# Boston College Law Review

Volume 2 | Issue 2 Article 6

4-1-1961


# A Fresh Approach to Robinson-Patman: Price Differential as Price Discrimination


Peter A. Donovan

# COMMENTS

# A FRESH APPROACH TO ROBINSON-PATMAN: PRICE DIFFERENTIAL AS PRICE DISCRIMINATION

PETER A. DONOVAN*

In *FTC v. Anheuser-Busch, Inc.*,[1] the Supreme Court rendered a decision under § 2(a) of the Robinson-Patman Act, which, although strictly limited in scope, has far reaching implications and promises to effect a change in the format of future price discrimination cases.

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, provides in part:

> That it shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . .[2]

Thus § 2(a) makes unlawful, price discriminations having the proscribed competitive effects in three distinct levels or "lines of commerce," commonly termed the primary-line (injury to competition between sellers),[3] the secondary-line (injury to competition between purchasers),[4] and the third or tertiary-line (injury to competition

* A.B. 1957, LL.B. 1960, Boston College; Trial Attorney, Antitrust Division, U.S. Department of Justice. The opinions expressed herein are those of the writer and not necessarily those of the Department of Justice.

1 363 U.S. 536 (1960).

2 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958), amending 38 Stat. 730 (1914).

3 Anheuser-Busch is itself a case involving primary-line price discrimination. See also, for examples, Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954); Atlas Building Products Co. v. Diamond Block & Gravel Co., 269 F.2d 950 (10th Cir. 1959), cert. denied, 363 U.S. 843 (1960); Samuel H. Moss, Inc. v. FTC, 148 F.2d 378 (2d Cir. 1945), cert. denied, 326 U.S. 734 (1945); Maryland Baking Co. v. FTC, 243 F.2d 716 (4th Cir. 1957); E. B. Muller & Co. v. FTC, 142 F.2d 511 (6th Cir. 1944); Nat'l Biscuit Co. v. FTC, 299 Fed. 733 (2d Cir. 1924); and Mennan Co. v. FTC, 288 Fed. 774 (2d Cir. 1923).

4 See, e.g., FTC v. Morton Salt Co., 334 U.S. 37 (1948); George Van Camp & Sons Co. v. American Can Co., 278 U.S. 245 (1929); Klein v. Lionel Corp., 138 F. Supp. 560, 563 (D. Del. 1956), aff'd, 237 F.2d 13, 14-15 (3d Cir. 1956); Naifeh v. Robinson Art Metal Works, Inc., 117 F. Supp. 690, 694 (W.D. Okla. 1953), aff'd, 218 F.2d 202, 205 (10th Cir. 1954); Shaw's Inc. v. Wilson-Jones Co., 105 F.2d 331, 333 (3d Cir. 1939); Alexander v. Texas Co., 149 F. Supp. 37, 41 (W.D. La. 1958).

between customers of purchasers).[5]

In the *Anheuser-Busch* case, a leading national brewer sold a "premium beer"[6] priced higher than the beers of regional and local breweries in the great majority of markets although both the price of the Anheuser-Busch beer and the premium differential varied from market to market and from time to time.[7] In 1953 most of the national breweries, including Anheuser-Busch, granted their employees a wage increase, and raised their prices.[8] Although many regional and local breweries throughout the country followed suit by raising their prices, Anheuser-Busch's competitors in the St. Louis market maintained their existing price. Twice in 1954 Anheuser-Busch reduced the price of its premium beer in the St. Louis market without making corresponding reductions in other markets.[9] It did not again raise its price for over a year. During the period in which the price differential existed, there was an over-all increase in beer sales in the St. Louis market of less than ten percent, but Anheuser-Busch's sales increased more than 200%. Of its three competitors, one suffered a slight loss while the sales of the others declined 33% and 41%, respectively.

The Federal Trade Commission issued a complaint in 1955 charging Anheuser-Busch with a violation of § 2(a).[10] The complaint described a pricing pattern having adverse effects upon sellers' competition (primary-line competition), but not upon buyers' com-

[5] See, e.g., Standard Oil Co. v. FTC, 173 F.2d 210 (7th Cir. 1949), rev'd, 340 U.S. 231 (1951); Mackey v. Sears, Roebuck & Co., 237 F.2d 869 (7th Cir. 1956), petition for cert. dismissed, 355 U.S. 865 (1957).

[6] A "premium beer" is one that is advertised and sold nationally at a premium over the local or regional beers which are confined in advertisement and sales to a limited geographical area.

