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Trade Regulation-Robinson-Patman Act-Price Discrimination in the Marketing of Gasoline

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TRADE REGULATION—ROBINSON-PATMAN ACT—PRICE DISCRIMINATION IN THE MARKETING OF GASOLINE—Section 2 of the original Clayton Act[1] was directed primarily at geographical price discrimination which was destructive of competition among sellers.[2] The major source of anti-competitive behavior which the act sought to eliminate was the practice by which a number of large national corporations slashed prices in areas in which they had local competition in order to force their smaller rivals from the market.[3] In response, the act prohibited price discriminations which threatened "to substantially lessen competition or tend to

1 Ch. 323, 38 Stat. 730 (1914).

2 ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 155 (1955) [hereinafter cited as A.G. REP.].

3 See Rowe, *Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act*, 66 YALE L.J. 1, 4 (1956).

create a monopoly in any line of commerce" unless such price differentials resulted from differences in the grade, quality, quantity, or cost of sale or transportation, or were "made in good faith to meet competition."[4]

The emergence of chain stores and mail-order houses in the 1920's posed a new threat to competition; this time at the retail level. The quantity purchase discounts which large buyers could exact placed the small independent merchant at a competitive disadvantage so substantial as to cast doubt upon his continued presence in the competitive picture.[5] To prevent these competitive advantages, which were felt to be unfair and undesirable, Congress, in 1936, passed the Robinson-Patman Act[6] which, in part, amended section 2 of the Clayton Act.[7] The effect of the amendment was to tighten the application of the quantity purchase defense so as to require a strict cost justification for price differentials.[8] In short, this legislation was intended to prevent price discrimination destructive of competition among buyers,[9] as well as among sellers.

I. THE STRUCTURE OF THE GASOLINE MARKET

The marketing of gasoline has many distinctive features.[10]

4 38 Stat. 730 (1914).

5 FTC v. Morton Salt Co., 334 U.S. 37, 43-44 (1948).

6 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1958).

7 For a full discussion of the legislative history of the Robinson-Patman Act, see ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 3-23 (1962) [hereinafter cited as ROWE].

8 The statute provides in part: "It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . 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: *Provided*, That nothing . . . 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 . . . ." 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958).

9 A.G. REP. 155.

10 The general statements made in this section are conclusions of the writer drawn from a study of the following sources: CASSADY, PRICE MAKING AND PRICE BEHAVIOR IN THE PETROLEUM INDUSTRY (1959); CASSADY & JONES, THE NATURE OF COMPETITION IN GASOLINE DISTRIBUTION AT THE RETAIL LEVEL (1951); DE CHAZEAU & KAHN, INTEGRATION AND COMPETITION IN THE PETROLEUM INDUSTRY (1959); MCLEAN & HAIGH, THE GROWTH OF INTEGRATED OIL COMPANIES (1954); ROSTOW, A NATIONAL POLICY FOR THE OIL INDUSTRY (1948); 1 WHITNEY, ANTITRUST POLICIES 95-187 (1958); Dirlam & Kahn, *Leadership and Conflict in the Pricing of Gasoline*, 61 YALE L.J. 818 (1952); Learned, *Pricing of Gasoline: A Case Study*, 26 HARV. BUS. REV. 723 (1948); McGee, *Price Discrimination and Competitive Effects: The Standard Oil of Indiana Case*, 23 U. CHI. L. REV. 398 (1956); Comment, *Conscious Parallelism in the Pricing of Gasoline*, 32 ROCKY MT. L. REV. 206 (1960); Comment, *Price Discrimination in Gasoline Marketing: The Detroit Jobbers Case*, 19 U. CHI. L. REV. 58 (1951).

Although a large number of companies of varying size participate in the overall refining and marketing process, a predominant proportion of the total output is controlled by approximately twenty-two major oil companies, all of rather large size.[11] The principal finished product of the industry, gasoline, is quite standardized, with little real physical difference between the various brands. Hence, there is no rational basis for a difference in price between competing brands in any one market area; and, in any given market area at any given time, the demand for gasoline is completely inelastic. This means that an industry-wide decrease in the price of gasoline will have no corresponding increase in the demand for gasoline, with the converse also being true. On the other hand, however, the demand for any one dealer's supply is extremely elastic, and a decrease (or increase) in his price will, in the absence of a corresponding change in the price of his competitors, result in a substantial increase (or decrease) in the volume of sales for that company or its dealers.

The production of gasoline requires that the major oil companies make extremely large investments in production facilities, pipelines and refineries. To reduce costs per unit, the refining process must be operated at maximum capacity, and without costly stoppages. Therefore, the gasoline supply is rather difficult to limit.[12] Consequently, the resulting supply must be disposed of in available markets at available prices, and the resulting abundance leads to an intense competition among the major oil companies to increase their sales volume. The need to dispose of the available supply of gasoline often exceeds the refining company's willingness or ability to sell it under its own brand name. The result is that the major refiners have been willing to sell increasing quantities of gasoline

11 Several of these are among the largest corporations in the United States. Four of the ten largest industrial corporations in the United States are oil companies, with assets of more than $20 billion and sales of more than $17 billion. *The 500 Largest U.S. Industrial Corporations*, Fortune, July 1962, pp. 171-90. In addition, the propensity for growth of the major oil companies is quite pronounced. In the eleven-year period, 1951 through 1961, of the thirty-two petroleum companies among the top 500 industrial corporations, all but five made acquisitions. Two acquired more than twenty other companies, and four purchased ten or more. HOUSE SELECT COMM. ON SMALL BUSINESS, 87TH CONG., 2D SESS., MERGERS AND SUPERCONCENTRATION: ACQUISITIONS OF 500 LARGEST INDUSTRIAL AND 50 LARGEST MERCHANDISING FIRMS 31 (Comm. Print 1962).

12 The 27½% depletion allowance granted under the Internal Revenue Code of 1954, § 613(b), has been alleged to be a contributing factor to the excessive supply of gasoline being produced. Another reason for excess gasoline supplies lies in the fact that "for every two barrels of heating oils extracted from crude, refiners must produce three barrels of gasoline." As a result, in cold spells when refiners are forced to step up crude runs to meet extra heavy demands for heating oils, gasoline stocks are pushed higher than necessary. The Wall St. J., Feb. 8, 1963, p. 20.

to jobbers to be sold under private brand names.[13] This surplus gasoline is usually sold for whatever it will bring,[14] and this is generally less than the price to the major's own dealers. Because of the high degree of standardization of the product, brand loyalty is not sufficient to overcome the appeal of a lower price offered by a competing brand. Therefore, a price reduction by one major must be matched by all others if their respective sales volumes are to be maintained.[15] As a result, price competition among the majors is virtually non-existent on the supplier level.[16] The practical effect of this lack of competition is that the price in any one market area is effectively established by the market leader in that area.[17] The possibility of artificially high prices resulting from the absence of price competition, combined with an excessive supply of gasoline, has created a favorable situation for the growth of independent or non-major oil companies.[18]

The independent or non-major companies[19] have in fact captured a large share of the market and have increased their sales significantly in recent years.[20] Although many independents gained their initial acceptance by offering the motorist gifts or premiums, their primary appeal has been in the lower prices charged. The independents have been able to charge lower prices because they normally have lower costs; they usually engage in no advertising; they perform no servicing which calls for high-paid labor; and they have no credit cards. Lower prices are also explained by consumer loyalty to brand names which forces the independents to charge less than the major brands in order to remain competi-

13 The major oil companies supplied about 75% of the private-brand gasoline sold in 1958. *Private Brander: He's Confident*, Nat'l Petroleum News, Feb. 1958, p. 137.

