

The fact remains, however, that if Section 4 of the Norris-LaGuardia Act creates a federal substantive labor policy against the issuance of injunctions, it should be binding on the state courts. If it is simply a jurisdictional limitation on the federal courts it should not be binding.⁶⁴ The better approach, it appears, would be to consider the Norris-LaGuardia Act a jurisdictional statute and allow the states to maintain their right to issue injunctions. Congress intended the act to apply only to the federal courts. It would have specifically stated otherwise if it had intended the states to be bound by the act.⁶⁵ In general, the reasons behind this point of view as set out above are the more convincing.

Therefore, if the states possess the power to issue a no-strike injunction, the right to remove must be denied. If not, the right to this state enforcement would be in name only and ineffective since removal of the action would always preclude its use. Since the majority of the federal courts now refuse to grant a motion for removal under the conditions of the case at hand, this should continue to be the policy.⁶⁶

In conclusion, it appears that the federal courts do not have the power to entertain an action for removal which seeks a no-strike injunction. The action should be remanded to the state court. Further, all of these actions for violation of collective bargaining agreements should be considered to have arisen under Section 301(a) of the LMRA and the federal substantive labor law should be applied by the states in enforcing these actions. However, since the Norris-LaGuardia Act is not part of the federal substantive law, but rather is jurisdictional, the states need not apply this law but may issue injunctions to enforce no-strike agreements.

If the United States Supreme Court should ultimately resolve the issue, the following holding might be anticipated. State courts must apply federal labor law and policy in enforcing collective bargaining agreements, but retain the power to issue the no-strike injunction. Further, the federal district courts are unable to grant removal of actions in which no-strike injunctions are sought.

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Trade Regulation—Price Discrimination—Meaning of "Like Grade and Quality" Under Section 2(a) of the Robinson-Patman Act—*Borden Co. v. FTC.*¹—The Borden Company manufactures and distributes dairy products and sells both the Borden brand and private label brand evaporated milk. Although chemically identical and similarly packed, except for the

⁶⁴ See Comment, 72 Harv. L. Rev. 354, 364-68 (1958).

⁶⁵ The Court in *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195, 204 (1962), stated that "if Congress had intended that § 301 suits should also not be subject to the anti-injunction provisions of the Norris-LaGuardia Act, it . . . would have made its intent known in this same express manner." This argument can also apply to the fact that had they intended the states to be bound by the act they would have specifically made their intent known.

⁶⁶ See cases cited *supra* note 9.

¹ *Borden Co. v. FTC*, 339 F.2d 133 (5th Cir. 1964).

label, the Borden brand has a proven customer preference and commands a higher price at both wholesale and retail levels. Many wholesalers buy both types of milk from Borden, treating the Borden brand as a premium line. Uniform throughout the country, Borden's price substantially exceeds that of the private label brand, which is sold on a cost-plus basis. Section 2 (a) of the Robinson-Patman Act² makes it unlawful to discriminate in price between purchasers of commodities of "like grade and quality." The FTC attacked the difference in price between the Borden brand and the private brand. The issue was whether "demonstrated consumer preference" should be considered to show unlikeness of grade or quality of products otherwise similar and thus remove the price differential from the restraint of the statute. The Hearing Examiner found the goods were of like grade and quality but dismissed the petition on other grounds.³ The Commission reversed,⁴ ordering Borden to end the price difference. On appeal, HELD: The products were not of like grade and quality since demonstrated consumer preference made them sufficiently unlike to take the price difference out of the Robinson-Patman prohibition.

Curbs on price discrimination can be traced to the Interstate Commerce Act.⁵ This legislation was principally aimed at railroads, but regulation of price discrimination was extended to private, non-monopolistic enterprise by the Clayton Act.⁶ The Robinson-Patman Act reiterated and extended the Clayton Act, emphasizing protection of the independent merchant. The reason for Robinson-Patman was the advent of the chain store.⁷ Because of the size and economic power of the chains, the proponents of Robinson-Patman felt that the chain stores could force producers to sell to them at prices lower than those offered to the independent.⁸ Thus, the purpose of

² 49 Stat. 1526 (1936), as amended, 15 U.S.C. § 13(a) (Supp. V, 1964):

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, 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: *Provided*, 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.

³ Borden Co., 3 Trade Reg. Rep. (Trade Reg. Rep. Tr. Binder, FTC Complaints, Orders, Stipulations) ¶ 15634 (1961). The Hearing Examiner felt there was adequate cost justification and no injury to competition.

⁴ Borden Co., 3 Trade Reg. Rep. (Trade Reg. Rep. Tr. Binder, FTC Complaints, Orders, Stipulations) ¶ 16191 (1962).

⁵ 24 Stat. 379 (1887), as amended, 49 U.S.C. § 2 (1958).

⁶ 38 Stat. 730 (1914), as amended, 15 U.S.C. § 13(a) (Supp. V, 1964).

