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Trade Regulations—Robinson-Patman Act—Meeting Competition.—Sunshine Biscuits, Inc. v. FTC

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only then may it consider whether the discount is a violation of subsection (c).

While the court is not clear as to the guidelines for this new method of determining subsection (c) violations, it still takes pains to avoid the snare of fusing the defense of subsection (a) with subsection (c).[27] The court's position is not as artificial as it may appear. It was argued in the respondent's brief that the mere fact that the conduct in question is nonviolative of subsection (a) does not preclude its violation of subsection (c).[28] Something of the converse may also be true, that if a business practice clearly falls within the sanction of subsection (a) it must so remain and not be invalidated because, in form though not in substance, it is described in subsection (c).[29] With the *Thomasville* decision, it is now necessary to determine whether the brokerage rate was an internal matter—the seller's response to factors not peculiar to one customer—or was a concession to favored customers.[30]

A criticism which can legitimately be brought to bear on the case is that despite all of its fine distinctions there seems, in effect, to be a fusion of subsections (a) and (c), thereby greatly diluting the effect of subsection (c). Whether this unfortunate tendency actually is present will depend on the use of *Thomasville* in future decisions involving subsection (c) violations.[31]

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Trade Regulations—Robinson-Patman Act—Meeting Competition.— ***Sunshine Biscuits, Inc. v. FTC.***[1]—Sunshine Biscuits manufactures and distributes baked goods on a nation-wide scale, and in the Cleveland area it sells potato chips to independent retail outlets by way of its Velvet-Krun-Chee Division. In 1959 competing local distributors offered discount prices to some of Sunshine's Cleveland customers and Sunshine responded with similar discounts. The lower prices enabled Sunshine to keep its old customers, and were also a source of new business from customers who had not previously purchased from Sunshine. The Federal Trade Commission issued a complaint against Sunshine showing that its discriminatory prices had injured competition as prohibited by Section 2(a) of the Robinson-Patman Act.[2] At a subsequent hearing the examiner found the Commission's

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27 Rowe, supra note 6.

28 Brief for Respondent, p. 24.

29 80 Cong. Rec. 9417 (1936): "There is no limit to the phases of production, sale and distribution in which such improvements may be devised . . . nor from which those [improvements] . . . when demonstrated may be expressed in price differentials in favor of the particular customers whose distinctive methods of purchase . . . makes them possible."

30 Brief for Petitioner, p. 5: "This has been the practice as far back as anyone presently with the company can recall."

31 It is somewhat significant to note that FTC did not apply for certiorari.

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1 306 F.2d 48 (7th Cir. 1962).

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

Section 2(a) of the act, as amended, provides in part:

It shall be unlawful for any person engaged in commerce, in the course allegations to be true, but dismissed the complaint when Sunshine introduced evidence that its discriminatory pricing was carried on "in good faith to meet the equally low prices of a competitor," and thereby justified under the terms of section 2(b) of the act.[3] This result was later vacated by the Commission, a cease and desist order against Sunshine being substituted. In a four-to-one decision the FTC ruled that discriminatory prices are always illegal when used to obtain new customers and can be justified under section 2(b) only when granted in a good faith effort to meet competition for the purpose of retaining old customers. On appeal the Seventh Circuit reversed. HELD: A complete defense to a charge of price discrimination is established when a seller shows that his price differential was made in good faith to meet the lawful and equally low price of a competitor. It is of no consequence that these prices are being offered to purchasers who have not been the seller's customers in the past.

The Robinson-Patman Act enacted in 1936 amended the original Section 2 of the Clayton Act[4] by providing that price discrimination among

> of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination 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. . . .

[3] 49 Stat. 1526 (1936), 15 U.S.C. § 13(b) (1958).

Section 2(b) of the act, as amended, provides in part:

> Upon proof being made, at any hearing on a complaint under this section, that there has been a discrimination in price . . . 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 the 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 . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor. . . .