14 See DE CHAZEAU & KAHN, *op. cit. supra* note 10, at 466.

15 See Note, *The Good Faith Defense of the Robinson-Patman Act: A New Restriction Appraised*, 66 YALE L.J. 935, 940-41 (1957).

16 The same holds true under normal circumstances for the dealers on their level also, although there are many cases of non-conforming dealers because of particular local situations. Dealers will often engage in identical pricing on a local level to maintain an artificially high price level, and this is often beyond the reach of the federal antitrust laws. See Comment, 32 ROCKY MT. L. REV. 206 (1960).

17 See Dirlam & Kahn, *supra* note 10, at 823-26.

18 On the growth of non-major oil companies, see McGee, *supra* note 10, at 413-16.

19 The dividing line between a "major" and a "non-major," or "independent," oil company is not clearly drawn. Major oil companies are vertically integrated in that they engage in every branch of the business and operate on every functional level—owning and operating oil wells, pipelines, refineries, bulk storage plants, and some service stations. Generally, a non-major does not own its own refinery, or, if it does, the refinery is usually small. The non-majors usually own and operate their own service stations rather than leasing them to independent dealers. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 166 n.4 (1940); Sun Oil Co. v. FTC, 294 F.2d 465, 467 n.3 (5th Cir. 1961), *rev'd*, 371 U.S. 505 (1963).

20 It has been estimated that the independents accounted for 10% of the national gasoline sales in 1948 and for nearly 25% in 1958. Bus. Week, May 17, 1958, p. 66.

tively alive. As they have gained consumer acceptance, however, the size of the price differential has decreased. At the present time, private brands generally sell at a differential of about two cents a gallon at retail below the major brands.[21] The prevailing theory has been that a two-cent differential between major and non-major brands allows maintenance of the competitive status quo. When the differential increases, however, the non-majors gain business and the majors lose business.[22]

On the retail level, gasoline today is marketed through single-supplier stations[23]—the split pump stations of earlier days having passed out of the picture. The three predominant types of supply arrangements[24] are lessee-dealers,[25] consignment stations,[26] and company owned and/or operated stations.[27]

21 DE CHAZEAU & KAHN, *op. cit. supra* note 10, at 466. See also Sun Oil Co. v. FTC, 294 F.2d 465, 482 (5th Cir. 1961), *rev'd*, 371 U.S. 505 (1963); American Oil Co., 3 TRADE REG. REP. (Trade Cas.) ¶ 15961, at 20788 (FTC June 27, 1962), *appeal docketed*, 3 TRADE REG. REP. 25901 (7th Cir. March 4, 1963).

22 See Note, *Competition in Gasoline Retailing: A Price War*, 101 U. PA. L. REV. 644, 645 (1953). The attempt of Standard Oil (Indiana) to maintain a differential no greater than 2¢ a gallon, in markets where it tended to be greater, by means of a "Suggested Competitive Retail Price" plan, resulted in the issuance of a price-fixing complaint by the Federal Trade Commission. Standard Oil Co. (Ind.), 3 TRADE REG. REP. (Trade Cas.) ¶ 16128 (FTC Oct. 5, 1962) (initial decision dismissing the complaint), *petition for appeal filed*, BNA ANTITRUST TRADE REG. REP. No. 69, at C-1 (Oct. 25, 1962).

23 Exclusive dealing clauses in the leases or supply contracts requiring the dealer to deal only in the products of the supplier company are invalid, however, under § 3 of the Clayton Act, when their effect "may be to substantially lessen competition." Standard Oil Co. v. United States, 337 U.S. 293 (1949). However, the practice of leasing underground tanks and pumps to retail dealers at nominal prices and upon condition that the equipment be used only with gasoline supplied by the lessor was held not to be an illegal tying arrangement under § 3 of the Clayton Act, so long as there was no covenant obligating the lessee not to sell the goods of another. FTC v. Sinclair Ref. Co., 261 U.S. 463 (1923).

24 There are actually more than three types, and several means of classification are possible. For a list of ten of the most common arrangements, see MCLEAN & HAIGH, *op. cit. supra* note 10, at 14.

25 This term is used here to indicate a dealer who leases the station from the supplier who either owns it, or leases it from a third party. There are even some cases where the dealer himself owns the station and/or the land and leases it to the supplier who then leases it back to the dealer. The leases generally provide for termination, upon notice by the company, in periods as short as ten days. Theoretically, the lessee-dealer is free to set his own price for the gasoline he sells.

26 The term is used here to denote any type of station which obtains its gasoline from the supplier by consignment. The dealer in such a case earns a commission on the gasoline he sells as agent for the supplier. Such an arrangement gives the supplier the right to control the retail price. Consignment arrangements are outside the Robinson-Patman Act. ROWE 51. So far as the Robinson-Patman Act is concerned, the supplier may selectively engage in consignment arrangements. *Id.* at 52. However, such plans have been attacked by the FTC under § 5 of the Federal Trade Commission Act as an unfair method of competition by reason of alleged abuse for coercion and price-fixing purposes. In one case, an FTC hearing examiner held that the dealers were coerced into the consignment plan, and that it was not a bona fide consignment, but rather a fiction or subterfuge merely to enable the supplier to fix the retail price with its dealers. Sun Oil Co., 3 TRADE REG. REP. (Trade Cas.) ¶ 15909 (FTC May 17, 1962). But, in another case, the

II. THE DISCRIMINATION PROHIBITED

A. *Generally*

Section 2 of the amended Clayton Act prohibits price discriminations which have the probable effect of substantially lessening competition or tending to create a monopoly in any line of commerce, or injuring, destroying or preventing competition with anyone who grants or knowingly receives the benefit of such a discrimination.[28] While the act aims at halting or preventing injuries to competition on any level, the discriminations attacked are generally on one of the two principal levels: the seller level (primary line competition), or the buyer level (secondary line competition). A frequent type of discrimination on the seller level exists where a manufacturer, selling products nationwide, lowers his prices in one local area to drive out of the market a competitor operating only in that particular area. The manufacturer, in such a case, subsidizes his local losses by maintaining his prices throughout the rest of the country. The evil to be prevented here is predatory pricing in local markets. The typical case of price discrimination on the buyer level is where a large purchaser in a local market is granted price reductions which enable him to sell at lower prices than his competitors, thus substantially injuring competition and tending toward monopoly in the local market area.

B. *Price Discrimination in the Gasoline Market*

To establish a violation of section 2(a), the Federal Trade Commission must prove: (1) that there has been a price discrimination,[29] (2) in commerce, (3) among purchasers of commodities of like grade and quality, (4) where the effect tends to injure competition or create a monopoly. The seller may rebut any of these elements, or defend upon the basis of a cost justification for

hearing examiner held that the oil company had met all the requirements of a valid consignment as laid down in United States v. General Elec. Co., 272 U.S. 476 (1926), and that the company's retention of control over retail prices under the consignment arrangement with its service station operators was a legal method of helping its independent operators survive price wars. Atlantic Ref. Co., 3 TRADE REG. REP. (Trade Cas.) ¶ 15786 (FTC March 7, 1962).

