

THE MEETING COMPETITION DEFENSE IN ROBINSON-PATMAN: FTC v. THE COURTS

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The "meeting competition" proviso in Section 2(b) of the Robinson-Patman Act¹ is undoubtedly one of the most significant defenses available to a seller.² From the outset of their mutual dealing with the section 2(b) language, the Commission and the courts have differed over the interpretation and scope of the defense. Several recent decisions have exemplified this conflict, and presage skirmishes to come. This comment attempts to fix the present location of the battle lines and to indicate the most defensible positions.

The first clash between the courts and the Commission over the interpretation of section 2(b), *Standard Oil Co. v. FTC*,³ would have been the last had the Commission's view, virtually writing the defense out of the statute, prevailed. The respondent refiner was ordered by the Commission to cease selling gasoline to some four large "jobbers" in Detroit, at one and one half cents per gallon below the prevailing price to retail stations; since the jobbers, while wholesaling, sold largely at retail, the FTC found that the price differential resulted in an injury to competition. Respondent's offer of evidence that its lower price was made to meet the equally low price of competitors, in order to retain the particular jobber customers, was rejected. The Commission contended that the defense was not available where it had found an injury to competition or, alternatively, that the availability of the defense depended on the extent of the injury to competition resulting from meeting other sellers' prices. The Supreme Court rejected the Commission's view and held that, if supported by the facts, section 2(b) constituted an absolute defense to a charge of price discrimination.⁴

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¹ 49 Stat. 1526 (1936), 15 U.S.C. § 13(b) (1958), amending 38 Stat. 730 (1914). Upon proof being made, at any hearing . . . that there has been discrimination in price . . . the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged . . . Provided, however, that nothing [herein contained] shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services of facilities furnished by a competitor.

² Barton, *Defenses in Price Discrimination Cases*, 17 A.B.A. Anti-Trust Section 389 (1960).

³ 41 F.T.C. 263 (1945), modified, 173 F.2d 210 (7th Cir. 1949), rev'd, 340 U.S. 231 (1950).

⁴ 340 U.S. 231, 251 (1950). The opinion emphasizes that the Commission's construc-

While the basic availability of the defense to a seller was thus upheld, the Commission's acceptance of this result was reluctant, as subsequent decisions showed.⁵

In *Exquisite Form Brassiere, Inc. v. FTC*,⁶ a proceeding under section 2(d) of the act,⁷ respondent was charged with making payments to customers for merchandising services rendered by the latter, on a basis not proportionately available to all customers. The section 2(b) defense was tendered, but was rejected by the Commission on the reasoning that the language of the proviso ("... or the furnishing of services . . .") limited the defense to situations where the seller furnishes the services in kind.⁸ The Court of Appeals reversed, observing that there was no reason in the purposes of the act or in logic to create any distinction, insofar as the availability of the defense is concerned, between a section 2(d) and a section 2(e) case. In both situations, the economic effects are the same: the seller makes available to its customer merchandising assistance (either in kind or by payments in lieu thereof). There is no reason to attribute to Congress any intent to create such a distinction and, therefore, "furnishing" as used in section 2(b) necessarily must be construed⁹ to embrace both arrangements.¹⁰

tion not only received no support from the language of the act but was opposed to a widespread understanding and assumption as to the availability of the defense, in the circumstances of the case, by the courts and by the Commission itself. *Id.* at 243-47.

⁵ Thus, in the same proceeding, on remand, the respondent's undisputed evidence of a meeting of competitive offers by major and independent refiners to the four jobbers in question was held by the Commission not to make out the § 2(b) defense because the reductions were made pursuant to a "pricing system", *FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 757 (1945), rather than on an individual basis. On appeal the Commission was reversed, 233 F.2d 649 (7th Cir. 1956), *aff'd*, 355 U.S. 396 (1957) (5-4 decision).

⁶ No. 6966, Trade Reg. Rep. (1960 FTC Ord.) ¶ 29,195, *rev'd*, — F.2d — (D.C. Cir. 1961), Trade Reg. Rep. (1961 FTC Cas.) ¶ 70,157. In a subsequent similar case, *Shulton, Inc.*, No. 7321, Trade Reg. Rep. (1961 FTC Ord.) ¶ 15,323, Commissioners Elman and Kern dissented. Cf. *Delmar Construction Co. v. Westinghouse Electric Corporation*, — F. Supp. — (D. Fla. 1961), Trade Reg. Rep. (1961 FTC Cas.) ¶ 69,947, which reaches the same result as the circuit court in *Exquisite Form Brassiere Inc.*, *supra*.