[7] The market structure in the beer industry is such that there are few national sellers and many regional or local sellers. There is competition among them in numerous regional and local markets throughout the country. The structure of each market varies and consequently the same beers are sold at different prices in different markets, the premium beers, however, selling at a higher price than the beers of the regional or local breweries.

[8] It appears that Anheuser-Busch did not raise its prices in Missouri or Wisconsin. However, in view of the limited question reviewed on appeal to the Supreme Court, this fact was immaterial.

[9] On January 4, 1954, Anheuser-Busch lowered its price from $2.93 to $2.68 per case, thereby reducing the previous 58 cents premium differential to 33 cents. A second price cut occurred on June 21, 1954, this time to $2.35, the same price charged by Anheuser-Busch's competitors. In March 1955, Anheuser-Busch increased its St. Louis price 45 cents per case, and its three competitors almost immediately raised their prices 15 cents. A substantial difference was thereby again established. This ended the period of alleged price discrimination. The FTC made no claim that the January 4th reduction was discriminatory, but based its contentions on the June 21st reduction.

[10] Trade Reg. Rep. (1954-1955 FTC Cas.) ¶ 25441.

petition (secondary-line competition). Both the hearing examiner[11] and the Commission[12] held that the evidence introduced at the hearing established a violation of § 2(a).

The Commission rejected Anheuser-Busch's contention that its price reduction had been made in good faith to meet the equally low price of a competitor within the meaning of the proviso to § 2(b).[13] The Commission then adopted and issued the examiner's cease and desist order with slight modification. The Seventh Circuit set aside the order, holding the price cuts not discriminatory because "[t]here must be some relationship between the different purchasers which entitles them to comparable treatment" before a price discrimination within the meaning of § 2(a) may be found to exist.[14] Thus the Seventh Circuit interpreted "different purchasers" to mean "competing purchasers."[15]

Shortly thereafter, the Tenth Circuit decided *Atlas Building Products Co. v. Diamond Block & Gravel Co.*,[16] a private treble damage action[17] brought by a local manufacturer and seller of cinder

---

11 Trade Reg. Rep. (1956-1957 FTC Cas.) ¶ 26257.

12 Trade Reg. Rep. (1957-1958 FTC Cas.) ¶ 26705.

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

14 265 F.2d 677, 681 (1959).

15 Id. at 681-82. The court reasoned:

> Where two purchasers from a seller are competing with each other, that competition creates a relationship that entitles them to comparable treatment as to price, without which treatment there would be a discrimination in price within the meaning of section 2(a). On the other hand, in a case like this, where the purchasers from a seller are located in different areas of the country and are not in competition with each other, there is generally no relationship which entitles them to be charged the same prices. This is particularly true when different prices in different markets are characteristic of all sellers in the industry. Thus, a retailer in Boston or San Francisco, in paying a higher price for beer than a retailer in St. Louis or Chicago, is in no way prejudiced or treated unfairly.

For other ambiguous implications that price differentials as such are not "discriminatory" unless quoted among competing customers, see General Shale Products Corp. v. Struct Construction Co., 37 F. Supp. 598, 603 (W.D. Ky. 1941). Cf. Patman, The Robinson-Patman Act 59 (1938).

16 Supra note 3.

17 Section 4 of the Clayton Act provides that any person injured by a violation of any of the antitrust laws may sue for treble damages. 38 Stat. 7310 (1914), 15 U.S.C. § 15 (1958). Section 2(a) of the Robinson-Patman Act was specifically made an amendment to the Clayton Act and, therefore, there was little doubt but that a treble damage action would lie for a violation thereof. Section 3, however, although explicitly forbidding local price reductions under specified circumstances, was not enacted as an amendment to the Clayton Act. Section 3 does not depend upon the sanctions provided in the Clayton Act but carries its own criminal sanctions. Consequently, there was some doubt whether a private treble damage action would lie for its violation. This issue was settled when the Supreme Court decided the companion cases of Nashville Milk Co. v. Carnation Co., 355 U.S. 373 (1958), and Safeway Stores v. Vance, 355 U.S. 389 (1958). These cases held that § 3 does not amend the Clayton Act, and

blocks in Las Cruces, New Mexico (Diamond Block & Gravel Co.), against an interstate manufacturer and seller of cinder blocks (Atlas Building Products Co.). The crux of the charge was that Atlas had lowered its price in Las Cruces, where it was in competition with Diamond, without correspondingly lowering its price in a market where it had a virtual monopoly, using funds obtained in the latter market to finance its operations in the former. In holding such a price difference discriminatory within the meaning of § 2(a), even though competing purchasers were charged uniform prices and differences existed only among noncompeting purchasers, the Tenth Circuit stated:

