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## BUYING GROUPS UNDER THE ROBINSON-PATMAN ACT

ROY C. PALMER\*

**F**OR SOME FORTY YEARS<sup>1</sup> the Federal Trade Commission has been wrestling with the problems created by cooperative buying groups. In every litigated case except one,<sup>2</sup> the Commission has ruled that the buying group activities violated the Clayton Act. Nevertheless, buying groups continue to flourish and grow. Ironically, one of the most important functions of the Commission is to protect small business, and yet, in this area, the Commission is bringing case after case against the small businessman.

A buying group is an organization of purchasers, pooling their purchases, in order to obtain a better price than that which would be available to them individually. The organizational form is immaterial. It may be a corporation, partnership, joint venture, or unincorporated association. It may also be organized under special state statutes for cooperative ventures.

A "group" is generally composed of retailers attempting to obtain the wholesale price, or secondary wholesalers attempting to obtain the primary wholesaler price. However, the group may be made up of any class of purchasers as long as there is an opportunity for the members to obtain a better price through the group than that which would be available to them as individuals.

One of the more important differences between "groups" is the degree to which they perform the function performed by the members of the class they attempt to enter. They range from performing no function whatever,<sup>3</sup> to being nearly indistinguishable

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<sup>1</sup> Mennen Co., 4 F.T.C. 258 (1922), *rev'd*, 288 Fed. 774 (2d Cir. 1923).

<sup>2</sup> *Ibid.*

<sup>3</sup> Mid-South Distributors, FTC Dkt. No. 5767, *aff'd*, 287 F.2d 512 (5th Cir. 1961); Cotton States, Inc., FTC Dkt. No. 5766, *aff'd*, 287 F.2d 512 (5th Cir. 1961).

from the members of the higher class.<sup>4</sup> This issue is at the heart of the controversy, questioning whether function is important only as a cost justification feature, or whether the function has a bearing on the competitive effect of the group and should therefore go to the issue of injury to competition. It has also been suggested as being an important element in determining who is the "purchaser."<sup>5</sup>

The original Clayton Act,<sup>6</sup> three sections of the Robinson-Patman Act,<sup>7</sup> and section 5 of the Federal Trade Commission Act<sup>8</sup> have been utilized in determining the legal status of the "buying group." At this stage, the application of the original Clayton Act is only of historical interest and will be treated shortly.

The conflict begins when a group of retailers band together and demand the wholesaler price. This has been done by the group demanding that the orders of all its members be totaled for purposes of a volume price or a volume rebate.<sup>9</sup> The groups have also demanded a pure functional discount.<sup>10</sup> The Commission has issued its complaint against a manufacturer *for refusing* to grant the group the wholesale price<sup>11</sup> and it has issued its complaint against manufacturers charging that they violated the law *by granting* the group the wholesale price.<sup>12</sup> Groups that received the wholesale price have been charged with knowingly inducing and receiving discriminatory prices, as well as with the illegal receipt of brokerage.<sup>13</sup>

Observing the metamorphosis of the legal status of the buying

<sup>4</sup> National Parts Warehouse, FTC Dkt. No. 8039, *aff'd*, 346 F.2d 311 (7th Cir. 1965), *petition for cert. filed*, 34 U.S.L. Week 3085 (U.S. Sept. 16, 1965) (No. 579).

<sup>5</sup> Alhambra Motor Parts, 57 F.T.C. 1007 (1960), *set aside in part and remanded*, 309 F.2d 213 (9th Cir. 1962).

<sup>6</sup> Section 2: Mennen Co., *supra* note 1.

<sup>7</sup> Section 2(a): Standard Motor Products, Inc., 54 F.T.C. 814 (1957), *aff'd*, 265 F.2d 674 (2d Cir. 1959), *cert. denied*, 361 U.S. 826, 80 Sup. Ct. 73 (1959); Section 2(c): Atlas Supply Co., 48 F.T.C. 53 (1951), and Central Retailer-Owned Grocers, Inc., FTC Dkt. No. 7121, *order set aside*, 319 F.2d 410 (7th Cir. 1962); Section 2(f): Alhambra Motor Parts, *supra* note 5.

<sup>8</sup> Section 5: Atlas Supply Co., *supra* note 7.

<sup>9</sup> Standard Motor Products, Inc., *supra* note 7.

<sup>10</sup> National Parts Warehouse, FTC Dkt. No. 8039, Commission Decision, Dec. 16, 1963, *aff'd*, 346 F.2d 311 (7th Cir. 1965), *petition for cert. filed*, 34 U.S.L. Week 3085 (U.S. Sept. 16, 1965) (No. 579).

<sup>11</sup> Mennen Co., 4 F.T.C. 258 (1922), *rev'd*, 288 Fed. 774 (2d Cir. 1923).

<sup>12</sup> Standard Motor Products, Inc., *supra* note 7.

<sup>13</sup> National Parts Warehouse, *supra* note 10; Central Retailer-Owned Groceries, Inc., FTC Dkt. No. 7121, *order set aside*, 319 F.2d 410 (7th Cir. 1962).

group is particularly startling because the Federal Trade Commission's current position<sup>14</sup> is diametrically opposed to its original position<sup>15</sup> and the courts seem about to do the same thing by adopting the Commission's original position.<sup>16</sup> This little drama is also rife with irony as the Commission's original position was that a manufacturer had to grant the "buying group" the wholesale price<sup>17</sup> (a position which enabled the independent retailer to take advantage of the same efficiencies and economies so successfully utilized by corporate chains), while the Commission's current position is that the manufacturer may not grant the group the wholesale price<sup>18</sup> (which obviously prevents the independent retailer from improving his competitive posture by emulating the practices of the corporate chains). The irony lies in the fact that one of the primary and basic motives in enacting the Robinson-Patman amendment to the Clayton Act was to enable the independent merchant to weather the storm of the ever-encroaching corporate chain.

