketing information because of the orders resulting therefrom, may have been an excellent reason why Biddle passed on such brokerage fees, yet, if that be a justification, every price discrimination direct or indirect may be justified as necessary to get or retain the buyer's business.

The circuit court of appeals for the fourth circuit passed on the same question in *Oliver Bros. v. Federal Trade Commission.*[101] As to the selling services rendered the court recognized that Oliver obviated the necessity of sellers using and compensating inde-

(1939) 27 Geo. L. J. 384. (Petition for enforcement of decree of C.C.A. 2d Cir. filed August 15, 1940). Judge Swan's dissent found that the sellers' payments were for services rendered by the broker, but in so far as buyers received cash rebates on their purchases when brokerage credits exceeded subscription dues, these payments were illegal. This is a distinction between cash rebates and marketing information service. But to the extent that both were of value to the buyer an illegal discrimination in his favor results. The majority stressed the secrecy of the brokerage payments as justifying Congress in calling the making of such payments an unfair trade practice. See McLaughlin, Legal Precedents as Criteria, (1939) 11 Boston Conference on Distribution 89.

[101]In the Matter of Oliver Brothers, (1937) 26 F. T. C. 200 (identical facts as Biddle case), aff'd, (C.C.A. 4th Cir. 1939) 102 F. (2d) 763; (1939) 24 Wash. U. L. Q. 607. See (1938) 47 Yale L. J. 1207, 1212 (passing on of costs, if saved, should be permissible). Although subsection (c) was directed at the chains, the court indicated that size or lack of size of the buyers involved was irrelevant. The court for the purposes of argument treated the broker as a sellers' agent, but said that whether or not such an agent was also a buyer's broker, he could not split with the buyer his commissions, earned for selling services.

pendent selling brokers. To this extent services were rendered to them, but since Oliver had to perform such services anyway by finding a seller under his contract with buyers, such services were rendered in reality only to buyers and not to sellers, benefit to whom then was only incidental.

But one further step was taken in the *Oliver Case* beyond the *Biddle Case,* in suggesting a proper interpretation of the ambiguous "excepting" clause. For compensation to a buyer for services rendered by him or his agent to come within the "excepting" clause of sec. 2 (c), such services must be such as the seller is bound to render in connection with the sale, not such as are performed by the buyer in connection with the purchase, or such as are rendered to him by his agent to enable him to purchase. Thus a seller ordinarily has the obligation to find buyers, it being a part of the cost of goods sold. But, if the buyers have employed an agent to find a seller, the seller's duty is removed. The conclusion then seems to follow that payment of compensation would be authorized to one who shoulders the seller's obligation, which the latter otherwise would be obliged to perform and pay for himself. But payment of such compensation is exactly what the statute prohibits.

In *In the Matter of the Great Atlantic & Pacific Tea Company*[102] respondent buyer, from its different buying offices and warehouses scattered over the country, maintained field buying agents who purchased grocery products for respondent and collected brokerage fees from sellers. In the course of so doing, these agents exchanged with sellers information affecting market conditions, and advised how to improve quality and concerning the size of containers, manner of packing, traffic information, and routing of commodities. These agents even relieved sellers of surplus and bought when sellers were financially embarrassed, but then only when it was not contrary to the buying interests of respondent. The defense—that the sellers could under the exception clause pay those agents for such services rendered—was properly rejected. The agents represented only the buyer. All

[102](1938) 26 F. T. C. 486 (although claiming it unessential, the commission found substantial injury to competition, both in sellers' and buyers' lines); aff'd (C.C.A. 3d Cir. 1939) 106 F. (2d) 667, cert. denied, 308 U. S. 625, 60 Sup. Ct. 380, 84 L. Ed. 521 (1940), rehearing denied (1940) 309 U. S. 694, 60 Sup. Ct. 466, 84 L. Ed. 1035; (1938) 51 Harv. L. Rev. 1303; 47 Yale L. J. 1207; (1939) 7 U. Chi. L. Rev. 189, (1940) 28 Geo. L. J. 548. The Court rejected the idea that the cost proviso of (a) was applicable to (c). Services rendered to sellers were not selling services. Yet costs of only brokerage services were intended to be passed on.

of the aid they gave sellers was solely in the interests of respondent-buyer in performance of their duty as buying agents. To allow this defense would make it difficult to prevent any seller from paying a buyer compensation based upon the theory that the buyer is rendering that seller a service by coming to him rather than to a competitor. Although the "depression" has probably caused in every seller's heart a feeling of gratitude toward an approaching buyer, to allow this gratitude to be expressed in monetary terms under the "services rendered" clause would effectively nullify subsection (c).