> The same legal issue was before the Seventh Circuit in *Anheuser-Busch, Inc. v. Federal Trade Commission*, . . . where the court was presented with the basic question whether uniform local price cuts by an interstate manufacturer which disrupted the market to the injury of local competitors, were price discriminations within the meaning of Section 2(a). The court held that even though directed at local competitors, the price cuts were not discriminatory, apparently because they did not discriminate among local competitors. This conclusion is apparently based upon the theory contended for here that the statutory words "different purchasers" means competing purchasers. We respectfully reject any such restriction upon Section 2(a). For, we are convinced that geographic price discriminations employed for predatory ends are cognizable under either Section 2(a) or Section 3, . . . .[18]

As a result of these conflicting decisions, the Supreme Court granted certiorari in the *Anheuser-Busch* case, and, after reaching its decision in that case, denied certiorari in the *Atlas* case.[19]

that the Clayton Act sanctions are not available for violations of § 3. However, the Supreme Court did recognize that violations of § 3 might also constitute violations of § 2(a) of the Clayton Act, as amended. The question whether local price reductions were violative of § 2(a) remained unsettled.

[18] Supra note 3, at 955. The Court held that the jury could properly consider the size of Atlas and its economic power in both markets, the position and expectation of Diamond in a healthy Lac Cruces market, and the fact that Atlas' delivered price in the market in which it had a virtual monopoly was 23.1 cents while its delivered price in Las Cruces was 20 cents. The court found that adequate instructions were given to the jury on the good-faith-meeting-of-competition defense and on the necessity for a showing of a causal relationship between the price discrimination practiced by Atlas and injury to Diamond. The trial court's instruction that the price discrimination was actionable if there was a "reasonable possibility" of substantial lessening of competition was found to be correct under Corn Products Co. v. FTC, 324 U.S. 726 (1945), and FTC v. Morton Salt Co., supra note 4.

[19] Supra note 3. The conflict on this issue actually involved three circuits since

Because the Seventh Circuit had expressed some doubt whether § 2(a) was designed to protect primary-line competition, the Supreme Court made it explicitly clear, from the legislative history of § 2(a),[20] from the cases decided both before and after the passage of the Robinson-Patman Act amendments to the Clayton Act,[21] and from the language of the statute itself,[22] that "§ 2(a) is violated where there is a price discrimination which deals the requisite injury to primary-line competition, even though secondary-line and tertiary-line competition are unaffected."[23]

In the Supreme Court Anheuser-Busch conceded, contra the interpretation of the Seventh Circuit, that the existence of a competitive relationship among purchasers was not necessary to a finding of "discrimination in price." But, it argued, there must be "proof that the lower price is below cost or unreasonably low for the purpose or design to eliminate competition and thereby obtain a monopoly."[24] The Court, however, in accepting the Tenth Circuit's interpretation in *Atlas,* and in equating price discrimination with price difference, did not reject these arguments as totally irrelevant in § 2(a) proceedings. Such factors as the existence of a predatory intent and un-

the Ninth Circuit in Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356 (9th Cir. 1955), cert. denied, 350 U.S. 991 (1956), had held the same way as the Seventh Circuit in Anheuser-Busch.

20 H.R. Rep. No. 627, 63d Cong., 2d Sess. 8 (1914); S. Rep. No. 698, 63d Cong., 2d Sess. 2-4 (1914); H.R. Rep. No. 2287, 74th Cong, 2d Sess. (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. (1936); FTC, Final Report on the Chain Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. (1935).

21 Porto Rican American Tobacco Co. v. American Tobacco Co., 30 F.2d 234 (2d Cir. 1929) (decided under the original Clayton Act and assuming without expressly so deciding, that local price discrimination violated the Act); E. B. Muller & Co. v. FTC, supra note 3 (dictum indicating that no competitive relationship between buyers is necessary to establish a violation of § 2(a)); Maryland Baking Co. v. FTC, supra note 3 (assuming that local price discriminations violate § 2(a)); Atlas Building Products Co. v. Diamond Block & Gravel Co., supra note 3. See also Moore v. Mead's Fine Bread Co., supra note 3 (sustaining a treble damage action in favor of a competing seller based partly upon a violation of § 2(a)). But see, Balian Ice Cream Co. v. Arden Farms Co., supra note 19.

