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THE Robinson-Patman Act was approved by the President on June 19, 1936. The purpose of the act was to amend section 2 of the Clayton Act, which prohibited price discriminations in interstate commerce. Congress, by amending section 2 of the Clayton Act, broadened the scope of the section by extending its purposes and prohibitions to price discriminations not formerly covered and by prohibiting other forms of discrimination which give favored purchasers undue cost advantages over their non-favored competitors. It also reduced the extent of requisite competitive injury.

When the act was passed, there was considerable debate as to its ultimate significance to business management. It was apparent that any seller marketing goods of like grade and quality in interstate commerce at different prices was in danger of being in violation of section 2(a) of the act. Brokerage fees, discounts, allowances, or other forms of compensation paid by sellers to buyers, to buyers' agents, intermediaries acting for buyers, or buyer-controlled intermediaries, were prohibited by the act. It was also apparent that the act required equality of treatment in furnishing services or facilities, or paying for them, where the seller's customers were in competition one with the other. Buyers who knowingly induced or received discriminations in price prohibited by section 2 were guilty of violating the act as was the seller who granted such discriminations.

At the passage of the act some believed that section 2(a) might be interpreted to require all sellers uniformly to maintain a single price plan of sale, thus displacing much of the pricing discretion of management and destroying one of the most relied-upon sales techniques.

After eleven years the fears of the act's antagonists are far from realized. Neither the Federal Trade Commission nor the courts have interpreted section 2(a) of the act as so universally applicable to all sellers in every situation that all price differentials are *per se* unlawful and can be condemned without separate regard to the competitive

* For a more comprehensive discussion see writer's paper presented at the Symposium on the Robinson-Patman Act before The Chicago Bar Association, January 24, 1947.

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factors in each situation. The commission and the courts have applied themselves to determining which competitive conditions condemn price discriminations under certain circumstances and which extenuate them under others.

It is believed that the immediate objective of the Federal Trade Commission in manifesting the significance of section 2(a) of the Robinson-Patman Act is to overcome a recent adverse decision of the Seventh Circuit Court of Appeals in *Morton Salt Co. v. Federal Trade Commission.*[1] This decision reversed the commission on the matter of requisite competitive effect and on the matter of burden of proof. Its overruling of earlier precedents developed by the commission has regenerated many issues as to the meaning of section 2(a) and has unsettled the interpretation and practical significance of this subsection of the act.

The year 1948 promises to be important for Robinson-Patman Act interpretation from the standpoint of two other cases now before the courts. The *Standard Oil* case,[2] pending in the Seventh Circuit Court of Appeals, will clarify the act's application to wholesalers and will determine whether the meeting of an equally low price of a competitor in good faith is a substantive defense to a violation of section 2(a) of the act. The *Cement Institute* case,[3] now before the Supreme Court for decision, involves, in part, the application of the Robinson-Patman Act to the basing point system of pricing when used by individual sellers and when used by sellers collectively, but it is doubtful how far the decision in this case will clarify the Robinson-Patman Act's interpretation in this respect. Recently the Supreme Court, in *Bruce's Juices, Inc. v. American Can Co.*,[4] held that a seller's violation of section 2(a) of the Robinson-Patman Act is no defense by a buyer to an action for the purchase price of merchandise.

Thus the Robinson-Patman Act in its twelfth year of existence is in a very important period of judicial review and construction. The exact significance of the act to business management cannot yet be told. Careful appraisal of the construction placed upon it to date by the Federal Trade Commission and the courts, however, reveals some points as to which its applicability has been conclusively settled. Such

[1] (C.C.A. 7th, 1947) 162 F. (2d) 949, cert. granted Jan. 12, 1948.

[2] Case No. 9211, C.C.A. 7th, F.T.C. Docket No. 4389, modified order issued Aug. 9, 1946.

[3] Federal Trade Commission v. The Cement Institute, Nos. 23-34, October Term, 1947, Supreme Court of the United States; Aetna Portland Cement Co. v. Federal Trade Commission, (C.C.A. 7th, 1946) 157 F. (2d) 533, 37 F.T.C. 87 (1943).

[4] 330 U.S. 743, 67 S.Ct. 1015 (1947).

appraisal increases appreciation of the factors of contention which in these coming months will determine the ultimate significance of the act and which might yet eventually lead to that universality of application apprehended by some persons when the act was passed.

I

SECTION 2(a)

Section 2(a) of the amended Clayton Act (the Robinson-Patman Act),[5] omitting its Provisos, now reads as follows:

> "That 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 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. . . ."

The elements of a violation under this section consist of: (1) commerce, (2) discrimination in price, and (3) effect on competition.

1. *Commerce*

The scope of the federal commerce power in the matter of price discriminations, and the extent to which Congress has exercised that power in the Robinson-Patman Act, have been liberally construed. In contrast with its decision concerning section 5 of the Federal Trade Commission Act,[6] the Supreme Court has decided that the Robinson-Patman Act applies both to price discriminations in interstate commerce and to those outside interstate commerce which affect or obstruct it.[7] The Supreme Court was guided by a quite clearly indicated intention of Congress relative to the jurisdictional scope of the act. Section 2(a)

[5] 49 Stat. L. 1526 (1936), 15 U.S.C. (1940) § 13, as amended.

[6] Federal Trade Commission v. Bunte Bros., Inc., 312 U.S. 349, 61 S.Ct. 580 (1941).

[7] Corn Products Refining Co. v. Federal Trade Commission, 324 U.S. 726, 65 S.Ct. 961 (1945).

of the Robinson-Patman Act applies "where either or any of the purchases involved in such discrimination are in commerce." In connection with this provision it was explained to the House of Representatives that its purpose was to ensure:

> " . . . extending the protections of this bill against the full evil of price discrimination, whether immediately in interstate or intrastate commerce, wherever it is of such a character as tends directly to burden or affect interstate commerce." [8]

Two United States district courts have held that the federal commerce power has a broad extent in the matter of price discriminations under the Robinson-Patman Act.[9] Both district courts have held the act applicable to sales of gasoline to wholesalers and retailers after shipment from another state and temporary storage awaiting sale. On the other hand, a third district court has held the act inapplicable to the retail sales of a local branch maintained by an out-of-the-state manufacturer.[10]

2. *Discrimination in price*

The act contains no definition of the word "discrimination." The meaning of "discrimination" under the Robinson-Patman Act was expressed to Congress by Congressman Utterback, Chairman of the House of Representatives' Subcommittee on the Patman Bill, as follows:

> "In its meaning as simple English a discrimination is more than a mere difference. Underlying the meaning of the word is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other. If the two are competing in the resale of the goods concerned, that relationship exists. Where, also, the price to one is so low as to involve a sacrifice of some part of the seller's necessary costs and profit as applied to that business, it leaves that deficit inevitably to be made up in higher prices to his other customers; and there, too, a relationship may exist upon which to base the charge of discrimination." [11]

[8] H.R. Rep. No. 2287, 74th Cong., 2d sess., p. 8 (1936).

[9] Alabama Independent Service Station Assn. v. Shell Petroleum Corp., (D.C. Ala. 1939) 28 F. Supp. 386; Midland Oil Co. v. Sinclair Refining Co., (D.C. Ill. 1941) 41 F. Supp. 436.

[10] Pittsburgh Plate Glass Co. v. Jarrett, (D.C. Ga. 1942) 42 F. Supp. 723.

[11] 80 CONG. REC. 9416 (1936).

The cases to date have substantiated Congressman Utterback's definition, and have developed certain elaborations upon it. Whereas the definition speaks of a relationship between the purchasers involved, the act is also concerned with the relationship between the seller and his own competitors, known as "primary line" competition.

A price discrimination, for purposes of the Robinson-Patman Act, may be summarized as a difference in price, primarily the seller's responsibility,[12] which is effectuated under competitive conditions existing either between the seller and other sellers, between the favored purchaser and other purchasers, or between customers of any of such purchasers. Every difference in price is not necessarily a discrimination.[13]

(a) *Primary line competition.* The act prohibits differences under circumstances where the effect may be to injure a seller's own competitors. This position has been sustained by the courts in three decisions.[14] The pending *Cement Institute* case,[15] and many others in the delivered price field, also concern first-line competition.

A seller is prohibited under section 2(a) of the statute from lowering his price in a certain market, or markets, for the purpose of eliminating a competitor, while at the same time maintaining a higher price in other markets where the competition of the competitor is not encountered.[16] This is the significance of the *Muller* and *Metz* cases.[17] The *Moss* case[18] concerns unlawful discriminations granted favored purchasers within given markets. In these cases the commission attacked the discriminations because of their injurious effect on the seller's own competitors, and the courts in the *Muller* and *Moss* cases sustained the commission's position in this regard.

[12] The writer believes that in some instances a seller's price may be fixed by the buyer who knowingly induces and receives a discrimination in price in violation of section 2(f) of the act.

[13] This is similar to the interpretation placed upon the word "discrimination" under the Interstate Commerce Act. McCollester, "Section 2(b)," N.Y. STATE BAR ASSN. ROBINSON-PATMAN ACT SYMPOSIUM 23 at 26 (1946).