After the passage of the Robinson-Patman Act respondent changed its system of receiving a direct brokerage fee to one of discounts from current prices and cumulative discounts, equalling those former brokerage fees, except for the omission of fractions. Discounts were thus given regardless of the quantities in individual orders. The commission, perceiving that these methods were only other ways of passing on brokerage to the respondent-buyer, rejected the distinction attempted to be drawn and thus demonstrated more clearly that brokerage is really another form of price discrimination. The court of appeals likewise recognized the distinction as merely an attempt to avoid the Robinson-Patman Act.

The commission indicated that the true reason for the controversial exception clause was not to relax as to some customers the prohibition that a seller cannot pay brokerage to a buyer or his agent, but to make it certain that a seller could pay brokerage to his own broker for selling services when that broker rendered to a buyer incidental accommodating "services," similar to the kind which respondent-buyer's brokers had in this case been rendering to sellers. Thus in the reverse situation the exception would validate payment by buyers to their own brokers for buying services, notwithstanding the latter's incidental accommodating "services" rendered the seller.

A new issue was raised, but not answered in *In the Matter of the Webb Crawford Company.*[103] There partners composing a brokerage firm, Daniel Brokerage Company, also owned the stock in respondent—a wholesale grocery company. Daniel represented sellers in sales to buyers, other than the wholesale buyer-respondent. But when convenient, respondent bought through Daniel, which also collected brokerage fees on such purchases from

[103](1938) 27 F. T. C. 1099.

sellers, in all amounting to about 75 to 85 per cent of its total income, although respondent bought only ten per cent of its supplies through Daniel. The commission treated the Daniel Company as representing only the buyer and not the seller on such sales. Hence any services rendered by Daniel to the seller were only incidental. The sellers' payment of brokerage to Daniel on such sales, in accord with the prior cases, clearly violated section 2 (c). By ignoring the corporate fiction the commission concluded that the buyer itself received the benefit of brokerage fees paid on its own purchases. When the same men bought in one capacity and then in another capacity received brokerage on such purchases, to preserve the corporate fiction, even had Daniel been incorporated, would have nullified the statute.

The fifth circuit court of appeals affirmed,[104] but held unjustified the conclusion that the buyer controlled the broker. Instead it found that the broker controlled the buyer. The distinction is meaningless, since, no matter how expressed, the buyer was the broker. Furthermore, the court reversed the commission's conclusion that on Webb Crawford's orders Daniel was only a buyer's broker. The court held that even here Daniel remained a seller's broker, but, because the brokerage partners were also representatives of the buyer-respondent, the sellers' payments of brokerage to the partners were payments to representatives of the buyer, and as such fell within the exact terms of sec. 2 (c). This holding leads to the inference that, had Daniel been incorporated, payments would not have been made to the buyer representatives, but to a separate legal entity—Daniel, Inc., not the buyer's broker, but the seller's, the corporate fiction thus defeating the statute. The court's holding rendered unnecessary passing on respondent's contention that the buyer's unexercised power of control over the brokers did not come within the terms "subject to the direct or indirect control."[105] But this distinction, if upheld, would destroy the statute.

[104]Webb-Crawford Company v. Federal Trade Commission, (C.C.A. 5th Cir. 1940) 109 F. (2d) 268, cert. denied, (1940) 310 U. S. 638, 60 Sup. Ct. 1080, 84 L. Ed. 1406 (exception for services rendered does not qualify prohibition). The court by change of commas tied up the exception-for-services-rendered clause with the prior words of subsection (c) and cut it loose from the limitation that said services be in connection with the selling and buying of commodities. This interpretation broadens the clause. But cf. In the Matter of the Great Atlantic & Pacific Tea Co., (1938) 26 F. T. C. 486 (no services rendered seller *in connection with sale or purchase).*

[105]Brief for Appellants, pp. 25-31, Webb-Crawford Company v. Federal Trade Commission, (C.C.A. 5th Cir. 1940) 109 F. (2d) 268.