22 The Court stated, 363 U.S. at 543:

> . . . The statute could hardly be read any other way, for it forbids price discriminations "where the effect . . . may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

23 363 U.S. at 542-43.

24 Id. at 546. Anheuser-Busch also argued that the absence of a showing of such unreasonably low price was the pivotal factor in the Seventh Circuit's decision. See Brief for Respondent, pp. 20-24, FTC v. Anheuser-Busch, Inc., supra note 1. The Commission, however, insisted that the Seventh Circuit's decision rested upon the absence of competition among purchasers and challenged it as being tantamount to holding § 2(a) not applicable to protect primary-line competition. Brief for Petitioner, pp. 7-8, FTC v. Anheuser-Busch, Inc., supra note 1.

reasonably low price cuts were conceded to have possible relevance to the determination of injury to competition but were regarded as irrelevant to the existence of a price discrimination.[25]

Insofar as the Supreme Court's decision in *Anheuser-Busch* stands for the proposition that § 2(a) prohibits price discriminations between a seller's customers, whether or not those customers are competitors, it is not subject to criticism. This conclusion is amply supported by legislative and judicial authority.[26] The injury complained of was injury to the seller's competitors, that is, injury to primary-line competition. The purpose of the act, in its application to this kind of competition, is to prevent injury to the seller's *competitors*, not his customers. The relationship between purchasers affected by the price discriminations or differences is, therefore, of no import. The Seventh Circuit, by focusing its attention upon Anheuser-Busch's customers, overlooked this important fact, but the Supreme Court, looking to the policy of the Act in this area, pointed out that, while the existence of competition among buyers who are charged different prices by a seller is obviously important in terms of adverse affects upon secondary-line competition, where the purpose of the Act is to protect competition among the seller's customers,[27] "it would be merely a fortuitous circumstance so far as injury to primary-line competition is concerned."[28]

The significance of *Anheuser-Busch,* however, does not lie in its resolution of this issue. It has implications of major importance,

25 363 U.S. at 549, 552. That this construction of the Robinson-Patman Act led to a partial overlap between § 2(a) and § 3 was considered irrelevant, the Court concluding that although § 3, which provides criminal sanctions for territorial price cuts for the purpose of destroying competition or eliminating a competitor, might appear more relevant to the fact, § 2(a) was also applicable.

26 See notes 20 and 21 supra. In Moore v. Mead's Fine Bread Co., supra note 3, and Porto Rican American Tobacco Co. v. American Tobacco Co., supra note 21, violations of § 2(a) were predicated upon injury to primary-line competition without reliance upon the absence of competition as a relevant factor. E. B. Muller & Co. v. FTC, supra note 3, contains dictum indicating that a competitive relationship between buyers is not necessary to establish a § 2(a) violation in primary-line competition. But see, Balian Ice Cream Co. v. Arden Farms Co., supra note 19, at 367-68, wherein it was held that, despite the fact that the discrimination may be at the primary level, a competitive relationship between buyers must be present before § 2(a) can be violated.

Thus, prior to Anheuser-Busch it was held that reduction of price in one area to an unreasonable level with intent to eliminate a competitor violated § 2(a), Moore v. Mead's Fine Bread Co., supra, that reduction of price in one area without a corresponding reduction elsewhere likewise violates § 2(a) where buyers in the two areas are competitors, E. B. Muller & Co. v. FTC, supra, and proof that all buyers in the same locality are charged the same price is not exculpatory, Corn Products Refining Co. v. FTC, supra note 18; cf. Maryland Baking Co. v. FTC, supra note 21.

27 See in this regard FTC v. Morton Salt Co., supra note 4.

28 363 U.S. at 546.

extending far beyond its decision in this regard, for although the complaint described a pricing pattern having adverse effects upon primary-line competition only, the Supreme Court, in its opinion, answered a question applicable to all three lines when, without dissent, it equated price discrimination with price difference in the following words:

> . . . We are convinced that whatever may be said with regard to the rest of §§ 2(a) and 2(b)—and we say nothing here—there are no overtones of business buccaneering in the § 2(a) phrase "discriminate in price." Rather, *a price discrimination within the meaning of that provision is merely a price difference.* [Emphasis supplied.][29]

The Court pointed out, however, that its decision "does not raise the specter of a flat prohibition of price differentials, inasmuch as price differences constitute but one element of a § 2(a) violation."[30] The remaining element, apart from the jurisdictional requirements of commerce,[31] is that the price differences must be found to have the effect of creating substantial competitive injury.[32] Moreover, even if the discriminatory practice should cause substantial injury to

---

[29] Id. at 549.