[14] E. B. Muller & Co. v. Federal Trade Commission, (C.C.A. 6th, 1944) 142 F. (2d) 511, 33 F.T.C. 24 (1941); Samuel H. Moss, Inc. v. Federal Trade Commission, (C.C.A. 2d, 1946) 155 F. (2d) 1016, (C.C.A. 2d, 1945) 148 F. (2d) 378, 36 F.T.C. 640 (1943); Midland Oil Co. v. Sinclair Refining Co., (D.C. Ill. 1941) 41 F. Supp. 436.

[15] Nos. 23-34, October Term, 1947, Supreme Court of the United States.

[16] This is expressly forbidden by § 3 of the Robinson-Patman Act, 49 Stat. L. 1526 at 1528 (1936), 15 U.S.C. (1940) § 13a.

[17] E. B. Muller & Co. v. Federal Trade Commission, (C.C.A. 6th, 1944) 142 F. (2d) 511; Metz Bros. Baking Co., 30 F.T.C. 268 (1939).

[18] (C.C.A. 2d, 1946) 155 F. (2d) 1016, modifying 148 F. (2d) 378.

(b) *Second and third line competition*

(1) *What constitutes second and third line competition?* Second line competition is that which exists between customers of a given seller. A large percentage of the proceedings brought by the Federal Trade Commission under section 2(a) of the Robinson-Patman Act have involved second line competition. Third line competition is that which involves customers of such purchasers.

Parties are competitors for purposes of the act if each is attempting to resell the goods in question within the same marketing area to the same general class of customers. This is true, even though one such party may market through a cash and carry super-market, another may market through a neighborhood outlet featuring delivery services, and, according to two recent Federal Trade Commission proceedings, a third may market through vending machines.[19] In a recent case it was argued that ball park concessionaires are competitors of ordinary candy retailers.[20]

It is not necessary that two purchasers compete in direct resale of the goods concerned in order to be in competition within the meaning of the act. They are in competition if they compete in the sale of products manufactured in part from the goods concerned.[21] Nor need purchasers be located in the same cities in order to be in competition within the meaning of the act. Manufacturers in different cities may market their products in nation-wide competition. Wholesalers and retailers in different cities may compete in overlapping territories, or may compete against chain stores, mail order houses, and similar organizations.[22]

(2) *Functional classification.* Functional discounts are those given wholesalers, retailers, and other types of distributors according to their respective distributive functions. The position of the Federal Trade Commission appears to be that such discounts are not discriminatory

[19] Morton Salt Co. v. Federal Trade Commission, (C.C.A. 7th, 1947) 162 F. (2d) 949, affirming 39 F.T.C. 35 (1944), order modified April 14, 1945. See Brief for Respondent, p. 29; see also Brief for Respondent, p. 12, Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 67 S.Ct. 1015 (1947). Concerning vending machines: Curtiss Candy Co., F.T.C. Docket No. 4673, order issued November 12, 1947; Automatic Canteen Co. of America, F.T.C. Docket No. 4933, complaint issued March 19, 1943.

[20] Brief for Commission, pp. 11 ff., 23 ff., Curtiss Candy Co., ibid.

[21] Corn Products Refining Co., 324 U.S. 726, 65 S.Ct. 961 (1945), affirming 34 F.T.C. 850 (1942).

[22] Corn Products Refining Co., ibid; Agricultural Laboratories, 26 F.T.C. 296 (1938).

within the meaning of the Robinson-Patman Act, because the recipients are not in competition with purchasers performing other functions who do not receive them.[23]

Many purchasers perform dual functions of both a wholesaler and retailer nature. In such situations, according to the commission in several cases,[24] sellers may grant discounts only on such part of a purchaser's business actually performed under the function for which the discount is accorded. In the *Standard Oil* case,[25] the commission found that Standard Oil was granting wholesaler prices to four "jobbers," who, in addition to their wholesale business, were operating retail service stations for the sale of gasoline to the public. The commission ordered Standard Oil to cease granting the wholesaler discount to such jobbers on the gasoline being resold at retail.

This matter entails a serious problem as to how a seller is going to keep combined wholesaler-retailers from reselling, at retail, articles which have been bought under a wholesaler discount. The seller can either refuse to sell to all such distributors, or can sell to them entirely on a retailer price basis. It is also probable that he can continue to sell to such distributors on a dual-price basis, and vindicate himself under the act, if he requires good faith proof as to the amount of each such distributor's purchases procured for resale at wholesale and the amount procured for resale at retail.[26]

[23] The commission has reviewed functional discounts in several cases, but has never held them unlawful *per se*. See cases cited in note 24, infra. For discussion of validity of functional discounts under section 2 of the Clayton act prior to its amendment, and of legislative history of the Robinson-Patman Act concerning functional discounts, see Shniderman, " 'The Tyranny of Labels'—A Study of Functional Discounts under the Robinson-Patman Act," 60 HARV. L. REV. 571 (1947). Arbitrary customer classification in order to justify different prices is no doubt unlawful if the purchasers are performing the same function and are seeking to sell the product to the same general class of customers.

But see discussion of Standard Oil case, infra, p. 461.

[24] Standard Oil Co., Case No. 9211, C.C.A. 7th, F.T.C. Docket No. 4389, modified order issued August 9, 1946; American Art Clay Co., 38 F.T.C. 463 (1944); Hansen Inoculator Co., Inc., 26 F.T.C. 303 (1938); Nitragin Co., Inc., 26 F.T.C. 320 (1938); Urbana Laboratories, 26 F.T.C. 312 (1938); Sherwin-Williams Co., 36 F.T.C. 25 (1943); Nutrine Candy Co., 30 F.T.C. 115 (1939); American Oil Co., 29 F.T.C. 857 (1939).

[25] Ibid.

[26] The findings and order to cease and desist in Sherwin-Williams Co., 36 F.T.C. 25 at 65 ff. (1943), indicate that a seller must be critical in his acceptance of purchasers' evidence as to business done under each of more than one function. See also Shniderman, " 'The Tyranny of Labels'—A Study of Functional Discounts under the Robinson-Patman Act," 60 HARV. L. REV. 571 at 601 (1947). As to whether a seller may conflict with the Sherman Act in efforts to keep wholesaler-retailers from

A related problem is that of granting functional discounts to wholesalers who are owned by retailers with whom they do part or all of their business, and vice versa.[27] The situation is similar to that of combined wholesaler-retailers except that two separate entities are involved. The problem is likewise similar to that of the brokerage cases under section 2(c) of the act and probably can be resolved on the basis of decisions under that section, as well as on the basis of the *Standard Oil* case. If a wholesaler is owned 100 per cent by a given retailer, or if both are 100 per cent owned by the same financial interest, the real party in interest receives a price advantage in the retail business on goods purchased at the wholesale price and resold through the retail outlets. Where there are different degrees of ownership of the wholesaler or of the retailer, the question becomes more difficult of ascertainment. Such cases would seem to be determined by the cases under section 2(c) which hold that if brokerage payments in any way ultimately accrue to the benefit of buyers, or of any party financially interested in such buyers, the payments are unlawful.[28]

(c) *Undue burden of costs.* In Congressman Utterback's hereinabove quoted definition he speaks of a price to one purchaser being so low as to cast an undue burden of costs on other purchasers or classes of purchasers. This is exemplified in the recently amended complaint against Champion Spark Plug Company.[29] The complaint alleges:

> " . . . customers who have paid 21 cents . . . per plug have been compelled to thereby subsidize in part other buyers who paid respondent only 6 cents per plug. . . . Therefore, respondent's practice of selling its spark plugs for original equipment below cost places upon its purchasers of spark plugs for replacement the

abusing functional discounts, see Van Cise, "Functional Prices," N.Y. STATE BAR ASSN., ROBINSON-PATMAN ACT SYMPOSIUM 89 at 102 (1947).

[27] This is well illustrated by Paragraph 17, D, of the complaint in Sherwin-Williams Co., 36 F.T.C. 25 (1943). However, the commission dismissed this section of the complaint without prejudice.

[28] Webb-Crawford Co. v. Federal Trade Commission, (C.C.A. 5th, 1940) 109 F. (2d) 268, cert. den., 310 U.S. 638, 60 S.Ct. 1080 (1940), affirming 27 F.T.C. 1099 (1938); Modern Marketing Service, Inc. v. Federal Trade Commission, (C.C.A. 7th, 1945) 149 F. (2d) 970, affirming 37 F.T.C. 386 (1943); Reeves Parvin & Co., 28 F.T.C. 1429 (1939); Reed-Harlin Grocer Co., 33 F.T.C. 1114 (1941); Thomas Page Mill Company, Inc., 33 F.T.C. 1437 (1941); Miles Brokerage Co., 33 F.T.C. 1580 (1941); Parr Sales Co., 31 F.T.C. 1286 (1940).

[29] F.T.C. Docket No. 3977, complaint issued December 16, 1939, amended June 27, 1937. See also General Motors Corp., F.T.C. Docket No. 3886, complaint issued Sept. 8, 1939.

unjust . . . burden of paying a price made higher . . . so as to carry the loss . . . on the said . . . sales at 6 cents per plug."

This theory of discrimination has received little development up to the present time. The theory has been suggested in certain of the delivered price cases.[30] Its potentialities are significant for those situations in which sellers discriminate between consumers who are not actually in competition with each other.