#### THE EARLY CASES

The Commission's first venture into the group buying arena involved the Mennen Company.<sup>19</sup> This case was brought under the provisions of the original Clayton Act. It is of unusual interest because the Commission has not only taken an about face in position, but also because the Commission is still litigating the same issues some 40 years later.

Mennen was charged with violating section 2 of the original Clayton Act. Mennen manufactured and distributed a long line of toiletry articles. It sold to retailers at the dealer price and to wholesalers at the wholesale price. The Commission found that certain retailers organized corporate buying groups that purchased in wholesale quantities, stocked the goods in question, and sold only to retailers (mostly themselves). It went on to find that respondent refused to classify the retailer cooperatives that func-

<sup>14</sup> National Parts Warehouse, *supra* note 10.

<sup>15</sup> Mennen Co., *supra* note 11.

<sup>16</sup> Alhambra Motor Parts, 57 F.T.C. 1007 (1960), *set aside in part and remanded*, 309 F.2d 213 (9th Cir. 1962).

<sup>17</sup> Mennen Co., 4 F.T.C. 258 (1922), *rev'd*, 288 Fed. 774 (2d Cir. 1923).

<sup>18</sup> Dayton Rubber Co., FTC Dkt. No. 7604, Commission Opinion, Aug. 5, 1964.

<sup>19</sup> Mennen Co., *supra* note 17.

tioned as wholesalers, and thereby discriminated in price between them and other wholesalers (non-group wholesalers).

The Commission stated that:

Such cooperative corporations originated in an effort, upon the part of small retailers to find some means of purchasing products, at prices which would enable them to meet the competition of larger retail dealers which were able to purchase from manufacturers and wholesale distributors in larger quantities and at lower prices than said small retail competitors. Said cooperative corporations met the situation by offering retail customers wholesale distribution, service at cost, and also offering to cut such cost to a minimum.<sup>20</sup>

The Commission concluded that Mennen's refusal to recognize the retailer buying group as a wholesaler constituted a violation of section 2 of the Clayton Act. A comparison of the Commission's more recent *Alhambra*<sup>21</sup> decision with the *Mennen*<sup>22</sup> decision will vividly demonstrate that the Commission condemned in *Alhambra* the very practice that it rewarded in *Mennen*.

One year later, the Commission's landmark decision in *Mennen* was reversed by the Second Circuit.<sup>23</sup> The court's holding is often said to be founded on the following language:

Whether a buyer is a wholesaler or not does not depend upon the quantity he buys. It is not the character of his buying but the character of his selling which marks him as a wholesaler as this court pointed out in *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Company*, *supra*. A wholesaler does not sell to the ultimate consumer but to a "jobber" or to a "retailer." The persons who constitute these mutual or cooperative concerns are buying for themselves to sell to ultimate consumers, and not to other "jobbers" or to other "retailers." The nature of the transaction herein involved is not altered by the fact that they make their purchases through the agency of a corporation . . .<sup>24</sup>

A close reading of the case indicates that this last paragraph was merely a make-weight argument—pure *obituro dictum*.

The court in *Mennen* accurately analyzed the charge and determined that the alleged injury was among purchasers from the Mennen Company. The court reviewed the history of the Act and

<sup>20</sup> *Mennen Co.*, *supra* note 17, at 279.

<sup>21</sup> *Alhambra Motor Parts*, *supra* note 16.

<sup>22</sup> *Mennen Co.*, *supra* note 17.

<sup>23</sup> *Mennen Co. v. FTC*, 288 Fed. 774 (2d Cir. 1923).

<sup>24</sup> *Id.* at 782.

concluded that the Mennen Company did not violate the Clayton Act as there was no provision in the Act involving the type of injury charged in the case—secondary line injury. The court stated that it was the intent of Congress:

[T]o exclude from the operation of the section mere competition among "purchasers" from the "seller" or "person" who allowed or withheld the discount and to include therein only competition between such "seller" or "person" and the latter's own competitors.<sup>25</sup>

The court had decided that it was impossible for Mennen's activities to violate the law if only secondary line injury was charged, before it launched into its definition of a wholesaler.

The Supreme Court in *George Van Camp & Sons v. American Can Co.*,<sup>26</sup> said that the decision in *Mennen* was wrong, that the Act did cover secondary-line injury. Not only was the *Mennen* definition of a wholesaler *dictum*, the authority it cited as support for its position only dealt with the subject incidentally. Likewise, in *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*,<sup>27</sup> A & P sought to enjoin Cream of Wheat from refusing to sell to it. The Court upheld the defendant's right to sell to whomsoever it chose. The definition of a wholesaler had no bearing on the case.

#### NONFUNCTIONING GROUPS

*Mennen* was destined to stand alone for nearly 40 years as the only buying group case presented to the Commission where the buying group actually performed the function performed by the members of the level of competition the group tried to enter. An understanding of the synthesis of buying group law would have been simplified if the Commission had first heard *Mennen* in 1962 instead of 1922.