[30] Id. at 553.

[31] The coverage of the Robinson-Patman Act is not as broad as that of the Sherman Act. The Sherman Act prohibitions apply to restrictive or monopolistic business practices or activities wherever they occur as long as interstate commerce is "affected." E.g., United States v. Employing Lathers Ass'n, 347 U.S. 198 (1954); Lorain Journal Co. v. United States, 342 U.S. 143 (1951); United States v. Nat'l Ass'n of Real Estate Boards, 339 U.S. 485 (1950); Mandeville Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948). On the other hand, the price discrimination provisions of the Robinson-Patman Act require that the discriminator be "engaged in commerce," that the challenged discrimination occur "in the course of such commerce," and that "either or any of the purchasers involved in such discrimination are in commerce. . . ." Rowe, Sales of Commodities in Commerce: Jurisdictional Criteria Under the Robinson-Patman Act, 67 Yale L.J. 1155, 1166 (1958).

[32] In a secondary-line competition case, Corn Products Co. v. FTC, supra note 18, at 738, the Supreme Court stated:

> . . . § 2(a) does not require a finding that the discrimination in price has in fact had an adverse effect on competition. . . . It is enough that they "may" have the proscribed effect . . . the use of the word "may" was not to prohibit discriminations having "the mere possibility" of those consequences, but to reach those which would probably have the defined effect on competition.

This statement was reaffirmed and followed in FTC v. Morton Salt Co., supra note 4. Indeed, some have commented that the injury requirement of § 2(a) has evolved into an almost automatic inference from the differential itself. See Rowe, Borderline Issues in Court and Commission Cases Under Sections 2 and 3 of the Clayton Act, ABA Section of Antitrust Law Proceedings 60-72 (1956); Rowe, Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act, 66 Yale L.J. 1 (1956); Von Kalinowski, Price Discrimination and Competitive Effects, 17 ABA Section of Antitrust Law Proceedings 360 (1960).

competition, it may be justified under one of the several exculpatory provisions of §§ 2(a)[33] and 2(b).[34]

---

[33] Section 2(a) contains four such justification defenses: (1) cost defense provision, (2) quantity limits proviso, (3) customer selection proviso, and (4) the changing conditions exemption. The cost defense proviso states that nothing in the Act "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 . . . sold or delivered." However, that proviso is immediately qualified by the quantity limits proviso which authorizes the Commission to "fix and establish quantity limits . . . as to particular commodities or classes of commodities, where it finds available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce." A further proviso exempts "price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods." Section 2(a) also contains a proviso declaring that nothing contained in the Act "shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."

At least one person has commented regarding these exculpatory provisions that the cost justification proviso is the only § 2(a) defense worth considering since it is doubtful whether the other defenses will ever have any substance or applicability. See Barton, Defenses in Price Discrimination Cases, 17 ABA Antitrust Section Proceedings 389 (1960). See also, Murray, Cost Justification Under the Robinson-Patman Act: Impossibility Revisited, 1960 Wis. L. Rev. 227. The difficulty in presenting a satisfactory cost justification on defense might have the effect of preventing a price reduction which is justified in those terms. See Rowe, Cost Justification Of Price Differentials Under the Robinson-Patman Act, 59 Colum. L. Rev. 584 (1959). See generally, Att'y. Gen. Nat'l Comm. Antitrust Rep. 155-79 (1955).

[34] Section 2(b) contains an exculpatory provision commonly referred to as the good faith meeting of competition defense. The proviso declares in part, that nothing in the Act "shall prevent a seller rebutting the prima facie case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor." The requirements for a valid good faith meeting of competition are set out for the most part in FTC v. Standard Oil Co., 355 U.S. 396 (1958), and in an earlier decision involving the same litigation, Standard Oil Co. v. FTC, 340 U.S. 231 (1951). Considerable confusion centers around the requirement that the price reduction be in "good faith" to meet a competitors "lawful" price. See Att'y. Gen. Nat'l Comm. Antitrust Rep. 179-86 (1955); Note, Competitors' Lawful Prices and Lawful Competition, 43 Minn. L. Rev. 327 (1958). Of all the Robinson-Patman Act defenses, the cost justification defense of § 2(a) and the good faith meeting of competition defense of § 2(b) are the only two of any real substance in application. See Barton, op. cit. supra note 33.