27 This term refers to any station operated by the supplier with hired employees. All control over the station, including price, is in the supplier. While the majors operate a few such stations, the independents operate virtually all their stations on this basis.

28 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1958).

29 "[A] price discrimination within the meaning of that provision is merely a price difference . . . ." FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 549 (1960).

the quantity sold. In addition, section 2(b) provides that a seller may rebut the prima facie case by showing that its lower price "was made in good faith to meet an equally low price of a competitor."[30]

It should be noted that, barring some unusual circumstances, a gasoline supplier will not engage in price discrimination at the buyer level and thus put its own dealers out of business. Nor would it normally engage in area price discrimination because the effect would be merely a general price reduction throughout the area since the other suppliers would meet the lower price. Hence, the price discrimination problem usually arises in a price war situation. Price wars can arise in any number of ways:[31] (1) a dealer may cut his profit margin to reduce his price and thereby gain volume, thus triggering a chain reaction;[32] (2) competing dealers located in close proximity to each other may agree to reduce their prices to draw additional volume into their area, each complaining to his supplier, so as to obtain a competitive price allowance, that he had to meet the price of the nearby dealer;[33] (3) an independent, selling substantially below the prevailing price level, may move into the area and force the major brand dealers to drop their prices to remain competitive;[34] or (4) a major company may be over-supplied and attempt to solve the problem by dumping its excess in a localized area.[35]

30 49 Stat. 1526 (1936), 15 U.S.C. § 13(b) (1958). Another defense available to a seller is the "changing conditions" proviso in § 2(a), which in pertinent part declares "that nothing herein contained shall prevent price changes from time to time where 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." 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958). (Emphasis added.) For a discussion of the "changing conditions" proviso, see ROWE, 323-29; A.G. REP. 177-79.

31 See FTC v. Sun Oil Co., 371 U.S. 505, 525 (1963).

32 Often when this happens the oil companies will grant discounts to the surrounding dealers to allow them to drop their prices to eliminate the price competition. H.R. REP. No. 1423, 84th Cong., 1st Sess. 13 (1955).

33 See Enterprise Indus., Inc. v. Texas Co., 240 F.2d 457, 458 (2d Cir. 1957).

34 One of the most unusual price wars to come to this writer's attention was triggered by a sign at a service station stating a low price for cigarettes which competing dealers mistook for a gasoline price which they met on their own pumps.

35 "In a normally competitive industry, an oversupply would result in a general lowering of wholesale prices. . . . [But the oil companies, by disposing of their surplus gasoline through channels which lead to off-brand dealers] do not directly affect the established wholesale price in that part of the market represented by their lessee dealers nor do they in any way commit themselves to a general lowering of the wholesale price to such dealers. At the same time, the excess gasoline has a serious effect upon the market. This market disturbance, however, is usually temporary and is localized by the oil companies 'meeting the competition' of their own gasoline which was sold to off-brand dealers. . . . The resulting price war may accomplish three objectives: (1) It prevents

A recent case will serve to introduce and illustrate the problems.[36] In 1958, a price war developed in the Smyrna-Marietta area of Georgia when a Shell station[37] (a major brand) located in Marietta lowered its prices to meet those of a Paraland station (an independent brand) situated across the street.[38] In order to aid its dealers in competing with the lower prices of Paraland and Shell, American, another major, lowered prices to its dealers in Marietta in the form of "competitive price allowances" or discounts from the prevailing tank wagon price, without lowering prices to its dealers in Smyrna, a town several miles away. At times the prices to American dealers in Marietta and Smyrna differed by as much as five cents to eleven and one-half cents per gallon. The evidence tended to establish that competition did exist between the favored and non-favored dealers in the resale of American gasoline, and that the price difference was sufficient to give the favored dealers a significant competitive advantage.[39] Among the defenses offered by American was that it had lowered its prices in good faith to meet the equally low price of a competitor—Shell.

III. THE SECTION 2(B) DEFENSE

A. *The Meeting Competition Requirement*

The FTC has adopted the policy that the defense of a "good faith meeting of competition" is inapplicable where the seller reduces its prices to help the seller's customer meet that customer's competition.[40] The defense, according to the Commission, is available to a supplier only in meeting the supplier's own competition. This distinction was established by the Federal District Court for Connecticut in *Enterprise Industries, Inc. v. Texas Co.*,[41] and has

the off-brand dealer from gaining a permanent position in the market; (2) it moves additional amounts of surplus gasoline through regular brand outlets; and (3) it causes the cost of the operation to be borne in part by the brand dealers through the reduction and, in many cases, the elimination of their profit margin." H.R. REP. No. 1423, 84th Cong., 1st Sess. 16 (1955).

36 American Oil Co., 3 TRADE REG. REP. (Trade Cas.) ¶ 15961 (FTC June 27, 1962), *appeal docketed*, 3 TRADE REG. REP. 25901 (7th Cir. March 4, 1963).

37 The record seems inconclusive as to whether the Shell station was operated by the Shell Oil Company, as contended by American Oil, or by an independent lessee-dealer. *Id.* at 20788.

38 There was some evidence that Paraland was owned by, or affiliated with, Phillips Petroleum, a major producer. Dissenting opinion by Commissioner Elman, *id.* at 20793.

39 *Id.* at 20786.

40 *Id.* at 20787.

41 136 F. Supp. 421 (D. Conn. 1955), *rev'd on other grounds*, 240 F.2d 457 (2d Cir.),

been endorsed by the Senate Select Committee on Small Business.[42] In that case, the plaintiff had operated a Texaco station on the highway near Hartford, Connecticut, and was in competition with other stations on the highway and with those in the city. Because of a price war, Texaco gave allowances to Hartford dealers so that they received gasoline at a lower price than the plaintiff. Plaintiff sued for treble damages under section 2(a). The district court rejected the use of the section 2(b) defense in such a situation, although it recognized that "perhaps it is a fiction to speak of price competition at the oil company sale to the station level" in view of the realities of the marketing of gasoline.[43] It was this fiction which led the Court of Appeals for the Fifth Circuit to allow the defense in *Sun Oil Co. v. FTC*.[44] Sun had assisted one of its lessee-dealers, McLean, who was suffering substantial losses in business to a nearby non-major service station, Super Test, which was selling substantially below McLean's price. McLean asked for and, after several months, finally received a price allowance or discount from Sun to enable him to sell at closer to Super Test's price. This allowance was not initially given to Sun's other dealers in the same general area. The FTC charged and found Sun to be in violation of section 2(a) of the Clayton Act, rejecting Sun's asserted defense under section 2(b) of the act because Sun was not meeting its own competition.[45] On appeal to the Fifth Circuit, the decision was

cert. denied, 353 U.S. 965 (1957). Prior to this time the Federal Trade Commission had taken the opposite view. See testimony by Chairman Gwynne of the Federal Trade Commission, *Hearings Before the Subcommittee on Antitrust and Monopoly To Amend Section 2 of the Clayton Act of the Senate Committee on the Judiciary,* 84th Cong., 2d Sess. 229-32 (1956). For further evidence as to the Commission's position, see ROWE 250. For a criticism of the *Enterprise* decision, see Note, *The Good Faith Defense of the Robinson-Patman Act: A New Restriction Appraised,* 66 YALE L.J. 935 (1957). "[B]y narrowing the scope of section 2(b), the decision aggravates the effect of price wars on retailers who are forced to cut their prices to maintain their volume of sales. . . . [The] sole effect is to prohibit suppliers from lowering their wholesale prices to help their retailers meet a competitor's price cut." *Id.* at 941.