The *Pittsburgh Plate Glass*<sup>28</sup> case is the logical place to begin a discussion of buying group law. It not only was the first group type case decided by the Commission after the enactment of the Robinson-Patman Act, but it also involved the group least deserving of a favored price. Members of the Window Glass Manu-

<sup>25</sup> *Id.* at 779.

<sup>26</sup> 278 U.S. 245, 49 Sup. Ct. 112 (1929).

<sup>27</sup> 227 Fed. 46 (2d Cir. 1915).

<sup>28</sup> *Pittsburgh Plate Glass Co.*, 25 F.T.C. 1228 (1937).

facturers Association (WGMA) were charged with granting members of the National Glass Distributors Association (NGDA) a favored price in the sale of flat glass in violation of section 2 (a) of the amended Clayton Act. The distributors were charged with inducing and receiving a favored price from the manufacturers in violation of section 2 (f) of the amended Clayton Act.

WGMA established a "Quantity Bonus" price. This price was only available to members of NGDA. NGDA published "car-load lot buyers" prices which were  $7\frac{1}{2}\%$  higher than the "quantity buyers" price. All nonmembers were forced to purchase car-load lots of flat glass from or through NGDA members. The manufacturers drop shipped the glass directly to the purchaser. On sales to nonmembers, NGDA members paid the "quantity buyers" price plus  $2\frac{1}{2}\%$ , and charged the "quantity buyers" price, plus  $7\frac{1}{2}\%$ . The result was that members paid  $7\frac{1}{2}\%$  less than nonmembers as well as making  $5\%$  on purchases by nonmembers. This case marks a practice that was obviously in violation of the Clayton Act as it was nothing more than a trade association demanding not only a better price than its nonmember competitors, but also a commission on purchases by its nonmember competitors. There was no ruse or disguise. It was nothing more than commercial blackmail with a trade association's combined buying power as a lever.

The second step in the development of the Robinson-Patman buying group also involved a trade association, the Professional Golfers Association (PGA).<sup>29</sup> It is different only as the PGA had an excuse for the favored price it received, while NGDA did not. Golf ball manufacturers paid PGA a royalty for the privilege of imprinting "PGA" on their golf balls. The PGA used some of this money to promote the PGA and returned the rest to its members. The PGA justified its position by alleging that "PGA" was a valuable property and that the organization was entitled to be compensated for its use. The Federal Trade Commission saw this deal as no more than a way to grant PGA members a discount not available to nonmembers and issued a section 2 (f) order against the PGA for this practice.

<sup>29</sup> Golf Ball Manufacturers Ass'n, 26 F.T.C. 824 (1938).

The next step in the development of the Robinson-Patman buying group involves the first organization created primarily to induce a discriminatory price.<sup>30</sup> A group of department stores created a corporation to obtain a better price for its shareholders. The corporation, AMC, utilized the combined buying power of all its members in order to induce the special price. Suppliers that cooperated with AMC, by granting it a rebate on sales to its members, were classified as "preferred resources." The Commission created no special doctrine or fiction in appraising the reality of this scheme. It merely recited the facts and called it price discrimination. This case was followed by a similar one, the *Atlas Supply Co.* case, wherein several major oil companies formed a buying group.<sup>31</sup> It differed from AMC in that AMC only induced a better price for its members or received a rebate, while Atlas was paid "commissions, brokerages, or other compensation in lieu thereof"<sup>32</sup> on sales to its members.

#### THE AUTOMOTIVE PARTS CASES

By 1953, the Commission was in the buying group field in earnest. That year marked the beginning of the Commission's attack on the automotive parts buying groups. In the automotive parts field, the most common distributional pattern finds the manufacturer selling to a warehouse distributor (WD), the WD selling to a jobber, the jobber selling to a retailer, and the retailer selling to a consumer. Sellers seldom, if ever, vary their prices from those suggested by the manufacturers. The manufacturers distribute suggested price lists for every level of distribution.

The warehouse distributor normally purchases the manufacturer's products in large quantities and at the maximum discount. In 1953, and earlier, it was common for manufacturers to have a cumulative volume discount or rebate for its jobber customers and a functional discount for WD's. Others sold to WD's as well as jobbers on a volume discount basis. The volume rebate tended to cause the WD's to purchase the bulk of their needs of a product from one manufacturer, in order to qualify for the maxi-

<sup>30</sup> Associated Merchandising Corp., 40 F.T.C. 578 (1945).

<sup>31</sup> Atlas Supply Co., 48 F.T.C. 53 (1951).

<sup>32</sup> *Id.* at 64.



mum volume discount. The WD's maintained large staffs of salesmen and often sold to jobbers in a multi-state area.

Jobbers were very much aware of the advantages of purchasing large quantities. They began to investigate the possibilities of obtaining large discounts by pooling their purchases. The scheme decided upon was to set up a corporation. Each jobber was to own one share of stock in the corporation. Order pads were printed with the corporation's name. The jobbers then placed their orders on the new corporation's order form. The forms were either sent directly to the manufacturer or to the new corporation's office to be forwarded to the manufacturer. The manufacturer would then ship the goods directly to the jobber, but bill the corporation, allowing it the volume discount on the total purchases of all its shareholders or the WD functional discount. The member-jobbers received a share of the group's profit proportional to their purchases from the group.