In the three preceding cases decided under subsection (c) the broker was found to have passed on the brokerage fees received. Here Daniel, the court held, did not. The statute makes this fact immaterial. But Daniel was in reality the buyer. Another distinction lies in the fact that the broker here was an independent bona fide seller's broker at all times according to the court; except on sales to respondent-buyer, according to the commission. Which of these two conclusions, that of the court or of the commission, is correct seems to depend on a careful factual analysis. The commission found that Daniel had "connections with only a small proportion of the sellers from whom purchases are made by the buyer respondent." If "purchases" here means those made through the broker, then Daniel, searching for a new seller, was a buyer's broker as to these transactions. If "purchases" included those made independently of Daniel, then on purchases through Daniel, the latter merely sold for one of its regular seller-clients to the respondent-buyer. The proportion in Daniel's business of sales to respondent and those to outside buyers, as well as the proportion of respondent's purchases through Daniel to all other purchases independently made would help to decide this issue. A bona fide, independent seller's broker occasionally can sell to himself and still collect a commission, but, if he does so often, he seems to be a buyer rather than a broker. Perhaps the commission intends to prevent this practice because of the difficulty of drawing a line between a true, independent broker and a buyer's broker or the buyer himself.[106]

[106]The exception for services rendered was applied in Letter of W. A. Ayres, supra note 6, Nos. 45 (English manufacturer paid brokerage to exclusive sales agent in United States); 53 (seller's agent found no longer to be interested in buyer). Other violations of subsection (c) have been: In the Matter of Quality Bakers of America, (1939) 28 F. T. C. 1507, modified, (1939) 29 F. T. C. 1328 (benefits to buyers in reductions of association dues and manufacturing and merchandising advice), aff'd, (C.C.A. 1st Cir. 1940) 114 F. (2d) 393 (immaterial that buyers receive brokerage in form other than cash). In the Matter of Reeves Parvin & Co., (1939) 28 F. T. C. 1429 (broker and wholesaler corporations owned by same men; wholesaler recommending sellers to brokers and brokers to sellers, netting broker 95 per cent of its business); In the Matter of C. R. Anthony Co., (1939) 29 F. T. C. 922 (sellers' lack of knowledge that brokerage payments reach buyer immaterial); In the Matter of Jake Felt, Docket No. 3765 (F.T.C. Dec. 22, 1939) (individual operating two businesses); In the Matter of Charles v. Herron, Docket No. 3916 (F.T.C. Jan. 27, 1940) (6c allowance in lieu of brokerage, denial as matter of law buyer can render seller services); In the Matter of Mississippi Sales Co., Docket No. 3511 (F.T.C. May 15, 1940); In the Matter of San Pedro Fish Exchange, Docket No. 3739 (F.T.C. July 13, 1940). In the Matter of Atlantic Commission Co., Docket No. 3344 (F.T.C. July 24, 1940); In the Matter of Parker T. Frey Co., Docket No. 4290 (F.T.C. Oct. 8, 1940) (broker in resale business); In the

The new issue, suggested by the interpretation that Daniel was a seller's broker, is whether a true intermediary, acting as agent for both sides, can under subsection (c) still legally be compensated by both sides, especially by the seller. Such an agent, while he is subject to buyer control, is not subject to control by one "other than" the seller, for he is the seller's agent too. This interpretation reads "exclusive" into the statute. The court seemed to recognize the status of such a true intermediary. To the extent that such intermediary retains his commissions, received from both sides, competition in neither the buyer's nor seller's line is injured. It is submitted that such practice falls neither within the words nor the spirit of section 2 (c).[107]

ADVERTISING ALLOWANCES

"(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of any thing 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 customers competing in the distribution of such products or commodities."

Subdivision (d) is a recognition that under some circumstances the buyer can render services of value to the seller. In *In the Matter of Golf Ball Manufacturers' Association,*[108] two-

Matter of Parr Sales Co., Docket No. 4233 (F.T.C. Nov. 2, 1940). See George, Business and the Robinson-Patman Act: The First Year, (1937) 4 Law & Contemp. Prob. 392, 404 (cooperative headquarters insist they do real cooperative service in persuading members to buy from sellers and securing repeat business). Similar cases under the Packers and Stockyard Acts were: Trunz Pork Stores v. Wallace, (C.C.A. 2d Cir. 1934) 70 F. (2d) 688; Wilmington Provision Co. v. Wallace, (C.C.A. 3d Cir. 1934) 72 F. (2d) 989 (same situation; since seller charged buyer brokerage fee he paid buyer's broker, no price advantage to buyer); see Note, (1940) 26 Va. L. Rev. 494, 503.

