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The Legality of Backhaul Allowances Under The Robinson-Patman Act: An Analysis

I. Introduction

A serious question exists regarding the legality of backhaul allowances, price concessions granted to customers who transport and deliver their own goods. The dilemma was articulated in 1967¹ when a seller requested a Federal Trade Commission Advisory Opinion. The Commission indicated that backhaul allowances created a probable violation of Section 2(a) of the Robinson-Patman Act² because of potential price discrimination. Accordingly, the FTC position has severely curtailed the practice of backhauling.³

The decrease in backhauling is economically undesirable because it results in the waste of thousands of gallons of fuel annually.⁴ This waste increases gas prices and exacerbates shortages by maintaining demand at a higher than necessary level. Furthermore, prices on a multitude of other goods are driven upward because of the increased fuel costs, adding to the inflationary pressures on the United States economy.⁵ In light of the rapid escalation of fuel prices,⁶ as well as the nation's recent renewed commitment to energy conservation,⁷ backhauling should be explicitly authorized and encouraged by the FTC.

This comment analyzes the legality of backhaul allowances under the Robinson-Patman Act. A discussion of the FTC Advisory

1. FTC Advisory Opinion 147, 16 C.F.R. § 15.147 (1980). (Originally published in 32 Fed. Reg. 14694 (1967)). See notes 9-21 and accompanying text *infra*.

2. 15 U.S.C. § 13(a) (1976). The Robinson-Patman Act amended the price discrimination provisions of Section 2 of the Clayton Antitrust Act. 15 U.S.C. 12, 13, 14-21, 22-27 (1914) (amended 1936). Section 2(a) of the Robinson-Patman Act attempts to eliminate direct or indirect price discrimination when specified competitive injury might result. Section 2(a) was also intended to eradicate monopoly, see note 89 *infra*, and increase economic efficiency, see note 94 *infra*.

3. Butler, *Federal Trade Agency's Backhaul Policy Put Down by Ford's Wage-Price Council*, *Traffic World*, Apr. 14, 1975, at 29.

4. PRIVATE LINE, June, 1978, at 1.4.

5. Parker, *What the Oil Crunch Has Done to the Outlook*, *FORTUNE*, July 30, 1979, at 9.

6. Since April, 1979, fuel prices have risen at an annual rate of 78 percent. Franklin, *Business Outlook*, *BUSINESS WEEK*, Sept. 24, 1979, at 29.

7. Address by President Carter to the nation (July 15, 1979), as reprinted in the *New York Times*, July 16, 1978, at 12, col. 1.

Opinion⁸ is presented, along with an overview of the treatment of price discrimination under the act. In addition, the comment analyzes the weaknesses of the FTC viewpoint and discusses the policy reasons supporting backhaul allowances.

II. Background of the Backhaul Allowance Issue

A. *Federal Trade Commission Policy Against Backhaul Allowances: Advisory Opinion 147*

The chief factor in discouraging backhauling has been the Federal Trade Commission policy that price allowances to backhauling buyers violates the Robinson-Patman Act. The FTC articulated this position in 1967 when it issued Advisory Opinion 147.⁹ The question arose when a manufacturer of food products sought an opinion¹⁰ regarding the legality of offering a discount from its uniform delivered price.¹¹ The manufacturer sold all its products on a typical delivered price basis. The invoice amount included delivery to the customer and incorporated a flat rate identical for all purchasers regardless of their proximity to the shipping manufacturer. Because certain customers had trucks returning unfilled along routes near the seller's warehouses, they requested a price allowance for using their unfilled trucking capacity to transport their purchases. The manufacturer requested an advisory opinion from the FTC on the legality of granting an allowance to the backhauling customers equal to the actual common carrier freight rate that the seller would otherwise incur.¹²

The Commission analyzed the proposal in light of Section 2(a) of the Robinson-Patman Act.¹³ Section 2(a) provides that it is un-

8. 16 C.F.R. § 15.147 (1980). Backhaul allowances were initially called into question by Opinion 147. The Federal Trade Commission is authorized by F.T.C.R. PRAC. 1.1 to issue advisory opinions at the request of any person, partnership, or corporation regarding its view of the legality of a proposed course of action. These opinions do not have the force and effect of law, but indicate whether the FTC would prosecute if the proposed action were taken.

9. 16 C.F.R. § 15.147 (1980). The FTC has twice reiterated its position on backhaul allowances since issuing Advisory Opinion 147 in 1967. See FTC Press Release (Mar. 28, 1975); FTC Press Release (Dec. 26, 1973).

10. See note 8 *supra*.

11. A uniform delivered price includes cost of the item and cost of delivery and is identical to all buyers regardless of their geographic location. The price includes delivery of the goods to the buyer's plant.

12. For instance, assume that a backhauling customer saved the seller a \$10 charge for the delivery of an item with a uniform price of \$100. The seller then would deduct this savings from the uniform price, and charge the backhauling buyer \$90 for the goods. The price allowance reflects the seller's savings arising from the buyer's performance of the transportation function.

13. 15 U.S.C. § 13(a) (1976). Section 2(a) provides in pertinent part:

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

lawful for a seller to discriminate in the price charged different buyers of "commodities of like grade and quality"¹⁴ when the effect "may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition,"¹⁵ and when no defense afforded by the Act is applicable.¹⁶ The Commission advised that, assuming the presence of all the other elements of a prima facie violation of the statute,¹⁷ the

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

14. *Id.*

15. *Id.*

16. The Robinson-Patman Act provides three affirmative defenses to a charge of price discrimination: the good faith meeting of a competitor's equally low price; cost justification of price differentials; and price differentials in response to changing market conditions. The "meeting competition" defense applies only to meeting a competitor's prices in individual competitive situations and not as part of any pricing system. It may not be used in defense of an entire pricing system, although it is a valid defense for charges of discrimination in individual transactions. The defense does not apply when the seller undercuts, rather than meets, his competitor's price. To sustain his burden of proof, the seller must "show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 759-60 (1945).

The cost justification defense may be used when the price discrimination arises from differences in the seller's cost of manufacture, sale, or delivery resulting from different methods or quantities in which the goods are sold. The defense, therefore, permits justification of price differentials based upon cost economies of serving different customers. The price differential granted, however, may not exceed the seller's actual cost savings. See Section III *infra*.

The "changing market conditions" defense permits a seller to alter his prices in response to changing conditions affecting the market for or the marketability of the particular goods. The defense applies to price allowances for changes in the goods themselves, *e.g.*, actual or imminent deterioration of the goods or obsolescence of seasonal goods, and changes in the conditions of the market, *e.g.*, a distress sale under court process or sales in good faith discontinuance of business in the goods concerned. For an excellent discussion of all three defenses, see F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 207-329 (1962).