This scheme worked for some time, but it was inevitable that it would eventually fail. The WD's price was usually about 20% lower than the price paid by the jobber. The WD was granted the price because it performed a valuable service to the manufacturer. The WD provided local inventory, improved service, a large sales organization, better credit, and reduced bookkeeping and billing. A WD in a territory enabled the manufacturer not only to eliminate a local warehouse, but also to have less capital tied up in inventory. The manufacturer's sales and warehouse staff were much smaller than they would have been if he had to sell and ship to every small jobber handling his product. Overall, the WD was well worth his keep.

The jobber buying group then came along and demanded that it be treated in the same fashion as the WD. The group's approach to each manufacturer can only be based on speculation and conjecture, but the only benefit it had to offer was that its members would handle the manufacturer's product. The group had no warehouse or salesmen. It performed no service. The only apparent incentive to sell to the group was the fear that the group would get the deal from a competitor and leave the manufacturer that refused to deal with them out in the cold. The success of the groups

make it obvious that the *quid pro quo* was enough, or perhaps it might be better stated by saying that the manufacturer couldn't afford not to give in.

There is little doubt that the manufacturers were not happy with the situation. They not only had to give the group the right to pool its purchases and thereby qualify for the maximum volume discount or the WD functional discount, but they also had to perform the warehouse function as well. However, they were between the devil (the group) and the deep blue sea (the group's members purchasing from the competitor that allowed them the price break), and had no alternative. The situation made the group members happy as they made the WD profit as well as the normal jobber profit. But, the whole thing didn't set well with the manufacturers (who were forced to take the WD price, but not get the WD service), the legitimate WD's (who were completely foreclosed from selling to group members as group members could purchase as cheaply as the WD), and finally, the independent jobber (who was paying the manufacturer or the WD the full jobber price, while his competitor was paying a much lower price).

The automotive parts "aftermarket" was loaded with "buying groups." Since its first order in 1953,<sup>33</sup> the Commission has issued 19 cease and desist orders specifically prohibiting manufacturers from granting nonfunctional groups a favored price.<sup>34</sup> Since its first order in 1958,<sup>35</sup> the Commission has issued 9 cease and desist

<sup>33</sup> Namsco, Inc., 49 F.T.C. 1161 (1953).

<sup>34</sup> Namsco, Inc., *supra* note 33; Whitaker Cable Corp., 51 F.T.C. 958 (1955), *aff'd*, 239 F.2d 253 (7th Cir. 1956), *cert. denied*, 353 U.S. 938, 77 Sup. Ct. 813 (1953); Moog Indus., Inc., 51 F.T.C. 931 (1955), *aff'd*, 238 F.2d 43 (8th Cir. 1956), *aff'd*, 355 U.S. 411, 78 Sup. Ct. 377 (1958), *rehearing denied*, 356 U.S. 905, 78 Sup. Ct. 559 (1958); E. Edelmann and Co., 51 F.T.C. 978 (1955), *aff'd*, 239 F.2d 152 (7th Cir. 1956), *cert. denied*, 355 U.S. 941, 78 Sup. Ct. 426 (1958); C. E. Niehoff and Co., 51 F.T.C. 1114 (1955), *aff'd as modified*, 241 F.2d 37 (7th Cir. 1957), *modified*, 355 U.S. 411, 78 Sup. Ct. 377 (1958), *rehearing denied*, 355 U.S. 968, 78 Sup. Ct. 531 (1958); P and D Mfg. Co., 52 F.T.C. 1155 (1956), *aff'd*, 245 F.2d 281 (7th Cir. 1957), *cert. denied*, 355 U.S. 884, 78 Sup. Ct. 150 (1957); Standard Motor Products, Inc., 54 F.T.C. 814 (1957), *aff'd*, 265 F.2d 674 (2d Cir. 1959), *cert. denied*, 361 U.S. 826, 80 Sup. Ct. 73 (1959); Federal-Mogul Bower Bearings, Inc., 54 F.T.C. 1628 (1958); Guaranteed Parts Co., 55 F.T.C. 433 (1958); Thermoid Co., 55 F.T.C. 518 (1958); Neapco Products, Inc., 55 F.T.C. 708 (1958); The Eis Automotive Corp., 55 F.T.C. 1473 (1959); Airtex Products, Inc., 55 F.T.C. 1754 (1959); Northeast Capital Corp., 57 F.T.C. 429 (1960); American Ball Bearing Co., 57 F.T.C. 1259 (1960); Perfect Equipment Corp., 58 F.T.C. 65 (1961); Borg-Warner Corp., 58 F.T.C. 629 (1961); Perfection Gear Co., 59 F.T.C. 598 (1961); Tung-Sol Electric, Inc., FTC Dkt. No. 8514, Commission Opinion, Sept. 12, 1963.

<sup>35</sup> Warehouse Distributors, Inc., 55 F.T.C. 188 (1958).

orders specifically prohibiting buying groups and their individually named jobber members from receiving a favored price through a nonfunctional buying group.<sup>36</sup>

### A. Order Desk Groups

The original automotive parts cases caused the Commission and the courts little trouble. These groups were little more than order desks. Members would send their orders to the group and the individual orders were forwarded to the manufacturers. The manufacturers would drop ship the goods directly to the member. The group merely forwarded orders, billed the members, and paid the suppliers. It was determined that the jobber members and not the corporate groups were the "purchasers." This was established by a showing that the group was merely a funnel, and not always even that, for group member's orders. The corporate group had no life or function of its own. Section 4 of the Robinson-Patman Act provided the group no immunity as it only declares that:

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.<sup>37</sup>

Similarly, "the fact that earnings which result from illegal activity may be distributed to the association's members does not insulate the association from prosecution for the illegal activity."<sup>38</sup>

The Commission was able to establish that there was little likelihood that the discount was cost justified, because the manufacturers treated group and nongroup members exactly alike, except for billing, and it was clear that any savings in billing that existed could not give rise to sufficient cost savings to justify the price discrimination.