[107]Contrast the dicta in Oliver Bros. v. Federal Trade Commission, (C.C.A. 4th Cir. 1939) 102 F. (2d) 763, 770, with that in Great Atlantic & Pacific Tea Co. v. Federal Trade Commission, (C.C.A. 3d Cir. 1939) 106 F. (2d) 667, 674 and Quality Bakers of America v. Federal Trade Commission, (C.C.A. 1st Cir. 1940) 114 F. (2d) 393, 399.

[108](1938) 26 F. T. C. 824 (percentage of advertising allowance passed on to individual retailer called violation of sec. 2 (a), but part retained by association and used for benefit of all members called violation of sec. 2 (d)). See Thorp and George, Check Lists of Possible Effects of the Robinson-Patman Act (1936) in Dun & Bradstreet Monthly Review 14 (advertising allowance contracts separate from sales). The tie-up with a sale seems necessary to bring such practices within the jurisdiction of Congress—Interstate Commerce—and required by the statutory wording.

thirds of the retailers of golf balls were professional golfers associated together in the P.G.A., (Professional Golfers' Association). As an association they were under contract with manufacturers and wholesalers of golf balls to print on such balls the name, "P.G.A.," in return for compensation. The P.G.A. was not the buyer, but furnished the services, the joint prestige of all the professional golfer-members giving advertising value to the trade mark. To this extent the services could be said to be "furnished . . . through such customer" buyers. The seller's payments therefor were "for the benefit of a customer" in that half was paid directly to the buying retailer, and the rest was used in advertising and promotional work, generally for the benefit of all retail-members. Retailers, non-members of the P.G.A., received no benefits from such payments either directly or indirectly. In entering a cease and desist order against this practice the commission did not pass on the most difficult words in the subsection, "available on proportionally equal terms to all other customers competing. . . ." To allow as a defense merely a gesture by a seller of willingness to permit other buyers to render similar services and to be similarly compensated when no other buyer has the size, prestige, and ability to render such services, as has the buyer so favored, would nullify the statute. Here no other retailers could possibly have been of any value to the sellers by lending their collective name for advertising purposes. Or such value would have been so slight, as compared to that of the P.G.A. name, that compensation therefor would not have made up for the discriminatory effects of the compensation to the P.G.A.

Similarly in *In the Matter of United States Rubber Company*[109] respondent-manufacturer gave to oil companies, retailing through their various service station outlets, as favorable discounts as those given wholesalers in return for the former exercising their influence and giving merchandising assistance in such retail selling of respondent's tires. What are "proportionally equal terms" was not considered, because respondent made no offer of these "over-riding commissions" to other buyers in return

[109] (1939) 28 F. T. C. 1489; In the Matter of Curtice Brothers Co., Docket No. 3381 (F.T.C. April 15, 1940); In the Matter of Lambert Pharmacal Co., Docket No. 3749 (F.T.C. Aug. 12, 1940). Letters of W. A. Ayres, supra note 6, Nos. 18 (monthly advertising allowance contract cancelled); 25, 26 (chain store soliciting manufacturer to share expenses of listing latter's product for each store manager held no price discrimination, but payment for services rendered, though no evidence existed that seller made like payments available to other customers). Since the case was decided under subsection (a) the costs savings proviso was utilized.

for pushing retail sales. If the favored buyers were the only ones in a position to make such services of any value, the discrimination would then again be merely by reason of size and economic marketing power of mass buyers, which kind of advantage the Act is designed to prevent. Yet in both cases—this and the P.G.A. case—the payments were for bona fide advertising and sales promotional services, unlike the situation where the drug wholesaler induced discounts on its purchases from sellers for worthless advertising from such sellers in its trade or house magazine.[110] If payments for true services rendered were intended to be proscribed, a constitutional issue might be raised, for a seller should not be required to offer all other competing buyers, less able to perform the advertising services required, a chance to do so, just because such seller wishes to advertise with one of them, more able. But since even an offer to other buyers of the opportunity to earn some compensation when in a position to be of some advertising and promotional value to the sellers was not present in either case, neither can be criticized. While "available" does not require the actual granting of promotional allowances to other competing customers, how much less than that is legal is uncertain. But actual granting does seem to be required when such customers do offer to furnish "the similar and same services and facilities."[111]

Furnishing of Services or Facilities

"(e) That 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

[110] In the Matter of Miami Wholesale Drug Corp., (1939) 28 F. T. C. 485.