17. To establish a prima facie case of price discrimination under Section 2(a) five requirements must be met. First, the seller charged must be engaged in interstate commerce, and the transactions in question must have occurred in the course of that commerce. If the sales were wholly intrastate, the Act does not apply. See, *e.g.*, *Abramson v. Colonial Oil Co.*, 390 F.2d 873 (5th Cir. 1968), *cert. denied*, 393 U.S. 831 (1968); *Borden Co. v. FTC*, 339 F.2d 953 (7th Cir. 1964); *Willard Dairy Corp. v. National Dairy Prods. Corp.*, 309 F.2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963); *Central Ice Cream Co. v. Golden Rod Ice Cream Co.*, 287 F.2d 265 (7th Cir. 1961), *cert. denied*, 368 U.S. 829 (1961).

Second, the discriminatory transactions must involve commodities. Thus, the Robinson-Patman Act does not apply to discrimination in the following instances: sales of mutual fund shares, *Baum v. Investors Diversified Servs., Inc.*, 409 F.2d 872 (7th Cir. 1969); sale of a news report service to radio broadcast stations, *Tri-State Broadcasting Co., Inc. v. United Press Int'l, Inc.*, 369 F.2d 268 (5th Cir. 1966); sale of television time, *Columbia Broadcasting Sys., Inc. v. Amana Refrig., Inc.*, 295 F.2d 375 (7th Cir. 1961), *cert. denied*, 369 U.S. 812 (1962); construction contracts, *General Shale Prods. Corp. v. Struck Constr. Co.*, 132 F.2d 425 (6th Cir. 1942), *cert. denied*, 318 U.S. 780 (1943); exclusive licensing agreements, *Record Club of America, Inc. v. Columbia Broadcasting Sys., Inc.*, 310 F. Supp. 1241 (E.D. Pa. 1970); fees for license rights to a patented process, *La Salle Street Press, Inc. v. McCormick & Henderson, Inc.*, 293 F. Supp. 1004 (N.D. Ill. 1968); leases of real estate, *Gaylord Shops, Inc. v. Pittsburgh Miracle Mile Town & Country Shopping Center*, 219 F. Supp. 400 (W.D. Pa. 1963).

Third, the commodities that are the subject of the price differential must be of like grade and quality. For example, a price difference between identical physical products bearing dif-

manufacturer's proposal would "probably result in a violation of the law."¹⁸ This conclusion necessarily flows from the FTC's interpretation of a delivered pricing system. In a delivered pricing system the freight factor included in the price is not the actual freight to any given point, but an average of the freight costs for all buyers within the zone where the delivered price is quoted. Thus, this figure is determined by a formula apart from actual costs. Consequently, if one customer is given a backhaul allowance for the actual freight costs saved by the seller, the Commission concluded that a "serious possibility of discrimination would exist."¹⁹

Although the Opinion is not a legally binding interpretation,²⁰ it has created the presumption that use of the allowances may result in prosecution by the FTC. Accordingly, Opinion 147 has effectively eliminated the granting of backhaul allowances from uniform prices²¹ thereby removing the buyer's incentive to backhaul.

ferent labels and brand names violates the Act. *Hartley & Parker, Inc. v. Florida Beverage Corp. & America Distilling Co.*, 307 F.2d 916 (5th Cir. 1962). If substantial physical differences in the products exist which affect consumer preference or marketability, however, they are not of like grade and quality regardless of whether the raw materials used, manufacturing operations, and manufacturing costs are the same. *Universal Rundle Corp.*, 65 F.T.C. 924 (1964), *order set aside on other grounds*, 382 F.2d 285 (7th Cir. 1967); *Quaker Oats Co.*, 66 F.T.C. 1131 (1964).

Fourth, two actual and completed purchases by different purchasers must be shown. *Shaw's Inc. v. Wilson-Jones Co.*, 105 F.2d 331 (3d Cir. 1939). A "purchaser" means a present purchaser, rather than a past or prospective one. *Naifeh v. Ronson Art Metal Works, Inc.*, 218 F.2d 202 (10th Cir. 1954); *Chicago Seating Co. v. Karpen & Bros.*, 177 F.2d 863 (7th Cir. 1949). Also, the sales must be substantially or reasonably contemporaneous in time to invoke the Act. *Atlanta Trading Corp. v. FTC*, 258 F.2d 365 (2d Cir. 1958); *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743 (1947). The sales, however, need not be made at exactly the same time. *Hartley & Parker, Inc. v. Florida Beverage Corp. & American Distilling Co.*, 307 F.2d 916 (5th Cir. 1962). The Act also requires that the sales giving rise to the alleged discrimination be made "within the United States or any territory thereof, or in the District of Columbia or in any insular possession or other place under the jurisdiction of the United States." 15 U.S.C. § 13(a) (1976).

Last, the Act requires a showing that the effect of the price differential is to substantially lessen competition, or to tend to create a monopoly, or to injure, destroy, or prevent competition. Actual harm is not required, but rather only the possibility of competitive injury must be established. *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948). The potential effect on competition must nevertheless be substantial. *International Film Center, Inc. v. Graflex, Inc.*, 427 F.2d 334 (3d Cir. 1970); *Borden Co. v. FTC*, 339 F.2d 953 (7th Cir. 1964); *American Oil Co. v. FTC*, 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 337 U.S. 954 (1964). The burden of proof on the issue of competitive effect is on the FTC, *Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835 (7th Cir. 1961); *General Foods Corp.*, 50 FTC 885 (1954); or on the plaintiff, if the suit is a private one, *Atlas Bldg. Prods. Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960); *Elgin Corp. v. Atlas Bldg. Prods. Co.*, 251 F.2d 7 (10th Cir. 1958), *cert. denied*, 357 U.S. 926 (1958). With respect to competitive injury, see generally, C. EDWARDS, *THE PRICE DISCRIMINATION LAW* 518-45 (1959); F. ROWE, *supra* note 16, at 113-206.

18. 16 C.F.R. § 15.147 (1967).

19. *Id.*

20. P. AREEDA, *ANTITRUST ANALYSIS* 47 (1967).

21. See note 3 *supra*. The FTC position has raised nationwide dissent. See, e.g., Borghesani, *Private Carriage, Delivered Prices, FTC Opinions And Allowances for Customer Pickup Observed*, *PRIVATE CARRIER*, Oct. 1974, at 1; Butler, *supra* note 3. A bill has been introduced in Congress that would permit backhaul allowances. The Diesel Fuel and Conservation Act of 1977 would amend § 382 of the Energy Policy and Conservation Act, 42 U.S.C. 6201 (1976), by adding the following paragraph:

B. Price Discrimination in the Robinson-Patman Act — Section 2(a)

Section 2(a) was designed to prevent price discrimination between similarly situated buyers.²² “Discrimination” under Section 2(a) means merely a difference in net²³ price.²⁴ Although a competitive relationship among purchasers is not a prerequisite to a finding of price discrimination,²⁵ the possibility that the discrimination will tend to create a monopoly or will be deleterious to competition must be shown.²⁶ Accordingly, granting a price reduction to a backhauling customer, while charging the full delivered price for similar goods to another customer, results in Section 2(a) price discrimination.

Section 2(a), however, provides an affirmative defense of cost justification to a charge of price discrimination.²⁷ This proviso permits a seller to vary prices between buyers if actual differences in the costs of serving them exist. The FTC failed to account for the possibility of this defense in Advisory Opinion 147.