⁷ 80 Cong. Rec. 8130 (1936) (remarks of Rep. Robsion); Rowe, *Evolution of the Robinson-Patman Act: A Twenty-Year Perspective*, 57 Colum. L. Rev. 1059, 1061 (1957)

⁸ 80 Cong. Rec. 8111 (1936) (remarks of Rep. Patman).

Robinson-Patman was to strengthen the Clayton Act⁹ and to provide equal opportunity for the independent.¹⁰ The concept of like grade and quality with respect to interstate commercial transportation was found in the Interstate Commerce Act¹¹ but was not formalized in terms until the Clayton Act.¹² Robinson-Patman then shifted a showing of like grade and quality from a defense to an essential element of the charge.¹³

The FTC and the courts have fixed on various tests in determining like grade and quality. Most widely used is the physical composition test, that is, if the goods are of identical physical composition, they are of like grade and quality.¹⁴ Until the instant case, courts have given no weight to different labelling without physical differences.¹⁵ Thus, on facts similar to those of the instant case,¹⁶ the FTC found that tires produced by Goodyear Tire & Rubber Co., and sold under the Goodyear label and a private merchandiser's label were of like grade and quality. The physical composition test has likewise been used to find that goods are of unlike grade and quality.¹⁷ Minor variations in leather and workmanship caused such a finding in *Boss Mfg. Co. v. Payne Glove Co.*¹⁸ Inconsistent interpretations, however, have resulted from this test in that minor physical variations have also been passed over, and the goods found of like grade and quality.¹⁹

Another test occasionally used to find products of like grade and quality is functional interchangeability.²⁰ If the goods perform the same function, they are held to be of like grade and quality. Thus, in *McWhirter v. Monroe Calculating Mach. Co.*,²¹ computing machines that differed in appearance but had the same basic components were ruled to be of like grade and quality because they performed similar functions. So also in *Bruce's Juices, Inc. v. American Can Co.*,²² containers that were of the same composition and differed only in specifications were found to be of similar grade and quality because of their functional interchangeability.

⁹ *United States v. National Dairy Prods. Corp.*, 372 U.S. 29, 34 (1963).

¹⁰ 80 Cong. Rec. 8133 (1936) (statement from Report of Committee on the Judiciary).

¹¹ 24 Stat. 379 (1887), as amended, 49 U.S.C. § 2 (1958) ("a like and contemporaneous service in the transportation of a like kind of traffic. . .").

¹² 38 Stat. 730 (1914), as amended, 15 U.S.C. § 13(a) (Supp. V, 1964) ("nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity. . .").

¹³ 49 Stat. 1526 (1936), as amended, 15 U.S.C. § 13(a) (Supp. V, 1964).

¹⁴ See *United States Rubber Co.*, 46 F.T.C. 998 (1950); *Luxor, Ltd.*, 31 F.T.C. 658 (1940); *United States Rubber Co.*, 28 F.T.C. 1489 (1939).

¹⁵ See *Page Dairy Co.*, 50 F.T.C. 395 (1953); *Hansen Inoculator Co.*, 26 F.T.C. 303 (1938).

¹⁶ *Goodyear Tire & Rubber Co.*, 22 F.T.C. 232 (1936), rev'd on other grounds, 101 F.2d 620 (6th Cir. 1939).

¹⁷ See cases collected in 81 Cong. Rec. App. 2336-2441 (1937).

¹⁸ 71 F.2d 768 (8th Cir. 1934).

¹⁹ *General Foods Corp.*, 52 F.T.C. 798 (1956).

²⁰ Haslett, *Price Discriminations and Their Justifications under the Robinson-Patman Act of 1936*, 46 Mich. L. Rev. 450, 465 (1948).

²¹ 76 F. Supp. 456 (W.D. Mo. 1948).

²² 87 F. Supp. 985 (S.D. Fla. 1949), aff'd, 187 F.2d 919 (5th Cir.), modified, 190 F.2d 73 (5th Cir. 1951).

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A third possible test is commercial fungibility. To be of like grade and quality the goods would have to be fungible, that is, the customer would show no preference for one or the other at the same price.²³ This approach is strikingly pointed out in dictum in *Columbia Broadcasting System, Inc. v. Amana Refrigeration, Inc.*:²⁴

Although no two programs present the same artistic, educational or entertainment value to all persons it may well be that so-called prime time programs which have demonstrated comparable audience drawing power would be of like grade and quality from a commercial standpoint to prospective sponsor-advertisers.²⁵

The minority members of the Attorney General's National Committee to Study the Antitrust Laws²⁶ favored a somewhat similar test, calling only for consideration of consumer brand-preferences in deciding grade and quality within the broad framework of the physical or functional tests. The influence of consumer preference on like grade and quality has also been recognized in denying defenses of "meeting competition" under Section 2(b) of the Robinson-Patman Act.²⁷ This means that a producer of a premium product cannot use this defense if he lowers his price to that of his non-premium competitor, since he has thereby more than met competition.