[4] The Clayton Act of 1914, 38 Stat. 730 (1914), was addressed to the trade problems of that day and was aimed at the growing number of nation-wide manufacturers. These large trusts, while somewhat restricted by the Sherman Act, 26 Stat. 209 (1890), 15 U.S.C. §§ 1-7 (1958), chewed up small local competition by slashing prices in local areas just long enough to drive any small competitors out of business. This was the situation in Puerto Rican American Tobacco Co. v. American Tobacco Co., 30 F.2d 234 (2d Cir. 1929), where the court affirmed an injunction issued against the defendant halting his predatory lower prices in Puerto Rico which were designed to "eliminate a weaker competitor," id. at 237.

Congress attacked these tactics by prohibiting price discrimination which was injurious to competition or which tended to create a monopoly. The pricing could be justified, however, by showing that the price differences reflected "differences in grade, quality, or *quantity* of the commodity sold." Clayton Act, 38 Stat. 730 (1914). (Emphasis added.) The legality of the quantity discount was established in Goodyear Tire & Rubber Co. v. FTC, 101 F.2d 620 (6th Cir. 1939). This case, while decided after the Robinson-Patman Act was adopted, reversed an order that was issued against Goodyear prior to 1936.

The quantity discount provision proved to be a loophole in the Clayton Act for sellers who dealt with large chain stores. The purchasing power of the large chains enabled them to demand substantial discounts from the suppliers, and these savings were reflected in the prices offered to the consumer. Small buyers had no relief under the Clayton Act. National Biscuit Co. v. FTC, 299 Fed. 733 (2d Cir. 1924); Mennen Co. v.

competing customers[5] is illegal if such discrimination may injure or lessen competition in any level of commerce.[6] The burden of proving this price disparity and its adverse effects on competition is placed upon the party who alleges the violation.[7] The law is designed to prevent a seller from charging discriminatory prices and thereby injuring competitive sellers (primary line injury), injuring buyers or those in competition with them (secondary line injury) or harming those who purchase from these competing buyers (third line injury).

Under section 2(b) of the act the prohibited price discrimination can be justified on a theory of meeting competition. The party charged with the violation must show certain facts in order to establish his defense.[8] The price offered must be made in a good faith effort[9] to meet the lawful price[10] of a competitor. Early decisions interpreted the defense as a complete justification for pricing practices proscribed under section 2(a).[11] In 1945, however, the Federal Trade Commission tried to scuttle this earlier policy when it halted the pricing practices being carried on in the Detroit gasoline market by Standard Oil of Indiana.[12] The Commission proposed that the defense was no good when the price discrimination was shown to be injurious to competition. They, in effect, would allow sellers to invoke the 2(b) defense only

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FTC, 288 Fed. 744 (2d Cir. 1923). Pressure from independent merchants led to an FTC investigation of chain stores in 1928. The Commission made its final report in 1935 and in the following year the Robinson-Patman Act was passed, eliminating the quantity discount defense. This revision aimed to check what seemed to be the inevitable domination of retailing by chain stores. FTC Final Report on the Chain Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. 301 (1935); Austin, Price Discrimination and Related Problems Under the Robinson-Patman Act 11 (2d rev. ed. 1959).

5 The customers need not be in competition with each other when the injury complained of is to the primary line, i.e., harmful to sellers who compete with the party who is offering the discriminatory prices. FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 545-46 (1960).

6 Corn Prod. Ref. Co. v. FTC, 324 U.S. 726, 738, 742 (1945).

7 A. E. Staley Mfg. Co. v. FTC, 135 F.2d 453, 455 (7th Cir. 1943); Attorney General's Committee Report on the Study of the Antitrust Laws 161 (1955). But see, Samuel H. Moss, Inc. v. FTC, 148 F.2d 378 (2d Cir.), cert. denied, 326 U.S. 734 (1945). In this case the Second Circuit required that the complainant (FTC) show only that there was a price discrimination and then put the burden on the respondent (Moss) to show that injury to competition did not result.

8 Standard Oil Co. v. FTC, 340 U.S. 231, 250 (1951); FTC v. A. E. Staley Mfg. Co., 324 U.S. 746, 758, 759-60 (1945). These cases firmly established the meeting competition defense.