42 S. REP. No. 2810, 84th Cong., 2d Sess. 20, 28-29 (1956).

43 Enterprise Indus., Inc. v. Texas Co., 136 F. Supp. 421 (D. Conn. 1955), *rev'd on other grounds,* 240 F.2d 457 (2d Cir.), *cert. denied,* 353 U.S. 965 (1957).

44 294 F.2d 465 (5th Cir. 1961), *rev'd,* 371 U.S. 505 (1963).

45 Sun Oil Co., 55 F.T.C. 955 (1959). *But see* ROWE 254-55. "[I]n certain circumstances a rival's price *may* constitute competition for *both* the seller *and* the buyer, which *both* must meet or lose the business on which *both* depend for their common survival. By lowering his price selectively to assist a dealer's competitive encounters, the supplier *can* be meeting the equally low price of another supplier, quoted either to the latter's dealers or in his company owned stations. *Or,* the seller granting a temporary dealer allowance in a price war situation could, in commercial reality and in contemplation of law, 'step into the shoes' of the dealer for the duration of the emergency, so that the defensive lower prices quoted by him *through* his dealer to the public would meet in good faith *their mutual competitor's* equally low price at the pump."

reversed. In the marketing of gasoline, the court reasoned, the supplier cannot be cut off from the service station operator and treated as if it competed only for the business of the service stations. The competition between suppliers is for the consumer's business. "The filling station operator is a conduit between the supplier and the motoring public."[46]

The "conduit" theory relied upon by the Fifth Circuit is not new. Mr. Justice Jackson expressed it in his dissenting opinion in *Standard Oil Co. v. United States*.[47] In one sense, every retailer is merely the conduit through which a manufacturer gets his goods to the consumer market, but the "conduit" theory should not become the vehicle by which the supplier obtains the control associated with vertical integration without also incurring the inherent burdens. At one time, vertical integration in the oil industry was the rule rather than the exception. The retail service stations were under the direct salaried control of the supplying oil companies. The abandonment of direct salary operation was the result of a severe chain store tax law adopted in Iowa which, in 1935, caused practically every refiner and jobber to lease out all their company-owned and operated stations in that state.[48] Many companies subsequently adopted the "Iowa Plan" when they discovered that it was more profitable, under the economic circumstances of the late 1920's and 1930's, to lease their stations than to operate them themselves. Leasing added a new source of income in the form of rent. In addition, the private control factor often led dealers to increase the gallonage sales of the station, which, in turn, increased the profits of the oil company. Moreover, the rent was tied to the gallonage and increased with increased volume.[49] Independent dealer operation also removed from the supplying oil company the burdens of unemployment, social security, and workmen's compensation taxes, and minimum wage rate laws, as well as labor union difficulties.[50] Having deliberately

46 Sun Oil Co. v. FTC, 294 F.2d 465, 477 (5th Cir. 1961).

47 337 U.S. 293, 323 (1949). "[T]he retailer in this industry is only a conduit from the oil fields to the driver's tank, a means by which the oil companies compete to get the business of the ultimate consumer—the man in whose automobile the gas is used. . . . The retail stations, whether independent or company-owned, are the instrumentalities through which competition for this ultimate market is waged."

48 MCLEAN & HAIGH, *op. cit. supra* note 10, at 289.

49 *Id.* at 290.

50 Attempts by the oil companies to control the resale price of gasoline through independent operators on a consignment basis may have unfavorable results. In Site Oil Co., 4 CCH LAB. L. REP. (CCH Lab. Cas.) ¶ 11432 (July 13, 1962), Site owned a gasoline station and leased it to the lessees for an indefinite period, subject to termination on thirty days notice. Site also retained the right to terminate upon twenty-four

chosen to market through independent retail dealers for these reasons, the oil companies should not now be allowed to deny their dealers' independent status in order to justify a price discrimination in favor of one dealer at the expense of a number of others.

The *actual* question presented in the *Sun Oil* case was whether the "good faith meeting of competition" defense was available to a supplier who reduced the price of its gasoline to one of its dealers engaged in a price battle with a station *owned and operated* by a competing supplier.[51] The theory relied upon by the court of appeals was that such a station represents competition for Sun itself, rather than merely for its dealer. There would, however, seem to be no logical difference, assuming one accepts the underlying rationale of the court with regard to the realities of competition, between a station *owned and operated* by the supplier and one *leased* to a dealer who theoretically sets his own price.[52] If the dealer is merely a conduit when his competitor is a supplier-retailer, it would seem that his status should not change merely because his competitor is a lessee-dealer. On review of the record, the Supreme Court found no evidence to justify the conclusion that Super Test was an integrated supplier-retailer. Rather, the Court found the Super Test station to be merely a retail competitor of McLean. The Fifth Circuit decision was therefore reversed on the ground that the section 2(b) defense was not available to a supplier who gave a discriminatorily low price to one of its dealers to enable the dealer to meet *his* competition, when that competition is a competing retail dealer who "was not the beneficiary of any enabling price cut from its own supplier."[53]

hours notice if the station were operated contrary to the lease terms. The lease set the hours of operation and the price of the gasoline, and required that the operator get the prior approval of the company before he could sell any other products. The gasoline and oil were consigned to him, and he received a commission on what he sold. The NLRB held that "in view of the extensive control exercised or reserved by Site over all the aspects of the lessee's operations, . . . the lessees were not independent contractors but were employees of Site so that the individuals under their control were also Site employees." *Id.* ¶ 11432, at 17771. The company was held liable for an unfair labor practice in refusing to bargain with the employees' union.

51 This was the question presented to both the Fifth Circuit and the Supreme Court. However, the Supreme Court asserted that there was no evidence in the record to support the conclusion that Super Test was an integrated supplier-retailer of gasoline. Hence, the Supreme Court reversed the Fifth Circuit upon the basis that Super Test was engaged solely in retail operations, as was McLean. FTC v. Sun Oil Co., 371 U.S. 505, 512 (1963).

52 Some writers have felt that the decision of the Fifth Circuit would apply equally to both situations. See ROWE 254 n.196; 75 HARV. L. REV. 429, 432 (1961).