(d) *Indirect discrimination in price.* The act, by its own terms, covers price discriminations which are effectuated by indirect means, as well as those made directly. The Supreme Court has held that terms of sale are covered by the act where their effect is indirect discrimination in price.[31] In that instance the discriminations resulted from allowing certain purchasers more time to take up favorable options. Other types of indirect discrimination considered in other cases include: free goods given to purchasers,[32] free goods given to customers of purchasers,[33] freight allowances,[34] privilege of returning deteriorated goods,[35] and excessive payments for purported services.[36]

(e) *Discrimination in "mill net" price.* A controversial issue concerns the application of the Robinson-Patman Act to delivered prices. It is disputed whether the act is concerned with actual delivered prices or is concerned, instead, with sellers' "mill net" realizations at their

[30] See infra, note 43.

[31] Corn Products Refining Co. v. Federal Trade Commission, 324 U.S. 726, 65 S.Ct. 961 (1945).

[32] Republic Yeast Corp., 33 F.T.C. 701 (1941); National Grain Yeast Corp., 33 F.T.C. 684 (1941); Federal Yeast Corp., 33 F.T.C. 1372 (1941).

[33] Curtiss Candy Co., F.T.C. Docket No. 4673, order issued November 12, 1947; Dentists Supply Co., 37 F.T.C. 345 (1945). This might be condemned under § 2(e) of the act.

[34] Agricultural Laboratories, Inc., 26 F.T.C. 296 (1938); Urbana Laboratories, 26 F.T.C. 312 (1938); Master Lock Co., 27 F.T.C. 982 (1938).

[35] Agricultural Laboratories, Inc., 26 F.T.C. 296 (1938). Although condemned by the Federal Trade Commission under § 2(a) of the act, this practice might be prosecuted under § 2(e) of the act.

[36] Curtiss Candy Co., F.T.C. Docket No. 4673, order issued November 12, 1947; Miami Wholesale Drug Corp., 28 F.T.C. 485 (1939); Golf Ball Mfgrs.' Assn., 26 F.T.C. 824 (1938). There is a tenuous line of demarcation between indirect price discriminations unlawful under § 2(a) of the Robinson-Patman Act and discriminations unlawful under § 2(d) and § 2(e), relating to the payment for services or the rendering of services. It is argued by counsel for the commission in the Curtiss case (Brief, p. 41) that § 2(d) is differentiated from § 2(a) in that § 2(d) is concerned with services for which there is reasonable compensation, while § 2(a) is concerned with excessive payments for services. Section 2(e) may be differentiated from § 2(a) in that § 2(a) is concerned with services which immediately affect price, such as the allowance of free goods, while § 2(e) is concerned with less proximate services, such as the furnishing of demonstrators or other sales aids.

factories, after deduction of actual transportation costs to each purchaser.[37]

Common basing points and the concerted use of uniform delivered price systems have been condemned in several decisions and pending complaints by the Federal Trade Commission as instruments for the suppression of price competition by members of an industry.[38] Discriminatory "factory" or "mill net" returns, realized after deduction of actual transportation expenses to each purchaser, have frequently been discussed in these cases, but in none of them has the commission ever relied specifically upon the "mill net" theory in holding the systems unlawful.

Discriminations under the basing point system of pricing, wholly apart from agreement to maintain identical pricing, were enjoined by the Federal Trade Commission under section 2(a) of the Robinson-Patman Act in the *Corn Products*[39] and *A. E. Staley*[40] cases. In each

[37] For an excellent discussion of the application of the Robinson-Patman Act to delivered prices, see following: Austern, "The Legal Geography of Price" (before National Association of Purchasing Agents, June 3, 1947); Wooden, "The Delivered Price, Generally," N.Y. STATE BAR ASSN., ROBINSON-PATMAN ACT SYMPOSIUM 37 (1947), and Dunn, "The Validity of a Delivered Price," id. 13; Hinds, "Uniform Delivered Prices under Section 2(a)," N.Y. STATE BAR ASSN., ROBINSON-PATMAN ACT SYMPOSIUM 83 (1946); and 55 YALE L. J. 558 (1946).

[38] Under § 5 of the Federal Trade Commission Act alone: Inter alia, National Crepe Paper Assn. of America, 38 F.T.C. 282 (1944), affd., sub. nom. Fort Howard Paper Co. v. Federal Trade Commission, (C.C.A. 7th, 1946) 156 F. (2d) 899, cert. den., 329 U.S. 795, 67 S.Ct. 481 (1946); Milk and Ice Cream Can Institute, 37 F.T.C. 419 (1943), affd., (C.C.A. 7th, 1946) 152 F. (2d) 478; United States Maltsters Assn., 35 F.T.C. 797 (1942), order modified, 37 F.T.C. 342 (1943), affd., (C.C.A. 7th, 1945) 152 F. (2d) 161; Salt Producers Assn., 34 F.T.C. 38 (1941), order affd. with modification, (C.C.A. 7th, 1943) 134 F. (2d) 354, order modified 37 F.T.C. 339 (1943); Rigid Steel Conduit Assn., 38 F.T.C. 534 (1944), petition for review Case No. 8644, C.C.A. 7th; Ferro Enamel Corp., F.T.C. Docket No. 5155, order issued Feb. 26, 1946; American Iron and Steel Institute, F.T.C. Docket No. 5508, complaint issued Aug. 16, 1947, amended Nov. 14, 1947. Under § 2(a) Robinson-Patman Act and § 5 Federal Trade Commission Act: Inter alia, Cement Institute, Nos. 23-34, October Term, 1947, Supreme Court of the United States; United Fence Manufacturers Assn., 27 F.T.C. 377 (1938); Cast Iron Soil Pipe Assn., F.T.C. Docket No. 3091, complaint issued March 26, 1937; Chain Institute, Inc., F.T.C. Docket No. 4878, complaint issued December 22, 1942; American Refractories Institute, F.T.C. Docket No. 4900, complaint issued February 5, 1943; National Lead Co., F.T.C. Docket No. 5253, complaint issued November 25, 1944; Clay Products Assn., F.T.C. Docket No. 5483, complaint issued February 14, 1947; Clay Sewer Pipe Assn., F.T.C. Docket No. 5484, complaint issued February 14, 1947; Corn Products Refining Co., F.T.C. Docket No. 5502, complaint issued June 24, 1947.

[39] 324 U.S. 726, 65 S.Ct. 961 (1945), affirming 34 F.T.C. 850 (1942).

[40] Federal Trade Commission v. A. E. Staley Manufacturing Co., 324 U.S. 746, 65 S.Ct. 971 (1945); 34 F.T.C. 1362 (1942).

case the Supreme Court referred, in part, to the discriminatory "mill nets" received by Corn Products and Staley in their use of basing points other than point of shipment, but affirmed the commission's orders on the ground that there were differences in the delivered prices, which could not be justified by the sellers.

The "mill net" theory of price discrimination, thus, although frequently referred to, has not been determinative in any of the cases decided so far.[41] Its evident potentialities concerning the validity of delivered price systems, however, cannot be discounted.

In this regard, it may be important that the commission has proceeded only twice against delivered price systems where such systems were not used as instruments by sellers, acting in concert, to control prices. In both cases, there was injury in the second line of competition, the respective purchasers being in competition with each other on a nation-wide basis. Thus, unless second-line competition is affected, the commission may be antagonistic to delivered price systems only where they are a means of collusive price maintenance by sellers. Delivered price systems, independently arrived at and individually maintained by sellers, may in many industries be of no concern to the Federal Trade Commission.[42]

Some caution is required in accepting this conclusion, however, in view of the repeated assertion in recent complaints that the effect of delivered price systems is to deprive nearby purchasers of their natural freight advantages and to make such customers bear part of the freight to distant purchasers.[43] This is reflective of the "undue

[41] The "mill net" theory of price discrimination has been raised in both the pending Cement Institute case, Nos. 23-34, Oct. Term, 1947, Supreme Court of the United States and the pending review of the Rigid Steel Conduit Assn. case, 38 F.T.C. 534 (1944), petition for review Case No. 8644, C.C.A. 7th. However, the commission's orders in both cases are directed against concerted action to maintain "matched" delivered prices, and it is doubtful whether either case will bring a determination on the "mill net" issue.

[42] Dr. Corwin D. Edwards in his comments and discussion before the New York State Bar Association, N.Y. STATE BAR ASSN., ROBINSON-PATMAN ACT SYMPOSIUM 57 at 58 (1947), suggests that delivered price systems may be objectionable only where they are instruments of collusion, except in the case of basing points, which may be undesirable because of certain economic consequences of their use.

[43] The Milk and Ice Cream Can Institute, 37 F.T.C. 419 (1943), affd., (C.C.A. 7th, 1946) 152 F. (2d) 478; Rigid Steel Conduit Assn., 38 F.T.C. 534 (1944), petition for review Case No. 8644, C.C.A. 7th; American Iron and Steel Institute, F.T.C. Docket No. 5508, complaint issued Aug. 16, 1947, amended Nov. 14, 1947; Corn Products Refining Co., F.T.C. Docket No. 5502, complaint issued June 24, 1947; Chain Institute, Inc., F.T.C. Docket No. 4878, complaint issued Dec. 22, 1942; Clay Products Assn., F.T.C. Docket No. 5483, complaint issued Feb. 14, 1947; Clay Sewer Pipe Assn., F.T.C. Docket No. 5484, complaint issued Feb. 14, 1947.

burden of costs" theory, heretofore referred to, of Congressman Utterback. This language may portend a new inclination of the Federal Trade Commission in the delivered price field, under which few, if any, delivered price systems could be absolved.