In Anheuser-Busch, the FTC found that, although Anheuser-Busch maintained prices which differed in each market in which it sold, the price resulting from the price reductions was discriminatory because it did not reflect the historic price difference of premium beers over region beers. Anheuser-Busch's defense that the price reduction was made to meet the competition of the regional breweries, was rejected on the theory that price reduction in such a situation by a seller with a product that has "greater public acceptance" is not a good faith lowering of price. Anheuser-Busch, Inc., Trade Reg. Rep. (1957-1958 FTC Cas.) ¶ 26705. In reversing the Commission the Seventh Circuit did not consider this aspect of the case, and when the case came before it for the second time, it again found it unnecessary to decide whether a price reduction in a premium product which only equalled the prices of competing non-premium products was in reality an undercut. See note 35 infra. If the reduction were considered an undercut, the good faith meeting of competition defense would not have

Because the Seventh Circuit in *Anheuser-Busch* had rested its decision entirely upon its holding that the threshold statutory element of price discrimination had not been established, the Supreme Court limited its consideration to that question alone. In reversing, therefore, the Supreme Court did not decide what constitutes substantial competitive injury within the meaning of § 2(a) as applied to the primary-line, or whether Anheuser-Busch's defense of good faith meeting of competition was valid.[35] In fact, it took pains to say that "nothing in this opinion should be interpreted as intimating a view upon the remaining aspects of the controversy,"[36] and that "Nothing that we have said, of course, should be construed to be the expression of any view concerning the relevance of the factors stressed by . . . [Anheuser-Busch] to statutory standards other than price discrimination."[37] Nevertheless, the Court did make it quite clear that, although it was not departing from its holding in *FTC v.*

---

been available. For a discussion of this aspect of the case see Notes, 58 Colum. L. Rev. 567 (1958); 26 Geo. Wash. L. Rev. 769 (1958); 71 Harv. L. Rev. 1367 (1958); 24 Marq. L. Rev. 119 (1958). See also Gerber Products Co. v. Beech-Nut Life Savers, Inc., 167 F. Supp. 916 (S.D.N.Y. 1958).

[35] On remand [Anheuser-Busch, Inc. v. FTC, 29 U.S.L. Week 2352 (Feb. 7, 1961)], the Seventh Circuit concluded that the Commission failed to prove that Anheuser-Busch's price reductions in 1954 caused any present actual or potential injury to competition. The Court stated that whatever position Anheuser-Busch obtained was temporary and pointed to the fact that while Anheuser-Busch's share of the St. Louis market increased 5% between January 1953 and January 1956, the share of its leading competitor underwent an increase of almost 14%. It explained the 8% and 11.6% decline in the market shares of Anheuser-Busch's other two competitors by what it termed "special circumstances," and laid great emphasis on the fact that the record did not show how much of their loss was attributable to these special circumstances and how much resulted solely from the price reductions. It further pointed to the fact that none of Anheuser-Busch's competitors lost retail customers and each continued to vary their competitive sales activities and continued to make profits. The court felt it important that the trial examiner had found that there was no proof that Anheuser-Busch had used income or profits from the rest of its business to stabilize losses in St. Louis, or, indeed, that it suffered any losses in St. Louis during the period of price reductions. The court distinguished the territorial price discrimination cases relied on by the FTC (see cases in notes 19 and 26 supra) on the ground that:

> In each of those cases the motive for the price cut was vindictive and the effect was punitive. There was not even a pretense that the price change was incident to a general intensification of the sales effort, as in the case at bar. It was a single lethal weapon aimed at a victim for a predatory purpose.

Having thus concluded that the record showed no actual present injury, the court, relying on its reading of Corn Products, supra note 18, refused to find any reasonable probability or possibility of future adverse effect, again stressing the absence of a showing of predatory intent.

Because the Court thus found that the record did not support a finding of the requisite substantial competitive injury, it refused to consider Anheuser-Busch's § 2(b) good faith meeting of competition defense or its contention that the Commission's order was unduly broad.

[36] 363 U.S. at 542.

[37] Id. at 553.