[111] In the Matter of Lambert Pharmacal Co., Docket No. 3749 (F.T.C. August 12, 1940). Who is to be the judge of whether one buyer is as able as another to render "the similar and same services and facilities?" In this case the commission found that buyers, offering less exclusive services and facilities than those furnished by the buyers highest paid therefor by respondent-seller, claimed an ability and willingness to provide such more exclusive services and facilities. Their requests for the higher compensation therefor respondent refused. A wide discretion in this matter should be given the seller's judgment, although the commission seems to be the final arbiter.

Much speculation has gone around as to what "proportionally equal terms" means. To the business man that a seller must advertise everywhere to advertise anywhere, or at least make such an offer to advertise everywhere, is preposterous. See Phillips, The Robinson-Patman Anti-Price Discrimination Law and the Chain Store, (1936) 15 Harv. Bus. Rev. 62, 74-75; Gell, Further Aspects of the Robinson-Patman Anti-Price Discrimination Act, (1937) 2 Law Society Journal 856.

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."[112]

This is the reverse of subsection (d) and has been construed in *In the Matter of Luxor, Ltd.*,[113] holding that the furnishing to only some of the respondent-manufacturer's customers of a smaller sized package of cosmetics, found to be more salable than the larger size, constituted 'a service or facility supplied in connection with the handling, sale or offering for sale of such commodities.' It is arguable that in so far as some of the kinds of cosmetics were inseparable from their containers, the two sizes were not 'of like grade and quality' and that the seller was only exercising its privilege of customer selection. But assuming 'like grade and quality,' customer selection likewise applies to quantity, a valid reason existing for such selection.[113a] Here, however, no such reason appeared. The commission may have been somewhat influenced by the fact that the larger size offered no quantity discount and that the smaller size, sold only to the large mass distributors, was denied to the small ones. Furthermore not to declare the furnishing of a more salable package a service within the meaning of sec. 2 (e) would render the drawing of a line difficult and confusing and would result in circumvention of the act.

Selling to some buyers at delivered prices and not to others might also be considered as a "furnishing of . . . services . . . connected with the . . . handling . . . of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."[114]

[112]No requirement here exists that either the seller or buyer be engaged in commerce, or that the discrimination be made in the course of commerce nor do the "purchasers" to whom the services or facilities are rendered need to be competing. Since subsection (e) describes a situation analogous to the one involved in subsection (d), the same requirements will likewise probably be imposed on (e). Thus in In the Matter of Luxor, Ltd., Docket No. 3736 (F.T.C. July 31, 1940) the commission found the purchasers there involved to be competing. The use of the word "discriminate" in (e) and not in (d) will probably have no significance. The same is true of the word "purchaser" in (e) instead of "customer" as used in (d), except that "purchaser" is here limited to one "for resale."

[113]Docket No. 3736 (F.T.C. July 31, 1939).

[113a]See note 42, supra.

[114]In the Matter of Agricultural Laboratories, (1938) 26 F. T. C. 296. The same may be said of the uniform delivered price where some buyers receive goods at a much reduced transportation cost, while others pay more than the real cost of transportation. The same may also be said of the basing-point system, if transportation costs from the manufacturing point are considered the real cost and compared with those from the basing point. The services by the yeast manufacturer to customer-bakers in the form

BUYER'S LIABILITY

"(f) That it shall be unlawful for any person engaged in commerce in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

