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REGULATION OF BUSINESS-ROBINSON-PATMAN ACT-DEFENSE OF MEETING A COMPETITOR'S PRICE

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REGULATION OF BUSINESS—ROBINSON-PATMAN ACT—DEFENSE OF MEETING A COMPETITOR'S PRICE—Standard Oil sold gasoline to "jobber" customers at a price lower than that at which it sold to other customers in the area. The price differentials were not justified by lower costs. The jobbers made both wholesale and retail sales of the gasoline; some of them passed on the reduced prices by sales at less than the prevailing rates in the area. The F.T.C. held[1] that Standard's price differential violated section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.[2] Standard contended that the differential was established

[1] In the Matter of Standard Oil Co., 41 F.T.C. 263 (1945).

[2] ". . . 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 the effect of such discrimination

in good faith to meet an equally low price of a competitor, and the trial examiner made a finding supporting this contention. The F.T.C. made no finding on the point, holding that under the act,[3] the defense of meeting a competitor's price only rebuts the prima facie case that arises from a showing of discrimination, and that it is immaterial when, as here, there is affirmative proof that the discrimination injured, destroyed, and prevented competition.[4] The court of appeals affirmed.[5] On appeal, *held,* three justices dissenting,[6] reversed and remanded for a finding by the commission whether the price reduction was in good faith to meet the equally low price of a competitor.[7] Such a finding establishes a complete defense under the Robinson-Patman Act. *Standard Oil Co. v. Federal Trade Commission,* (U.S. 1951) 71 S.Ct. 240.

Under the original Clayton Act, lowering a price to meet competition was clearly a substantive defense.[8] The Robinson-Patman Act narrowed the scope of this defense and placed the provision in a procedural section.[9] The principal case marks the first time that the Court has considered the precise question of the effect of this change on the nature of the defense.[10] The legislative history

may be substantially . . . 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. . . ." 49 Stat. L. 1526 (1936), 15 U.S.C. (1946) §13(a).

[3] "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." 49 Stat. L. 1526 (1936), 15 U.S.C. (1946) §13(b).

[4] In the Matter of Standard Oil Co., supra note 1, at 283; see 49 MICH. L. REV. 261 (1950).

[5] Standard Oil Co. v. FTC, (7th Cir. 1949) 173 F. (2d) 210.

[6] Justice Minton, who wrote the opinion in the court of appeals, took no part in the consideration of the case before the Supreme Court.

[7] The Court indicates that the competitor's price must be "lawful." Principal case at 250. As to what constitutes proof of this defense, see: Corn Products Refining Co. v. FTC, 324 U.S. 726, 65 S.Ct. 961 (1945); FTC v. A. E. Staley Manufacturing Co., 324 U.S. 746, 65 S.Ct. 971 (1945); FTC v. Cement Institute, 333 U.S. 683, 68 S.Ct. 793 (1948); Berger and Goldstein, "Meeting Competition under the Robinson-Patman Act," 44 ILL. L. REV. 315 at 327 et seq. (1949).

[8] ". . . *Provided,* That nothing herein contained shall prevent . . . discrimination in price in the same or different communities made in good faith to meet competition. . . ." 38 Stat. L. 730 (1914), 15 U.S.C. (1934) §13.

[9] See note 3 supra.

[10] In FTC v. A. E. Staley Manufacturing Co., supra note 7, at 752, the Court said: "The change in language of this exception was for the purpose of making the defense a matter of evidence in each case, raising a question of fact as to whether the competition justified the discrimination." The Court there considered whether the evidence proved the defense, even though there was a finding of injury to competition. This seems to indicate that it was considered as absolute defense. See also Corn Products Refining Co. v. FTC, supra note 7; FTC v. Cement Institute, supra note 7. In Moss v. FTC, (2d Cir. 1945) 148

of this provision is confused,[11] and has been used to support both constructions.[12] As a matter of technical construction, either result is possible. In support of the Court's decision, it is argued that this defense is introduced by the same language (". . . nothing herein contained shall prevent . . .") as the other defenses in section 2(a) that are admittedly absolute.[13] The use of the term "justification" may indicate that it is absolute.[14] Also, logically, this may not be a rebuttal of a prima facie case, as it does not disprove the injury to competition; there may be injury even when this defense is shown.[15] It is argued too that otherwise the provision has little meaning, since the commission can easily establish a prima facie case.[16] It has been suggested that the other interpretation makes the provision unconstitutional,[17] but it is doubtful if this argument has validity today.[18] On the other hand, the provision is placed in a procedural section.[19] And the language here is not that "nothing herein contained shall prevent" such practice, but that "nothing herein contained shall prevent" rebutting a prima facie case in this manner.[20] And it is also said that otherwise the change made by the Robinson-Patman Act has no meaning.[21] If nothing else, these arguments indicate an ambiguity in the language which should be resolved on the grounds of

F. (2d) 378, cert. den., 326 U.S. 734, 66 S.Ct. 44 (1945), the court of appeals clearly considered this a complete defense.