*Morton Salt Co.*,[38] as to adequacy of proof of tendency to injure competition in secondary-line cases, the more restrictive standard of proof enunciated in *Morton Salt* did not apply to primary-line cases.[39]

The argument of Anheuser-Busch that the phrase "discrimination in price" meant "more than a mere difference" was not wholly without foundation. Previously, in *Automatic Canteen Co. v. FTC*,[40] a case arising under § 2(f)[41] of the Robinson-Patman Act, the Supreme Court by way of dictum had quoted a statement to this effect by Representative Utterback, a manager of the conference bill which later became § 2(a).[42] In that case the Court had acknowledged that discrimination might mean either a price difference in sales between competitors or only such a differential that "puts the unfavored competitor at a disadvantage." Furthermore, in an opinion of somewhat doubtful significance, the Ninth Circuit, in 1955, refused to accept the proposition that a price difference among geographically disparate customers was tantamount to a discrimination.[43]

Nevertheless, in urging its interpretation, Anheuser-Busch was attempting to overthrow twenty years of precedent. Several Supreme Court decisions, while not adjudicating this precise issue, had used the phrase "price discrimination" interchangeably with price dif-

---

38 334 U.S. 37 (1948).

39 363 U.S. at 552 n.21. For an analysis of what constitutes substantial injury to competition within the meaning of § 2(a), see Von Kalinowski, op. cit. supra note 32.

40 346 U.S. 61, 70 n.10 (1953).

41 49 Stat. 1526 (1936), 15 U.S.C. § 13(f) (1958).

42 The statement in full is 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 cast 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 profits 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. But where no such relationship exists, where the goods are sold in different markets and the conditions affecting those markets set different price levels for them, the sale to different customers at those different prices would not constitute a discrimination within the meaning of the bill. 80 Cong. Rec. 9416 (1936).

43 Balian Ice Cream Co. v. Arden Farms Co., supra note 19. The court did not analyze the basis or import of its assertion in this regard, the first of several alternative holdings. It distinguished both the Moore and Porto Rican cases on their facts stating that both involved proof of the destruction of competition or possible injury to a competitor while there was no such proof in Balian. From what has been stated above it is obvious that this would be good grounds for denying relief. Nevertheless, the court went on to say that local price discrimination does not violate § 2(a).

ference, particularly regarding sales among competing customers.[44] In *FTC v. Cement Institute*,[45] the Supreme Court flatly defined "discrimination in price" as "selling the same kind of goods cheaper to one purchaser than to another."[46] And in *Morton Salt* the Court said, "Congress meant by using the words 'discrimination in price' in § 2 that in a case involving competitive injury between a seller's customers the Commission need only prove that a seller had charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors."[47]

As a result of the holding in the principal case it is possible that a national seller may in the future be reluctant to make wholly justifiable selective price reductions. He may feel that before he can make a profitable reduction in any market, he must reduce his price in all markets.[48] Such a reluctance on the part of sellers would indeed give rise to adverse effects upon competition. It would result in artificial, inflexible prices,[49] never going below that set by a less efficient competitor in each market. Both sellers and buyers would be deprived of the full rewards of efficiency, volume production, and volume sales.

---

44 FTC v. Ruberoid Co., 340 U.S. 470, 473-74 (1952); FTC v. Morton Salt Co., supra note 4, at 45 n.13; cf. FTC v. A.E. Staley Mfg. Co., 324 U.S. 746, 757 (1945). See also, Austin, Price Discrimination and Related Problems Under the Robinson-Patman Act, 18-20 (2d rev. ed. 1959); McAllister, Price Control by Law in the United States: A Survey, 4 Law & Contemp. Prob. 273, 291-93 (1937); Rowe, 66 Yale L.J., supra note 32, at 36-38. Cf. Patman, op. cit. supra note 15, at 24 ("The statement that it shall be unlawful to discriminate in price is of the same effect as to say that it shall be unlawful to make a different price.").

45 333 U.S. 683 (1948).

46 Id. at 721. Cf. Moore v. Mead's Fine Bread Co., supra note 3, at 116-19; Samuel H. Moss, Inc., supra note 3 at 379. The exhaustive FTC analysis specifically addressed to the context of the term "discrimination" is in accord, Purex Corp., Ltd., FTC Dkt. 6008, at 4-7 (April 16, 1954), initial decision adopted by the FTC, Trade Reg. Rep. (1954-1955 FTC Cas.) ¶ 25172 (released Sept. 22, 1954). In the Atlas case, supra note 16, the Tenth Circuit approved instructions that price discrimination means "the giving to one of the purchasers an advantage in price not accorded or given to other purchasers."

47 334 U.S. at 45. The court also stated that it is "self-evident . . . that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of those customers." (Id. at 50).

48 It has been suggested that to compel a seller to reduce all his prices, rather than practice "selective" price reductions, may be more effective in preserving price rivalry. Att'y. Gen. Nat'l Comm. Antitrust Rep. 185-86 (1955). See also, Note, Competitors Lawful Prices and Lawful Competition, 43 Minn. L. Rev. 327 (1958).