53 FTC v. Sun Oil Co., 371 U.S. 505, 512 (1963).

Thus the Supreme Court answered the question not specifically considered by the court of appeals. It did not, however, address itself to the question which the Fifth Circuit did attempt to answer, *i.e.*, whether the section 2(b) defense was available to a supplier to enable it to help one of its dealers meet the competition of a station *owned and operated* by a competing supplier.[54] Theoretically, the question remains open. However, since the Fifth Circuit did answer this question, but did so upon the basis of the "conduit" theory, the rejection of that theory by the Supreme Court in its dicta would seem to resolve the very issue that they expressly claimed to leave undecided. "The 'conduit' theory . . . would so expand the § 2(b) defense as to effect a return to the broader 'meeting competition' provision of the Clayton Act which the Robinson-Patman amendments superseded."[55]

In addition to rejecting the "conduit" theory, the Supreme Court went on to answer a number of the arguments which the court of appeals used in rejecting the FTC's view of the section 2(b) defense. Having assumed that Super Test was an integrated supplier-retailer, the court of appeals asserted that a narrow construction of the section 2(b) defense

> "violates the policy of the Act that places emphasis on individual competitive situations; focuses on injury to particular competitors rather than on the health of the competitive process; conflicts with the purpose of the Act to protect the small retailer; fosters vertical integration of retailing operations, jeopardizing the future of the non-major as well as the independent filling station operator; discourages sound marketing in that it confers a competitive advantage on a supplier gaining trade by sporadic predatory low prices unrelated to economic factors, in the sense that a high-volume low-margin policy of a super-market is related to such economic factors as low cost efficiency of operation and the maximization of over-all profit; denies the realities of the market place in refusing to accept the undeniable fact that a supplier of gasoline competes with a supplier-retailer at the consumer level through filling station operators; tends to spread rather than localize price wars; and makes it impossible, as a practical matter, for a supplier to defend one of its filling stations,

54 "Were it otherwise, *i.e.*, if it appeared either that Super Test were an integrated supplier-retailer, or that it had received a price cut from its own supplier—presumably a competitor of Sun—we would be presented with a different case, as to which we herein neither express nor intimate any opinion." *Id.* at 512 n.7.

55 *Id.* at 525.

> fighting for survival, or even to defend itself against destructive price raids of a supplier-retailer."[56]

If true, this would undeniably be a persuasive argument in favor of allowing the defense. However, the opposing argument seems to carry greater weight.

Unquestionably Congress intended, by enacting the Robinson-Patman Act, to protect small retailers like McLean. However, the purpose in protecting the individual was to protect the system. "[S]urely there is no more effective means of lessening competition or creating monopolies than the debilitation of a competitor."[57] Hence, the competitive process should be viewed as the sum of the individual competitive situations. By intending to protect the individual retailer, Congress did not intend to include, as a means of protection, those mechanisms which might injure other retailers by placing the stamp of legality upon price discriminations against them. Although there is a tendency, for very good reason, to think of the competition in the gasoline market as being between suppliers, there is also a very vital competition existing between lessee-dealers of the same supplier in any competitive area. If the intent of discriminatory price allowances is to protect retailers from the effects of price wars, it would seem that greater protection could be achieved by limiting their duration. When a dealer receives a subsidy from his supplier during a price war, it is usually granted so that the dealer, as well as the supplier, absorbs part of the loss resulting from the price reduction.[58] Consequently, the retailer has little incentive to prolong the price war since he is operating on a smaller profit margin. It is thus to his benefit to prevent the oil companies from subsidizing price wars,[59] because of the tendency of subsidization to prolong them.[60]

There is a real possibility that a narrow construction of the

56 Sun Oil Co. v. FTC, 294 F.2d 465, 481 (5th Cir. 1961). The Fifth Circuit's opinion received considerable support from the writers as a realistic appraisal of the price war situation. *E.g.*, ROWE 253. "[T]emporary cooperative pricing by supplier and dealer may become an indispensable defensive mechanism for meeting local price disruptions. Due to the limited resources of the typical dealer, the supplier *must* carry at least part of the financial burden of coping with cut-price competition as the price of economic survival. The alternative is a murder of middlemen, who are the supplier's lifeline to the market. In such commercial emergencies, therefore, the competition confronting the dealer becomes the supplier's price competition as well, and the dealer's price in commercial reality becomes also the supplier's price." *Id.* at 253-54.

57 Atlas Bldg. Prods. Co. v. Diamond Block & Gravel Co., 269 F.2d 950, 954 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960).

58 *E.g.*, FTC v. Sun Oil Co., 371 U.S. 505, 508-09 (1963).

59 See S. REP. No. 2810, 84th Cong., 2d Sess. 21 (1956).

60 *Id.* at 19.

section 2(b) defense will tend to foster vertical integration of retailing operations;[61] but vertical integration followed neither from the outlawing by the Supreme Court of exclusive dealing contracts in the gasoline industry[62] nor from the earlier denial of the section 2(b) defense in *Enterprise Industries.* There is also the possibility that supplier-retailers attempting to gain trade by sporadic predatory pricing may obtain a competitive advantage, but this practice, when it exceeds the limits of fair competitive pricing, may fall under the ban of section 3 of the Robinson-Patman Act.[63] In addition, it would not be impossible for a supplier to defend one of its stations caught in a price raid by a supplier-retailer, because the supplier could effect a general price reduction to all dealers within any particular competitive area without violating section 2(a).[64]

That a broad construction of the section 2(b) defense would have a tendency to localize rather than spread price wars, as the court of appeals felt, does not seem to be a valid assumption. Even in the *Sun Oil* case itself the court of appeals admitted that Sun's discriminatory practice, which the defense would have made lawful, had no localizing effect, but rather caused what had started out as a skirmish on one street corner to develop into "a full-scale price war" in the area.[65] The Supreme Court decision in *Sun Oil* does not by any means settle all of the questions as to the scope of the section 2(b) defense, but it does seem to lend considerable weight to the FTC view that, at least where both dealers are independent retailers, the section 2(b) defense is available to a supplier aiding a dealer only where the dealer has received a lower

61 The court of appeals failed to indicate what harm vertical integration would create in this situation. Vertical integration may be attacked under § 7 of the Clayton Act, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958), to prevent a lessening of competition. If, as the Fifth Circuit assumes, the only competition is among suppliers, then vertical integration which would eliminate competition only at the dealer level would have no adverse effect. See Brown Shoe Co. v. United States, 370 U.S. 294, 323-24 (1962).

62 Standard Oil Co. v. United States, 337 U.S. 293 (1949). It should be noted that for all practical purposes the oil companies were able to achieve their purpose by using tying clauses in their leases. See note 23 *supra.*

63 49 Stat. 1526 (1936), 15 U.S.C. § 13a (1958). Section 3 of the Robinson-Patman Act is a criminal statute, and can be enforced only by the Justice Department and the United States attorneys. The Federal Trade Commission, however, has no authority to enforce § 3; nor is it one of the antitrust laws the violation of which gives a private party the right to sue for treble damages or injunctive relief. Nashville Milk Co. v. Carnation Co., 355 U.S. 373 (1958). In a criminal prosecution for selling at unreasonably low prices for the purpose of destroying competition or eliminating a competitor, National Dairy Products Corporation challenged the constitutionality of § 3. In a 6-to-3 decision, the Supreme Court held that the section was not so vague as to be void or unconstitutional. United States v. National Dairy Prods. Corp., 31 U.S.L. WEEK 4218 (U.S. Feb. 18, 1963).