<sup>36</sup> Warehouse Distributors, Inc., *supra* note 35; Midwest Warehouse Distributors, Inc., 55 F.T.C. 414 (1958); Hunt-Marguardt, Inc., 55 F.T.C. 910 (1958); Borden-Aicklen Auto Supply Co., 55 F.T.C. 1279 (1959), *aff'd*, 287 F.2d 512 (5th Cir. 1961); D and N Auto Parts Co., 55 F.T.C. 1279 (1959), *aff'd*, 287 F.2d 512 (5th Cir. 1961); American Motor Specialists Co., 55 F.T.C. 1430 (1959), *aff'd*, 278 F.2d 225 (2d Cir. 1960), *cert. denied*, 364 U.S. 884, 81 Sup. Ct. 169 (1960); Albright's, 55 F.T.C. 1556 (1959); Automotive Southwest, Inc., 57 F.T.C. 590 (1960); Southwestern Warehouse Distributors, Inc., 57 F.T.C. 611 (1960).

<sup>37</sup> 15 U.S.C.A. § 13b.

<sup>38</sup> American Motor Specialties Co. v. FTC, 278 F.2d 225, 229 (2d Cir. 1960), *affirming*, 55 F.T.C. 1430 (1959), *cert. denied*, 364 U.S. 884, 81 Sup. Ct. 169 (1960).

### B. Warehousing Groups

Traditionally, manufacturers of automotive replacement parts have discriminated in price between primary and secondary wholesalers. The warehouse distributor receives a 20% allowance for the function it performs. The function is to service the jobber. The bells tolled long and hard for the "order desk" groups, but they were making too much money to give up so easily. They figured that the basic difference between their operation and that of a legitimate warehouse distributor was that their suppliers drop shipped to their members, while legitimate WD's received the bulk of their merchandise in their warehouse and reshipped it to their customers. Accordingly, a number of groups acquired or built warehouses. If a WD could get 20% as a functional allowance, why couldn't a group perform the same function and receive the same allowance?

The thinking of the buying groups that a warehouse would change them from fish to fowl demonstrated a basic misunderstanding of why the functional discount to WD's was not a violation of the Robinson-Patman Act. The fact the WD's had warehouses was merely secondary. The crucial aspect was that the WD's did not compete with the jobbers. Their function is to sell to jobbers. Function is determined by trade classification and not physical accouterments. The difference in price between jobbers and WD's is in conformity with the Robinson-Patman Act not because the WD maintains a warehouse, but because WD's do not compete with jobbers. Functional pricing does not provide jobber buying groups with warehouses with an impenetrable barrier through which the FTC cannot enter. As long as the group jobbers continue to compete with other jobbers, they function as jobbers. As jobbers, they are only entitled to the jobber price.

The Commission approaches a buying group with a warehouse under the same theory that it approaches a group without a warehouse. The first issue is who is the "purchaser," the group as an entity or the individual member jobbers? If it is determined that the individual members are the "purchasers," this results in a price discrimination of 20%, as nonmember jobbers pay the regular jobber price, while member jobbers pay the WD price

through the group. By virtue of *Automatic Canteen*,<sup>39</sup> the Commission must also show that the member jobbers had no reason to believe that the price difference was cost justified.

The only difference in a warehousing group and a nonwarehousing group, involves cost justification. The test of *Automatic Canteen*<sup>40</sup> is easily met in the nonwarehousing group as the only difference in treatment by suppliers is that they bill the group headquarters and not the individual members. This clearly would not result in a 20% savings. In the warehousing situation, however, the picture changed. Drop shipments are eliminated. The group makes large purchases and maintains large inventories. It continues to handle the billing.

1960 saw the result of the Commission's first formal action against a buying group where warehousing was a factor. On October 28, 1960, the Commission issued a cease and desist order in the matter of *Alhambra Motor Parts*.<sup>41</sup> The Commission did not write an opinion in this matter. It adopted the initial decision of the hearing examiner. The hearing examiner treated the *Alhambra* matter much as the "order desk" group cases had been treated in the past. He merely made mention of the fact that a portion of the products were warehoused. He did, however, indicate that "the allowance of a warehouse distributor's discount to Southern California Jobbers, Inc. (S.C.J.), as herein found, cannot be defined as a functional discount. . . ."<sup>42</sup> The hearing examiner based this finding on his conclusion that the group, SCJ, was merely a device by which jobbers obtained the WD price.

In 1961, two more group cases involving warehousing came out. Hearing examiners issued initial decisions in *Ark-La-Tex*

<sup>39</sup> "The Commission need only to show, to establish its prima facie case, that the buyer knew that the methods by which he was served and quantities in which he purchased were the same as in the case of his competitor. If the methods or quantities differ, the Commission must only show that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential, and that the buyer, knowing these were the only differences, should have known that they could not give rise to sufficient cost savings. The showing of knowledge, of course, will depend to some extent on the size of the discrepancy between cost differential and price differential, so that the two questions are not isolated. A showing that the cost differences are very small compared with the price differential and could not reasonably have been thought to justify the price difference should be sufficient." *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 80, 73 Sup. Ct. 1017, 1027-8 (1953).