In almost every instance whether a violation of sec. 2 (a), (c), (d), or (e) is charged the situation involved is one where the buyer because of size or circumstances has been able to force the seller to accord him terms more favorable than those granted to other buyers. For this reason subsection (f) is an important amendment to the Clayton Act. In so far as this kind of a buyer is equally liable with the sellers, he may be dissuaded from inducing or accepting such discriminatory favors, Further, sellers may be better enabled to withstand such inducements. The words "a discrimination in price which is prohibited by this section," in so far as subsections (c), (d), and (e) are merely specific examples of indirect price discrimination, would prevent the buyer from coercing the seller into indulging in any of the practices proscribed in sec. 2. This interpretation is strengthened by the use of the word "section."[115]

of sales promotions were evidently not found discriminatory in In the Matter of Standard Brands, Incorporated, (1939) 29 F. T. C. 121. In the Matter of Nutrene Candy Company, Docket No. 3756 (F.T.C. December 19, 1939) involved the furnishing by the seller of a candy lottery to some purchasers. Since such lottery was really offered to all buyers and the only reason why some did not receive it was because of their own moral scruples, the rendering of such a service to some purchasers only would not be a violation of sec. 2 (e).

[115]In the Matter of Pittsburgh Plate Glass Company, (1937) 25 F. T. C. 1228; In the Matter of Golf Ball Manufacturers' Ass'n, (1938) 26 F. T. C. 824 (f includes d); In the Matter of Miami Wholesale Drug Corp., (1939) 28 F. T. C. 485 (same); In the Matter of American Oil Co., (1939) 29 F. T. C. 857; cf. Letter of W. A. Ayres, supra note 6, Nos. 25, 26 (although on the part of the seller the practices described involved violation of subsection (d), charges were brought against buyer under subsection (a)). Subsection (c) itself prevents the buyer from accepting the brokerage payments therein proscribed. If the case fails against the seller, it equally fails against the buyer. In the Matter of Bird & Son, (1937) 25 F. T. C. 548.

The Robinson-Patman Act has a provision providing for criminal penalties. Section 3. "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell,

COOPERATIVES

"Section (4). Nothing in this Act shall prevent a cooperative association from returning to its members, *producers, or consumers* the whole, or any part of the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association."[116]

When income, accruing to a corporation-purchasing company, composed of stockholder-members, who were also banded together to form an unincorporated association, was derived from brokerage payments and selling commissions paid by sellers on such members' purchases made through the corporation and in addition was applied one-half to the association dues of such stockholder-members in proportion to their individual and respective purchases and the other half generally for services rendered to all of such members, the commission found such corporation not to be a cooperative association within the meaning of sec. 4.[117] Its members were not producers or consumers, but

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or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

"Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both." This is the Borah-Van Nuys Amendment to the Act. See (1936) 80 Cong. Reg. 6346 (small merchant can have violator prosecuted without going to Washington). The wording of sec. 3 was taken from 25 and 26 Geo. V, ch. 46 sec. 9 (Can. 1935). Cf. Attorney-General for British Columbia v. Attorney-General for Canada, [1937] A. C. 368, affirming, [1936] Can. S. C. R. 363.

[116]Italics supplied. Section 4 is to protect *producer* and *consumer* cooperatives against any charges under the Act based upon their distribution upon a patronage basis of earnings and surplus among their members. H. R. Rep. No. 2951, (1936) 74th Cong. 2d Sess. 9. See Jaffe, Some Comments on the Price Discrimination Act, (1936) 10 U. Cin. L. Rev. 402, 418 n. 28. Zorn and Feldman, Business Under the New Price Laws (1937) 69 (cooperatives as buyer cannot receive brokerage, nor different treatment from any other buyer); Lazo, Commercial Cooperatives Under the Patman Law in Werne, Business and the Robinson-Patman Law (1938) 142; cf. Procon Grocery Service Co., (1937) 24 F. T. C. 1402. This activity is purely internal as distinguished from those activities which the Act proscribes. An amendment to the act was passed, "That nothing in the act approved June 19, 1936 (Public, 692, Seventy-fourth Congress, second session), known as the Robinson-Patman Anti-Discrimination Act, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit." (1938) 52 Stat. at L. 446; 15 U. S. C. sec. 13(c) (Supp. 1939). In so far as these institutions purchase commodities for their own use, competition with nobody is injured. Hence the amendment seems purely precautionary. See Senate Bill 2383 to make Robinson-Patman Act inapplicable to purchases of supplies by State welfare agencies.