It shall not be unlawful for a seller of goods, wares or merchandise pursuant to a uniform zone delivered pricing system to grant backhaul allowances to a buyer where the backhaul function is actually performed by the buyer or an authorized carrier serving the buyer, where the allowance is no greater than the actual savings in delivery costs to the seller and where the allowances are available to all the seller's customers on a non-discriminatory basis.

S. 1699, 95th Cong., 1st Sess. (1977). In addition to reflecting public sentiment, this nationwide dissent indicates that the accuracy of the FTC view that backhaul allowances contravene the Robinson-Patman Act is questionable. The Commission's admission in Opinion 147 that the conclusion “may seem unreasonable” indicates its own uncertainty regarding the disallowance of price concessions.

22. See EDWARDS, *supra* note 17, at 21-53 (legislative history of the Robinson-Patman Act).

23. The prices compared in determining whether a difference exists are “net” prices, *i.e.*, the invoice amount less all discounts, rebates, and allowances. See, *e.g.*, *Corn Products Ref. Co. v. FTC*, 324 U.S. 726, 737 (1945). According to the report of the Advisory Committee appointed to study the cost justification defense of § 2(a), reality is the prime consideration not form. The price used in determining whether discrimination exists, the Committee stated, must be “net of all applicable allowances, discounts and rebates which the buyer receives or is entitled to receive.” Advisory Committee on Cost Justification, Report To The Federal Trade Commission 9 (FTC Mimeo., 1956). Thus, if a purchaser is billed and pays \$10 at the date of sale, but is subsequently given a rebate of \$1 upon the performance of some specified act or the attainment of a specified volume of purchases, the price is reduced to \$9.

24. *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960).

25. *Id.*

26. For a discussion of the degree of competitive injury that must be shown, see H. SHNIDERMAN, *PRICE DISCRIMINATION IN PERSPECTIVE* 24-41 (1977). See also Austern, *Presumption and Perception About Competitive Effect: An Evaluation*, 37 A.B.A. ANTITRUST L.J. 22 (1968); Rowe, *Section 2(a) of the Robinson-Patman Act: New Dimensions In The Competitive Injury Concept*, 37 A.B.A. ANTITRUST L.J. 14 (1968).

27. The statutory language of § 2(a) provides: “[N]othing 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 by which such commodities are to such purchasers sold or delivered.” 15 U.S.C. § 13(a) (1976).

III. Availability of Cost Justification Defense of Section 2(a) to Justify Granting of Backhaul Allowances

Examination of the cost justification deferral of Section 2(a) reveals that it applies to the price discrimination between backhauling and nonbackhauling buyers. The defense clearly encompasses the granting of backhaul allowances since transportation by the purchaser, as opposed to delivery by the seller, is a “differing method”²⁸ of delivery through which the seller realizes tangible savings in freight costs. Price differentials that make “only due allowance for differences in the cost of manufacture, sale, or delivery”²⁹ resulting from different methods or quantities in which goods are sold or delivered to different customers are permissible. The FTC, however, in Opinion 147, disposes of this defense by stating that its availability is “highly doubtful.”³⁰ This statement is contrary to the Commission’s prior decisions³¹ and the express purpose of Congress³² in creating the defense, which indicate that backhaul allowances are cost-justifiable.

A. *Cost-Justification - A Defense to Discriminations Arising from Backhaul Allowances*

The legislative history of Section 2(a) indicates congressional intent to allow price differentials that reflect varying delivery costs to buyers.³³ Interpreting the cost justification provision, Congressman Hubert Utterback³⁴ noted that a seller may give price reductions in favor of those particular customers whose “distinctive methods of purchase and delivery”³⁵ make possible economies in distribution. Furthermore, Section 2(a) permits the translation of differences in cost into price differentials to the customers concerned, “no matter where those differences arise.”³⁶ Accordingly, the cost justification defense should be applicable to backhaul allowances, since these allowances reflect the seller’s distribution savings arising from the backhauling customer’s performance of the delivery function.

B. *Prior FTC Rulings Recognizing a Cost Justification Defense*

Prior FTC decisions authorize a price differential when differ-

28. *Id.*

29. *Id.*

30. 16 C.F.R. § 15.147 (1967).

31. See Section IIIB, *infra*.

32. See Section IIIA, *infra*.

33. For a general discussion of the history of the act, see EDWARDS, *supra* note 17, at 21-53.

34. Congressman Utterback was chairman of the House Judiciary Subcommittee that conducted hearings on the Patman Bill.

35. 80 CONG. REC. 9417 (1936).

36. *Id.* (emphasis added).

ing delivery methods result in a cost savings. For example, in *Kraft-Phenix Cheese Corp.*,³⁷ the respondent was charged with violating Section 2(a) of the Robinson-Patman Act for granting discounts to purchasers who bought loaf cheese in quantities greater than 150 pounds.³⁸ These buyers received delivery directly from the Kraft warehouse at a cost of seven and one-half cents per pound, or roughly three-tenths of one percent of sales price. Buyers of less than 150 pounds, however, received delivery from the Kraft delivery truck³⁹ at an average cost of three dollars and seventy-seven cents per pound,⁴⁰ about fourteen percent of the sales price. The Commission found that the more expensive mode of delivery justified the higher price to purchasers in quantities of less than 150 pounds. The Commission expressed no doubt that the delivery costs were a proper subject of the cost justification defense.⁴¹

In *Ideal Cement Company*,⁴² purchasers who transported their cement from respondent's cement plants by motor carrier were charged twenty cents per barrel more than those transporting cement of identical grade and quality from the same plants by rail freight. Ideal asserted that the additional cost delivery to motor carriers justified the price variance. The defense failed because Ideal was not able to carry its burden of proving cost justification.⁴³ The FTC, therefore, prohibited Ideal from further use of this pricing practice. The cease and desist order, however, recognized the future validity of the pricing practice upon presentation of sufficient proof of the claimed difference in costs.⁴⁴ The Commission thus acknowledged

37. 25 F.T.C. 537 (1937).

38. The quantity discount granted by Kraft was also challenged. Retail buyers of more than \$5 of package cheese and salad products over a two to three week period, as well as billed group buyers of over \$100, received a 5% discount. This discount was upheld because the FTC determined that it did not inflict any injury to competition. *Id.* at 544-45.

39. Kraft used a delivery system that was designed to insure the freshness of the products when delivered, to facilitate the return of products that were not fresh, and to stimulate the retailers interest in its products. It was this system, as well as the small quantities involved in each delivery, that made these deliveries so expensive. *Id.* at 544.

40. This average was for the delivery of all products by the delivery truck. The FTC found that although an argument could be made that the delivery of one particular item was less expensive than the average, any reasonable allocation of cost would unquestionably leave a differential large enough to support the difference in price. In the Commission's view, the practical impossibility of making an accurate allocation of cost to each kind and amount of product delivered from the truck was no ground for ignoring the "reasonable inference" that the differential was cost-justified. *Id.* at 546.