<sup>40</sup> *Ibid.*

<sup>41</sup> 57 F.T.C. 1007 (1960), *set aside in part and remanded*, 309 F.2d 213 (9th Cir. 1962).

<sup>42</sup> *Id.* at 1019.

*Warehouse Distributors, Inc.*<sup>43</sup> and *Automotive Jobbers, Inc.*,<sup>44</sup> holding that these two groups and their members had violated section 2 (f) of the Robinson-Patman Act by knowingly inducing and receiving illegal discriminatory prices. Although each of these two groups warehoused some of their products, not much was made of it. Again, the two initial decisions read much like the older "order desk" type group cases.

Automotive Jobbers, Inc. did not appeal the initial decision. In January of 1962, the Commission adopted the initial decision of the hearing examiner.<sup>45</sup> Ark-La-Tex did appeal to the Commission.

In June of 1962, the hearing examiner issued his initial decision in *National Parts Warehouse*.<sup>46</sup> NPW looked more like a warehouse operation than any of the other groups that had come under the Commission's scrutiny. NPW warehoused 80% of its products. It had a salesman. It sold to nonmembers. It was a limited partnership, while many of the others had been corporations. This meant that the members or limited partners, had very little to say about its day-to-day activities. The hearing examiner evaluated these factors, and in finding that section 2 (f) of the Robinson-Patman Act had been violated by NPW and its partners, he concluded:

N.P.W. performs some of the services usually performed by a warehouse distributor, but the prime question is not what functions are performed or who controls the operation of the partnership, but whether the respondent jobbers receive the price discrimination.<sup>47</sup> (Emphasis added.)

The Commission's earlier opinion in *Alhambra* had been appealed to the Ninth Circuit Court of Appeals. Four months after the initial decision in *NPW*, the Ninth Circuit issued its opinion in *Alhambra*.<sup>48</sup> The court upheld the Commission's order regarding drop shipments or brokerage, but remanded the case back to the Commission for further consideration of SCJ's warehousing activities and, in that regard, the "purchaser" issue.

<sup>43</sup> FTC Dkt. No. 7592, Hearing Examiners Initial Decision, Oct. 13, 1961.

<sup>44</sup> FTC Dkt. No. 7590, Hearing Examiners Initial Decision, Oct. 13, 1961.

<sup>45</sup> 60 F.T.C. 19 (1962).

<sup>46</sup> FTC Dkt. No. 8039, Hearing Examiners Initial Decision, June 12, 1962.

<sup>47</sup> *Id.* at 14.

<sup>48</sup> *Alhambra Motor Parts v. FTC*, 309 F.2d 213 (9th Cir. 1962).

The "purchaser" issue in *Alhambra* involved a determination of whether the jobber members as individuals, or the group, as a separate entity, are the "purchasers." The warehousing issue involved the court's conclusion that SCJ performed a number of services such as warehousing, delivery, distribution of price lists and catalogs and the like, for its suppliers and members. The court determined that these services may have saved the groups' suppliers money, as compared to dealing directly with jobbers, and that "the burden was on the Commission to show that the cost savings could not be commensurate with the price differential."<sup>49</sup>

This cost savings issue stems from a proviso in section 2 (a) of the Robinson-Patman Act,<sup>50</sup> that provides

[T]hat 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.

In a proceeding charging a manufacturer with violating section 2 (a) of the Act, by discriminating in price between customers, the manufacturer has the burden of establishing cost justification, if any exists. In a section 2 (f) case, charging a customer with knowingly inducing a discriminatory price, the burden is on the Commission to establish that there is little likelihood that the differential was cost justified.<sup>51</sup>

On June 5, 1963, subsequent to Ark-La-Tex's appeal to the Commission, the Commission remanded the *Ark-La-Tex* matter to the hearing examiner.<sup>52</sup>

On December 16, 1963, the Commission issued its opinion in *National Parts Warehouse*.<sup>53</sup> The Commission concluded that NPW had violated section 2 (f) of the Robinson-Patman Act, and accordingly, issued a cease and desist order. The Commission's NPW decision involves, among others, the same two issues that were remanded to the Commission in the *Alhambra* case,—who is the "purchaser," and cost justification.

<sup>49</sup> *Id.* at 219.

<sup>50</sup> 15 U.S.C.A. § 13.

<sup>51</sup> *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 73 Sup. Ct. 1017 (1953).

<sup>52</sup> FTC Dkt. No. 7592, "Order Vacating Initial Decision and Remanding Case to Hearing Examiner."

<sup>53</sup> *National Parts Warehouse*, FTC Dkt. No. 8039, Commission Decision, Dec. 16, 1963.

In *NPW*, the Commission determined that the group organization was the agent of the members, and, therefore, that the members were the "purchasers." The rationale behind this conclusion was that:

(T)he jobber partners, in reserving to themselves the absolute legal right to receive all of their creature's profits, have made themselves responsible for the acts by which it "earns" those profits. Everything that *NPW* does is done not for itself, but for those who receive its profits. It is, therefore, their agent.<sup>54</sup>

Determination of the cost justification issue involves a very different problem than the "purchaser" issue. The "purchaser" issue facilitates the utilization of rules of law of rather general applicability. The cost justification issue does not. It is basically a question of fact. The question is whether the group device was so constituted that it saved suppliers an amount equal to or greater than the discount it granted the group, as compared to the suppliers' costs in serving direct buying jobbers. This involves determining what services a supplier provides a direct buying jobber; which of these services the supplier can eliminate by selling through a group rather than directly; the cost to the seller of the eliminated services; and finally, does the cost to the seller of the eliminated services equal or exceed the discount granted. If it does, the discount is cost justified; if it doesn't, the discount is not cost justified.