The commission's "mill net" theory, in such case, would come into full play and would require a clear-cut determination by the courts. Basing point delivered prices might be proceeded against without reliance on the theory, but the uniform delivered price system could only be invalidated by use of the theory. The decisive test may eventuate out of any of a group of recent complaints, all of which involve uniform delivered prices within given zones.[44]

(f) *Discrimination in price affecting third line competition.* The problem of discrimination affecting third line competition is among the most challenging in the enforcement of the Robinson-Patman Act. The act by its terms is specifically concerned with the effect on competition "with customers of either" the seller or the purchaser. The significance of this provision from the Federal Trade Commission's findings and orders, appears to be that there may be unlawful price discrimination where a price difference exists between any person purchasing directly from a seller and a competitor of such person who purchases indirectly through a seller's customer.

The *Standard Oil* case[45] is important on this problem. The case concerns Standard Oil's sales of gasoline to wholesalers at one and one-half cents per gallon lower than sales to retailers. The wholesalers, in turn, resold the gasoline at prices which enabled their customers to obtain the gasoline at lower prices than retailers who purchased directly from Standard Oil. Standard Oil was ordered to cease and desist from selling gasoline to wholesalers "at a price lower than respondent charges its retailer-customers who in fact compete . . . with the retailer customers of such jobbers or wholesalers," if the wholesalers resell at lower prices to their retailer-customers than charged by Standard Oil to its own retailer-customers.

The order appears to require the seller either to limit direct sales

[44] Chain Institute, Inc., ibid; National Lead Co., F.T.C. Docket No. 5253, complaint issued Nov. 25, 1944; Corn Products Refining Co., F.T.C. No. 5502, complaint issued June 24, 1947; Clay Products Assn., ibid; Clay Sewer Pipe Assn., ibid.

[45] Case No. 9211, C.C.A. 7th, F.T.C. Docket No. 4389, modified order issued Aug. 9, 1946. For discussion of Standard Oil case on this problem, see Shniderman, " 'The Tyranny of Labels'—A Study of Functional Discounts under the Robinson-Patman Act," 60 HARV. L. REV. 571 at 598 (1947) and Van Cise, "Functional Prices," N.Y. STATE BAR ASSN., ROBINSON-PATMAN ACT SYMPOSIUM 89 at 97, 102 (1947).

to one class of customers alone, or else to stand ready to sell directly to all retailers at the retail prices set by the wholesalers. This leaves the pricing initiative in the hands of the wholesalers. It may be possible for the seller to retain the initiative and control the resale prices of the wholesalers by the threat of withdrawing trade, but this would involve serious risks under present construction of the Sherman and Federal Trade Commission Acts, unless the Robinson-Patman Act is to be considered as making an exception to those acts.

The *Morton Salt* case[46] involved the converse situation. Morton sold to certain large chain retailers at lower prices than it sold to wholesalers. The result was that retailers buying through wholesalers were required to pay higher prices for the salt than the chain retailers who purchased directly. The order to cease and desist required Morton to cease "selling such products to any retailer at prices lower than prices charged wholesalers whose customers compete with such retailers."[47]

An inevitable issue is whether there may be price discrimination where wholesalers and retailers are sold at the same price. Customers of the wholesalers must necessarily in this situation pay a higher price for the article in question than retailers who purchase directly. While it is true that there is no difference in the seller's own prices, the price difference which is important is that which exists between the competing retailers who purchase directly and those who purchase indirectly through the wholesalers. It is to be noted, however, that the order in the *Morton Salt* case leaves open this very type of situation. Thus, if sustained, the order may be authority for the proposition that the act does not apply to situations in which the seller grants the same price to wholesalers and retailers. The case of *Bird and Son, Inc.*[48] appears to be authority to the same effect.

It is believed, however, that sellers who sell to both wholesalers and retailers at the same price must hold themselves out to accept orders from all retailers who seek to purchase directly and who compete with retailer customers of the wholesalers. It is possible that the right to purchase directly from a seller in such circumstances may be a "service" or "facility" which under section 2(e) of the act, must be accorded on proportionally equal terms to all purchasers. Likewise,

[46] (C.C.A. 7th, 1947) 162 F. (2d) 949, affirming 39 F.T.C. 35 (1944), order modified April 14, 1945.

[47] See also C. F. Sauer Co., 33 F.T.C. 812 (1941); Curtiss Candy Co., F.T.C. Docket No. 4673, order issued November 12, 1947.

[48] 25 F.T.C. 548 (1937).

it may be that the act requires a seller to accept direct orders from all would-be direct purchasers where the result otherwise would be price inequality among such purchasers. Section 2(a) of the Robinson-Patman Act provides:

> " . . . Nothing herein contained shall prevent presons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade. . . ."

The implication from this is that the statute does prevent a selection of customers where such selection is in "restraint of trade." Where a seller's policy is an effort to realize favorable prices to large customers, it is probable that this favoritism, violating the spirit of the Robinson-Patman Act, is, for purposes of the act, in "restraint of trade."

(g) *Seller's final responsibility for price difference.* The Federal Trade Commission has indicated in certain decisions that price differentials are not discriminations within the meaning of the Robinson-Patman Act if non-favored purchasers have had equal opportunity to receive the favorable prices on fair terms, but have failed to take advantage of them for reasons of their own. In the *Kraft-Phenix* case[49] the commission upheld a quantity discount offered purchasers who ordered a certain quantity of cheese and salad dressings equal to a two or three weeks' supply for a small grocer. The commission said:

> " . . . a retailer who wishes to do so may safely buy a two or three weeks' supply at one time without fear of spoilage.
>
> "Although, even under these conditions, an appreciable number of retailers do not obtain the discount, the Commission does not believe that the respondent is required by law to make no distinction between these and other retailers. . . ."[50]

Reflecting, in part, the above principle, there has been little question under the act about the validity of "cash discounts." These discounts are granted for payment within a designated time, and are customarily offered to all purchasers alike.[51] Similarly, "unit delivery discounts"—those based on quantities delivered at a given time—have

[49] 25 F.T.C. 537 (1937).

[50] Id. at 544 (1937). See also American Optical Co. case, 28 F.T.C. 169 (1939).

[51] In the following cases cash discounts were held unlawful, because offered to certain purchasers and not to others: Republic Yeast Corp., 33 F.T.C. 701 (1941); National Grain Yeast Corp., 33 F.T.C. 684 (1941); Federal Yeast Corp., 33 F.T.C. 1372 (1941).

been little affected by the act. If the quantity limits are not large, all purchasers are ordinarily in equal position to take advantage of the discounts. Unit delivery discounts are probably also justifiable under other provisions of the statute.[52]

Discounts are commonly granted on the basis of aggregate volume of purchases placed with sellers over given periods of time. These so-called "quantity discounts" have been consistently regarded as discriminatory in most situations by the Federal Trade Commission.[53] Only in rare circumstances, such as those of the *Kraft* case, can aggregate quantity limits be set effectively within the capacity of smaller competitors to attain.

The Morton Salt Company took issue with the commission concerning standard quantity discounts before the Circuit Court of Appeals.[54] The company argued that standard quantity discounts are not discriminatory, because they are made known to all purchasers and are made available on conditions beyond a seller's control. There is language in the court's opinion which might sustain the company's argument, but no specific determination was made on the point.

The commission has reflected the *Kraft* principle, but with questionable significance, in its emphasis in many of the quantity discount cases. The commission has condemned the practice of allowing separate purchasers to combine their purchases for the purpose of qualifying for quantity discounts.[55] It has also disapproved discounts based on the aggregate purchases of members of buyer cooperatives,[56] or on the

[52] Infra, "Justifications Under the § 2(a) Provisos." Several economic advantages of unit delivery discounts are demonstrated in De Birny, "Price Discrimination under the Robinson-Patman Act," (before Annual Convention of National Preservers Association, January 20, 1941), citing W.H.S. Stevens.

[53] H. C. Brill Co., Inc., 26 F.T.C. 666 (1938); Morton Salt Co. v. Federal Trade Commission, (C.C.A. 7th, 1947) 162 F. (2d) 949, affirming 39 F.T.C. 35 (1944); Standard Brands, Inc., 30 F.T.C. 1117 (1940); American Optical Co., 28 F.T.C. 169 (1939); C. F. Sauer Co., 33 F.T.C. 812 (1941); Simmons Co., 29 F.T.C. 727 (1939); Sherwin-Williams Co., 36 F.T.C. 25 (1943); National Biscuit Co., 38 F.T.C. 213 (1944); Caradine Hat Co., 39 F.T.C. 86 (1944); Ferro Enamel Corp., F.T.C. Docket No. 5155, order issued Feb. 26, 1946; John B. Stetson Co., F.T.C. Docket No. 5172, order issued Oct. 8, 1945; Minneapolis-Honeywell Regulator Co., F.T.C. Docket No. 4920, order isued January 26, 1948; International Salt Co., F.T.C. Docket No. 4307, complaint issued Sept. 9, 1940; Jacques Kreisler Mfg. Co., F.T.C. Docket No. 5446, complaint issued June 17, 1946.