64 FTC v. Sun Oil Co., 371 U.S. 505, 527 (1963).

65 Sun Oil Co. v. FTC, 294 F.2d 465, 469-70 (5th Cir. 1961), *rev'd,* 371 U.S. 505 (1963).

offer from another supplier.[66] The justification for allowing such a price discrimination is basically simple. Although the favored dealer would receive a competitive advantage over non-favored dealers in that he could sell for less, there are balancing factors in that (1) the favored dealer, having already received a lower offer, could in any event sell for less than the non-favored dealers, and (2) the supplier is not deprived of a customer. While the defense, when so restricted, seems hollow because gasoline dealers do not generally receive offers from competing suppliers, desirable locations are often at a premium, and some dealers who own their stations are free to change suppliers.[67]

B. *The Lawful Lower Price Requirement*

A seller charged by the FTC with violating section 2(a) must bear the burden of proving all the elements of the section 2(b) defense.[68] One of the elements to be proved is that the reduction in price was made in good faith to meet a competitor's *lawful* lower price.[69] The defense is not available to a seller who meets a competitor's lower price which the seller knows or has reason to believe is illegal.[70] This problem rather clearly arises in the gasoline price discrimination situation because of the existence of independent brands which normally sell in competition with the major brands only at a price differential.[71] Thus, if a major brand drops its price to meet exactly the price of an independent brand, it will be more than "meeting" competition,[72] because the independent normally sells at a lower price. Such a price cut is

66 Another requirement imposed upon the defense by the FTC is that it be used only to retain old customers rather than to obtain new customers. However, in Sunshine Biscuits, Inc. v. FTC, 306 F.2d 48 (7th Cir. 1962), the court held that the language of the Clayton Act pertaining to meeting the lower prices of competitors did not limit a manufacturer to granting discounts only to retain customers, but could grant them to certain purchasers who up to that time were not its customers, in order to obtain them as customers.

67 There is some indication that in certain situations suppliers do compete for efficient accounts. See FTC v. Sun Oil Co., 371 U.S. 505, 524 n.13 (1963); CASSADY, PRICE MAKING AND PRICE BEHAVIOR IN THE PETROLEUM INDUSTRY 58-61 (1954); MCLEAN & HAIGH, THE GROWTH OF INTEGRATED OIL COMPANIES 270-71 (1954); 1 WHITNEY, ANTITRUST POLICIES 178 (1958).

68 Standard Oil Co. v. FTC, 340 U.S. 231, 250 (1951). See Comment, *Price Discrimination in Gasoline Marketing: The Detroit Jobbers Case*, 19 U. CHI. L. REV. 58, 66 (1951).

69 Standard Oil Co. v. FTC, *supra* note 68, at 242.

70 Standard Oil Co. v. Brown, 238 F.2d 54 (5th Cir. 1956); American Oil Co., 3 TRADE REG. REP. (Trade Cas.) ¶ 15961, at 20789 (FTC June 27, 1962), *appeal docketed*, 3 TRADE REG. REP. 25901 (7th Cir. March 4, 1963).

71 See text *supra* at 959.

72 It may, in fact, be predatory pricing in violation of § 3 of the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. § 13a (1958). See note 63 *supra*.

"beating" competition, because it is unnecessary for the seller of the premium product to match the lower price of an off-brand product in order to retain or gain business. Such a lower price manifests a lack of good faith and should not provide a defense against a section 2(a) violation.[73] Nor can a seller which reduces its prices to compete with another seller which illegally reduced its price to meet the price of an off-brand avail itself of the section 2(b) defense. This was the situation in the *American Oil Co.* case, where American had reduced its price to meet the lower price of a competitor, Shell; but the Commission held that Shell's price was illegal[74] because it was meeting the price of Paraland, an independent brand.[75]

In a very vigorous dissent in the *American Oil Co.* case, Commissioner Elman eloquently presented arguments which seriously challenge the majority view. "Section 2(a) requires that probable competitive injury derive from the discrimination or difference in price charged to different buyers."[76] Thus, since American's price reductions to its Smyrna dealers were made only after competing suppliers and dealers had made equally large price reductions, the diversion of customers from American's Marietta dealers would have taken place regardless of the prices charged to the Smyrna dealers.[77] Elman also criticized the majority finding that American was meeting a price which they knew or should have known was illegal.

> "This seems to me to place an unrealistic and competitively unfair burden on businessmen. 'Good faith' does not require businessmen to be put in the impossible dilemma of either (1) losing business by not meeting competitors' lower prices, or (2) meeting the competitive lower prices and running the risk that years later the Commission will find these 'third

[73] See FTC v. Standard Brands, Inc., 189 F.2d 510, 514-15 n.7(c) (2d Cir. 1951); Porto Rican Am. Tobacco Co. v. American Tobacco Co., 30 F.2d 234 (2d Cir.), *cert. denied*, 279 U.S. 858 (1929); Minneapolis-Honeywell Regulator Co., 44 F.T.C. 351, 396 (1948), *rev'd in part*, 191 F.2d 786 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952). See AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT 100 (2d rev. ed. 1959).

[74] Although the Commission held that Shell's price was illegal, and that the meeting of this illegal price was the basis for issuing a cease and desist order against American Oil, a complaint was not issued against Shell until after the order was issued in the *American Oil* case. Shell Oil Co., 3 TRADE REG. REP. (Trade Cas.) ¶ 16132 (FTC Oct. 16, 1962).

[75] American Oil Co., 3 TRADE REG. REP. (Trade Cas.) ¶ 15961, at 20788 (FTC June 27, 1962), *appeal docketed*, 3 TRADE REG. REP. 25901 (7th Cir. March 4, 1963).

[76] *Id.* at 20794.

[77] *Ibid.*

> party' prices to be unlawful, after complex and protracted proceedings whose outcome could not confidently be predicted even by legal experts specializing in the field of trade regulation."[78]

Elman's dissent also contains a suggestion that perhaps this was a situation in which a good defense could be made on the basis of the "changing conditions" proviso of section 2(a), because "American's price cuts to Smyrna dealers were its competitive response to dynamic market conditions which it did not create and over whose rapid changes it had no control."[79]

IV. THE PRIVATE BRAND PROBLEM

In the *American Oil Co.* case, the independent Paraland station was alleged to have been owned by, or affiliated with, a major oil company, Phillips Petroleum.[80] This allegation raises another significant problem with regard to price discrimination in gasoline marketing—whether it is a violation of section 2(a) for a major brand supplier to sell gasoline to independent stations for less than it sells identical gasoline to its own lessee-dealers.[81]

"Section 2(a) confines the statute to discriminations 'between different purchasers of commodities of like grade and quality.' "[82] The key question is whether differences in packaging or labeling of the same goods are sufficient to take the goods out of the "like grade and quality" category. There is no doubt that different labels affect consumer acceptance and, consequently, the price a consumer will pay for a branded item. A heavily advertised, well-known brand can usually sell in larger volume even at a higher price than an identical product sold under an off-brand name.[83]

78 *Id.* at 20796.

79 *Id.* at 20794.

80 See note 38 *supra.* According to 1960 financial data, Phillips Petroleum was the eighth largest of the integrated oil companies. Among United States industrial corporation of all types, it ranked seventeenth in assets, and thirty-first in sales. HOUSE SELECT COMM. ON SMALL BUSINESS, 87TH CONG., 2D SESS., MERGERS AND SUPERCONCENTRATION: ACQUISITIONS OF 500 LARGEST INDUSTRIAL AND 50 LARGEST MERCHANDISING FIRMS 31 (Comm. Print 1962).

81 One other problem which this allegation raises, but which will not be discussed, is whether ownership by a major oil company is sufficient to take that brand or station out of the off-brand classification and put it into the major brand category. Such a change in classification would affect the illegality of meeting the lower price on the part of other major brands.

