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Trade Regulation—Robinson-Patman Act—Knowledge of Violation Imputed to Members of Buyers' Association by Way of Trade Experience.—American Motor Specialties,Inc. v. F.T.C.

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to strike down, in their incipiency, such contracts as may substantially lessen competition or tend to create monopolies.

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Trade Regulation—Robinson-Patman Act—Knowledge of Violation Imputed to Members of Buyers' Association by Way of Trade Experience.—*American Motor Specialties, Inc. v. F.T.C.*[1]—It had been the custom of major suppliers in the automotive parts industry to offer jobbers successively increasing percentage reductions off their list prices for specified increases in dollar volume purchases. These cumulative volume rebates and graduated price schedules were accorded all purchasers and were available generally throughout the industry. Certain companies engaged as jobbers in the sale and distribution of automotive parts formed a buying group to which suppliers were requested to submit their price schedules. After the prices of a certain supplier had been approved by a committee, the member firms would place their individual orders with the buying group, i.e., the orders were written on forms bearing the name of the buying group, but these forms were either sent by the individual firm directly to the supplier or were sent through the group office without any consolidation of member orders. The orders were processed by the supplier in the same manner as if they had been received directly from the individual jobber instead of in the name of the buying group, and the volume rebates were computed on the basis of the total purchases for all member-jobbers. After deducting operating expenses of the buying group these rebates were distributed to member-jobbers in proportion to each jobber's purchases for the year. The effect of this was to give member-jobbers a substantially lower cost than would have been paid for the same kind and quantity of goods by such jobber individually or by a competing jobber. The granting of these volume discounts by suppliers had previously been held violative of § 2(a)[2] of the Robinson-Patman Act.[3] In this case the Commission issued

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[1] 278 F.2d 225 (2d Cir. 1960), cert. denied, 364 U.S. 884 (1960).

[2] "That it shall be unlawful for any person engaged in 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 purchasers involved in such discrimination are in commerce . . . 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 . . ." 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958).

[3] Standard Motors Products v. F.T.C., 265 F.2d 674 (2d Cir. 1959), cert. denied, 361 U.S. 826 (1959); P. Sorenson Mfg. Co. v. F.T.C., 246 F.2d 687 (D.C. Cir. 1957); P & D Mfg. Co. v. F.T.C., 245 F.2d 281 (7th Cir. 1957), cert. denied, 355 U.S. 884 (1957); C. E. Niehoff & Co. v. F.T.C., 241 F.2d 37 (7th Cir. 1957), modified sub nom. Moog Industries, Inc. v. F.T.C., 355 U.S. 411, rehearing denied, 355 U.S. 968 (1958); E. Edelmann & Co. v. F.T.C., 239 F.2d 152 (7th Cir. 1956), cert. denied, 355 U.S. 941 (1958); Whittaker Cable Corp. v. F.T.C, 239 F.2d 253 (7th Cir. 1958), cert. denied,

cease and desist orders against the buyers from these suppliers for violations of § 2(f)[4] of the Act, which makes it unlawful for buyers knowingly to induce or receive discriminatory prices that are prohibited under § 2(a). The buyers seek to set aside this order on the ground that the Commission failed to establish that the buyers knew that the prices they were receiving were prohibited and could not be justified by savings in cost to the supplier. The Court of Appeals affirmed the Commission's order. HELD: Since the buyers knew that they, as individual firms, were receiving goods in the same quantities and that they were served in the same manner as their competitors, by the fact of having combined into a group for the purpose of obtaining thereby a favorable difference in price, they were charged with notice that this price differential could not be justified. Thus, irrespective of whether the buyers knowingly induced such price differentials, they *knowingly* received them in violation of § 2(f).

Under the Robinson-Patman Act the buyer's violation was made derivative from the seller's; thus the buyer does not violate § 2(f) if the lower prices he induces or receives are either within one of the seller's defenses, or not known by him not to be within one of those defenses.[5] In *Automatic Canteen v. F.T.C.*[6] the Commission attempted to apply § 2(b)[7] to buyers in a § 2(f) proceeding and thus establish that once it had shown that the buyer received lower prices than his competitor, and that he knew of this price differential, there was a *prima facie* case of a § 2(f) violation and the burden shifted to the buyer to show that differentials were cost-justified, or that the buyer did not know that they were not cost-justified. The Supreme Court held that the Commission had the burden of showing that the price differentials were not justified and that the buyer knew that they were not justified. In an attempt to foreclose any strict interpretation of the Commission's burden in § 2(f) proceedings the court stated:

> ". . . a buyer who knows that he buys in the same quantities as his competitors and is served by the seller in the same manner or with the same amount of exertion as the other buyer can fairly be charged with notice that a substantial price differential cannot be justified. *The Commission need only to show, to establish its prima facie case, that the buyer knew that the methods by which he was served and*

353 U.S. 938, rehearing denied, 353 U.S. 962 (1957); Moog Industries v. F.T.C., 238 F.2d 43 (8th Cir. 1956), aff'd, 355 U.S. 411, rehearing denied, 356 U.S. 905 (1958).

[4] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." 49 Stat. 1526 (1936), 15 U.S.C. § 13(f) (1958).

[5] Although the Robinson-Patman Act prohibitions were aimed at discriminatory concessions coerced by powerful buyers the legislative formula relegated Section 2(f) to a minor role. See Edwards, The Price Discrimination Law 488 (1959).