[54] Morton Salt Co., (C.C.A. 7th, 1947) 162 F. (2d) 949, affirming 39 F.T.C. 35 (1944), order modified April 14, 1945.

[55] Morton Salt Co., ibid.; International Salt Co., F.T.C. Docket No. 4307, complaint issued September 9, 1940; C. F. Sauer Co., 33 F.T.C. 812 (1941); Minneapolis-Honeywell Regulator Co., F.T.C. Docket No. 4920, order issued January 26, 1948.

[56] Standard Brands, Inc., 30 F.T.C. 1117 (1940); Simmons Co., 29 F.T.C. 727

aggregate purchases of several principals acting through buying agents;[57] and those discounts which have been offered chain organizations on the basis of aggregate purchases of all units of such chains, rather than on the basis of separate purchases of each unit.[58] The result of compliance with these objections of the commission would be greater equality among purchasers in qualifying for the quantity discounts concerned. This, however, would by no means assure that the discounts were so accessible to small purchasers that small purchasers could have free volition in the matter of taking advantage of the discounts or of passing them up.

(h) *Goods of like grade and quality.* Price differentials do not constitute discriminations prohibited by the Robinson-Patman Act unless they exist on articles of "like grade and quality." Goods are probably of like grade and quality, not only where they conform to the same specifications, but also where, though not of the same specifications, they give substantially identical performance and are held out by the seller as of the same quality.

The Federal Trade Commission now has before it the question whether the designation of different brand names for goods of like grade and quality differentiates such goods into goods of separate grade and quality. According to two pending complaints, goods of like quality sold under different brands must be sold at the same price.[59] This is also true as to goods sold for distribution under purchasers' private brands.[60]

The commission has held that where goods of like grade and quality are sold in different sizes or types of package, the privilege of buying each size or package is a "service" or "facility," which, under section 2(e) of the act must be accorded to all purchasers on proportionally equal terms.[61] It may be that, by the same principle, all purchasers

(1939); Caradine Hat Co., 39 F.T.C. 86 (1944); Jacques Kreisler Mfg. Co., F.T.C. Docket No. 5446, complaint issued June 17, 1946.

[57] Simmons Co., ibid.

[58] Standard Brands, Inc., 30 F.T.C. 1117 (1940); C. F. Sauer Co., 33 F.T.C. 812 (1941); Simmons Co., ibid; Sherwin-Williams Co., 36 F.T.C. 25 (1943); Morton Salt Co. v. F.T.C., (C.C.A. 7th, 1947) 162 F. (2d) 949, affirming 39 F.T.C. 35 (1944); National Biscuit Co., 38 F.T.C. 213 (1944); John B. Stetson Co., F.T.C. Docket No. 5172, order issued Oct. 8, 1945.

[59] Hood Rubber Co., F.T.C. Docket No. 4971, complaint issued June 1, 1943; U. S. Rubber Co., F.T.C. Docket No. 4972, complaint issued June 1, 1943.

[60] U.S. Rubber Co., 28 F.T.C. 1489 (1939); U.S. Rubber Co., F.T.C. Docket No. 4972, complaint issued June 1, 1943; Hood Rubber Co., ibid; Hansen Inoculator Co., Inc., 26 F.T.C. 303 (1938).

[61] Luxor, Ltd., 31 F.T.C. 658 (1940).

must be given "proportionally equal" opportunity to buy each of a seller's different brands, thus preventing the restriction of popular brands to favored purchasers. It was asserted during the Congressional hearings on the Patman Bill that all purchasers must have equal opportunity to purchase under private brands.[62]

3. *Effect on competition*

Price discriminations are not unlawful under the Robinson-Patman Act unless their 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. . . ."

Congress augmented the earlier philosophy of the antitrust acts concerning requisite competitive effect, by adding to the language of the Robinson-Patman Act the phrase "to injure, destroy, or prevent competition." No longer was it necessary to prove that competition had been substantially burdened in any line of commerce, and no longer was the status of competition a primary matter of concern, as under the Sherman Act and earlier interpretations of the Clayton and Federal Trade Commission Acts.

The Supreme Court has held[63] that, since the act is concerned with discriminations where the effect "may be" to injure competition, it is not necessary for the Federal Trade Commission to prove actual injury to competition. The court further held that the requirements of the act are met by an "inference" that discriminations constitute "a substantial threat to competition."[64]

The far-reaching potentialities of subordinating the competitive effect provision of the Robinson-Patman Act have been somewhat restricted by the Seventh Circuit Court of Appeals in the *Morton Salt* case.[65] The court interpreted the Supreme Court's ruling as implicitly conditioned on the probability that favored customers would use their advantages for the purposes of price-cutting, and on the probability that

[62] Hearings before House Committee on H.R. 8442, 74th Cong., 2d sess., pp. 355, 469 (1936). For interesting discussion of "like grade and quality," see WASHINGTON POST, THE ROBINSON-PATMAN ACT, ITS HISTORY AND PROBABLE MEANING 16 (1936), citing W. A. Thorp.

[63] Corn Products Refining Co. v. Federal Trade Commission, 324 U.S. 726, 65 S.Ct. 961 (1945).

[64] Cf. the Supreme Court's recent interpretation of requisite competitive effect under § 3 of the Clayton Act and § 1 of the Sherman Act. It was held that "it is unreasonable, *per se*, to foreclose competitors from any substantial market." International Salt Co., Inc. v. United States, (U.S. 1947) 68 S.Ct. 12 at 15.

[65] (C.C.A. 7th, 1947) 162 F. (2d) 949, cert. granted January 12, 1948.

such price-cutting would force non-favored customers to reduce their prices in order to stay in competition. The court also held that the commission's inference can be rebutted by proof that there has been no price-cutting or that the financial returns of non-favored customers have not suffered in comparison with those of favored customers.

The commission had given cognizance to these contentions in earlier decisions and had denied their validity.[66] Whether or not favored purchasers actually use discriminations to win business away from non-favored purchasers by price-cutting is immaterial, the commission holds, because the favored purchasers' greater margins of profit give them advantages which may be used in other ways to strengthen their competitive standings. The favored purchasers can re-invest their added profits in increased salaries, expanded sales and service forces, more extensive advertising, improved premises, and other factors which strengthen their ability to compete against their rivals. In the *Morton* case[67] it was testified that rebates received on certain grocery items might be used for price-cutting on important other items having a greater consumer acceptance. In the *Curtiss* case[68] it has been testified that favored vending machine operators were able by virtue of better prices to outbid non-favored competitors for the most advantageous vending machine locations in railroad depots and other public places.

In the *Morton Salt* case it is the commission's position that evidence of comparative gross sales and net income of favored and non-favored purchasers when offered by respondents to rebut an inference of competitive injury, is inconclusive and of no particular probative significance. Actual gain or loss of business is dependent upon the complex interplay of many factors, such as the particular initiative of each competitor, the favorable location of his place of business, success in advertising, superior service, and general growth of his particular market. The actual loss of business produced by discriminations can seldom be measured in restrospect through the financial statements of the purchasers concerned.

These issues bear materially on the practical enforceability of the Robinson-Patman Act, and are of considerable importance to the ultimate significance of the act. If the Supreme Court affirms the commis-

[66] Simmons Co., 29 F.T.C. 727 (1939); American Maize Products Co., 32 F.T.C. 901 (1941); Morton Salt Co., ibid. See also Minneapolis-Honeywell Regulator Co., F.T.C. Doctrine No. 4920, order issued January 26, 1948.

[67] Morton Salt Co., ibid.

[68] Ibid.

sion on each, the way may be opened to the eventual conclusion that, once all of the elements are present which make a price differential a discrimination, such discrimination is unlawful *per se*, within whatever limitations the commission may impose.[69]

Price discriminations may occur on items which represent only a small part of a purchaser's total operating costs, or may be so small in amount as to affect only a small part of total costs. The Federal Trade Commission has not yet evolved a conclusive principle as to the proportion of gross costs which must be affected by price discriminations in order for them to entail requisite competitive effect.

The commission has held that a price discrimination on one item out of several thousand carried by a grocery retailer has the requisite effect on competition. It was stated:

> ". . . Of course a price differential of 2¼ per cent on a single product of no greater importance than ice cream powder is not sufficient to give The Great Atlantic and Pacific Tea Company any appreciable competitive advantage in all of its business, but it does receive a definite advantage in the sale of that particular commodity. The competitive advantage becomes the greater when a company doing a Nation-wide business is permitted to obtain a 2¼ percent differential from a considerable number of sellers. Even though individually they are of relatively little importance, the sum of the differentials would undoubtedly give the buyer a decided competitive advantage. . . ."[70]

The commission has also held that price discriminations are unlawful on glucose, constituting an important percentage of the weight of candy; on yeast, which represents a significant cost in the manufacture of bread; on enamel, which represents an important cost in the manufacture of certain household fixtures and appliances; and on oil burner controls, which represent up to 40 per cent of the "materials cost" in the manufacture of oil burners.[71] Pending complaints concern

[69] Cf. the objections of Dr. Corwin D. Edwards, N.Y. STATE BAR ASSN., ROBINSON-PATMAN ACT SYMPOSIUM 57 at 58 (1947), in his recommendations concerning sound relationship of the anti-trust laws to pricing.