9 Standard Oil Co. v. FTC, 233 F.2d 649 (7th Cir. 1956), aff'd, 355 U.S. 396 (1958).

10 ". . . a seller should be deemed to have met a lawful price unless he knew or had reason to know otherwise." Attorney General's Committee Report, supra note 7 at 182. See also cases cited in note 8 supra; see remarks of Rep. Utterback stating that Congress intended that only lawful prices be met, 80 Cong. Rec. 9418 (1936).

11 General Shale Prod. Corp. v. Struck Constr. Co., 132 F.2d 425, 429 (6th Cir. 1942), cert. denied, 318 U.S. 780 (1943); See also Moss v. FTC, supra note 7.

12 Matter of Standard Oil, 41 F.T.C. 263 (1945), modified & aff'd, 173 F.2d 210 (7th Cir. 1949), rev'd, 340 U.S. 231 (1951). Standard had been selling its gasoline to four "jobbers" at a 1½¢ discount from the regular tank-wagon price offered to retail dealers. Some of this gas was sold on the retail market at stations which were operated by the jobbers. The FTC showed that the price discrimination had lessened competition through injury to the small retail stations. Standard admitted the practices as charged,

to justify a price discrimination not shown to be injurious to competition. Since any discriminatory prices which are not harmful to competition do not come within the prohibitive terms of section 2(a), such a defense would be meaningless. The Supreme Court reversed the Commission on this point and rejected its interpretation of 2(b), holding that under this section "it is a complete defense to a charge of price discrimination for a seller to show that his price differential has been made in good faith to meet a lawful and equally low price of a competitor."[13] The Court did not give a restrictive interpretation to the Clayton Act provisions, and, as a result, aligned itself with those who had drafted the act.[14] The absolute right of sellers to offer discriminatory prices in order to prevent competitors from stealing their customers was firmly established in the *Standard Oil* decision.

In the present case the Federal Trade Commission did not deny the availability of an absolute 2(b) defense, but maintained that the language in *Standard Oil* restricted its use to fact situations similar to that case.[15] They urged that the court follow a recent Second Circuit case which held that "it is well settled that a lowered price is within 2(b). . . only if it is used defensively to hold customers rather than to gain new ones."[16] The instant case rests squarely on the issue of how far the scope of this 2(b) defense extends, and whether or not it reaches far enough to allow the procurement of a new customer with competitive, yet discriminatory, prices. The court states the question to be "whether the language of section 2(b) was correctly limited by the Commission to situations in which Sunshine granted discounts equal to those of its competitors in order to retain its customers or whether the section also permitted Sunshine to grant similar discounts to purchasers who up to then were not its customers."[17]

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but offered evidence tending to prove that its lower prices were offered to the jobbers in good faith to meet the equally low prices then being offered them by competitors. The Commission treated this evidence as immaterial, stating that "this does not constitute a defense in the face of affirmative proof that the effect of a discrimination was to injure, destroy and present competition with the retail stations. . . ." 41 F.T.C. 263, 282-83 (1945). This leading case is well analyzed in McGee, Price Discrimination and Competitive Effects: The Standard Oil of Indiana Case, 23 U. Chi. L. Rev. 398 (1956).

[13] Standard Oil Co. v. FTC, supra note 8, at 246. A second decision, supra note 9, firmly established the defense and, in particular, held that Standard had exercised "good faith" in the pricing practices used to meet competition.

[14] Standard Oil v. FTC, supra note 8, at 249.

[15] In the *Standard Oil* decision, supra note 8, at 241-42, the Court stated that "the actual core of the defense . . . consists of the provision that wherever a lawful lower price threatens to deprive a seller of a customer, the seller, to *retain* that customer, may in good faith meet that lower price." (Emphasis supplied.)

[16] Standard Motor Prod. v. FTC, 265 F.2d 674, 677 (2d Cir.), cert. denied, 361 U.S. 826 (1959). The decision adopted the Commission's interpretation of *Standard Oil* as part of its reasoning in affirming an FTC cease and desist order halting a New York City auto parts distributor whose discount-rebate system in pricing was discriminatory. The court made the quoted remarks a part of its opinion, but relied strongly on the *Staley* decision, supra note 8, and found that Standard's discriminatory pricing, carried on as part of a general pricing policy rather than individually negotiated sales, lacked the good faith required in maintaining the defense.