[6] 346 U.S. 61 (1953).

[7] "Upon proof being made . . . 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 . . ." 49 Stat. 1526 (1936), 15 U.S.C. § 13(b) (1958).

quantities in which he purchased were the same as in the case of a competitor."[8] (Emphasis supplied.)

However, in reading this language one must keep in mind the precise holding of *Automatic Canteen*, i.e., that the Commission failed to establish a *prima facie* case by merely introducing evidence that the buyer received lower prices and knew of such differentials. In this light the language quoted above is seen as merely an attempt to furnish an illustration of a *prima facie* case upon which the Commission may base its finding of a § 2(f) violation.

There is, however, a further problem, i.e., what must the Commission find before issuing a cease and desist order? Or to put it more specifically, what is the meaning of "knowingly" in § 2(f)? Although the court in *Automatic Canteen* did not purport to decide this issue,[9] Justice Frankfurter, writing for the majority, gave strong indication that actual knowledge was needed to establish a § 2(f) violation. He stated: ". . . we think a fairer reading of the language and of what limited legislative elucidation we have points toward a reading of § 2(f) making it unlawful only to induce or receive prices known to be prohibited discriminations."[10] A recent decision[11] involving a situation similar to that of the instant case, stated with reference to the element of knowledge in § 2(f): ". . . the Court's opinion [*Automatic Canteen*] reflects an awareness that this critical knowledge of the buyer as to both (a) the underlying facts constituting the asserted justification and (b) the conclusion that it would not legally constitute a justification may have to be established from indirect circumstantial inferences."[12]

However, the Commission and the Court of Appeals in the instant decision seem to interpret *Automatic Canteen* as indicating that when the buyer knew, or *should have known* that the price differentials could not be cost-justified, there is a violation of § 2(f).[13] This result was reached

[8] Automatic Canteen v. F.T.C., supra note 6, at 80.

[9] Id. at 65. The court stated: "We are here asked to settle a controversy involving simply the burden of coming forward with evidence under § 2(f) of the Act." The Commission appeared to sustain this conclusion in the decision on remand of Automatic Canteen. Automatic Canteen Company of America, 51 F.T.C. 574, 576 (1955).

[10] Id. at 73. Similar statements were made throughout the decision: ". . . § 2(f) does not reach all cases of buyer receipt of a prohibited discrimination in prices. It limits itself to cases of knowing receipt of such prices." Id. at 71; "We therefore conclude that a buyer is not liable under § 2(f) if the lower prices he induces are either within one of the seller's defenses such as the cost justification or not known by him not to be within one of those defenses." Id. at 74.

[11] Mid-South Distributors and Cotton States, Inc. v. F.T.C., Trade Reg. Rep. (1961 Trade Cas.) ¶ 69939, at 77705 (5th Cir. February 23, 1961).

[12] Id. at 77709.

[13] The Commission's finding stated: "Respondents, therefore, having knowledge of this fact, knew or should have known that the lower prices which they received could not be cost-justified." Metropolitan Automotive Wholesalers Cooperative, Inc., Trade Reg. Rep. (1959-1960 FTC Cas.) ¶ 27876, at 36942. The Court of Appeals similarly held: ". . . by the very fact of having combined into a group and having obtained thereby a favorable price differential, they each, under Automatic Canteen, were charged with *notice* that this price differential they each enjoyed could not be justified. And this *knowledge* . . . is imputable to the organization . . . " (Emphasis supplied). Ameri-

even though, as shown above, *Automatic Canteen* did not purport to decide the elements of a § 2(f) violation,[14] and despite the strong dicta that a finding of actual knowledge is needed under § 2(f).[15]

In the instant case, a finding of actual knowledge on the part of the buyer would have been amply supported by substantial evidence and would have clearly been upheld on review. However, in situations unlike the present, where actual knowledge is not so easily inferred, a cease and desist order based upon a finding that the buyer knew, or *should have known,* of the price discrimination may lead to the situation that concerned the Court in *Automatic Canteen,* i.e., where the Commission seeks to enforce an order against a buyer who may be an "unsuspecting recipient of prohibited discriminations."[16] In fact, even in a situation similar to that of the instant case, an order based upon an erroneous conclusion of law is subject to objection and possible remand under the *Chenery* doctrine.[17]

At any rate, the element of knowledge in § 2(f) has yet to be determined by the courts, since there has been no case to date dealing specifically with this precise issue. However, in view of the recent increase of § 2(f) proceedings by the Federal Trade Commission a determination of such may be forthcoming in the near future.[18]

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can Motors Specialties, Inc. v. F.T.C., supra note 1, at 228. The Mid-South Distributors case, supra note 11, at 77710, upheld a similar cease and desist order and appeared to retreat from its earlier language when it stated: "The buyer could not reasonably have entertained any idea that he was getting preferred treatment over his competitors because credit costs were less."

[14] See note 9 supra.

[15] See note 10 supra.

[16] Automatic Canteen v. F.T.C., supra note 6, at 81.

[17] SEC v. Chenery Corp., 318 U.S. 80 (1943).

[18] In addition to the Mid-South Distributors case, supra note 11, there is another case involving identical transactions pending in the Ninth Circuit. Alhambra Motor Parts v. F.T.C., No. 17222 (9th Cir. 1961), filed January 4, 1961.