41. The FTC has explicitly agreed. See *Southern Cal. Jobbers, Inc.*, F.T.C. Dkt. 6889, TRADE REG. REP. (CCH) ¶ 17,410 (1965). In that case, the Commission stated that in determining the manufacturer's costs, the appropriate areas for consideration are among others, sales expense (such as compensation for sales personnel), *freight and delivery costs*, the expense of publishing and distributing catalogs and price lists, and billing and credit expenses.

42. 47 F.T.C. 1030 (1951). See also *Monolith Portland Cement Co.*, 47 F.T.C. 1292 (1951) (companion case with identical fact situation and ruling by FTC).

43. The burden of proof of cost justification is on the seller because it is an affirmative defense. *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

44. The provision read,

that a customer's receipt of goods at the seller's plant is a "method of delivery" within the meaning of Section 2(a).

The *Kraft-Phenix* and *Ideal* rulings illustrate the appropriateness of the cost justification defense for price differentials between either two buyers who take door delivery or between two buyers who receive their goods at the seller's plant. A logical extension of this reasoning reveals that a variance in price between two buyers, one who accepts full delivery⁴⁵ and the other who transports his own goods, should be cost-justified. The federal courts actually reached this conclusion in a private antitrust action,⁴⁶ *Morton v. National Dairy Products Corporation*.⁴⁷ Defendant, National Dairy, sold milk at a "platform" price from its plant in Camden, New Jersey, to Pennsylvania buyers at prices less than it charged on into-the-store Sales in Pennsylvania. Customers who bought at the platform used their own trucks to transport the milk to Pennsylvania. The evidence indicated that the cost of serving customers at the platform was twenty-six percent less than that of making full delivery. The court found that this savings justified the twenty-two percent difference in price.⁴⁸

Although *Morton* was a unique market situation,⁴⁹ it is important because of the judicial recognition that differences in store-door delivery and factory pick-up prices are not outside the scope of Section 2(a). The FTC, in summarily dismissing this defense, has ig-

Provided, however, that the foregoing shall not be construed to prevent the respondent from defending any alleged violation of this order by showing that any differences in price make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which said product is to such purchasers sold or delivered.

47 F.T.C. at 1038.

45. "Full delivery" means delivery by the seller to the buyer's plant or warehouse; the delivery function is performed by the seller, rather than the buyer.

46. Private antitrust actions for treble damages are authorized by § 4 of the Clayton Act, 15 U.S.C. § 15 (1976). Section 4(a), added in 1955, authorizes the United States to institute single damage suits for injuries to the government's business or property through antitrust violations. The three essential elements to a private action are a violation of the antitrust laws, injury to the plaintiff's business or property, and measurable damage. *Hudson Sales Corp. v. Waldrip*, 211 F.2d 268, 274 (5th Cir. 1954), *cert. denied*, 348 U.S. 821 (1954); *Kinnear-Weed Corp. v. Humble Oil & Ref. Co.*, 214 F.2d 891, 893 (5th Cir. 1954), *cert. denied*, 348 U.S. 912 (1954).

47. 287 F. Supp. 753 (E.D. Pa. 1968), *aff'd*, 414 F.2d 403 (3d Cir. 1969), *cert. denied*, 396 U.S. 1006 (1970).

48. No requirement exists that a price reduction reflect the full amount of the seller's cost savings. The Senate Judiciary Committee Report on the Robinson-Patman Act stated, "The bill neither requires nor compels the granting of discrimination or differentials of any sort. . . . It does not require the differential, if granted, to be the arithmetical equivalent of the difference. It is sufficient that it does not exceed it." S. REP. NO. 1502, 74th Cong., 2d Sess. 5 (1936).

49. The market was unique because milk prices were regulated by both Pennsylvania and New Jersey, and the New Jersey price floor was lower than Pennsylvania's. The court nevertheless found that "[defendant's] cost justification adequately demonstrated the true economies of selling its milk in large bulk quantities at the Camden platform." 287 F. Supp. at 763.

nored its own policy as well as the intent of the authors of the Robinson-Patman Act. Notwithstanding the FTC's indication, a discrimination in price between backhauling and nonbackhauling buyers is squarely within the purview of the cost justification defense.⁵⁰

IV. Possible Discrimination From the Unavailability of Backhaul Allowance to Some Buyers

In addition to the discrimination between buyers who elect to backhaul and those that do not, the FTC was concerned that only a relatively small number of buyers would be able to take advantage of a backhaul allowance.⁵¹ Accordingly, discrimination would then exist against the majority of buyers.⁵²

No price discrimination arises, however, if the same concessions are accessible to all customers, even though some do not choose to take advantage of them.⁵³ Nevertheless, theoretical price allowances that are not practically available to all purchasers have been consistently struck down as violative of Section 2(a).⁵⁴ Evidence indi-

50. The preparation of a cost justification study from the seller's records often poses difficult financial and accounting problems. In one writer's opinion the defense is available "only to the wealthy, the resourceful, and the tireless." Austern, *Tabula in Naufragio Administrative Style, Some Observations on the Robinson-Patman Act*, CCH ROBINSON-PATMAN SYMPOSIUM 105, 115 (1953). For an analysis of criticisms of the defense, see Murray, *Cost-Justification Under The Robinson-Patman Act: Impossibility Revisited*, 1960 WIS. L. REV. 227. The FTC, however, has indicated that a seller's cost study made in good faith and in accordance with standard accounting principles will be given "very great weight." Minneapolis-Honeywell Regulator Co., 44 F.T.C. 351, 394 (1948). For information regarding the practicalities of preparing a cost defense study, see Taylor, *Cost Accounting Under The Robinson-Patman Act*, 3 ANTITRUST BULL. 188 (1958); Van Cise, *The Robinson-Patman Act and the Accountant*, 3 ANTITRUST BULL. 325 (1958). For an example of a successful cost study, see *Morton v. National Dairy Prods. Corp.*, 287 F. Supp. 753 (E.D. Pa. 1968), *aff'd*, 414 F.2d 403 (3d Cir. 1969), *cert. denied*, 396 U.S. 1006 (1970).

Only actual costs are considered in justifying a price differential. The FTC has rejected claimed cost items such as investment costs, *Borden Co.*, 62 F.T.C. 130 (1963), and return on investment, *Thompson Prods., Inc.*, 55 F.T.C. 1252 (1959). Also, differentials may not be justified on the basis of unequal distribution of overhead costs. The House Judiciary Committee Report of the Robinson-Patman Act reveals that all buyers must bear their aliquot share of overhead. The price differential must be based on actual cost savings attributable to the business of the particular customer receiving the allowance. H.R. REP. NO. 2287, 74th Cong., 2d Sess. 10 (1936).

51. See, e.g., Advisory Opinion 198, 16 C.F.R. § 15.198 (1968), in which the Commission rejected a proposed quantity discount on the grounds that it would discriminate "between customers qualifying for the discount and competing customers not able to qualify for it." *Id.* at 172. (The Commission also rejected the proposed quantity discount for lack of apparent cost justification).

52. Section 2(a) applies to indirect as well as direct discrimination. *Corn Products Ref. Co. v. FTC*, 324 U.S. 726 (1945); *Forster Mfg., Inc. v. FTC*, 335 F.2d 47 (1st Cir. 1964).