In considering the possible areas of cost savings to manufacturers dealing with *NPW*, the Commission discussed freight, billing, selling expenses and warehousing. After developing these areas in detail, Chairman Dixon, in his majority opinion,<sup>55</sup> concluded:

(T)hat respondents' operation of *NPW*, far from lessening their supplier's cost of selling to and servicing the 55 jobber partners, has actually *increased* these particular cost items for the manufacturers.

*NPW* was subsequently affirmed by the United States Court of Appeals for the Seventh Circuit and a petition for certiorari has been filed in the United States Supreme Court.<sup>56</sup>

<sup>54</sup> *Id.* at 12.

<sup>55</sup> *Id.* at 29.

<sup>56</sup> *National Parts Warehouse v. FTC*, 346 F.2d 311 (7th Cir. 1965), *petition for cert. filed*, 34 U.S.L. Week 3085 (U.S. Sept. 16, 1965) (No. 579).



Pursuant to the Ninth Circuit's remand in *Alhambra*,<sup>57</sup> hearings were held in Los Angeles. On November 20, 1964, the hearing examiner issued his initial decision dismissing the complaint.<sup>58</sup> Although he found the members of SCJ to be the "purchasers," he also found that it had not been established that the discounts in question were not cost justified.

The hearing examiner stated that "it may be inferred that the functional discounts paid to independent WD's are substantially cost justified. . . ."<sup>59</sup> He then outlined the services performed by SCJ and went on to say that "as far as its manufacturer-suppliers were concerned, these services performed for them by SCJ were comparable to the cost-saving services performed by other WD's."<sup>60</sup> He then held that "there is no reason to believe that the performance of substantially similar services by SCJ did not result in comparable savings in cost to the manufacturers selling through SCJ."<sup>61</sup> The hearing examiner's decision in *Alhambra*<sup>62</sup> is currently on appeal to the Commission.

The most recent Commission activity in the automotive buying group field is the hearing examiner's second initial decision in *Ark-La-Tex Warehouse Distributors, Inc.*<sup>63</sup> The hearing examiner concluded that the suppliers of Ark-La-Tex discriminated in price by selling to the members of Ark-La-Tex through Ark-La-Tex, at lower prices than the prices charged competing jobbers; that this discrimination was or may have been injurious to competition; and that the members knew or should have known that the differentials were not cost justified. The hearing examiner found that these activities violated section 2 (f) of the Robinson-Patman Act, and, therefore, issued a cease and desist order.

The Commission has only issued one cease and desist order against a supplier selling to a buying group with a warehouse.<sup>64</sup> The Commission's opinion followed the principles enunciated in

<sup>57</sup> *Alhambra Motor Parts v. FTC*, 309 F.2d 213 (9th Cir. 1962).

<sup>58</sup> *Alhambra Motor Parts*, FTC Dkt. No. 6889, "Supplemental Initial Decision on Remand of Proceeding," Nov. 20, 1964.

<sup>59</sup> *Id.* at 34.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> *Alhambra Motor Parts*, *supra* note 58.

<sup>63</sup> FTC Dkt. No. 7592, Hearing Examiner's Second Initial Decision on Remand of Proceedings, Feb. 18, 1965.

<sup>64</sup> *Dayton Rubber Co.*, FTC Dkt. No. 7604, Commission Opinion, Aug. 5, 1964.

the earlier "automotive parts cases," with the exception that it also deals with the issue of the boundaries of "official notice." That case, *Dayton Rubber*, is currently on appeal in the Sixth Circuit Court of Appeals. In another recent case, outside the field of automotive parts, the Commission issued a cease and desist order against a supplier selling to a buying group.<sup>65</sup> Kaplan was charged with violations of subsections (a), (d), and (e) of section 2 of the amended Clayton Act, by engaging in discriminatory practices in the sale of products to a department store buying group, Associated Merchandising Corp. (hereinafter referred to as AMC). As noted earlier, AMC was found to have violated section 2 (f) in 1945.<sup>66</sup> The Commission issued another section 2(f) complaint against AMC and its members on November 24, 1964.<sup>67</sup>

### THE RESULTS

The first page of this article states that in spite of vigorous Commission activity, buying groups, and in particular, automotive parts buying groups, continue to flourish and grow. Such being the case, how can one assess the results of the Commission's activities? It is impossible to speculate as to how many groups did not form due to the presence and attitude of the Commission. There is no doubt that the number is substantial. However, there are areas where there has been noticeable progress in this field, particularly in automotive parts.

The annual volume discount constitutes one of the most notorious and injurious methods of discriminatory pricing. It injures competition in at least two ways. The first is at the primary level of competition. A customer tends to limit his purchases to one supplier, because each additional purchase may lower the price. This results in the supplier's competitor being cut off from the customer. The second is at the secondary level of competition. The volume buyer is able to use his large buying power to obtain a lower price than his smaller competitor. This is in spite of the fact that there may not be savings accruing to the supplier by selling to

<sup>65</sup> Joseph A. Kaplan and Sons, FTC Dkt. No. 7813, Commission Opinion, Nov. 15, 1963.