⁷ *Supra* note 1, 15 U.S.C. § 13(d):

[I]t shall be unlawful . . . to pay . . . to . . . a customer . . . as compensation . . . for any services or facilities furnished by or through such customer in connection with the . . . sale of any products . . . manufactured . . . by such person . . . unless such payment . . . is available on proportionately equal terms to all other customers competing in the distribution of such products

⁸ That is, to a § 2(a) case:

It shall be unlawful . . . to discriminate . . . by contracting to furnish or furnishing . . . any services or facilities . . . not accorded to all purchasers on proportionately equal terms.

Supra note 1, 15 U.S.C. § 13(3).

⁹ The Supreme Court has observed that "precision of expression is not an outstanding characteristic of the Act." *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 65 (1953).

¹⁰ The construction advanced by the Commission in the particular case was again at variance with its views elsewhere expressed. In the FTC Guides for Advertising Allowances and Other Merchandising Payments, the Commission recognized that for pur-

In *Sun Oil v. FTC*¹¹ a common sense interpretation, consistent with the objectives of the section 2(b) proviso, was again substituted by the Court of Appeals for a Commission construction having little to recommend it but a barren textual support.¹²

When gasoline "price wars", which periodically break out on the retail level in various regions, are in progress, a gasoline distributor, in order to enable its retail outlets in the area of the price reductions to meet the prevailing prices and survive, is eventually required to lower its prices to such retailers. In order not to encourage the spread and duration of such episodes (an objective shared by the majority, at least, of its retailers¹³), as well as to minimize their cost, the distributor endeavors to confine its price assistance to its retailers most directly and immediately encountering the lower prices. The differentials thus set up among its various retail outlets have resulted in actions against the distributor by the Commission, and by the retailers continuing to pay the higher prices.¹⁴ Prior to the instant case, the meeting competition defense had been rejected¹⁵ on the reasoning that section 2(b) only applied where a competitive price offer to the respondent's customer was being met, and that competitive distributors' prices to their retailers were not offers to the respondent's retailers.

In *Sun Oil* the usual situation was presented,¹⁶ the section 2(b) defense rejected, and a cease and desist order issued against the respondent by the Commission. The Court of Appeals set aside the order, holding that the section 2(b) defense was established.¹⁷ Char-

poses of compliance with §§ 2(d) and (e) services could be substituted for payments, and vice versa. It is difficult to see why a similar substitution could not be read into § 2(b), when there is no discernible difference in the administration of the act.

¹¹ 55 F.T.C. 955 (1959), rev'd, 294 F.2d 465 (5th Cir. 1961), Trade Reg. Rep. (1961 FTC Cas.) ¶ 70,083.

¹² Supra note 9.

¹³ See Sen. Rep. No. 2810, 84th Cong., 2d Sess. 24-27 (1956).

¹⁴ The Texas Company, No. 6898, Trade Reg. Rep. (1959 FTC Ord.) ¶ 26,754; *Enterprise Industries v. The Texas Co.*, 136 F. Supp. 421 (D. Conn. 1955), rev'd, 240 F.2d 457 (2d Cir. 1957), cert. denied, 353 U.S. 965 (1957).

¹⁵ See cases supra note 14; in *Enterprise Industries*, the only decision on the point was by the District Court; on appeal the question was not raised by reason of the Circuit Court's decision for the defendant on the issue of proof of damages.

¹⁶ 294 F.2d 465, 470 (5th Cir. 1961). Only one of the respondent's retailers was involved and the price reductions granted, in response to price cutting by a retailer of unbranded gasoline located across the street, came too late to save the particular customer, who subsequently went out of business.