53. The seller is only required to make the price concession available to all buyers on a nondiscriminatory basis. A buyer cannot render a seller's allowance discriminatory merely by refusing to take advantage of it.

54. See, e.g., *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948) (standard quantity discounts not functionally available to all buyers held discriminatory); *Viviano Macaroni Co.*, 78 F.T.C. 313 (1968), *aff'd*, 411 F.2d 255 (3d Cir. 1969) (giving free goods to a supermarket chain on an introductory basis held discriminatory because not available to established customers competing with the chain); *Mueller Co.*, 60 F.T.C. 120 (1962), *aff'd*, 323 F.2d 44 (7th Cir. 1963), *cert.*

cates,⁵⁵ however, that backhaul allowances and the corresponding benefits would not be limited in availability.

Two potential bars exist to a purchaser's ability to take advantage of a backhaul allowance. First, the allowance is only given to buyers who accept delivery at the seller's plant. Thus, many small retailers who do not maintain truck fleets would not be able to receive the allowance directly. Nevertheless, these buyers would still receive the benefits of an allowance.⁵⁶ A study by the Cost of Living Council indicates that the fear that elimination of the backhaul restrictions would discriminate against certain retailers is not justified in the food industry.⁵⁷ Small retailers who could not directly avail themselves of the allowance would still benefit because the backhauling wholesalers would be induced to pass on the cost savings.⁵⁸

Second, the ability of buyers to avail themselves of the allowance also depends upon the location of their shipping routes in relation to the seller's plant. Obviously, not all customers of a particular seller will conveniently be able to backhaul. Nothing inherent in the seller's pricing policy, however, prevents them from doing so. Further, the savings from backhauling will be evenly distributed because retailers will have many sources of supply at different locations. In different instances, all will be able to take advantage of the cost savings generated from backhauling.⁵⁹ The evidentiary findings⁶⁰ by

denied, 377 U.S. 923 (1964) (10% functional discount granted to jobbers who maintained an inventory but not made available to regular jobbers was discriminatory because no objective standards existed to guide in qualifying for the discount; decisions to grant the discount were based on a concern to protect established jobbers); *American Can Co. v. Bruce's Juices, Inc.*, 187 F.2d 919 (5th Cir. 1951), *modified*, 190 F.2d 73 (5th Cir. 1951) (annual volume discounts for which only 2% of defendant's customers could qualify were discriminatory); *Black Mfg. Co.*, 54 F.T.C. 1196 (1958) (advertising allowances granted only on the basis of negotiations and not made available on proportionally equal terms to all customers found discriminatory); *American Optical Co.*, 28 F.T.C. 169 (1939) ("big dealer" discounts based solely on the buyer's dollar volume during the discount period, regardless of the size or number of separate orders handled, held discriminatory).

55. See notes 56-60 *infra*.

56. Letter of Apr. 6, 1973 from John T. Dunlop, Director of the Cost of Living Council, to Hon. Lewis A. Engman, Chairman of the Federal Trade Commission (on file with Dickinson Law Review).

57. *Id.* The conclusion of the study was that the benefits of backhaul allowances are nondiscriminatory by size.

58. See note 60 *infra*.

59. *Id.*

60. See also Draft of a study by the National-American Wholesale Grocer's Assn. examining the impact of a significant increase in availability of backhaul/customer pickup privileges on the competitive position of small independent retailers and small wholesalers (contained in letter of Feb. 28, 1973 from Gerald E. Peck, Executive Vice President of National-American Wholesale Grocer's Assn., to Morris Lewis, Jr. (on file with Dickinson Law Review)). The study found that all stores of all sizes in the food industry are served by a distribution center, all independent stores are served by a wholesaler, and, practically all wholesalers can utilize backhaul privileges. The small independent retailers benefit from backhaul through lower wholesaler fees. The wholesalers are under pressure to reflect backhaul savings in lower fees because of the internal competition between wholesalers. Also,

the Cost of Living Council rebut the Commission's presumption that backhaul allowances, in all instances, will be discriminatory because of limited availability.⁶¹ Absent proof that this type of discrimination will occur in a specific case, a seller should not be denied the ability to grant backhaul allowances.

V. Backhaul Discrimination is Analogous to the Discrimination Inherent in Uniform Delivered Prices

In addition to the possibilities of discrimination arising from different prices to backhauling versus nonbackhauling buyers and discrimination because of unavailability of the allowance to some buyers, a third discriminatory aspect of backhaul allowances exists. This discrimination occurs when two purchasers both accept delivery at the seller's warehouse and receive the backhaul allowance. Under a uniform delivered pricing system an *average* freight rate is charged all buyers, while the backhaul allowances are for the *actual*⁶² shipping costs saved. The allowances will be unequal unless both buyers are located exactly the same freight-cost⁶³ distance from the seller's plant. In all other cases prices to purchasers who provide their own transportation will vary since nonuniform costs will be deducted from uniform prices. Discrimination occurs because each buyer will be paying different prices for identical goods.⁶⁴ The cost justification defense is not available because between backhauling buyers the

economies of scale encourage wholesalers to pass on backhaul savings to increase their number of customers.

With regards to backhaul availability arising from proximity to the seller, the study disclosed that generally, competing stores in a given shopping area are supplied by distribution centers from a common marketing area. For all these stores, therefore, the benefit from backhauling is equitable since all distribution centers have access to backhaul benefits.

In cases in which competing chain and/or independent stores are serviced by distribution centers from different market areas, equalization factors exist:

It boils down to the fact that distribution centers, chain or wholesale, must keep stores they service competitive in the store's shopping area. . . . Quite obviously there are circumstances where prime highway routes and manufacturer shipping points concentrations . . . could combine to disadvantage one distribution center relative to one of its competitors . . . this is the exception. . . . Ultimately, because of the forces of competition the benefits of backhaul will pass through to retail stores.

Id. at 8-9.

61. The finding that the benefits of backhaul allowances will be available to most buyers in the food industry cannot summarily be assumed true for all other markets. The findings prove, that in at least some instances discrimination of this type will not take place. The FTC, therefore, cannot justify a universal prohibition against backhaul allowances based on this type of discrimination.

62. See note 50 *supra*.

63. Freight rates do not vary directly with distance. Thus, delivery costs may be the same to buyers located varying distances from the seller's shipping point.

64. An illustration of this discrimination is as follows: assume a Pittsburgh seller has customers in Los Angeles and Philadelphia, both of whom accept delivery of their goods at the Pittsburgh plant. Seller's actual freight costs to the two buyers are \$10 and \$2, respectively. The delivered price is \$100. If both backhauling buyers receive a price reduction equal to actual freight expenses, the price to the Los Angeles buyer will be \$90 while the price to the Philadelphia buyer will be \$98. The result is clearly discriminatory, assuming the only relevant difference between the two buyers is their location. A seller will have as many variations

method of sale and delivery to each is the same.⁶⁵

Standing alone, a pricing practice producing this result violates Section 2(a). Discrimination of this nature, however, is inherently sanctioned under various uniform delivered pricing systems. Yet these pricing systems have been repeatedly approved by both the FTC and the courts⁶⁶ thereby rendering a seller's price, if uniform to all buyers, unassailable even if discriminatory.⁶⁷

The Commission's refusal to endorse the discrimination inherent in a system of backhaul allowances is irreconcilable with its acquiescence to the discrimination of uniform prices. It cannot disallow a system of backhaul allowances without contradicting the time-honored view upholding the legality of delivered prices.