<sup>66</sup> Associated Merchandising Corp., 40 F.T.C. 578 (1945).

<sup>67</sup> FTC Dkt. No. 8651.

the large volume customer. The volume customer may use the better price to destroy his competitor.

This iniquitous system of pricing was rife in the automotive aftermarket before the Commission began its buying group activities. This type of pricing has nearly disappeared since then.

Another area of progress involves the metamorphosis of the order desk buying group into nearly a full service warehouse. The order desk buying group performed no economic service in the channel of distribution. As far as the physical distribution of products are concerned, the order desk buying group did not exist. It did nothing for suppliers or members. Its sole purpose was to enable its members to obtain a discriminatory price.

Today, many automotive buying groups maintain substantial warehouse facilities. They often provide delivery or pay freight. Some have salesmen. They have come a long way from their beginning as order desks. They provide benefit to their suppliers and to their members.<sup>68</sup>

#### THE FUTURE

This is the most ticklish problem of all. In his concurring opinion in *Monroe Auto Equipment Company*,<sup>69</sup> Chairman Dixon stated:

There always has been a substantial sentiment in the country that small local enterprises should be encouraged and that their members should grow. That emotion was translated into legislation such as the Robinson-Patman amendment to the Clayton Act. To some, our strong enforcement of this Act now seems a childish clinging to a bygone era. And it is, of course, true that today's dissent may, in fact, be tomorrow's majority view.

In his dissenting opinion in *National Parts Warehouse*, Commissioner Elman stated:

We should hesitate to prevent the independent jobbers from adopting a new marketing method which, by eliminating one step

<sup>68</sup> "As a result of numerous Commission actions against buying groups through which jobbers of automotive parts have aggregated their purchases to obtain discriminatory discounts, or against the manufacturers which have granted them the discounts, some jobber groups have abandoned their simple 'order-desk' method of business, whose only function was to combine the separate purchase orders of their members, and have developed warehouse operations which perform the same economic function, and are compensated by parts manufacturers on the same basis, as traditional warehouse distributors." (Citations omitted.) Dissenting Opinion, Commissioner Elman, *National Parts Warehouse*, FTC Dkt. No. 8039, Commission Decision at 3, Dec. 16, 1963.

<sup>69</sup> FTC Dkt. No. 8543, Commission Decision at 4, July 28, 1964.

in their channel of distribution, would increase their competitive strength vis-a-vis that of their more fully integrated competitors, at least in the absence of facts showing that such an effort by the independents to meet competition is, itself, anticompetitive in its results. There are no such facts here.<sup>70</sup>

Commissioner MacIntyre, in his speech on cooperatives, delivered before the Antitrust Section of the American Bar Association, August 11, 1964, stated:

With the exception of hard core violations involving predatory practices, in the case of small business or farmers' cooperatives, it may be expected that the Commission will increasingly look at the economic and competitive function of the particular cooperative and where permissible, will apply the rule of reason.

These three statements, by the Chairman and the two senior Commissioners of the Federal Trade Commission, make it evident that the Commission is extremely concerned with its finding itself in the position of prosecuting small business. However, it has no choice but to enforce the law equally among the large and the small. The Commission cannot allow the group members to destroy their smaller competitors, in order to make the group members more effective in their competition with their larger competitors.

The dilemma is now clear. How can small business be allowed to equate the efficiencies of their larger, vertically-integrated competitors? The present type group organization is not appropriate because it results in injury to the group members' smaller, independent competitors. Therefore, the group members must devise a method to eliminate the competitive injury to their competitors. Can this be done within the framework of the Robinson-Patman Act?

If the group were to open membership to any and all of its members' competitors, at a nominal cost, would the problem be solved? This would enable all competitors to take advantage of the lower price. If this were to happen, where would the injury be? The theory that the availability of the lower price would eliminate competitive injury, finds support in two areas.

In the Report of the Attorney General's National Committee to Study the Antitrust Laws, March 31, 1955, it is stated on pages 164-5:

<sup>70</sup> FTC Dkt. No. 8039, Commission Decision at 3, Dec. 16, 1963.

Nor should a competitive price reduction be singled out as responsible for "injury" if alternative means of access to goods at the lower price are in any event available to the buyer.

In *Tri-Valley Packing Association v. FTC*,<sup>71</sup> the court stated:

To be more specific, if the lower price would have been available to the nonfavored buyer in the same market where the favored buyer made his purchase, the probability of competitive injury due to the fact that the nonfavored buyer paid more for the product is not the result of price discrimination, but of the nonfavored buyer's failure to take advantage of the opportunity, equally available to him, of buying at the same low prices.

Price discrimination would be eliminated if the nonfavored buyers chose to join the group and take advantage of the benefits of the group. If the nonfavored buyer chose not to join, the price discrimination would still exist, *but* would it be the proximate cause of the injury? It seems that if any injury existed, it would be due to the nonfavored buyers own unwillingness to take advantage of the lower price.

This is only one possible solution. It is not perfect. For example, what happens to the independent warehouse distributor if all his customers join the group? There is no doubt that he would have to adapt in some way, or face a substantial loss of business. But, would he have any remedy? He would still be paying the same price as the group. There would be no price discrimination. Without price discrimination, there is no violation of the Robinson-Patman Act.

<sup>71</sup> 329 F.2d 694, 703-4 (9th Cir. 1964).