[17] 306 F.2d at 50. Resolution of this central question depends on what is considered to be the source of the defense. Sunshine urged that the statute itself be looked at in defining the defense since it is the act which establishes the illegality of

Had the Commission's position been sustained, practical problems of enforcement would have arisen. The shortcomings of a system which favors discounts to old customers as opposed to new ones were outlined by Commissioner Elman in his strong dissent to the Commission's opinion:

> The line between 'old' and 'new' customers is far easier to state than to apply to the myriad situations that develop in actual business relations between sellers and buyers. . . .
>
> Does an 'old' customer retain that status forever, regardless of the infrequency or irregularity of his purchases? Suppose an 'old' customer transfers his business to another seller offering a lower price; how long a grace period does the first seller have in which to meet the lower competitive price? If he waits too long will the 'old' customer be regarded as a 'new' one, and hence unapproachable because Section 2(b) no longer applies? If so, how long is too long? And if not, does it suffice that the buyer has at *any* time in the past, no matter how remote, been a customer of the respondent?[18]

These practical problems, as troublesome as they might be, would be overshadowed by the adverse economic ramifications effected by such a policy. The Commission's present enforcement policies contravene the competitive price structure aimed at in the Sherman Antitrust Act.[19] In the face of this traditional policy the Commission encourages a system of substantial price rigidity in each market area. Their policy would buttress resale price maintenance and defeat competition by bolstering rigid oligopoly pricing in a particular locale.[20] The interstate distributor who can cost justify his price differentials or the local distributor not regulated by the act is

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price discrimination to begin with. On the other hand, the Commission seemed to be holding out *Standard Oil* as the source, asking that the terms of that decision be interpreted and followed when the defense is applied. Sunshine would see in the decision only a judicial determination of the depth or strength of the defense, and no limitations or restrictions of the statutory terminology with regard to scope.

The Attorney General's Report treats the question as did the court in the present case:

> *Standard Oil* does not confine the 'good faith' proviso solely to *defensive* reductions to retain an *existing* customer. The Supreme Court in that opinion merely employed language describing the case at bar; it did not promulgate a general doctrine surrounding each seller with a protected circle of customers which may be exploited without fear of rival's price attacks. Such a limitation in any event would not be in keeping with elementary principles of competition, and would in fact foster tight and rigid commercial relationships by insulating them from market forces.

Supra note 7, at 184. See also Hally, The Meeting Competition Defense in Robinson-Patman: FTC v. The Courts, 3 B.C. Ind. & Com. L. Rev. 201, 205-06 (1962); Simon, Price Discrimination To Meet Competition, 1950 U. Ill. L.F. 575, 588 (1950).

18 Matter of Sunshine Biscuits, Inc., 3 Trade Reg. Rep. ¶ 15,469, at 20,317 (1961) (dissenting opinion).

19 See, Burns, The Antitrust Laws and the Regulation of Price Competition, 4 Law & Contemp. Prob. 301 (1937). See also remarks of Mr. Justice Jackson who made this point during the oral argument of the *Standard Oil* case as reproduced in Simon, op. cit. supra note 17, at 581.

20 See, The Swinging Door—or How to Avoid One Antitrust Law by Violating Another, 59 Yale L.J. 158, 162 (1949).

protected by this policy in whatever price he is maintaining, and, as long as regulated competitors cannot offer an equally low price, his customers are tied securely around him in a permanent economic colony. The problem was recognized by the Attorney General's Committee when they urged that "the absolute status which the Supreme Court accorded the 'meeting competition' defense must not be undermined by interpretations thwarting its effectiveness."[21]

The reversal of a Federal Trade Commission ruling in this case is in line with a present trend on the circuit court level. In a recent case the Fifth Circuit set aside a cease and desist order made against the Sun Oil Company.[22] There, as in the instant case, the Commission interpreted the 2(b) defense in a restrictive manner; the court responded with a reversal, but was subsequently reversed by the Supreme Court, which agreed with the FTC.[23]