82 A.G. REP. 156. For a discussion of "like grade and quality," see Cassady & Grether, *The Proper Interpretation of "Like Grade and Quality" Within the Meaning of Section 2(a) of the Robinson-Patman Act,* 30 SO. CAL. L. REV. 241 (1957).

83 See Trumbull, *Consumers Speak,* Food Field Rep., Feb. 12, 1962, p. 7, where the writer reports that, on the basis of a survey of U.S. homemakers' opinions of national brands

However, the FTC has, in several decisions, disregarded brand names and labels and promotional distinctions in deciding that physically identical products are of "like grade and quality."[84] As a result of this interpretation, the Commission has attacked these price variations even though the goods were aimed at a distinctive market or purchaser class.[85] This approach received the approval of the Attorney General's National Committee To Study the Antitrust Laws.[86] However, the Committee took the position that consumer preferences as between branded and unbranded items should be considered in determining whether the price differential could be "cost" justified[87] on the basis of savings in distribution costs "incurred through the promotional expenditures of merchandising a nationally advertised branded item,"[88] or whether there has been the required statutory "injury"[89] to competition, *i.e.*, where the price differentials between the branded and unbranded items "reflect no more than the spread between the prices the public will pay for the one as against the other, no 'injury' to competition should reasonably be found."[90]

In the gasoline industry, although a number of the majors supply gasoline to the independents[91] at prices below those at which they sell gasoline of "like grade and quality" to their own lessee-dealers, the FTC has not been challenging this practice as

versus private brands in the grocery product industry, "an overwhelming majority are convinced a well-known national-brand name product is a higher quality than an unknown or private brand. Furthermore, they are willing to pay more for the brand name."

84 For a criticism of the FTC's policy with regard to brand names, see ROWE 69-73; Rowe, *Price Differentials and Product Differentiation: The Issues under the Robinson-Patman Act*, 66 YALE L.J. 1 (1956).

85 *E.g.*, E. Edelmann & Co., 51 F.T.C. 978 (1955); Page Dairy Co., 50 F.T.C. 395 (1953); U.S. Rubber Co., 46 F.T.C. 998, 1006-08 (1950); U.S. Rubber Co., 28 F.T.C. 1489, 1500 (1939); Goodyear Tire & Rubber Co., 22 F.T.C. 232, 290 (1936), *rev'd on other grounds*, 101 F.2d 620 (6th Cir. 1939). See A.G. REP. 157; ROWE 69.

86 "[T]he economic factors inherent in brand names and national advertising should not be considered in the jurisdictional inquiry under the statutory 'like grade and quality' test. . . . [A]bandonment of a physical test of like grade and quality in favor of a marketing comparison of intrinsically identical goods might not only enmesh the administrators of the statute in complex economic investigations for every price discrimination charge, but also could encourage easy evasion of the statute through artificial variations in the packaging, advertising or design of goods which the seller wishes to distribute at differential prices." A.G. REP. 158-59.

87 For a discussion of the "cost justification" defense, see generally *id.* at 170-76; AUSTIN, *op. cit. supra* note 73, at 59-79; ROWE 265-312.

88 A.G. REP. 159.

89 For a discussion of the "injury" requirement, see generally *id.* at 160-70; AUSTIN, *op. cit. supra* note 73, at 40-52.

90 A.G. REP. 159.

91 See text *supra* at 957-58.

a violation of section 2(a). A major reason explaining the FTC's failure to attack this practice is that consumer acceptance of branded and unbranded gasoline is such that the two are not considered to be in competition with one another and, hence, there is no requisite injury to competition. It has been seriously proposed that, with respect to gasoline, if the major brand name is removed, a lower price to an unbranded retailer "is not discriminatory, strictly speaking, . . . since a different and inferior product in the economic sense is being sold."[92] The fallacy in the argument that there is no competition and hence no injury should be obvious. If there were no competition between branded and unbranded gasolines, there should logically be no price wars sparked by private brand stations. A distinction should be drawn between the absence of competition and an absence, in an established price differential situation, of any significant or noticeable shift in business. Any appreciable shift in either direction of the established two-cent differential between the major brands and the independent brands quickly demonstrates a very vigorous competition between them. The competition which exists is merely modified or nullified by the price differential.[93]

Nor should there be any question as to the actual injury caused by such a discrimination.[94] If an independent station exists alongside a major brand station and does any business at all, some of it will probably come from sales lost by the major. Any loss by the major station to the independent is an injury caused by the lower price of the independent made possible by the lower price paid by the independent to the major supplier. The injury can be emphasized by assuming that the independent drops his price a cent

[92] Dirlam & Kahn, *Leadership and Conflict in the Pricing of Gasoline*, 61 YALE L.J. 818, 833 n.48 (1952).

[93] *Cf.* United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956). In trying to define the relevant product market, the Court discussed the competition which exists between various cellophane substitutes and cellophane itself at various prices. "An element for consideration as to cross-elasticity of demand between products is the responsiveness of the sales of one product to price changes of the other. If a slight decrease in the price of [one] causes a considerable number of customers of [the] other . . . to switch . . . , it would be an indication that a high cross-elasticity of demand exists between them; that the products compete in the same market." *Id.* at 400.

[94] See, *e.g.*, FTC v. Sun Oil Co., 371 U.S. 505, 508-09 (1963). In any event, actual injury need not be proved in a case involving price discrimination on the secondary level, as there is a reasonable possibility that competition may be adversely affected by a manufacturer or producer selling to one customer at substantially lower prices than it sells to the competitors of the customer if the price differential is sufficient to influence their resale prices. FTC v. Morton Salt Co., 334 U.S. 37 (1948). A diversion of business or loss of profits is enough to establish a violation. Corn Prods. Ref. Co. v. FTC, 324 U.S. 726, 742 (1945); General Foods Corp., 52 F.T.C. 798 (1956).

or two below the already existing two-cent differential, compensating for the loss in profit margin by increased sales volume. Any argument that there is no injury would seem to be extremely naive.[95] Even if it could be shown that there is no injury to competition on the secondary level, a recent FTC decision[96] raises the question of whether this type of dual marketing price discrimination is not vulnerable to attack as being injurious to competition on the primary level. The Borden Company was packaging and selling evaporated milk under its own "Borden" label and also under purchasers' private labels. In reversing the hearing examiner's dismissal of the charges, the Commission by a two-to-one decision[97] ruled that Borden was engaged in illegal price discrimination by charging substantially higher prices for its "Borden" label evaporated milk than for milk of "like grade and quality" sold under private labels. The Commission found that the immediate competitive effect of Borden's entry into the private label field was to cause a number of midwest competitors to lose substantial sales and accounts to Borden, and held that these unjustified price differentials may substantially lessen competition with Borden and its wholesale and retail customers. Arguably, the dual marketing conducted by some of the major oil companies could have the same effect upon independent refiners and jobbers as in the *Borden* case. If competition from the independent refiners could be eliminated, then the competition with the major brand service stations by the off-brand retailers would stand on a rather weak foundation. The Commission's opinion in the *Borden* case does not indicate that any attempt was made to defend the price discrimination on the basis of the section 2(b) "meeting competition" defense. Certainly this defense would be raised if the dual marketing of the major oil companies were to be challenged. At first glance, this would appear to be the precise question raised in *Standard Oil Co. v. FTC*.[98] It was there held that section 2(b) was a complete defense to a charge of violating section 2(a), notwithstanding that the Commission proves an injury to competition.[99] The Court indicated that it was a "complete defense to a charge of price discrimination for the seller to show that its price dif-

[95] See FTC v. Sun Oil Co., *supra* note 94, at 508-09.