A few examples will illustrate the similarity between discrimination caused by backhaul allowances and uniform delivered prices. In *Chain Institute, Incorporated*,⁶⁸ the FTC upheld three different pricing schemes, each of which placed some buyers at a distinct disadvantage. Respondents were a trade institute and its eighteen member companies that manufactured, sold, and distributed substantially all the welded chain, weldless chain, and tire chain produced in the United States. The complaint charged each of the institute's members with violating Section 2(a) of the Robinson-Patman Act⁶⁹ by using single basing-point,⁷⁰ freight equalization,⁷¹ uni-

in prices as he has in his freight costs. Potentially, no two buyers will pay the same price for goods of like grade and quality when accepted at the seller's plant.

65. To be cost justifiable, the Robinson-Patman Act requires that the price differential be one "resulting from the differing methods or quantities in which such commodities are sold or delivered." 15 U.S.C. § 13(a) (1976).

66. In early interpretations of the Robinson-Patman Act the FTC and the courts applied a "mill net" concept to determine whether a price system was discriminatory. In applying this concept, actual freight costs were deducted from the uniform delivered price charged to establish the comparability of all prices "at the mill." If buyers were located at different distances from the seller's plant, prices compared on the basis of net return to the seller (i.e., deducting transportation costs) were discriminatory. *See, e.g.*, *FTC v. Cement Inst.*, 333 U.S. 683 (1948); *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746 (1945); *Corn Prods. Ref. Co. v. FTC*, 324 U.S. 726 (1945). The mill net theory was rejected in *National Lead Co.*, 49 FTC 791 (1953), *aff'd* 227 F.2d 825 (7th Cir. 1955), *rev'd*, 352 U.S. 419 (1957) (proceedings on review entirely consistent with abandonment of mill net theory), which upheld a zone delivered pricing system. *See* notes 81-86 and accompanying text *infra*.

67. *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960); *Sano Petroleum Corp. v. American Oil Co.*, 187 F. Supp. 345 (E.D.N.Y. 1960); *Klein v. Lionel Corp.*, 138 F. Supp. 560 (D. Del.), *aff'd*, 327 F.2d 13 (3d Cir. 1956).

68. 49 F.T.C. 1041 (1953), *order sustained on appeal*, 246 F.2d 231 (8th Cir.), *cert. denied*, 355 U.S. 895 (1957).

69. The complaint had two counts. The first count charged respondents with conspiring to fix prices and restrain trade in violation of § 5 of the Federal Trade Commission Act. The Act prohibits the use of "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce," as well as "contracts or agreements providing for the establishment or maintenance of minimum stipulated resale prices" between manufacturers, wholesalers, brokers, factors, retailers, or between persons, firms, or corporations in competition with each other. 15 U.S.C. § 45 (1976). The FTC inferred conspiracy from the "substantial uniformity and virtual identity" of the Institute member's prices and issued a cease and desist order to prevent the manufacturers from using delivered prices in the future. 49 F.T.C. 1041, 1107 (1953).

versal delivered price systems.⁷² The Commission found that when used independently⁷³ these methods did not violate Section 2(a). The price discrimination charge was dismissed because all buyers tendered the same actual dollar amount to the seller, although the seller's net receipts varied greatly.⁷⁴ All three of the pricing systems upheld were discriminatory.

In setting prices for welded chain products, respondents used a single basing point delivered method. The price was determined by adding to the f.o.b. plant⁷⁵ price an amount equal to the rail freight from Pittsburgh, Pennsylvania, to the point of delivery regardless of the point from which the shipment was actually made. In cases in which the seller shipped collect, the buyer paid the carrier the freight from the seller's *actual* shipping point, not the hypothetical amount computed on shipment from Pittsburgh. An adjustment was then made on the invoice for the difference between the actual freight paid and the Pittsburgh rate included in the price quotation. In form, all buyers located the same freight-cost distance from Pittsburgh paid the same price, but in reality there was no uniformity.⁷⁶ Despite this discrepancy, the FTC found the basing-point system nondiscriminatory.

In making sales of tire chains, the respondents in *Chain Institute* employed a universal delivered price system. Under this system, tire

70. A single basing point system is one in which delivered prices are computed as though goods originated at a single point of origin. It consists of the price at that point plus freight from that point to the destination.

71. A freight equalization system is one in which all points of production are basing points. The seller charges freight to the buyer on the basis of which production point is nearest the buyer, regardless of the original shipping location of the goods. The seller absorbs any differences between the respective freight costs.

72. Under a universal delivered price, the same price, including an average freight cost, is charged to all destinations in the United States regardless of the seller's actual shipping costs. For a more detailed discussion of this system and the pricing methods discussed in notes 75, 76 *infra*, see A. SAWYER, BUSINESS ASPECTS OF PRICING UNDER THE ROBINSON-PATMAN ACT 197-212 (1963).

73. The Commission issued a cease and desist order designed to prevent the *collusive* use of these pricing systems as a means of unfair competition through price fixing. See note 74 *infra*. The order was interpreted as not preventing the *independent* use of the pricing forms by the respondents.

74. 49 F.T.C. 1041, 1104-05 (1953).

75. The shipping term "f.o.b." means free on board and is used to designate the point to which freight is paid. Thus, "f.o.b. buyer's plant" indicates the seller has paid the freight, while "f.o.b. seller's plant" means either that the buyer has paid the freight or will transport the goods himself.

76. For example, assume that it costs a seller \$10 to ship to buyers A and B from Pittsburgh. At an f.o.b. plant price of \$100 Pittsburgh plus, seller's quoted price to either would be \$110. Assume further that the actual freight to both, from a shipping point other than Pittsburgh is \$4 and that buyer A receives his shipment collect thereby gaining an adjustment for his out-of-pocket disbursement to the carrier. As effective price would then be \$104, the adjustment being for \$6. If B, on the other hand, is shipped identical goods in the same quantity but the shipment is not made on a collect basis, his price will remain \$110. The difference in price is plainly discriminatory. The cost justification defense would not be available because it is used only to justify differentials based on *actual* cost differences between buyers. In this case the cost of shipping to each buyer is the same.

chains were sold everywhere in the United States at the same price regardless of any variations in transportation expenses. Buyers located considerable distances from the seller's plant were at a distinct advantage, because their actual price was lower.⁷⁷ The seller often expressly acknowledged this discrimination in cases in which the buyer paid the carrier for freight charges by making an allowance on the invoice for the amount of freight paid.⁷⁸ In other words, actual costs were deducted from the uniform price that included an average freight charge. This discrimination was permissible, in the Commission's view, because the actual dollar amount initially paid to the seller by each buyer was identical.⁷⁹

Finally, the respondents in *Chain Institute* used freight equalization prices on sales of weldless chain. The buyer's price was the seller's f.o.b. plant price plus freight from the nearest freight equalization point, regardless of the origin of the shipment. Discrimination occurred because buyers located the same freight cost distance from the point of actual shipment, yet unequal distances from the freight equalization city, paid different prices despite the seller's uniform costs of serving them.⁸⁰ Again, however, the Commission failed to find that an obviously discriminatory pricing method violated Section 2(a).