49 See, e.g., Edwards, Maintaining Competition 169-71 (1949); Rowe, Price Discrimination Competition and Confusion: Another Look at Robinson-Patman, 60 Yale L.J. 929 (1951); Note, the "Injury" Requirement of the Robinson-Patman Act, 49 Nw. U.L. Rev. 197 (1954). See generally, Aselman, The Consistency of the Robinson-Patman Act, 6 Stan. L. Rev. 3 (1953).

Another possible but more remote danger, arising from the fact that under *Anheuser-Busch* every price difference becomes suspect, is that a seller may be inclined to quote a single uniform price to all his purchasers whether they be classified as wholesalers, jobbers, retailers or consumers. Under the prevailing interpretation such across-the-board transactions would not create a discrimination, notwithstanding the natural consequence that those retailers who buy indirectly through wholesalers will ultimately pay more than retailers purchasing directly from the supplier.[50]

To the extent, if any, that either of these two pricing practices is stimulated, the decision in *Anheuser-Busch* would frustrate a basic purpose of the antitrust acts. Freedom to depart from established prices is of major importance to our free enterprise system. Ultimately, it may result in great benefits to the consumer by lowering the whole price level to the extent that prevailing prices may have been too high. Flexibility in pricing is also especially helpful to the seller in developing more efficient marketing methods. For example, departure from traditional prices is often undertaken upon a territorial basis to open new markets, or experimentally to test new ventures. Though a possibility exists that the *Anheuser-Busch* decision may have the effect of thwarting price flexibility, this is at most speculative.

On the other hand, the simplicity of the Court's solution has important advantages. In enacting the Robinson-Patman Act, Congress sought to deal with unfettered price cutting activity which became prevalent with the rise of the chain stores and other large volume purchasers. Such methods of pricing were regarded as a potential threat to the entire competitive system. Enforcement of that Act has already been hobbled because "precision of expression is not an outstanding characteristic of the Act."[51] Interpreting the

[50] Klein v. Lionel Corp., 237 F.2d 13 (3d Cir. 1956), affirming 138 F. Supp. 560 (D. Del. 1956). Lionel is a conventional application of the Robinson-Patman Act dating back to the Bird case of 1937. Bird & Son, Inc., 25 FTC 548 (1937); cf. FTC v. A. E. Staley Mfg. Co., supra note 44.

The Lionel court's substantive ruling that a retailer buying through a supplier's wholesaler was not a "purchaser" from the supplier must not be confused with the holding of Krug v. Int'l Tel. & Tel. Corp., 142 F. Supp. 230 (D.N.J. 1956). Krug decided only that a wholesaler who paid higher prices than some of his supplier's direct retail accounts sustained actionable competitive injury when his own retail customers were harmed by the price advantages secured by their direct buying competitors. Krug thus concerned merely the competitive impact of a price differential among his direct purchasers, whereas in Lionel no such differential among different purchasers existed. See 57 Colum. L. Rev. 429 (1957); Rowe, Discriminatory Sales of Commodities in Commerce, 67 Yale L.J. 1155 (1958).

[51] Automatic Canteen Co. v. FTC, 346 U.S. 61, 65 (1953).

phrase "discrimination in price" as meaning anything more than a simple price difference would have compounded the legal and economic complexities already inherent in proving violations. If the equitableness of specific price differentials were made the test, then not only would variations in price among different products be exempt, as the Act itself provides, but also an exotic variety of economically rationalized price spreads among "commodities of like grade and quality" might similarly claim exemption. Inevitably, every legal controversy involving any price difference would come to center upon an *ad hoc* resolution of "discrimination" divorced from the specifically pertinent statutory text, rather than upon the detailed governing provisions relating to injury, cost justification, meeting competition, etc.[52] Obviously, this is not what Congress intended. The plain language of the statute clearly demonstrates that Congress intended to and did prohibit *all* price discriminations substantially injuring competition subject to certain defined defenses. The formula adopted by the Court promises in the future to fulfill this Congressional intent by shifting emphasis from the determination of "discrimination" to consideration of these other provisions. Viewed in this light, the real benefits to enforcement likely to flow from the decision, as a practical matter, far outweigh any hypothetical injury to competition.

[52] This is the position adopted by Rowe, 66 Yale L.J., supra note 32, at 38, and relied upon by the Court, 363 U.S. at 551. Other commentators have generally shared this view. See note 44 supra.