[70] H. C. Brill Co., 26 F.T.C. 666 at 680 (1938). See also Minneapolis-Honeywell Regulator Co., F.T.C. Docket No. 4920, order issued January 26, 1948.

[71] Corn Products Refining Co. v. Federal Trade Commission, 324 U.S. 726, 65 S.Ct. 961 (1945); Federal Trade Commission v. A. E. Staley Mfg. Co., 324 U.S. 746, 65 S.Ct. 971 (1945); 34 F.T.C. 1362 (1942); American Maize-Products Co., 32 F.T.C. 901 (1941); Hubinger Co., 32 F.T.C. 1116 (1941); Standard Brands, Inc., 30 F.T.C. 1117 (1940); Republic Yeast Corp., 33 F.T.C. 701 (1941); National Grain Yeast Corp., 33 F.T.C. 684 (1941); Federal Yeast Corp., 33 F.T.C.

price discriminations in the sale of liquid carbon dioxide to soft drink bottlers; in the sale of dry ice to manufacturers and retailers of frozen foods.[72] It is probable that the commission will extend the principle of the *Brill* case to these latter situations, and will hold the discriminations unlawful, regardless of the fact that the items involved do not represent major proportions of the total operating costs of the purchasers concerned.

However, the commission in two decisions has indicated that the size of price discriminations is material in determining their effect upon competition for purposes of the Robinson-Patman Act. In the *Morton Salt* case[73] the modified order to cease and desist permitted discriminations of less than five cents per case of salt, except in particular situations where discriminations of even that size might "tend to lessen, injure or destroy competition." The cost of a case of "Blue Label" salt was $1.50. In the *Kraft-Phenix* case[74] one ground on which a discount was upheld was that it did not aggregate more than $6.50 per year to each favored purchaser.

The commission has not clarified its principles as to the size of differential it will permit under section 2(a) of the act. Such considerations are valid only where it is certain that discounts of given size, in per unit terms, are not sufficiently large to be effectively used for purposes of price-cutting. Once satisfied on this matter, it would appear necessary to ascertain the significance of the discounts in terms of aggregates realizable by favored purchasers after multiplying the per unit discounts by actual or prospective volume of purchases.

Uniformity and objectivity of analysis might require some common standard by which all cases could be measured. One relationship, common to all cases and having direct significance to the problem involved, is that of the aggregate amount realizable by a favored purchaser in comparison with net income, actual or prospective, for the period in question. Where the article in a particular case is only one of many carried in a favored purchaser's business, net income, for the purpose

1372 (1941); Ferro Enamel Corp., F.T.C. Docket No. 5155, order issued Feb. 26, 1946; Minneapolis-Honeywell Regulator Co., F.T.C. Docket No. 4920, order issued January 26, 1948.

[72] Pure Carbonic, Inc., F.T.C. Docket No. 5143, complaint issued March 29, 1944.

[73] (C.C.A. 7th, 1947) 162 F. (2d) 949, affirming 39 F.T.C. 35 (1944), order modified April 14, 1945.

[74] 25 F.T.C. 537 (1937). The order in Curtiss Candy Co., F.T.C. Docket No. 4673, order issued Nov. 12, 1947, permits discriminations of ½ cent per case of 24 candy bars.

of the relationship, might be reduced by applying the proportion which the total costs of the article for the period in question bear to the gross expenses of the business. The same basis could be applied where the article is purchased for reprocessing into a subsequent article.

A different type of issue concerning requisite effect on competition is whether a non-favored purchaser is injured by the price discrimination of a particular seller if he can obtain goods of like grade and quality at the favorable price from another seller. It may be that competition is not injured if purchasers can get articles conforming to the same specifications, or of equal performance, from other sources at the lower price.

However, where a seller's product carries a valuable trade name, the availability of products of like grade and quality from other sources does not destroy the competitive effects of a discrimination. In the *Standard Oil* case[75] it was shown that less well-known brand gasolines were available at lower prices to Standard Oil customers and were of like grade and quality as Standard's "Red Crown," "Stanolind," and other brands. The majority of the commission felt that the good will attached to Standard's brand names made the less well-known brands unacceptable as substitutes to the non-favored purchasers.

It is quite possible that more consideration must be given relative to the effect on competition where injury to a seller's own competitors, or first line competition, is concerned. It would seem probable that some showing of hardship on competitors in meeting a seller's discriminatory price is required, and the tests of injury to competition may be more similar to those of section 3 of the Clayton Act. The cases concerning first line competition have not been inconsistent with this suggestion. In the *Moss* case[76] it was shown that at least one competitor was forced out of business, and that others were unable to match the special prices of Moss and make a profit. In the *Muller* case[77] sales were made below cost in New Orleans for the express purpose of driving a competitor in that city out of business. However, in the *Minneapolis-Honeywell* case the commission's discussion of injury to first-line competition reflected no particular conviction that the tests of injury, to such competition differed materially from those of injury to second-line competition.

[75] Case No. 9211, C.C.A. 7th, F.T.C. Docket No. 4389, modified order issued Aug. 9, 1946. See also Minneapolis-Honeywell Regulator Co., F.T.C. Docket No. 4920, order issued January 25, 1948.

[76] (C.C.A. 2d, 1946) 155 F. (2d) 1016, (C.C.A. 2d, 1945) 148 F. (2d) 378, 36 F.T.C. 640 (1943).

[77] (C.C.A. 6th, 1944) 142 F. (2d) 511.

4. *Justifications under the section 2(a) provisos*

Price discriminations under certain circumstances are not prohibited by the Robinson-Patman Act. These circumstances are set forth in a group of provisos to section 2(a), the most important of which is the so-called "due allowance" proviso. This reads:

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

This proviso is followed by a provision empowering the Federal Trade Commission to fix and establish quantity limits beyond which differences justified by cost shall not be permissible. The commission has, as yet, taken no affirmative action to fix or establish any such quantity limit.

Section 2(a) also contains a proviso, previously referred to, concerning the selection of customers,[78] and concludes with the following proviso:

> "*And provided further*, 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."

This provision has not been invoked in any of the recorded cases so far.

The Federal Trade Commission seems to have tacitly assumed that the section 2(a) provisos constitute affirmative defenses, under which the burden of proof is on respondents who seek to invoke them.[79] There is some support for this view in Congressional interpretation.[80] The Seventh Circuit Court of Appeals, however, in the *Morton Salt*

[78] "Discrimination in price affecting third line competition," supra, p. 461.

[79] Standard Brands, Inc., 30 F.T.C. 1117 (1940); Standard Oil Co., Case No. 9211, C.C.A. 7th, F.T.C. Docket No. 4389, modified order issued Aug. 9, 1946; Minneapolis-Honeywell Regulator Co., F.T.C. Docket No. 4920, order issued January 26, 1948; U.S. Rubber Co., F.T.C. Docket No. 4972, complaint issued June 1, 1943.

[80] 80 CONG. REC. 9418 (1936); S. Rep. 1502, 74th Cong., 2d sess. (1936). See also infra, note 87.

case,[81] declared its unpreparedness to accept such conclusion. The court made no final determination on the matter, but held that, whatever the procedural significance of the provisos, a respondent's burden could be met by an inference of fact. It held that the commission should have recognized such inference under the circumstances of the *Morton Salt* case.

When the Robinson-Patman Act was passed, it was forecast that the due allowance proviso would stimulate extensive cost accounting in the distribution and marketing field. This has not eventuated. Management, in general, has not yet devoted the refined attention to distribution costs required by the act. The Federal Trade Commission has been required to make only a few interpretations as to acceptable cost accounting for purposes of the act. As a consequence, there are few specifically approved principles to serve as guides in a rather complex field, which involves the assignment of joint costs arising out of the activities of sales organizations, billing departments, and shipping rooms.[82] Eventually there may evolve from the decisions a recognized system, or systems, of accounting which may be used by sellers who wish to pass the benefit of cost savings to their customers.

The problem of accounting for distribution costs is an intensely practical, as well as interpretive, one. Disproportionate effort and expense involved in keeping accurate cost records constitutes a permanent obstacle to fullest realization of justifiable price differentiation based on savings in cost. It may be in recognition of the practical difficulties involved that it has been unofficially indicated that the Federal Trade Commission may accept cost justification based on sample experience, and cost justification based on average costs of serving typical classes of customers.[83] It is believed, however, that the commission would be willing to accept such type of cost justification only so long as good

[81] (C.C.A. 7th, 1947) 162 F. (2d) 949. Petition for certiorari filed December 2, 1947. See also 80 CONG. REC. 8452 (1936).