Apparently the FTC had previously considered it an absolute defense also. Principal case at 248. See also Berger and Goldstein, "Meeting Competition under the Robinson-Patman Act," 44 ILL. L. REV. 315 at 317 (1949); Haslett, "Price Discriminations and Their Justifications under the Robinson-Patman Act of 1936," 46 MICH. L. REV. 450 at 476 (1948).

[11] In explaining this section to the House, Representative Utterback said: "This does not set up the meeting of competition as an absolute bar to a charge of discriminations under the bill. It merely permits it to be shown in evidence. This provision is entirely procedural. It does not determine substantive rights, liabilities, and duties." 80 CONG. REC. 9418 (1936). Cf. "The proviso permits the seller to meet the price actually previously offered by a local competitor." H. R. Rep. No. 2287, 74th Cong., 2d sess., p. 16 (1936).

[12] Principal case at 248-9, 253-6.

[13] Principal case at 245.

[14] See Berger and Goldstein, "Meeting Competition under the Robinson-Patman Act," 44 ILL. L. REV. 315 at 318 (1949); 62 HARV. L. REV. 1249 (1949).

[15] See Haslett, "Price Discriminations and Their Justifications under the Robinson-Patman Act of 1936," 46 MICH. L. REV. 450 at 477 (1948).

[16] See Berger and Goldstein, "Meeting Competition under the Robinson-Patman Act," 44 ILL. L. REV. 315 at 320 (1949); 50 HARV. L. REV. 106 (1936).

[17] See Fairmont Creamery Co. v. Minnesota, 274 U.S. 1, 47 S.Ct. 506 (1927); Wheeler, "Comments on the Robinson-Patman Act," 12 CONN. B. J. 171 (1938); Haslett, "Price Discriminations and Their Justifications under the Robinson-Patman Act of 1936," 46 MICH. L. REV. 450 (1948); 23 VA. L. REV. 140 at 166 (1936).

[18] See Berger and Goldstein, "Meeting Competition under the Robinson-Patman Act," 44 ILL. L. REV. 315 at 317 (1949); 62 HARV. L. REV. 1249 (1949).

[19] See 49 COL. L. REV. 863 (1949). However, it has been suggested that the defense was taken from section 2(a) and placed in section 2(b) since this provision, as amended, refers not only to violations of section 2(a), but also of section 2(e). Berger and Goldstein, "Meeting Competition under the Robinson-Patman Act," 44 ILL. L. REV. 315 at 320 (1949). See principal case at 245.

[20] Principal case at 257.

[21] Principal case at 251.

policy.[22] The dissent in the Supreme Court indicates a desire for a policy of strict enforcement of uniformity in prices by narrowing the exceptions that allow differentials.[23] On the other hand, the majority argues that the purpose of the anti-trust policy of the government, as shown by the Sherman and Clayton Acts, is to protect competition, whereas taking away this defense prevents competition in certain situations[24] and may cause hardship to the seller, as he must either cut his prices to all customers or lose this particular customer and perhaps have to raise other prices to compensate for the loss; either alternative may be ruinous to his business.[25] Thus there are valid economic and policy arguments for the decision of the Court. The construction given the provision by the majority then reaches a desirable result without doing violence to the ambiguous language of the Robinson-Patman Act. Any inconsistency with the policy of that act is slight, since this defense is still narrow in scope, as it can be used only as a defense and not as an offensive weapon in price wars.[26]

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[22] The dissenting justices admit that there are arguments to support the majority's conclusion. Principal case at 258.

[23] Principal case at 256 et seq.

[24] Principal case at 249-50.

[25] Principal case at 250.

[26] Principal case at 249. See Berger and Goldstein, "Meeting Competition under the Robinson-Patman Act," 44 ILL. L. REV. 315 (1949).