[117]In the Matter of Quality Bakers of America, (1939) 28 F. T. C. 1507, modified, 29 F. T. C. 1328. The lack of a comma between "consumers" and "the whole" indicates that "producers, or consumers" does not limit the word "members." The comma before "or" substantiates this

retailers. On appeal the United States circuit court of appeals, first circuit, passing over the question whether either or both of the organizations involved were cooperatives within the meaning of the Act, held that sec. 4 neither authorized cooperative associations to engage in those practices forbidden by sec. 2 (c) nor excepted them from its provisions.[118]

CONCLUSION

Even before the passage of the Robinson-Patman Act the commission manifested a significant indication as to the purpose and scope of anti-price discrimination legislation.[119] The theory of granting a lower discriminatory price is that that buyer's profit has been increased by exactly the amount of the reduction in price granted, putting his competitor to a disadvantage in an amount equal to that sum. Any price variation is to be open, not secret, so that all buyers can purchase at a like price and on similar terms. Construed as a whole, the words:—"where the effect . . . may be substantially to lessen competition" must be interpreted to indicate generally the distinction between fair and unfair competition. The law is designed to prevent the lessening of competition by unfair acts. As long as fair methods are followed, competitive conditions will prevail, while unfair methods always tend toward monopoly. By what standard does the commission decide whether a given price practice is a fair or an unfair act? There is no other standard except that of its effect on competition itself. Every price policy of any producer or distributor would seem to have some effect, though often remote and unsubstantial, tending to restrict or lessen competition. The essence of the competitive system is to overcome and thus to impair competition of others. Unfair methods are not found independently of their effect on competition and then labeled "unfair" and "abnormal," because they will substantially lessen competition or cause a monopoly. But their effect on competition is discovered first. If harmful, they are then labeled "unfair."

Change in our economic system is inevitable. Congress cannot effectively legislate against it. But Congress, through the

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view. Hence "members" should include retailers and wholesalers; i.e., distributors, even though a definition to include them was struck in the earlier stages of the bill.

[118]Quality Bakers of America v. Federal Trade Commission, (C.C.A. 1st Cir. 1940) 114 F. (2d) 393.

[119]In the Matter of the Goodyear Tire & Rubber Co., (1936) 22 F. T. C. 232.

commission, can prevent too rapid a change from causing unnecessary hardships and suffering to those forced to readjust to the new ways. Congress and the commission can prevent individual units of the economic system from causing this too swift change by indulging in new and unusual practices, not sanctioned by the old distribution methods, and hence looked upon as improper. Business, desiring for its own security to prevent the dislocations of too rapid progress, has viewed certain practices generally as beyond the range of its legitimate activity because they promote too much aggrandisement on the part of those engaged in them and receiving their benefit. Congress has specifically described and prohibited them without regard to their effect on competition. The harmful effect can be presumed. But often practices promoting too rapid change occur in the form of the more usual price and sales policies, which are ordinarily considered legitimate. Most price variations are necessary, even beneficial to the distribution system and to consumers—they are the results of progress and change for the better. But some promote too accelerated a change in the competitive struggle. They are thus legal or illegal, depending upon their influence in promoting these too abrupt variations. To this extent the Robinson-Patman Act, with its application by the commission and by private litigation, steers a middle course between freezing the status quo, on the one hand, and, on the other, permitting to go unchecked the rapid alterations in our economic system with their consequential human dislocations.[120]

[120]Learned and Isaacs, The Robinson-Patman Law: Some Assumptions and Expectations, (1937) 15 Harv. Bus. Rev. 137. The emphasis of the new Act seems at first sight somewhat paradoxical. The broad aim is to promote competition, to prevent the growth of monopoly in the field of distribution; yet when certain individual competitors are injured in the competitive struggle, the act comes to their rescue. But the Act draws the line between ceasing protection of these individual competitors from the necessity of competing in order to keep competition alive, and throttling competition to protect such individual competitors in order to keep their competitive capacity alive. For a general review of the cases in the Federal Trade Commission under sec. 2 (a) through 1939 see—Sawyer, The Commission's Administration of Paragraph 2 (a) of the Robinson-Patman Act: An Appraisal, (1940) 8 Geo. Wash. L. Rev. 469. See also Copeland, The Problem of Administering the Robinson-Patman Act, (1937) 15 Harv. Bus. Rev. 156.