It has been contended that the statutory words—"like grade and quality"—are sufficiently broad to cover economic considerations.²⁸ That people prefer a brand over an identical private label product, even at an increase in price, is well acknowledged.²⁹ Much time and effort is spent in creating a demand for brand products. Thus, it has been said that goods can become different when wrapped in different packages.³⁰ This is especially true with regard to a wholesaler whose sole purpose is resale and whose only yardstick is price.

It would be easy to overestimate the significance of the instant case. Its application is limited to instances where there is "demonstrated consumer preference."³¹ Where this is not present, the traditional tests will continue to be determinative. An important question raised by the case, however, is whether consumer preference controls the determination of like grade and quality or is merely contributory. If consumer preference is controlling, the case seems close to the commercial fungibility approach.³² If, however, commercial significance is merely contributory to the finding and is to be considered along with physical and functional identity, the case is more in

²³ Rowe, Price Discrimination under the Robinson-Patman Act § 4.8 (1962).

²⁴ 295 F.2d 375 (7th Cir. 1961).

²⁵ Id. at 378.

²⁶ Att'y Gen. Nat'l Comm. Antitrust Rep. 158 (1955).

²⁷ Bigelow-Sanford Carpet Co., 3 Trade Reg. Rep. ¶ 16800 (1964).

²⁸ Rowe, Price Discrimination under the Robinson-Patman Act, *supra* note 23.

²⁹ Cassady & Grether, The Proper Interpretation of "Like Grade and Quality" within the Meaning of Section 2(a) of the Robinson-Patman Act, 30 So. Cal. L. Rev. 241, 256-73 (1957).

³⁰ Mayer, The Big Invisible Sell, *Saturday Evening Post*, March 13, 1965, 23, 27 ("... good advertising gives people a 'reason why' (to buy a product). An established brand name is itself a 'reason why' ...").

³¹ *Borden Co. v. FTC*, *supra* note 1, at 136.

³² Rowe, Price Discrimination under the Robinson-Patman Act, *supra* note 23.

accord with the minority view of the Attorney General's Committee.³³ In either alternative, this appears to be the first complete recognition of consumer preference in determining grade and quality under section 2(a). By postulating that consumer preference should be considered under like grade and quality, the court implicitly rejected Commission dictum³⁴ and the proposals of the Attorney General's Committee³⁵ that consumer preference might more properly be considered under cost justification or injury to competition.³⁶

One of the underlying reasons for the physical composition test was its simplicity and definiteness of application.³⁷ The proper determination could be made quickly and conclusively, especially in the food products line. The test postulated by the instant case, however, might be cumbersome and expensive to employ. Nor has the court specified the manner or extent of proof required. What are the means of showing "demonstrated consumer preference?" In the instant case, testimony of retailers and wholesalers was used. It appears equally valid, however, to employ rating services, consumer reports, or even testimony of consumers.³⁸

A more important problem is the quantum of proof required: must consumer preference be national or merely in the locality of the sale; for how long a time must the consumer preference exist; do mere numbers constitute consumer preference or can it exist if only a minority choose the product?

The instant case presents the further issue of burden of proof. Traditionally, a showing of like grade and quality has been an element of complainant's case.³⁹ Thus, if consumer preference is to be a legal test for like grade and quality, the complainant would be compelled to bear the burden of proving its existence. Language in the instant case, however, indicates that the defendant would bear the burden of proof on consumer preference.⁴⁰ This is a more reasonable allocation since evidence as to price, popular appeal, extent of advertising, etc. is far more readily available to a defendant. To place such a burden on the FTC would hamper otherwise legitimate investigations.

The complex proof problems involved in showing consumer preference prompted the Attorney General's Committee to reject consumer preference as a test for grade and quality. The majority felt that

abandonment of a physical test of grade and quality in favor of a marketing comparison of intrinsically identical goods might not only enmesh the administrators of the statute in complex economic

³³ Att'y Gen. Nat'l Comm. Antitrust Rep., *supra* note 26.

³⁴ Borden Co., *supra* note 4, at ¶ 21,019.

³⁵ Att'y Gen. Nat'l Comm. Antitrust Rep., *supra* note 26.

³⁶ 49 Stat. 1526 (1936), as amended, 15 U.S.C. § 13(a) (Supp. V, 1964).

³⁷ See Att'y Gen. Nat'l Comm. Antitrust Rep., *supra* note 26.

³⁸ Such evidence is used effectively to establish secondary meaning for trademark registration. Pattishall, *Secondary Meaning in Trade Identity Cases: Some Questions and Suggested Answers*, 45 Trademark Rep. 1261 (1955).

³⁹ General Foods Corp., 50 F.T.C. 885, 890 (1954).

⁴⁰ Borden Co. v. FTC, *supra* note 1, at 138.

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investigations for every price discrimination charge, but also could encourage easy evasion of the statute through artificial variations in the packaging, advertising or design of goods which the seller wishes to distribute at differential prices.⁴¹

This warning still stands.

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⁴¹ Att'y Gen. Nat'l Comm. Antitrust Rep., *supra* note 26, at 158-59.