[82] For discussion of distribution cost accounting problems, see Sawyer, "The Commission's Administration of Paragraph 2(a) of the Robinson-Patman Act: An Appraisal," 8 GEO. WASH. L. REV. 469 at 478 ff. (1940); Warmack, "Cost Accounting Problems under the Robinson-Patman Act," N.Y. STATE BAR ASSN., ROBINSON-PATMAN ACT SYMPOSIUM 105 (1947); and Massel, "Cost Factors Considered under the Due Allowance Clause of Section 2(a) of the Act as Justification for Price Differences" (before Chicago Bar Association Symposium, Jan. 24, 1947).

[83] Freer, "Accounting Problems under the Robinson-Patman Act" (before the Pennsylvania Institute of Certified Public Accountants, March 24, 1938); Woodrum, "Robinson-Patman Act" (before The Virginia Association of Retail Clothiers, Feb. 22, 1937). Cf. Minneapolis-Honeywell Regulator Co., F.T.C. Docket No. 4920, order issued January 26, 1948.

faith effort under current operating conditions was reflected. It would be necessary that sample experiences be kept current, and that classifications be reasonably related to differences in typical sales effort and representative of all individuals within each class.

The due allowance proviso permits differentials based on differences in cost "resulting" from differing "methods" or "quantities" in which commodities are "sold or delivered." Therefore, according to Congressional opinion, reduced manufacturing cost resulting from volume of production made possible by a single purchaser's large business cannot be made the basis for a reduced price to such customer under the proviso.[84]

Under section 2(c) of the Robinson-Patman Act, a seller is not permitted to justify a price discrimination by showing that the discrimination makes only due allowance for a savings in brokerage costs.[85]

In a pending case[86] it is argued that cost justifications may not be relied upon as a defense where there is evidence that other purchasers have not been accorded opportunity on proportionally equal terms to take advantage of the methods of sale or delivery resulting in such cost savings. It may be that under section 2(e) of the act, and in some cases under section 2(d), a seller must accord, on proportionally equal terms, all buyers the opportunity of taking advantage of methods of sale or delivery which result in cost savings. It would appear, however, that such issues under sections 2(e) and 2(d) are collateral to the validity of the cost savings as a defense in section 2(a) cases, and that cost justifications are admissible in section 2(a) proceedings, regardless of the fact that a seller may have violated sections 2(e) and 2(d) in connection therewith.

II

SECTION 2(b)

Section 2(b), because of ambiguous draftsmanship, has probably provoked greater controversy than is warranted by the section's subject matter. Section 2(b) provides:

[84] S. Rep. No. 1502, 74th Cong., 2d sess. (1936); H.R. Rep. No. 2287, 74th Cong., 2d sess. (1936); H. Hearings on H.R. 8442, 74th Cong., 2d sess. 256 (1936); 80 CONG. REC. 9417 (1936).

[85] Great Atlantic & Pacific Tea Co. v. Federal Trade Commission, (C.C.A. 3d, 1939) 106 F. (2d) 667, cert. den., 308 U.S. 625, 60 S.Ct. 380 (1940).

[86] Automatic Canteen Co., F.T.C. Docket No. 4933, complaint issued March 19, 1943, Brief for Commission, pp. 59 ff. See also Curtiss Candy Co., F.T.C. Docket No. 4673, order issued Nov. 12, 1947. Brief for Commission, pp. 67 ff.

"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."

It is believed that Congress intended section 2(b) only as a supplement to section 2(a), adding another proviso to those incorporated within the text of section 2(a), and assuring that the provisos were to be regarded as affirmative defenses in administrative proceedings before the Federal Trade Commission.[87] However, the phrasing of the section in the terms of "prima-facie" case and "rebuttal" has evoked issues as to whether the Federal Trade Commission can make out a prima facie case of violation of section 2(a) by mere proof of a price discrimination, and as to whether proof of meeting the equally low price of a competitor is a substantive defense under the act.

1. *The prima facie case*

Whether the Federal Trade Commission's proceedings under section 2(a) of the Robinson-Patman Act are facilitated by means of a prima facie case under section 2(b) is not of too great practical significance to the commission, if the commission's position as to the elements of requisite competitive effect under section 2(a) is sustained. The commission has never relied on its interpretation of a prima facie case as defined in the *Standard Oil* findings to support a conclusion of unlawful price discrimination under the Robinson-Patman Act. It has always considered it a part of its burden to show as a matter of fact that the price differentials tended to injure, destroy, or prevent competition. However, if the commission's reversal in the *Morton Salt* case[88] on the matter of requisite injury to competition is upheld, the concept of the prima facie case may become of substantial practical worth to the commission and may be affirmatively invoked in section 2(a) proceedings.

The matter of the prima facie case has been given attention at the

[87] 80 CONG. REC. 9418 (1936). See also supra, note 80.

[88] (C.C.A. 7th, 1947) 162 F. (2d) 949, cert. granted January 12, 1948.

present time, because it is a necessary corollary of the commission's position that the section 2(b) proviso, concerning the meeting of a competitor's equally low price, is merely procedural and does not constitute a substantive defense.[89] Also, the Second Circuit Court of Appeals has interpreted section 2(b) relative to a prima facie case, and, if the language of the court's opinion is to be read literally, has construed the prima facie case more liberally than contended by the commission.[90] The court said:

> "... Congress adopted the common device ... of shifting the burden of proof to anyone who sets two prices, and who probably knows why he has done so, and what has been the result. If he can prove that the lower price did not prevent or tend to prevent anyone from taking away the business; he will succeed, for the accuser will not then have brought him within the statute at all. . . ."[91]

It may be the court's position that the commission's prima facie case consists of mere proof of a price difference. From such proof the commission may presume the existence of competition which might be affected, and the requisite effect on such competition.

It is doubtful whether Congress anticipated the current contention concerning the prima facie case. No attention is directed to any procedural significance of the so-called prima facie case in the Congressional reports and debates.[92] It may be that Congress used the word "discrimination" and the phrase "prima-facie case" in section 2(b) to refer to the commission's complete cause of action, including effect on competition. It is to be noted that section 2(b) refers to "rebutting the prima-facie case ... by showing justification." In strict legal theory, a prima facie case is one in which a certain fact or facts are proved by a presumption drawn from the existence of other facts. A prima facie case is "rebutted" by advancing sufficient evidence of the non-existence of the disputed fact or facts to overcome the presumption. A "justification," on the other hand, does not deny and rebut any necessary facts in a cause of action, but "confesses" the existence of all required facts and "avoids" their result by proof of additional facts which excuse or extenuate. Therefore, it may be that the words "discriminate" and "prima-facie case" as used in section 2(b) can be properly understood only in their entire context in the statute.

[89] See infra, note 96.

[90] Samuel H. Moss, Inc. v. Federal Trade Commission, (C.C.A. 2d, 1946) 155 F. (2d) 1016, (C.C.A. 2d, 1945) 148 F. (2d) 378.

[91] 148 F. (2d) 378 at 379.

[92] See supra, notes 80, 81 and 87.

The pending *Automatic Canteen* case,[93] raises the question whether the prima facie case provision of section 2(b) of the Robinson-Patman Act applies to section 2(f). Section 2(f) makes it unlawful "knowingly" to induce or receive "a discrimination in price" prohibited by the act. Since a buyer's inducement of a discriminatory price is unlawful only where done "knowingly," there are convincing reasons for believing that the prima facie case, as interpreted in the *Standard Oil* decision, is not applicable to section 2(f) proceedings. Neither the commission nor the intervening National Candy Wholesalers Association take the position in the *Automatic Canteen* case that the commission's case consists of anything less than the full cause of action under section 2(a).

An interesting issue in the *Automatic Canteen* case is whether, since section 2(f) is concerned only with price discriminations "prohibited by" the act, it is necessary further for the Federal Trade Commission to prove absence of cost justification or other affirmative defense in proceedings against purchasers. It would not appear that the act was intended to place such a burden on the commission. However, the burden is an inequitable one on the purchasers also. Perhaps the commission is required to join sellers with purchasers in section 2(f) proceedings, so that the burden of proving affirmative defenses can rest on sellers, who have the necessary information to make such proof.

2. *The section 2(b) proviso*

The defense of meeting an equally low price of a competitor has been invoked in several important section 2(a) proceedings.[94] The Federal Trade Commission, after failing to take advantage of earlier opportunities,[95] is now attempting to nullify this defense by establishing that its purpose is merely procedural. According to the commission in the *Standard Oil* case,[96] proof of meeting a competitor's price is not a substantive defense, but is merely a means of rebutting the commission's prima facie case, and of forcing the commission to proof of competitive injury wherever the commission may have rested

[93] F.T.C. Docket No. 4933, complaint issued March 19, 1943.

[94] A. E. Staley Mfg. Co., 324 U.S. 746, 65 S.Ct. 971 (1945); 34 F.T.C. 1362 (1942); Standard Oil Co., Case No. 9211, C.C.A. 7th, F.T.C. Docket No. 4389, modified order issued Aug. 9, 1946; Cement Institute, Nos. 23-34, October Term, 1947, Supreme Court of the United States; Aetna Portland Cement Co. v. Federal Trade Commission, (C.C.A. 7th, 1946) 157 F. (2d) 533, 37 F.T.C. 87 (1943).