¹⁷ The decision also rejected other contentions of the Commission, viz., that the defense was barred by (1) an alleged agreement by the retailer to pass the requested reductions on to its customers, argued as constituting illegal price fixing, id. at 482; and (2) the respondent's action in cutting its dealer tank wagon price to within one cent of the unbranded price, in the face of testimony that a premium of two cents is normally obtained by a trademarked gasoline, on the theory that this constituted not "meeting" but the "beating", of a competitive price, id. at 483.

acterizing the Commission's position as "doctrinaire" and "barren logic",¹⁸ the court reasoned that the respondent's "customer", in all substance, is the ultimate consumer, and that the competitor's lower price is, in effect, being offered to that consumer-customer, and being met by the respondent through the lowered prices to its respective retail outlets. The court pointed out that the Commission's construction worked against the purposes of the act by increasing the difficulties of small retail outlets, and by encouraging the refiners to integrate vertically.¹⁹

The result reached by the court is sound; the secondary line injury (*i.e.*, among retail customers of the respondent-refiners), if any, resulting from countenancing differential prices in these circumstances, is far less than the injury to the respondent's customers in the price war areas, if the distributor is not allowed to lower its prices in this selective fashion.²⁰

A final instance of Commission interpretation of section 2(b), which may be noted, is its contention that the defense is limited to "defensive" rather than "aggressive" price cutting, *i.e.*, to "retaining an old", rather than "getting a new", customer. In *Sunshine Biscuits*²¹ the respondent's subsidiary sold potato chips in the Cleveland area in a market which the Commission found was marked by extremely sharp competition and by the offering of discounts of five percent and two percent "to certain favored purchasers". The respondent, in order not to lose customers, offered like discounts not only to its existing customers but also to its competitor's customers "and thus was able to obtain new customers".²² The Commission held that section 2(b) was not available to respondent, as to the price cuts to the new customers, regardless of the degree of competition in the market, because section 2(b) was limited "to those situations in which the seller is acting in self-defense".²³ The authorities relied on by the

¹⁸ *Id.* at 473, 479. The court also noted, as was true of the cases discussed above, that the Commission, in other contexts, had expressed a contrary view of the availability of the § 2(b) defense on the facts of the case. 294 F.2d 465, 481 (1961), and see note 42 *infra*.

¹⁹ *Id.* at 479, 481. The Commission will apparently refuse to follow the *Sun Oil* rationale; cf. *American Oil Co.*, No. 8183, Trade Reg. Rep. (1961 FTC Ord.) ¶ 15,582. But cf. Note, 75 Harv. L. Rev. 429 (1961).

²⁰ The availability of § 2(b) as an absolute defense to the discrimination charge in this situation probably depends upon the distributor's exercise of a good faith business judgment in the selection of its customers to whom the price cuts, for the purpose of meeting competitive prices, are granted; however, if the distributor's decision appeared to be a reasonable one, the court should not substitute its judgment for the defendant's, even though it might differ therewith. See *Orbo Theatre v. Loew's, Inc.*, 156 F. Supp. 770, 778, *aff'd per curiam*, 261 F.2d 380 (D.C. Cir. 1958).

²¹ No. 7708, Trade Reg. Rep. (1961 FTC Ord.) ¶ 15,469 (Comm'r Elman dissenting).

²² *Ibid.*

²³ *Ibid.*

Commission for this construction were the first *Standard Oil* case²⁴ and an earlier Commission decision.²⁵

The Supreme Court cannot fairly be read as addressing itself to the issue in *Sunshine*, as distinct from merely describing the application of section 2(b) to the facts of the case then before it.²⁶ By contrast, a considered statement of the Court, in the second *Standard Oil* case,²⁷ is explicable only on the view that offensive price cutting (on the facts of that case, at least) is lawful.²⁸

The question of precedents aside, the Commission's interpretation disregards economic realities and, as a consequence, would prove unworkable over a range of cases. Thus, as the dissent pointed out, the "new" v. "old" and "retain" v. "gain" distinctions break down in a repeat sale market. Where a large buyer purchased from a competitor last month, from the defendant currently, and will be solicited by both next month, which party can properly invoke section 2(b) as construed by the Commission?

Again, the Commission's interpretation runs contrary to the spirit and purpose of section 2(b), which, as the Supreme Court suggested in the first *Standard Oil* case,²⁹ was to reconcile the Robinson-Patman Act with the other anti-trust laws by making an accommodation for price competition. Limiting the availability of the proviso to the preservation of existing customers³⁰ contemplates a static situation which is the antithesis of true price competition.

²⁴ 340 U.S. 231 (1950).

For example . . . the seller may well find it essential, as a matter of business survival, to meet that price rather than to lose the customer. . . . There is, on the other hand, plain language . . . which permits a seller, through § 2(b), to retain a customer by realistically meeting in good faith the price offered to that customer

Id. at 249-50.

