

swer suggested in *Hubbard* of broadening the anti-monopoly laws, once accepted, will provide a ready remedy for any ethical non-member doctor feeling the force of organized medicine.

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Trade Regulations—Robinson-Patman Act—Cost Justification Defense to Discriminatory Prices.—*United States v. Borden*.¹—Borden and Bowman Companies attempted to defend against a Section 2(a) Clayton Act² suit by use of the cost justification proviso which allows price differentials if they "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." Respondents had admittedly discriminated between independently owned grocery stores and grocery chain stores by allowing the latter group a higher flat discount than the highest volume discount allowed to independents.³ The District Court allowed the defense and dismissed the injunction,⁴ but on appeal the Supreme Court reversed. HELD: The class cost justifications did not satisfy the burden of proving that the discriminatory prices reflected only a "due allowance" for cost differences.

The proviso in Section 2(a) of the Robinson-Patman Act⁵ permitting justification of price differential related to the seller's costs stems from a comparable provision in Section 2 of the original Clayton Act. The 1936 Robinson-Patman amendments to the Clayton Act attempted to strike a balance between protection of the small merchant from arbitrary and

the detriment of non-members. Furthermore, the court may still be confronted with precedent which has limited this type cause of action to traditionally commercial activities. Prosser, *The Law of Torts* 748 (2d ed. 1955).

Remedial legislation does not appear to offer a realistic solution in view of the potent political power organized medicine wields. *Supra* note 18.

Perhaps the only effective non-judicial answer to the problem is that offered by Chafee:

When an association has a strangle-hold upon an individual or occupation, internal decisions upon other questions besides expulsion and admission may be of much public concern. . . . However, the courts have usually refused to interfere in such internal questions, and perhaps public opinion is a better method for obtaining fair proceedings. Chafee, *supra* note 26, at 1023.

¹ 370 U.S. 460 (1962).

² 38 Stat. 730, as amended, 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1961 Supp.), (Robinson-Patman Act). The suit is referred to as a Clayton Act suit even though the specific defense and subject of this note is the cost justification proviso introduced as the Robinson-Patman amendment.

³ Borden Company allowed percentage discounts based on volume on a sliding scale basis up to a maximum of 4%. The chain stores, however, were given flat discounts up to 8½%. Bowman Company had a similar arrangement allowing volume discounts up to 8% and flat discounts to chains of 11%.

⁴ The District Court opinion is unreported. The litigants have been involved in the controversy for nearly twelve years; for this earlier history involving the Clayton and Sherman Acts, see: *United States v. Borden*, 111 F. Supp. 562 (1953); *United States v. Borden*, 347 U.S. 514 (1954).

⁵ *Supra* note 2.

CASE NOTES

unfair discrimination on the one hand, and preservation of legitimate price deductions by mass distributors on the other.⁶ Thus, the price difference may be exonerated if it does not exceed the cost difference in dealing with various customers.

This defense available to sellers charged with discrimination has proved to be a formidable barrier. The Supreme Court construed the law as placing the burden of proof on the respondent seller charged with unlawful pricing in the *Morton Salt* case,⁷ and since then few respondents have succeeded in marshalling enough accounting statistics to convince a court that the prices were cost justified. The justification may be addressed to reasonably homogeneous customer groupings whose members receive equivalent price treatment. It is not necessary that the cost be broken down into individual customers or transactions within the groups. But the groupings may not be so arbitrary as to favor one or two large customers (e.g., chain stores) in a single group and all others in a second group for pricing purposes.⁸

In *Borden* the justification attempted was based on the average cost of dealing with broad groups of customers. In holding that these groups lacked homogeneity, the Court decided that the members of the group were unrelated in cost savings factors. How "homogeneous" the groupings must be defies precise analysis, but the Court alluded to at least one requirement by stating that there must be a "close resemblance of the individual members of each group on the essential point or points which determine the costs considered." In theory, it is possible to cost-justify within customer groupings by apportioning costs to classes rather than individuals.⁹ In reality, the defense has been labeled "illusory" by the Attorney General's National Committee¹⁰ and "impossible" by an author in the field.¹¹ Neither is quite accurate since several successful defenses have been made, although none involving the exact point in question as in *Borden*.¹²

A defense, as here, based on *average* costs of dealing with broad customer groups seems destined to failure from the beginning. In the instant case fixed discounts were given to all independents whether individually warranted

⁶ For background on the legislative history, as well as a thorough analysis of the act, see Rowe, *Price Discrimination Under the Robinson-Patman Act* 265-321 (1962).