[95] It is to be noted that the commission has not asserted that the 2(b) Proviso is procedural in its brief in the pending Cement Institute case before the Supreme Court (Brief, pp. 112-117). A. E. Staley Mfg. Co., ibid.

[96] Case No. 9211, C.C.A. 7th, F.T.C. Docket No. 4389, modified order issued Aug. 9, 1946.

on its prima facie case. In connection with this point in the *Standard Oil* case, the commission said:

> " . . . If proof of good faith in meeting an equally low price of a competitor is made, the Commission could no longer rely upon its *prima facie* case, but must show by additional and affirmative evidence that the effect of the discrimination may be to . . . injure . . . competition. . . . Where such injurious effect on competition is affirmatively proved, the proof made as to meeting an equally low price of a competitor under the proviso of Section 2(b) does not constitute a substantive justification or defense."[97]

There is some support for the commission's position in the language used by Representative Utterback in his interpretation of the Act to Congress.[98] However, once again viewing statements in their entire context, it can be demonstrated that Congressman Utterback probably understood the proviso as substantive in nature. The remarks appear actually directed at the matter of "good faith" under the proviso, rather than at the issue whether the proviso is substantive or procedural.[99]

The fact that a seller in setting a discriminatory price may be meeting the price of a competitor does not indicate that the effect of such seller's discrimination may not be to injure competition. Thus, proof of meeting an equally low price of a competitor is not a logical rebuttal of a presumption of injury to competition drawn from the prima facie case. Introduction of such proof for a mere procedural purpose appears impractical from the standpoint of Robinson-Patman Act administration, because it needlessly complicates proceedings under the act. Furthermore, in an earlier precedent, the Supreme Court held that a state anti-price-discrimination statute was unconstitutional because it did not permit sellers to adjust their prices to local competitive conditions as a substantive defense.[100] For these reasons it is believed that the contention of the commission appears headed for defeat in the courts.

[97] Id. at 15.

[98] "This provision is entirely procedural. It does not determine substantive rights, liabilities and duties." 80 CONG. REC. 9418 (June 15, 1936).

[99] Congressman Utterback states that meeting an equally low price of a competitor is not "an absolute bar" to a prosecution, and that it is "a question of fact to be determined in each case, whether the competition to be met was such as to justify the discrimination given. . . . As in any case of self-defense, while the attack against which the defense is claimed may be shown in evidence, its competency as a bar depends also upon whether it was a legal or illegal attack." 80 CONG. REC. 9418 (1936).

[100] Fairmont Creamery Co. v. State of Minnesota, 274 U.S. 1, 47 S.Ct. 506 (1927).

The Second Circuit Court of Appeals has already held that the section 2(b) proviso, concerning the meeting of an equally low price of a competitor, constitutes a substantive defense. The Supreme Court, in the *A. E. Staley* case,[101] may have concurred. In the *Staley* case the section 2(b) proviso was not challenged as procedural. However, the implication of the Supreme Court's opinion is that the proviso is substantive. The Supreme Court stated that the sole issue was whether Staley had "succeeded in justifying" its price discriminations by proof of meeting competitors' prices in good faith. The Federal Trade Commission had not relied on its prima facie case, but had specifically proved the requisite effect of Staley's price discriminations on competition. The commission's findings were specifically affirmed by both the Seventh Circuit Court and by the Supreme Court. In view of this proof, it would have been wholly irrelevant to consider competitors' prices if such proof were merely procedural in effect. The conclusion seems inescapable that the Supreme Court by inference determined that the section 2(b) proviso constituted an affirmative defense.

In the *Moss* case[102] the Second Circuit Court of Appeals was specific in holding that the section 2(b) proviso was substantive. The court declared:

> " . . . Although it will then appear that he has lessened, or prevented, competition, the proviso of § 2(b) will still excuse him, if he can show that his lower price did not undercut his competitors, but merely 'met' their 'equally low price.' In short, that is a defence to the violation of § 2(a). This is as we interpret § 2(a) and § 2(b), when read together. . . ."[103]

In view of these precedents of the *Staley* and *Moss* cases, it seems predictable that the commission's position in the *Standard Oil* case that the section 2(b) proviso is merely procedural will be overruled. The rejection of this position will probably result in the subsidence of most of the current debate concerning the prima facie case.[104]

Sellers are permitted by the section 2(b) proviso to show that

[101] 324 U.S. 746, 65 S.Ct. 971 (1945); 34 F.T.C. 1362 (1942).

[102] (C.C.A. 2d, 1946) 155 F. (2d) 1016, (C.C.A. 2d, 1945) 148 F. (2d) 378, 36 F.T.C. 640 (1943). For fuller commentary on the Moss case relative to § 2(b), see Austern, "Required Competitive Injury and Permitted Meeting of Competition," N.Y. STATE BAR ASSN., ROBINSON-PATMAN ACT SYMPOSIUM 63 (1947).

[103] 148 F. (2d) 378 at 379.

[104] It is pointed out in Austern, id. at 75 that § 2(b) applies to § 2(e) proceedings, as well as to § 2(a) proceedings. Section 2(e) contains no requirement of effect on competition. Therefore, § 2(b) would have no logical connection with § 2(e) if merely procedural as interpreted in the Standard Oil case.

their lower prices were set "in good faith" to meet the equally low prices of competitors. "Good faith," as interpreted by the Supreme Court in the *Staley* case, apparently means good faith in adherence to the objectives of the Robinson-Patman Act. Thus the Court declared that the section 2(b) proviso is concerned primarily with competitive conditions which a seller may encounter in individual situations, and that in lowering his price to meet a given competitive price the seller must keep in mind his obligations under the act to treat his other customers equitably. It may be that in many situations a seller may not meet a competitor's lower price without extending the advantages of that price to all of his customers affected.[105]

The Supreme Court held that the prices under Staley's basing point system were not set in good faith to meet competitors' prices, because the prices were predetermined by use of an unfair system of pricing. Under this system, the Court held, Staley took advantage of higher competitors' prices charged certain customers to raise its own prices to the same customers. The argument was made that a seller could raise his price so high that competitors' prices would always be lower, and that every sale could thereby be justified by the existence of a lower price of a competitor. The court rejected this argument by saying that such an artifically high price would not be set in "good faith" and that "good faith" would never be interpreted in such a way that it would vitiate the whole purpose of the Robinson-Patman Act.

It is to be noted that in Congressman Utterback's discussion of justification permitted by the section 2(b) proviso, he states that a seller may meet the local price offered by a local competitor, but may not meet a nation-wide price offered by a nationwide competitor.[106] It is possible that the Supreme Court will concur in this view.

In both the *Staley* and the *Moss*[107] cases it was held that a seller may inadvertently undercut a competitor's price if he attempts in good faith only to meet the competitor's price. However, the seller must be reasonable in his belief as to the existence of the competitor's price and as to what that price is. In the *Staley* case the Supreme Court found that the seller was not reasonable and did not act in good faith in granting discounts on the basis of "verbal information received from salesmen, brokers, or intending purchasers, without supporting evi-

[105] For fuller discussion of "good faith" under § 2(b), see McCollester, "Section 2(b)," N.Y. STATE BAR ASSN., ROBINSON-PATMAN ACT SMYPOSIUM 23 at 26 (1946).

[106] 80 CONG. REC. 9418 (1936). See supra, note 99.

[107] (C.C.A. 2d, 1946) 155 F. (2d) 1016, (C.C.A. 2d, 1945) 148 F. (2d) 378, 36 F.T.C. 640 (1943).

dence" and with "no efforts by respondents to investigate or verify them."

It is probable that the seller need not always go as low as the competitor's price in order to combat it, but need make only a price concession within the limit established by the competitor. The determinative consideration in each case is probably the seller's good faith, based on the hardship of the seller's situation and on fairness to customers who might be affected by the seller's discrimination. In some industries goods of high quality, with higher costs of manufacture, are in competition with cheaper goods. A price concession may restore the balance in favor of the seller as against the considerably lower price of the competitor's inferior product. The same argument seems justified as to articles of higher price based on greater public acceptance, even though costs of manufacture may not substantially differ between the seller's product and that of the competitor.[108]

Section 2(b) speaks in terms of discrimination "in price or services or facilities furnished," and of rebutting the prima facie case by showing that the lower price "or the furnishing of services or facilities" was made to meet "the services or facilities furnished by a competitor." This extends the application of section 2(b) to section 2(e) of the statute, and possibly also to section 2(d). It is probable that a seller is permitted to justify a lower price on the basis of meeting a competitor's services and facilities, and, conversely, is permitted to justify services and facilities on the basis of the competitor's lower price, in each situation the justification turning on "good faith."

Under the Sherman and Federal Trade Commission Acts sellers have been restrained from acting in concert to suppress competition in price. The Robinson-Patman Act is directed at unfair competition in price and at unfair advantage in price in its aspect of cost to purchasers. There are potentialities in the act which might have far-reaching effects in the American economic scene. How far these potentialities may be realized depends on the act's development during the coming few years. The cases now before the Federal Trade Commission and the courts will be of key significance in determining the course, toward or away from, such potentialities.

108 Cf. Minneapolis-Honeywell Regulator Co., F.T.C. Docket No. 4920, order issued January 26, 1948. The commission in this case is concerned with the seller's "good faith."