²⁵ *Standard Motor Products*, 54 F.T.C. 814 (1958), aff'd, 265 F.2d 674 (2d Cir. 1959). In this case the statements of both Commission and the Second Circuit regarding § 2(b) being confined to defensive price cutting were offhand, and apparently based solely on the *Standard Oil* dictum. The case involved a flagrantly improper arrangement whereby groups of buyers pooled their purchases and received rebates based on the aggregate of the purchases.

²⁶ See Report of the Attorney General's National Committee to Study the Antitrust Laws 184 (1955).

²⁷ *FTC v. Standard Oil Co.*, 355 U.S. 396 (1957).

²⁸ Thus, in 355 U.S. 396, 399-400, n.4 (1957), the Court stated: "There is no showing or serious contention by the Commission that the offers of Standard's competitors were unlawful." Inasmuch as the competitors' offers were used offensively (to entice Standard's customers), their lawfulness must have derived from § 2(b), in the circumstances of a market traditionally characterized by discounts of one and a half to two cents per gallon to desirable large-volume (euphemistically termed) "jobbers", since the facts shown in the several opinions belie the availability of the cost justification or functional discount defenses. See *Standard Oil Company v. FTC*, 233 F.2d 649, 654-55 (7th Cir. 1956).

²⁹ *Standard Oil Company v. FTC*, 340 U.S. 231, 242, 248 (1950).

³⁰ Presumably a defendant is not even free to meet prices in order to obtain a

Although the Commission's restriction on the scope of the meeting competition defense in *Sunshine* was somewhat more warranted by the problems of administration of the act than was true in the other cases discussed above,³¹ its construction is not, on balance, desirable.³² In its natural concern to prevent the section 2(b) defense from becoming an open door to wide-spread price differentials, whereby one seller justifies his price reductions by his competitor's prices and vice versa, the Commission might better focus on whether a respondent's price cutting (meeting) is in response to "individual competitive situations".

It seems a reasonable conclusion, from the language and history of section 2(b), that it applies only to meeting price cuts on a customer-by-customer basis.³³ On this view, certain earlier cases, which have been described as denying the defense because the price met was "unlawful",³⁴ can be analyzed as cases where the respondent's attempt to justify a systematic granting of off-list prices fell outside the rationale of section 2(b).³⁵ Thus, *FTC v. A. E. Staley*³⁶ or *FTC v. Standard Motor Products*,³⁷ where all prices sought to be justified

replacement for customers lost to undercutting competitors. Similarly, the Commission's interpretation may well favor the established concern against the small newcomer, placing the former's customers off-limits.

³¹ Discounts of 2-5% might well, on the basis of Commission precedents, create the likelihood of secondary line (among competing customers) and, possibly, primary line (among competing sellers) injury. But see Note, Competitive Injury under the Robinson-Patman Act, 74 Harv. L. Rev. 1597, 1610 (1961) (Market inertia may insulate against the competitive effects of price differentials).

³² Nor does the dissenting opinion offer much aid to the Commission: after vigorously pointing out the difficulties inherent in the majority holding, the dissent suggests only that the case should be remanded to determine whether the competitive prices were "discriminatory" within the act, supra note 21. Since any differential price is a discriminatory price, *Anheuser-Busch v. FTC*, 363 U.S. 536 (1959), this does not reach the question of when a § 2(b) defense to such discrimination can be allowed.

³³ *FTC v. Standard Oil Co.*, 355 U.S. at 401 (1957); *FTC v. National Lead Co.*, 352 U.S. 419, 431 (1956); *Standard Oil Co. v. FTC*, 340 U.S. at 244 (1950); *FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 753 (1945).

³⁴ *FTC v. National Lead Co.*, 352 U.S. at 430 (1956); *FTC v. Cement Institute*, 333 U.S. 683, 724-25 (1948); *FTC v. A. E. Staley Mfg. Co.*, 324 U.S. at 753 (1945); *FTC v. Standard Motor Products Co.*, 265 F.2d 674, 676 (2d Cir. 1959); *Standard Oil Co. v. Brown*, 238 F.2d 54, 58 (5th Cir. 1956); cf. Report of the Attorney General's Committee, supra note 26, at 181-82.