⁷ *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

⁸ See *Champion Spark Plug Co.*, 50 F.T.C. 30 (1953).

⁹ See Murray, *Cost Justification Under the Robinson-Patman Act: Impossibility Revisited*, 1960 Wis. L. Rev. 227 (1960); Sawyer, *Accounting and Statistical Proof in Price Discrimination Cases*, 36 Iowa L. Rev. 244 (1950).

¹⁰ Report of the Attorney General's National Committee to Study the Antitrust Laws, 171 (1955).

¹¹ Rowe, *Price Discrimination, Competition and Confusion: Another Look at Robinson-Patman*, 60 Yale L.J. 929, 963 (1951).

¹² *Hamburg Bros., Inc.*, 54 F.T.C. 1450 (1958) (*de minimis* rule invoked to allow a partial defense); *Sylvania Elec. Prods., Inc.*, 51 F.T.C. 282 (1954) (quantity discounts allowed because of no competitive significance); *B.F. Goodrich*, 50 F.T.C. 622 (1954) (quantity discounts allowed); *U.S. Rubber Co.*, 46 F.T.C. 998 (1950) (cost justification based on production costs allowed; also the *de minimis* rule allowing a price difference if the cost difference varies insignificantly.); *Kraft-Phenix Cheese Corp.*, 25 F.T.C. 537 (1937) (good faith quantity discount allowed); *Bird & Son, Inc.*, 25 F.T.C. 548 (1937) (customer groupings again not involved; respondent here showed a cost difference of 28% as compared to a price difference of 20%).

or not, based on the average cost of supplying all independents; likewise, fixed allowances were allotted to all chains, warranted or not. Thus an independent which conceivably could be a larger operation than an individual store of a chain is a priori discriminated against. Therefore, no matter how voluminous the cost study is in attempting to justify the price differences, it will be to no avail since the defense is defective conceptually.

Cost justification, by its nature, is a difficult defense. As Mr. Justice Frankfurter said in *Automatic Canteen v. FTC*, "Cost Justification, being what it is, too often no one can ascertain whether a price is cost justified."¹³ The statement appears amply justified by the realistic problems of cost accounting. Functional costs, for example, may be allocated to customer groups if three principles are followed: (1) The discount class must not be too large; (2) The boundaries between the customer classes must be reasonably placed, *i.e.*, where costs change most conspicuously; (3) No class should receive a discount which is excessive as compared with another class.¹⁴ These costs, however, which are to be compared for defense purposes are not always apparent. They should take into account every allowance, rebate, discount, etc., or in sum, all financial considerations which pass from seller to buyer. The accounting problems, therefore, are visibly superimposed on the basic legal problems underlying the cost justification proviso.

The impact of the *Borden* decision is that *no* cost analysis constructed on the basis of a customer classification by ownership and providing *average* costs for the resulting groups can be used to justify discriminations among customers regardless of the actual costs of doing business with each. No matter how detailed the accounting justification, the defense will fail because of the incipient defect.

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Workmen's Compensation—Second Injury Fund—Accessibility Requirements When Second Injury Follows Latent Disability.—*Pittson Stevedoring Corp. v. Hughes*.¹—The claimant, while employed as a longshoreman by Nessa Corp., sustained an injury to his back. A compensation order found him to be totally disabled from January 30 until February 26, 1952 and partially disabled from February 27, 1952 to June 14, 1953. On June 13, 1953 the claimant, while working as a longshoreman for the Pittson Company, sustained a second injury to his back and in a subsequent compensation order was found to be totally disabled from June 15, 1953 to November 25, 1954 and partially disabled from November 26, 1954 to April 4, 1957. Each of the insurance carriers, on behalf of its insured employer, continued to make bi-weekly payments pursuant to the compensation award until each had paid to the claimant the sum of \$10,000, the statutory limit at the time of the accident for permanent partial disability. The claimant then made applica-

¹³ 346 U.S. 61, 79 (1953).

¹⁴ See Freer, Accounting Problems Under the Robinson-Patman Act, 65 J. Accountancy 480 (1938).

¹ 198 F. Supp. 657 (E.D.N.Y. 1961).