The FTC's refusal to find fault with the three pricing systems employed by the *Chain Institute* respondents was consistent with its decisions earlier the same year, *National Lead Company*,⁸¹ which upheld zone delivered prices.⁸² The decision in that case was also de-

77. For instance, actual delivery costs to buyer A might be \$10 and to buyer B \$5. Deducting these costs from a uniform price of \$100, A's nondelivered price is \$90, while B's is \$95.

78. 49 F.T.C. 1041, 1080 (1953).

79. *Id.* at 1104-05.

80. The seller used four equalization points: York, Pennsylvania; Cleveland and Cincinnati, Ohio; and Bridgeport, Connecticut. Assume that buyers A and B are located the same freight-cost distance from the point of actual shipment but unequal distances from the freight equalization city. Thus a seller might ship to both A and B from Cleveland at a cost of \$10 each, yet charge them from the nearer freight equalization point of Bridgeport at rates of \$6 and \$8, respectively. Assuming an f.o.b. plant price of \$100, A would pay \$106 while B would pay \$108. The seller's actual cost of serving both buyers, however, is identical, therefore the seller could not cost-justify the discrimination. See note 76 *supra*.

81. 49 F.T.C. 791 (1953), *modified*, 227 F.2d 825 (7th Cir. 1955), *rev'd on other grounds*, 352 U.S. 419 (1957).

82. The decision upheld the independent use of uniform zone delivered prices by sellers. All buyers of the same class within each pricing zone paid the same delivered price, regardless of their location within the zone. Accordingly, a purchaser located near the factory and one located hundreds of miles away, yet still within the same zone, pay the same price for items delivered to their respective plants. The Commission found that, with respect to these buyers, no violation of Section 2(a) existed. *Id.* at 871. The decision in *National Lead* inferred that national delivered pricing does not constitute a violation of Section 2(a) since national delivered pricing is nothing more than a zone system with the zone expanded to include the entire country. See SAWYER, *supra* note 72, at 256. This inference was confirmed in *Chain Institute*, 49 F.T.C. 1041 (1953), which upheld a national delivered price. See notes 77-79 and accompanying text *supra*.

pendent on the uniformity of the actual dollar amounts paid by each buyer,⁸³ notwithstanding the discriminatory effects. The United States Supreme Court upheld the FTC's finding that uniform prices are not illegal *per se*.⁸⁴ Accordingly,⁸⁵ "a uniform price to two or more buyers, despite nonuniform costs of serving them, is discriminatory yet legal."⁸⁶ In light of its endorsement of this discrimination, the FTC is not in a position to deny the use of backhaul allowances on the ground that, between backhauling buyers, some would be paying a lower net price than others. While the discrimination may be implicit with uniform prices and explicit in backhaul allowances, it exists in either case. No justification exists, however, for labelling the identical result illegal in the latter instance while upholding it in the former.

VI. Public Policy Considerations Supporting Backhaul Allowances

Strong public policy considerations support the granting of backhaul allowances. First, allowing discriminatory pricing is not inherently deleterious to the economy; rather, it promotes competition.⁸⁷ Forbidding discriminatory pricing freezes the pricing pattern and blocks the competitive process by obstructing price adjustments necessary to respond to changes in supply and demand.⁸⁸ Compulsory one-price policies, therefore, create rigid market structures not subject to competitive pressures.⁸⁹ Moreover, by insisting on uniform pricing the FTC is creating a high probability of monopoly formation. In imperfect markets, uniform prices permit near perfect monopoly since they enable colluding sellers to end competition by merely matching the uniform price. The uniform price lessens mutual uncertainty because any deviation from the norm can be quickly identified.⁹⁰ By denying flexibility to sellers through use of backhauling allowances in their pricing structures, the Commission has overlooked one of the basic objectives of the Robinson-Patman

83. 49 F.T.C. 791, 871 (1953).

84. *FTC v. National Lead Co.*, 352 U.S. 419 (1957). The Court stated, "It is our conclusion that the order does not . . . prohibit or interfere with independent delivered zone pricing *per se*. Nor does it prohibit the practice of absorption of actual freight." *Id.* at 431. Further, "delivered zone pricing violates the order only when two conditions are present: (1) identical prices with competitors, (2) resulting from zone delivered pricing." *Id.* at 426.

85. See also *Clay Prods. Ass'n.*, 47 FTC 1256 (1951); *Clay Sewer Pipe Ass'n., Inc.*, 48 FTC 202 (1951); *American Iron & Steel Inst.*, 48 FTC 123 (1951).

86. HOFFMAN, 2 ANTITRUST LAW AND TECHNIQUES 580 (Adelman 1951).

87. *Id.* at 578, 586.

88. *Id.*

89. Rowe, *Price Discrimination, Competition and Confusion: Another Look at the Robinson-Patman Act*, 60 YALE L.J. 929, 972-73 (1951).

90. *Id.*

Act — prevention of monopoly.⁹¹ Economic experts agree that the use of backhaul allowances will foster rather than dampen competition.⁹² Furthermore, these beneficial effects will not be limited to one industry. Any industry in which buyers have the capacity to backhaul, or who are served by wholesalers that backhaul, will experience increased competition if backhaul concessions are allowed.⁹³

Second, backhaul allowances should be permitted because the practice promotes efficiency. In particular, the cost justification defense of Section 2(a) was designed to assure that both buyer and seller could benefit from gains in efficiency in production and distribution.⁹⁴ Estimates indicate that for one industry alone, removal of the backhaul allowance prohibition would immediately save 100-250 million dollars in distribution costs per year with the potential for even greater long-term savings.⁹⁵

Last, in addition to the monetary savings, backhauling would save thousands of gallons of gasoline annually.⁹⁶ In light of the current fuel shortage and the expectation of a continued decline, a policy that encourages energy conservation best serves the national interest. Given the goals of decreasing wastefulness, increasing efficiency, preventing monopoly, and encouraging competition, public policy demands the removal of all questions regarding the legality of backhaul allowances.⁹⁷

VII. Infeasibility of Alternatives to a Backhaul Allowance for Actual Costs Saved

Only one method of encouraging the increase in the incidence of backhauling is acceptable under the Robinson-Patman Act. Sellers must be allowed to grant price reductions to backhauling buyers for the *actual* savings in transportation costs. The two alternative

91. See, e.g., the Report of the House Judiciary Committee on the Robinson-Patman Act:

The purpose of this proposed legislation is to restore, so far as possible, equality of opportunity in business by strengthening antitrust laws and by protecting trade and commerce against unfair trade practices and unlawful price discrimination and also against restraint and monopoly. . . [as well as] the protection of the public from a threat of monopoly or oppression in the production and manufacture of the things it needs. . . .