³⁵ To urge, as the Commission would, that these cases, supra note 34, deny the right to meet an "unlawful" price is unsatisfactory; an unlawful pirating price is the very price which, so long as it is an individual competitive situation, a seller ought to be free to meet promptly. Moreover, one avoids a logical dilemma otherwise presented by the *Sunshine* rule (when coupled with the doctrine that an unlawful price cannot be met): if *Sunshine* can properly meet a competitor's price to *Sunshine's* customer, but cannot offer the same price to the competitor's customer, then the competitor's price to *Sunshine's* customer must, on the same reasoning, be unlawful, with the result that either offensive price cutting is lawful or unlawful prices can be made.

³⁶ 324 U.S. 746 (1945).

³⁷ 265 F.2d 674 (2d Cir. 1959).

were offered pursuant to an established list or "system", are clearly outside the defense; equally clearly the defense is available where, as in the *Standard Oil* cases, only some four of 350 odd accounts are involved.

The interesting case would be the not uncommon, highly competitive market situation between these two extremes, where less than all, but more than a handful, of customers are traditionally extended discounts.³⁸ While much would depend on the facts as to price structure and the dissemination of competitive offers,³⁹ it is submitted that a defense of meeting competition (whether customers are gained or merely retained) could be established in such a case, notwithstanding that the instances of price-cutting were numerous.⁴⁰ If it be objected that this approach would perpetuate the widespread price differentials in such a market, one answer is that such a result has been recognized as being acceptable by Congress and the Supreme Court in creating and giving scope to the section 2(b) defense, in order to insure the leaven of price competition in the Robinson-Patman loaf. Moreover, the government is free, if anti-competitive effects should develop in such a market, either to move against the sellers (under Sections 1 or 2 of the Sherman Act) or against the larger, favored buyers under Section 2(f) of the Robinson-Patman Act.⁴¹

From this survey of section 2(b) decisions, it is apparent that the Commission's approach to the proviso has been characterized by an overriding desire to limit the scope of the defense, to the point where its constructions of section 2(b) have warranted rejection by the courts.⁴² To the latter, therefore, has fallen (in this area) the "task" of rationalizing the Robinson-Patman Act with the other anti-trust laws to the end of a common and harmonious body of law.⁴³

³⁸ E.g., the market situations apparently existing in: *Sunshine Biscuits*, supra note 21; *Central Ice Cream Co. v. Goldenrod Ice Cream Co.*, 184 F. Supp. 312, 315 (N.D. Ill. 1960), aff'd, 287 F.2d 265, 266 (7th Cir. 1961).

³⁹ And assuming always that the respondent seller has knowledge of facts justifying a bona fide belief in the existence of competitive offers to his customers (actual or prospective). Cf. *Staley* case, supra note 33, at 759-60.

⁴⁰ See *FTC v. Standard Oil Co.*, 355 U.S. 396, 403, n. 8 (1957):

This is not a situation involving only one or two competitive raids, however; continuation of reductions once granted is warranted by § 2(b) when competitor's reduced price offers occur again and again in a cutthroat market.

Cf. Report of the Attorney General's Committee, supra note 26, at 182.

⁴¹ In the market conditions assumed, such buyers would normally have the required knowledge that the seller's prices were not justified, *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 80-81 (1953), so as to expose them to prosecution under § 2(f).

⁴² Undoubtedly the Commission's view of its role as prosecutor under the Robinson-Patman Act has contributed heavily to this situation. Another factor may well be that the Commission has been assigned those statutes which tend to a pre-occupation with injury to "competitors" rather than to "competition". Report of the Attorney General's Committee, supra note 26, at 164-65.

⁴³ Frankfurter, J., dissenting in *FTC v. Motion Pictures Advertising Co.*, 344 U.S. 392, 406 (1952).

Affording a reasonable scope to the section 2(b) defense will contribute significantly to reconciling the differing price-market systems favored by the Sherman Act on one hand and by Robinson-Patman on the other.

⁴⁴ The Commission itself, speaking with reference to other antitrust laws, has espoused the values of active bargaining for price cuts. Union Carbide, No. 6826, Trade Reg. Rep. (1961 FTC Ord.) ¶ 15,503 (Clayton Act § 7); Snap-on-Tools, No. 7116, Trade Reg. Rep. (1961 FTC Ord.) ¶ 15,546 (§ 5 FTC Act).