[96] The Borden Co., 3 TRADE REG. REP. (Trade Cas.) ¶ 16191 (FTC Nov. 28, 1962).

[97] Commissioner Elman dissented without opinion, and Commissioners Higgenbotham and Anderson did not participate.

[98] 340 U.S. 231 (1951).

[99] *Id.* at 246-47.

ferential has been made in good faith to meet a lawful and equally low price of a competitor."[100]

In deciding whether the section 2(b) defense may be used in this situation, a determination would have to be made as to whether the sale of gasoline of "like grade and quality" by a major oil company to an independent retailer or jobber is a sale of a "premium brand" gasoline. This determination is significant, because it is unlawful for the manufacturer of a premium brand to lower its prices to meet exactly the price of an off-brand which normally sells at a lower price. The "good faith" defense is for "meeting" not "beating" competition. With regard to the definition of a premium product, it has been said that "the ultimate test . . . is whether a substantial part of the public is prepared to pay a greater price for the . . . product."[101] Under the cases deciding that items are of "like grade and quality" even though sold under a private label, it would seem that the premium brand clearly retains its quality of "premiumness."

From the standpoint of the economics of marketing, it has been argued that, because of the inelasticity of supply of gasoline, the oil companies should be permitted to engage in this kind of dual marketing because it enables them to dispose of gasoline supplies not salable through their normal channels.[102] But considering the economic realities of the gasoline market, this kind of price discrimination should not go unchallenged. Since both the demand for and the supply of gasoline are relatively inelastic, every gallon of gasoline sold as unbranded means a gallon less that can be sold as branded. The costs of advertising and promoting the brand name are thus shifted to and borne by a lesser volume of branded gasoline, thereby, in an illogical sort of way, leading to the argument that the price differential is cost-justified.[103] As the pressure

100 *Id.* at 246.

101 Gerber Prods. Co. v. Beech-Nut Life Savers, Inc., 160 F. Supp. 916, 922 (S.D.N.Y. 1958).

102 See CLARK, STUDIES IN THE ECONOMICS OF OVERHEAD COSTS 416 (1923). "'Discrimination is the secret of efficiency.' . . . The economic basis of it is simple. Existing business may or may not cover all overhead costs, but in either case, if there is spare capacity, added business will cause no added overhead, and will be a gain at anything above differential cost, *so long as it can be kept separate from existing business,* so that existing earnings are not impaired."

103 *But see* ROWE 72-73. "Since the cold fact is that the public *will* pay more money for a nationally advertised and branded version than it would pay for the physically same but promotionally unknown product *sans* brand, a manufacturer who sells a branded and an unbranded variation of the same basic item at a price differential is not 'discriminating' in any economic sense. The purchaser of the unbranded version of the seller's product naturally *pays less because he gets less.* Either he buys cheaper what he must resell cheaper—under its own private brand at a corresponding price spread

to dispose of surplus gasoline increases because of reduced branded sales, the majors will probably be willing to dispose of their excess at even lower prices to the independents, thus increasing the potentiality for price war instability.

V. CONCLUSION

Price discrimination in the marketing of gasoline, as well as attempts at price fixing[104] or price maintenance,[105] are directly attributable to the excess supply of gasoline available. The problem is not new[106] but, in the absence of corrective congressional action, it shows little sign of abating.[107] Until the demand for gasoline comes to equal the supply, or the supply can be controlled either voluntarily by the oil producers or compulsorily by direct government regulation and control, economic pressure and the realities of the market will force the major oil companies to seek and resort to practices which may have a predatory effect tending to drive the independent refiners and distributors from the market.[108]

Price discrimination is also used by the major oil companies as a means of maintaining a uniform retail price among all their dealers as well as a weapon to discipline off-brand dealers who attempt to increase the traditional price differential. The net effect of such activities is to reduce price competition on the retail level

below the manufacturer's nationally promoted product which enjoys greater consumer appeal. Or he may have to offset the initial price quotation in his favor by *his* expenditures in promoting his own private brand to match the supplier's appeal in the market. In short, the price differential in either event—unless disproportionately exceeding the consumer preference margin for the manufacturer's brand—bestows no *net* competitive advantage on the purchaser."

104 One element of the price discrimination cases usually involves an allegation of price fixing as well as price discrimination. See, *e.g.*, complaint issued in Shell Oil Co., FTC Docket 8537, Count II, Oct. 16, 1962.

105 *E.g.*, Standard Oil Co. (Ind.), 3 TRADE REG. REP. (Trade Cas.) ¶ 16128 (FTC Oct. 5, 1962) (initial decision dismissing the complaint), *petition for appeal filed*, BNA ANTITRUST TRADE REG. REP. No. 69, at C-1 (Oct. 25, 1962).

106 See United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

107 "The oil industry in general is troubled with excess production and capacity, and we see no immediate hope of things improving." Statement by John Harbin, Vice President of Halliburton Co., Dallas, Tex., in Time, Dec. 21, 1962, p. 69.

108 See, *e.g.*, The Pure Oil Co., 3 TRADE REG. REP. (Trade Cas.) ¶ 16111 (FTC Sept. 28, 1962), *appeal granted*, BNA ANTITRUST TRADE REG. REP. No. 76, at C-1 (Dec. 18, 1962). The hearing examiner ruled that the price reductions granted by Pure to its gasoline dealers in the Birmingham, Alabama, area, and its plan to narrow the prevailing price differential between its gasoline and the private brands allegedly injured private brand dealers. The hearing examiner found that Pure's plan to maintain a 1¢ differential "was so designed as to have the ultimate and inevitable effect of driving the private brand distributors out of the market." *Id.* at 20929.

among gasoline stations.[109] Since the only price competition that exists in the gasoline market, except for that resulting from individual dealers who are willing to cut their profit margins to increase sales, is provided by the independent brands,[110] this competition must be protected. This can be done presently only by protecting non-majors from unfair methods of competition through vigorous enforcement of the Robinson-Patman amendment to section 2 of the Clayton Act.[111]

Howard R. Lurie, S.Ed.

109 H.R. REP. No. 1423, 84th Cong., 1st Sess. 12 (1955). "[O]il company suppliers, for the avowed purpose of having their dealers reduce their retail prices at particular locations 'to meet the competition' of a dealer selling at a lower non-discriminatory price, including off-brand gasoline, have held the level of their prices generally while at the same time cutting their prices to one or more dealers at a particular location. In such situations the lower price has prevailed until the low-price off-brand dealer saw fit to increase his price. This policy or practice has had the immediate effect of fomenting price wars among the retail dealers, and resulting ultimately in eliminating a substantial amount of price competition between and among both brand and off-brand gasoline."

110 FTC v. Sun Oil Co., 371 U.S. 505, 523 (1963).

111 One result of the Supreme Court's *Sun Oil* decision may be to spark an investigation in Congress into the oil industry to determine the extent to which the major oil companies are supplying gasoline to both sides in price wars. See statement of Rep. James Roosevelt, 109 CONG. REC. A212 (daily ed. Jan. 23, 1963).