The holding in Sunshine is clear; its terms bring the procurement of new customers by means of competitive discriminatory prices within the 2(b) provisions—but how far has the door been opened? The facts of the case cannot be overlooked as they might well determine the weight that the case will have in future opinions. The court has allowed an acquisition of new customers, yet the circumstances of the transactions are such that the market practices could be labeled *defensive* acquisitions. Another court, distinguishing *Sunshine*, could halt other sellers if they found their dealings to be an *aggressive* acquisition of new customers. So deciding, they could move to save what was left of Robinson-Patman 2(a) and 2(b) and yet remain in line with the overall competitive spirit envisioned by the drafters of the Sherman Act. The *Sunshine* question is still open to this extent at least.[24]

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21 Supra note 7, at 181.

22 Sun Oil Co. v. FTC, 294 F.2d 465 (5th Cir. 1961), noted in 75 Harv. L. Rev. 429 (1962). The court recognized that Sun's lower price to its independent retail outlet was really a lower price being made to the consumer to meet the gasoline prices offered at a nearby station, which was owned and operated by another distributor. The decision reflected the realities of the market place as it allowed the 2(b) defense on prices offered to the independent retailers, not to meet competitive prices being offered to them, but to meet the actual consumer level competition; the court labeled the independent outlets as "conduits."

23 83 Sup. Ct. —, 31 L.W. 4055 (1963). The Supreme Court reversed the decision of the Fifth Circuit and expressly limited the 2(b) defense to sellers who meet the prices being offered by their own competitors, and not to sellers who reduce their prices to a particular purchaser in order to enable that purchaser to meet the prices being offered by the purchaser's own competition. The Court examined the record and found no evidence that the station competing with Sun's retail outlet was more than a retailer. The Court of Appeals had assumed that the competing station was an integrated supplier-retailer. The opinion indicated that the case might have been treated differently if such a structure were shown in the record. The Court stated that their opinion would not prejudice Sun from applying to the Commission in a petition to reopen the record for admission of any evidence on this point should it be available. Two Justices felt that the Commission should be ordered to admit any such evidence. See note, 4 B.C. Ind. & Com. L. Rev. No. 3 (Spring 1963).

24 The Federal Trade Commission has decided not to appeal this case to the Supreme Court, Trade Reg. Rep. ¶ 50,166 (1962). In a public statement issued on November 23, 1962, the Commission stated that, in the judgment of the Solicitor

As has been apparent for a long time, the Robinson-Patman Act is, as a whole, one of our most controversial trade regulation statutes. The recent trend in litigation is one that reflects the FTC's manifest desire to limit the scope of the 2(b) defense as far as the courts will allow. *Sunshine Biscuit* is a significant decision demonstrating this spirit, and on the other hand showing that the courts are shouldering the formidable task of aligning the Robinson-Patman Act, along with the other antitrust laws, into a system that will protect the consumer and yet nurture the economic growth of our nation.

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General, appeal would not be appropriate because the court did not reach the factual question raised on appeal in its disposition of the case. The decision makes the 2(b) defense available to a seller whether the customer is new or old, and the court did not decide the factual question of whether the buyers in this case were old or new customers of Sunshine.

The Commission feels that it will not have to change its position because of this decision. It points out that there is now a split of authority between the circuits on this question of law and it will maintain its position with the holding in the *Standard Motor* case, supra note 16, a Second Circuit decision.

Commissioner Elman, while agreeing with the outcome of the case on the Court of Appeals level, felt that the Commission should have appealed the case for final resolution of the issue. As he pointed out, future sellers face a prospect of litigation should they engage in the same practices here approved by the Seventh Circuit.

A final settlement on this question, in the absence of an FTC policy change, is a Supreme Court decision. Those waiting for a clear resolution of the issue can hope that the Commission finds a litigious seller who has clearly obtained a new customer by offering to him a price equally as low as the price being offered by a competitor. It is a fair speculation that one will be found, but the FTC will not look for him in the Seventh Circuit.