H.R. REP. NO. 2287, 74th Cong., 2d Sess. 2, 6 (1936).

92. See, e.g., Butler, *supra* note 3, at 29; Letter from John T. Dunlop, Director of the Cost of Living Council, *supra* note 56 at 1. "The Food Advisory Study clearly shows that the present backhaul prohibitions have the . . . effect of lessening competition and substantially reducing economic efficiency". *Id.*

93. See note 60 *supra*.

94. 80 CONG. REC. 9417 (1936).

95. Letter from John T. Dunlop, *supra* note 56.

96. PRIVATE LINE, June, 1978, at 1.

97. The FTC can accomplish this by rescinding Advisory Opinion 147. Under the FTC Rules of Practice, the Commission may at any time reconsider the questions raised by an advisory opinion and reverse its position if in the public interest. 16 C.F.R. § 1.3(b) (1969).

solutions, an allowance for an average freight charge and a separately computed f.o.b. plant price, would result in violations of Section 2(a).

A. *Deduction of Average Freight Charge*

The first alternative to achieving an increase in backhauling is that a deduction be allowed to the backhauling buyer only for the amount of the seller's *average* freight cost. This pricing system avoids any discrimination between backhauling buyers because both would have the same amount deducted from the delivered price and would, therefore, continue to pay a uniform price.⁹⁸ Two problems arise, however, when an average allowance is used. First, in many cases the deduction would not be cost-justified. The cost justification defense of Section 2(a) allows price differentials only in the amount of the seller's *actual* cost savings.⁹⁹ While the deduction need not be for the full amount of the savings, it may not exceed it.¹⁰⁰ Thus, in all cases in which backhauling buyers are closer than the average freight cost distance from the seller a deduction for the average freight charge would violate Section 2(a) since it would exceed the amount of the seller's actual savings and, therefore, would not be cost justified.¹⁰¹

Second, a backhaul allowance for only average costs would provide no incentive to customers whose cost of backhauling would exceed the amount of the average freight charge. Nevertheless, many of these customers can still perform the transportation function at a cost that is below the seller's *actual* cost of shipping to them, even if it exceeds the average charge.¹⁰² Backhauling, therefore, should be encouraged in this situation because it provides for the most efficient use of the available resources. Accordingly, an average freight cost allowance is undesirable because it overlooks the goal of economic efficiency.¹⁰³

98. Uniform prices are not assailable under Section 2(a), even if discriminatory. See note 72 *supra*.

99. See note 50 *supra*.

100. See note 47 *supra*.

101. See, e.g., FTC Advisory Opinion 198, 16 C.F.R. § 15.198 (1968). The manufacturer requesting the opinion proposed to offer to all buyers purchasing in truckload-lot quantities a 5% discount because of its *average* freight savings on those orders. The Commission advised the manufacturer that it could not approve the discount because based on the submitted data it did "not appear to be uniformly cost-justified" to all customers.

102. A buyer will often be able to perform the transportation function at a lower cost than the seller since the buyer's trucks are already on the road. Little additional cost is incurred in making a stop to pick up the goods, even if some rerouting is necessary. The seller, on the other hand, must pay the full common carrier fee or send his truck on a round trip to the buyer, generally at a greater expense.

103. See note 94 *supra*.

B. *Independently Calculated F.O.B. Plant Price*

The alternative to an allowance for actual costs saved proposed by the FTC would also result in a violation of the Robinson-Patman Act. The Commission indicated that rather than giving backhaul allowances sellers could "probably" avoid questions of illegality if they offered to all customers the option of purchasing at a "true f.o.b. shipping point price."¹⁰⁴ By having a separate nondelivered price, identical for all buyers who accept their goods at the factory, the seller would avoid the discriminatory effect of granting varying allowances to backhauling buyers.

Standing alone, the FTC solution does not violate 2(a). Subsequently, however, the Commission attempted to eliminate the confusion arising from its use of the term "true f.o.b. shipping point price." The Commission indicated that "no question of unlawful discrimination would arise so long as the f.o.b. price is uniform and available to all customers on a nondiscriminatory basis. *No legal requirement exists that the alternative f.o.b. price be of any particular amount or computed in any particular way.*"¹⁰⁵ This statement, however, implies that a seller may set the f.o.b. price below that of the net price paid by buyers accepting full delivery thereby discriminating against the latter.¹⁰⁶ Ordinarily, the FTC does not examine net prices to determine the existence of discrimination.¹⁰⁷ Nevertheless, in cases in which sales are made to one purchaser on a delivered basis and to another on an f.o.b. plant basis, a proper comparison requires that the prices be reduced to a common denominator.¹⁰⁸ The net price is used to determine whether the difference in price to the two buyers reflects only an allowance for the savings in transportation costs.¹⁰⁹ By implying that the f.o.b. plant price may be computed in any manner, the FTC alternative permits blatant discrimination.¹¹⁰ Furthermore, the cost justification defense is unavailable because the differentials are not based on actual costs.¹¹¹ A price reduction below the seller's net cost would have no actual cost justification.

Under either alternative solution, an independent f.o.b. plant

104. FTC Press Release (Dec. 26, 1973).

105. FTC Press Release (Mar. 28, 1975) (emphasis added).

106. For example, since the f.o.b. price need not be "of any particular amount or computed in any particular way," a seller could charge an f.o.b. plant price of \$85, while setting his delivered price, including a freight cost of \$10, at \$100. In net terms, the delivered price buyer would pay \$90, which is \$5 more than the price charged to the f.o.b. buyer.

107. See note 66 *supra*.

108. *Guyott Co. v. Texaco, Inc.*, 261 F. Supp. 942 (D. Conn. 1966).

109. *Id.*

110. The FTC view allows a seller to set his f.o.b. plant price below his true net cost, thereby discriminating against those buyers unable to take delivery at the plant. See, e.g., note 106 *supra*.

111. See note 50 *supra*.

price or an average freight cost deduction, a serious possibility of a Section 2(a) violation exists. Accordingly, assuming that achieving the goal of stimulating backhauls is desirable, sellers should be permitted to grant allowances from the uniform delivered price for the *actual* amount of freight costs saved.

VIII. Conclusion

The FTC opinion that a system of backhaul allowances from delivered prices would produce price discrimination in violation of Section 2(a) of the Robinson-Patman Act is not justified. The Commission has failed to account for the cost justification defense provided by Section 2(a), the effective availability of backhaul allowances to all buyers, and its own endorsement of price discrimination in uniform delivered price systems. The Commission has also ignored the public policy reasons in favor of backhauling: promoting efficiency, increasing competition while preventing monopoly, and conserving energy. The optimal method to encourage backhauling without violating the Robinson-Patman Act is to allow sellers to grant price reductions based upon actual cost savings. The FTC should rescind Advisory Opinion 147 and remove the impediment to backhauling by eliminating existing doubts about the legality of backhaul allowances.

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